

(2007) 09 OHC CK 0076
In the Orissa High Court
Case No : Writ Petition (C) No. 5678 of 2007

Suryanarayan Sahu

APPELLANT

Vs

Government of Orissa and Others

RESPONDENT

Date of Decision : 20-09-2007

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 15, 29(2), 42, 43, 45
Constitution of India, 1950 — Article 19, 226
Orissa Excise Rules, 1965 — Rule 102(A), 45, 45(1), 45(2)

Citation : (2007) CLT 359 Supp

Hon'ble Judges : Sanju Panda, J; I.M. Quddusi, J

Bench : Division Bench

Advocate : Gokulananda Mohapatra, P.K. Sahoo and S.K. Rout, for the Appellant; A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

I.M. Quddusi, J.—By means of this writ petition, the Petitioner has invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India with a prayer to quash the impugned order dated 17.4.2007 passed by the Commissioner-cum-Secretary to Government of Orissa, Excise Department refusing to renew the licence of the Petitioner for IMFL Off shop at Jagannathpur Chhak and for a direction to a renew the said licence.

2. The brief facts of the case are that the Petitioner was initially granted licence to open an IMFL Off Shop at Jagannathpur Chhak in the district of Ganjam from the date of licence to 31st of March, 2002. The date of licence was 1.6.2001. Thus the Petitioner became the exclusive privilege holder of the foreign liquor off shop at Jagannathpur Chhak. The same was renewed from time to time up to the year 2004-2005. But vide letter dated 18.1.2005 (Annexure-2) notice to show cause was issued by the Collector, Ganjam to the Petitioner mentioning that he along with his brother was doing clandestine liquor business and huge quantity of spirit, duplicate IMFEL and other apparatus were seized from his possession in

Chhatrapur P.S. Case Nos. 354 of 2004 and 355 of 2004. It was also mentioned in the notice that he was involved in spurious liquor trade and it was likely to cause liquor tragedy and his involvement in spurious liquor trade amounted to criminal breach of trust and violation of the conditions of the license which not only threatened law and order and loss of human lives but caused loss of revenue to the State Exchequer. Therefore, he was called upon to show cause as to why his licence for the remaining period of 2004-2005 may not be cancelled. However, his licence was renewed for the years 2005-2006 and 2006-2007 but another show cause notice was issued to him on 29.5.2006 on the self-same allegations seeking to show cause as to why the licence for the remaining period of 2006-2007 may not be cancelled at his loss and risk. At that time, the Petitioner filed a writ petition registered as W.P.(C) No. 8074 of 2006 before this Court which was disposed of on 3.8.2006 requiring the Petitioner to file his show cause. When the Collector did not receive any reply to the notice to show cause, he referred the matter to the Excise Commissioner for taking steps to cancel the IMFL Off shop licence of the Petitioner. According to the Petitioner, he has submitted his reply denying the allegations mentioned in the show cause notice issued by the Collector alleging that 10 persons of village Gopabandha under Gopalpur P.S. died due to consumption of suspected spurious liquor and charge sheet was submitted in Gopalpur P.S. Case No. 73 of 2006 which brought to light that the Petitioner was involved in sale of spurious liquor to the main accused namely Dharma Sahu and the Petitioner was a de facto owner of the out still shop. However, on the basis of the provision of order No. 2914 dated 28.4.2005 of the Excise Department, the Commissioner-cum-Secretary to Government considering the reply of the Petitioner and other aspects of the matter by a reasoned order refused to renew the licence of the Petitioner. Being aggrieved, the instant writ petition has been filed.

3. Learned Counsel for the Petitioner has placed reliance on the case of *Dusasan Behera Vs. State of Orissa and Others*, decided by a Division Bench of this Court in which it has been held that once the Government passes an order indicating its policy for settling the privilege, it cannot be permitted to deviate from the same in purported exercise of the power u/s 45 of the Bihar and Orissa Excise Act. Even though the Petitioner cannot be said to have a right to claim renewal in view of Section 45 of the Act as pointed out to the Court in course of hearing, his right that has accrued pursuant to the Government decision enunciating the Excise Policy as well as the Government order cannot be taken away in purported exercise of power which the Government does not have. It was further held therein that the trade in excisable articles is, no doubt, not a fundamental right and in view of the nature of the trade, the excise authorities as well as the Government may retain power to issue instructions from time to time in the matter of regulating the trade. But once having decided the Policy of Settlement for a particular year and having issued an order conferring a right on an existing exclusive privilege holder, the said right cannot be taken away by issuance of an administrative instruction. Sub-clause (b) of Sub-rule (2) of Rule 45 provides

that a former licensee whose conduct has been found to be unsatisfactory will not be entitled to the grant of renewal. But that sub-clause does not bring within its sweep where a criminal allegation has been made or a criminal case has been instituted. It is apparent from Sub-rule (1) of Rule 45 that only when a criminal allegation culminates in the conviction by a criminal Court of a non-bailable offence, no licence can be renewed. The Division Bench thus held that the rejection of renewal application on the basis of a mere criminal allegation or institution of a criminal proceeding is without jurisdiction.

4. Relying upon the above decision of this Court, learned Counsel for the Petitioner submitted that the Petitioner is entitled to get renewal of his licence. He has further submitted that in Section 42 of the Bihar and Orissa Excise Act, 1915 (hereinafter referred to as "the Act"), it has been provided that subject to such restrictions as the State Government may prescribe, the authority who granted any exclusive privilege, licence, permit or pass under this Act may cancel or suspend it on the condition which is relevant for the purpose of this case is Clauses (d) and (e) which provide as under:

(d) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence punishable under the Dangerous Drugs Act 2 of 1930, or under the Merchandise Marks Act 4 of 1890, or under any Section which has been introduced into the Indian Penal Code, XLV of 1960 by Section 3 of the Act; or

(e) if the holder thereof is punished for any offence referred to in Clause (8) of Section 167 of the Sea Customs Act, VIII of 1878; and, therefore, the Petitioner is entitled to get his exclusive privilege continued.

Learned Additional Government Advocate has submitted that the State Government has been conferred with powers to issue direction from time to time and make policy in respect of the grant of licence and since the Petitioner was involved in several criminal cases in which charge-sheet has also been filed relating to consumption of spurious liquor and also in view of the Order No. 2914 dated 28.4.2005 in which it has been, inter alia, provided that no licensee who is known to be involved in spurious liquor trade, or who has been facing a trial in any criminal Court under the Act or who has been charged of a non-bailable offence under the provisions of the Indian Penal Code, 1860 should be granted licence, the Petitioner is not entitled to get renewal of his licence.

5. In Section 45 of the Act, it has been provided that no person to whom any licence or exclusive privilege has been granted under this Act shall have any claim to the renewal of such licence or exclusive privilege or save as provided in Section 43, any claim to compensation on the determination thereof. In Section 43, it has been provided that whenever the authority who granted any licence or exclusive privilege under this Act considers that the licence or exclusive privilege should be withdrawn for any cause other than those specified in Section 42, it

shall remit a sum equal to the amount of the fees or consideration money payable in respect thereof for fifteen days, and may withdraw the licence or exclusive privilege either on the expiration of fifteen day's notice in writing of its intention to do so; or forthwith without notice. Section 42 of the Act relied upon by the Petitioner provides that subject to such restrictions as the State Government may prescribe, the authority who granted any exclusive privilege, licence, permit or pass under this Act may cancel or suspend the same on the grounds mentioned therein.

6. For a cumulative study of Sections 42, 43 and 45, it is necessary to peruse the relevant provisions of these Sections.

42. Power to cancel or suspend licence, permit or pass:

(1) Subject to such restrictions as the State Government may prescribed, the authority who granted any exclusive privilege, licence permit or pass under this Act may cancel or suspend it-

(a)

(b)

(c)

(d) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence punishable under the Dangerous Drugs Act 2 of 1930, or under the Merchandise Marks Act 4 of 1889 or under any Section which has been introduced into the Indian Penal Code, XLV of 1960 by Section 3 of that Act; or

(e) If the holder thereof is punished for any offence referred to in Clause (8) of Section 167 of the Sea Customs Act, VIII of 1878; or

(f)

(g)

(2)

(3) The holder of an exclusive privilege, licence, permit or pass shall not be entitled to any compensation for its collection or suspension under this Section, or to the refund of any fee or consideration money paid or deposit made in respect thereof.

43. Power to withdraw licences:

(1) Whenever the authority who granted any licence or exclusive privilege under this Act considers that the licence or exclusive privilege should be withdrawn for any cause other than those specified in Section 42, it shall remit a sum equal to the amount of the fees or consideration money payable in respect thereof for

fifteen days and may withdraw the licence or exclusive privilege either-

(a) on the expiration of fifteen days notice in writing of its intention to do so; or

(b) forthwith without notice

(2)

(3)

(4)

(5)

45. Bar of right to renewal and to compensation-No person to whom any licence or exclusive privilege has been granted under this Act shall have any claim to the renewal of such licence or exclusive privilege or save as provided in Section 43, any claim to compensation on the determination thereof.

7. A comparative study of the aforesaid provisions shows that Section 42 though prescribes cancellation of licence on conviction of the licensee on any offence punishable under the Act and the violations mentioned therein but at the very outset it provides that the same is subject to such restrictions as the State Government may prescribe. Section 43 provides that besides the grounds mentioned in Section 42, the licence or exclusive privilege can be withdrawn for any cause other than those specified in Section 42 meaning thereby that even if a person is not convicted of any offence and in whose case Section 42 does not apply, his licence or exclusive privilege can be withdrawn on any other cause. Therefore, it is not necessary that a person should be convicted and only then that the exclusive privilege can be withdrawn. Section 45 clearly specified that no person to whom any licence or exclusive privilege has been granted under the Act shall have any claim to the renewal of licence as a matter of right.

8. The Division Bench of this Court laid down the principle in the case of *Dusasan Behera* (supra) but vide Order No. 2914 dated 28.4.2005, the State Government in exercise of powers conferred by Sub-section (2) of Section 29 of the Bihar and Orissa Excise Act, 1915, made the amendments to the Order of the Government of Orissa published on 23.4.1990 in the Orissa Gazette by which Forms A and B were also substituted and Clause (ix) of which is reproduced hereunder:

No licence shall be granted to any person who is of doubtful solvency or who is known to be involved in spurious liquor trade, or who has been facing a trial in any criminal Court under the Act or who has been charged of a non-bailable offence under the provisions of Indian Penal Code, 1860 (Act No. XLV of 1860) or who is a defaulter in terms of Rule 45 of the Orissa Excise Rules, 1965 or in terms of Rule 102 (A) of Board's Excise Rules, 1965.

9. It is a fundamental right of a citizen as envisaged under Article 19 of the Constitution to carry on any occupation, trade or business but the State has the right to impose reasonable restrictions on the exercise of this right of a citizen in

the interest of the sovereignty and integrity of India, security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. The trade in liquor is fully controlled by the State and, therefore, the State may make any reasonable restrictions equally applicable to all persons concerned. The above quoted order is not only applicable to the Petitioner but the same is applicable unformally and, therefore, it also cannot be taken that the above order is discriminatory.

The above quoted order was not in existence when the Division Bench delivered its judgment in the case of Dusasan Behera (supra), Consequently, in the present scenario, the law laid down by the Division Bench in the year 1994 is not applicable to the present case.

10. The Petitioner has filed Annexure-6 by which a copy of the affidavit dated 24.3.2007 has been filed by him which was sworn before the Executive Magistrate, Berhampur/Chhatrapur, district Ganjam, paragraphs 2 to 6 and 9 of which are reproduced as under:

2. That three police cases vide Purushottampur P.S. Case No. 126/dtd.9.12.2004 and Chhatrapur P.S. Case Nos. 354 dtd.9.12.2004 and 355 dtd. 10.12.2004 relating to seizure of spirit and I.M.F.L. are falsely initiated against me.

3. That as per seizure list in all the above three police cases alleged seizure of spirit and duplicate I.M.F.L. have not seized from my exclusive and conscious possession and I have been implicated falsely by police.

4. That I have filed three revisions against taking of cognizance in the above mentioned three cases pending against me before the Court of District and Sessions Judge, Berhampur in Criminal Revision Petition Nos. 74, 75 and 76 of 2006 which are pending for hearing.

5. That out of the three cases two cases bearing Chhatrapur P.S. Case Nos. 354/9.12.2004 and 355/10.12.2004 are pending before the Court of Addl. Sessions Judge, Chhatrapur for consideration of charge on 18.4.2007.

6. That P.S. Case 126/9.12.2004 has not got committed to the Court of Session for consideration of charge. Hence the stage of charge has not come in respect of the above case.

9. The Gopalapur Police has falsely implicated me in Gopalpur P.S. Case No. 73 dtd. 23.4.2006 (G.R. 496 of 2006) being instigated by my business opponents. That I challenged the order of taking cognizance against me by the S.D.J.M., Berhampur in the said case who has taken cognizance basing on the charge sheet filed by the Gopalpur Police in the above case before the Hon"ble High Court in Crl. Rev. No. 798 of 2006 wherein the Hon"ble High Court after hearing stayed further proceeding against me in G.R. 496/2006 vide Gopalpur P.S. Case No. 73/06 and directed the S.D.J.M., Berhampur to recall the N.B.W. issued against me.

The above quoted paragraphs show that the Petitioner is involved in so many criminal cases and charge-sheet has also been filed against him. In the facts and circumstances of the case, the Petitioner was not entitled to get his licence renewed.

11. In view of the above facts and circumstances, we have found no illegality or impropriety in the impugned order passed by the Commissioner-cum-Secretary, Excise Department as contained in Annexure-

12. The writ petition is, therefore, devoid of merit and is accordingly dismissed. No costs.

Sanju Panda, J.

13. I agree.