(1989) 04 OHC CK 0002

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1443 of 1989

Trinath Sahoo APPELLANT

Vs

Government of Orissa and Others RESPONDENT

Date of Decision : 27-04-1989

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 20, 22, 22(1), 29(2)
Orissa Excise Rules, 1965 — Rule 45(2), 46, 46(4)

Citation : (1989) 68 CLT 481

Hon'ble Judges : J.M. Mahapatra, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : Ashok Mohanty, for the Appellant; Additional Government Advocate and J. Patnaik, for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—The Petitioner challenges the order of the State Government granting exclusive privilege in respect of foreign liquor ''Off'' licence for shop No. 1 at City High School Road, Berhampur, in favour of opposite party No, 5 rejecting the Petitioner''s application. The Petitioner asserts that he was the holder of the licence for sale of foreign liquor Off on vendors premises from 1972, till 31-3-1989 for the shop situated at City High School Road, Berhampur. For the financial year 1989-90,he also made an application to the Superintendent of Excise, and along with him two other persons had made applications one of whom is opposite party No. 5. The Collector, Ganjam. (opposite party No. 3) did not recommend the name of the Petitioner on the ground that the Petitioner has a licence for sale of foreign liquor to be commenced in the hotel premises in Jajati Hotel at Bhubaneswar and, therefore, grant of Off licence to the Petitioner at Berhampur would be contravention of Rule 46 of the Orissa Excise Rules. Though the Collector did not recommend the name of the Petitioner yet had not, recommended any name at all. When the matter was placed before the Excise Commissioner, the Excise Commissioner, however, recommended that the Petitioner may be given licence for three months to avoid any loss of revenue and a final decision in that regard may be taken by the Government. The Excise Commissioner''s recommendation has beep annexed as Annexure-I. The Petitioner, therefore, made a representation to the Minister, Excise, and while that representation was pending before the Minister, the Petitioner learnt that the State Government had granted the privilege in question in favour of opposite party No. 5. whereupon the Petitioner approached this Court.

2. It is undisputed that the privilege in question has been granted in favour of opposite party No, 5, but no licence has been issued in his favour in view of the interim order of this Court dated. 12-4-1989.

3. In assailing the order of the Government. Mr. Mohanty, the learned Counsel for the Petitioner, raises the following contentions:

(i) The power to grant exclusive privilege for retail sale of foreign liquor is not a power of the State Government but is that of the Collector particularly in case of old licences and, therefore, the State Government could not have exercised any power;

(ii) Rule 46(4) of the Orissa Excise Rules which has been considered to be a bar for Petitioner getting licence does not apply, inasmuch as the prohibition in question is in relation to the premises and not to the person;

(iii) Even if Rule 46(4) is held to be a prohibition in respect of a person, but the ''On'' licence granted in favour of Jajati Hotel at Bhubaneswar cannot: be construed to be a licence in favour of Trinath Sahu, the Petitioner and therefore, Trinath Sahu''s application for grant of exclusive privilege for retail sale of foreign liquor Off cannot be refused on the ground of prohibition contained in Sub-rule (4) of Rule 46 ;

(iv) In any view of the matter the collector not having recommended the grant in question in favour of the other competing applicants, but merely having refused the Petitioner''s case and without any materials before the Government the Government could not have granted to opposite party No. 5 by just pick and choose method and, therefore, the grant in favour of opposite party No. 5 cannot be sustained.

4. The learned Additional Government Advocate appearing on behalf of opposite parties 1 to 4 and Mr. Patnaik appearing for opposite party No. 5 repel the aforesaid contentions of Mr. Mohanty, the learned Counsel for the Petitioner, and according to them, the grant of exclusive privilege for retail sale of foreign liquor lies within the exclusive power of the State Government and not the Collector and that is why the Collector merely recommends, whereas the Government grants. The, learned Counsel further contend that in view of the plain and unambiguous language used in Rule 46(4) of the Orissa Excise Rules, the restriction must apply to person and not to premises, as otherwise the words "to a person" would be redundant. It is also urged by them that the licence in favour of Jajati Hotel is really a licence in favor of Trinath Sahu, the Petitioner, and,

therefore, Rule 46(4) will apply in terms.

5. In view of the rival submissions, the following questions arise for our consideration:

(a) who has the power to grant exclusive privilege for retail sale of foreign liquor?

(b) Whether the bar provided under Sub-rule (4) of Rule 46 is in relation to a premises or in relation to a person?

(c) Assuming that the bar provided under Sub-rule (4) of Rule 46 is a bar in relation to a ''person'', whether the licence in favour of Jajati Hotel, Bhubaneswar, can be construed to be a licence in favour of Petitioner Trinath Sahu ?

(d) Whether the Government was justified in choosing opposite party No. 5 to be the grantee in the facts and circumstances of the present case?

6. So far as the first question is concerned, it may not detain us any further in view of the specific provision contained in Section 22(1-a) of the Bihar and Orissa Excise Act. Under the said Sub-section, the State Government has been given the right to grant to any person on such conditions and for such period as it may think fit the exclusive privilege for retail sale of foreign liquor. In view of the aforesaid clear and unambiguous provision, we are not in a position ''to accept the submission of Me. Mohanty. the learned Counsel for the Petitioner, that the power to grant exclusive privilege for retail sale of foreign liquor lies with the Collector; Mr, Mohanty in support of his contention on this score relies upon Section 20 of the Bihar and Orissa Excise Act which is a provision for grant of licence. The real confusion lies since the learned Counsel has failed to notice the distinction between a "grant" and a "licence". The power to grant the exclusive privilege lies with the State Government, but notwithstanding the grant, the grantee cannot operate the business without a licence for that purpose and that power to grant licence lies with the Collector. This should be the only harmonious construction of the relevant provisions of the statute and the rules made thereunder. We would accordingly reject the first contention of Mr. Mohanty, the learned Counsel for the Petitioners and hold that it is the State Government which has the power to grant the exclusive privilege of retail sale of foreign liquor.

7. So far as the second question is concerned, it depends upon an interpretation of Sub-rule (4) of Rule 46 of the orissa Excise Rules. But it is not necessary for us to answer that question since our answer to the next question would be sufficient for a decision in the present case, namely whether the licence in favour of Jajati Hotel at Bhubaneswar, a company registered under the Indian Companies Act, can be held to be a licence in favour of Trinath Sahu, the Petitioner so as to debar him from getting the licence for consumption off We are going to consider this question even on the assumption that the licence for sale of foreign liquor for consumption ''off'' the premises shall not be granted to a person who holds a licence for retail vend of foreign liquor in a hotel to be

consumed on the premises and vice versa, but without answering the said question. The licence in favour of the hotel which was treated to he a licence, in favour of Trinath Sahu, the Petitioner, has been annexed as Annexure-3. That licence clearly indicates that the name of the vendor is "Sahu Hotel" at Kharvel Nagar. Bhubaneswar. According to the assertions made in the writ application, this is a company registered under the Companies Act which has its independent legal entity. It may be that Trinath Sahu, the Petitioner, is also the Managing Director of that Company and might be having some interest in the Company, but the Company being a distinct legal entity cannot be equated with Trinath Sahu as an individual. As an individual, Trinath Sahu has his own) personality apart from his personality as a share-holder or a Managing Director of'' the Company. In this view of the matter, the Collector as well as the State Government erred in law in debarring consideration of Trinath Sahu''s application for grant of licence for sale of foreign liquor for consumption ''off'' at City High School Road, Berhampur, applying Sub-rule (4) of Rule 46 of the Rules. In view of our conclusion that the hotel of which Trinath Sahu is the Managing Director and Trinath Sahu himself are two distinct personalities a licence in favour of the hotel to vend foreign liquor to be consumed on the hotel premises cannot be considered as a bar for getting licence for selling foreign liquor for consumption off the premises. In this view of the matter the exclusion of the Petitioner from consideration is wholly vitiated and cannot be sustained in law. The contention of Mr. Mohanty on this score accordingly must be upheld.

8. So far as the last point is concerned, no doubt Government has the discretion to grant the exclusive privilege in question. But making a grant in favour of some of the applicants without considering the claim of others or rejecting the claim of others on erroneous view of law vitiates the grant. Section 22 read with Section 29(2) of the Bihar and Orissa Excise Act indicates the manner in which the exclusive privilege should be settled: The main purpose is to raise the excise revenue. Therefore, the action of the Government must be in a manner which would be against the realisation of excise revenue. The file relating to the, grant in favour of opposite party No. 5 was produced before us and on perusal of the same, we do not find any basis on which opposite party No. 5 was favoured with the grant of exclusive privilege in question. Howsoever discretionary the power may be, when the Government deals with a grant, the order relating to the grant must be backed with reasons and the reason must be germane to the issue. The consideration must be bona fide and all applicants entitled to be considered must be considered. In view of our conclusion that the Petitioner was erroneously kept out of consideration on a mis-interpretation of Sub-rule (II) of Rule 45 of the Orissa Excise Rules, and further in view of our conclusion that no basis of reason has been indicated for conferring the privilege on opposite party No. 5, we have no other alternative than to quash the grant of exclusive privilege for retail sale of foreign liquor in favour of opposite party No. 5 for shop No. 1 at City, High School Road, Berhampur, and we accordingly quash the same.

9. In the net result, therefore, the recommendation of the Collector under

Annexure-I and the order of the State Government relating to grant of exclusive privilege for retail sale of foreign liquor for 1989-90 in favour of opposite party No. 5 for the shop at City High School Road. Berhampur, are quashed and the matter is remitted back to the State Government for re-consideration of all the applicants'' including the Petitioner in accordance with law bearing in mind the observations made by us in this judgment. Since the State is going to lose the, excise revenue, we direct that the matter may be re-considered and final order may be passed within a month from today. The writ application is accordingly allowed, but there will be no order as to costs.

J.M. Mahapatra, J.

I agree.

Application accordingly allowed.