

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).14407/2008

(From the judgement and order dated 29/04/2008 in WP No.3762/2008 of
The HIGH COURT OF ORISSA AT CUTTACK)

K. SANKAR NARAYAN SUBUDHI Petitioner(s)

VERSUS

MANOJ KUMAR SAHU & ORS. Respondent(s)

[With appln(s) for permission to place addl. documents on record,
with prayer for interim relief and office report]

Date: 13/01/2009 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.B. SINHA
HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA
HON'BLE MR. JUSTICE ASOK KUMAR GANGULY

For Petitioner(s) Mr. G. Ramakrishna Prasad, Adv.
Mr. Suyodhan Byrapaneni, Adv.
Mr. Amar Pal, Adv.
Mr. Bharat J. Joshi, Adv.

For Respondent No.1 Mr. Rajiv Roy, Adv.
Mr. S.K. Patri, Adv.
Mr. Abhijit Roy, Adv. for
Mr. Pranab Kumar Mullick, Adv.

Nos.2 to 5 Mr. Sibor Sankar Mishra, Adv.

UPON hearing counsel the Court made the following
ORDER

Leave granted.

The appeal is allowed in terms of the signed order.

(Subhash Chander) (Pushap Lata Bhardwaj)
A.R.-cum-P.S. Court Master

[Signed order is placed on the file]
IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.150 OF 2009
[Arising out of S.L.P.(C)No.14407 of 2008]

K. Sankar Narayan SubudhiAppellant

Versus

Manoj Kumar Sahu & Ors.Respondents

ORDER

Leave granted.

This appeal is directed against a judgment and order dated 29th

April 2008 passed by a Division Bench of the High Court of Orissa at Cuttack in Writ Petition(C) No.3762 of 2008 whereby and whereunder the excise licence granted in favour of the appellant herein in terms of the provisions of the Bihar and Orissa Excise Act, 1915 and the rules framed thereunder, was set aside.

Appellant and the 1st respondent, pursuant to a notice issued on 05th July 2007 by the Collector of Ganjam District, submitted applications for grant of licence including for India Made Foreign Liquor (IMFL) Off shop at New Bus Stand, Berhampur, on fixed amount of consideration by draw of lottery for the period from the date of grant thereof till 31.3.2008. 1st respondent, at the outset, raised an objection in regard to the grant of the tender documents in favour of the appellant herein, inter alia, on the premise that he had not submitted the clearance certificate by the Sales Tax Officer.
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The Collector, however, by reason of an order dated 10th March 2008, opined as under :

"... .."

Altogether the two sets of applications were received for new bus stand, Berhampur IMFL off shop.

Prior to allowing all the applicants to take part of a settlement of the said shop through lottery, the Collector Ganjam directed all the participants of new bus stand, Berhampur to produce the documents in response to the letter issued to them vide no.336/Ex 12.02.2008. But both applicants could not produce the required documents i.e. either Income-tax returns for 05-06 & 06-07 or no dues certificate of the Sale Tax Authority as the case may be. In case of Shri Manoj Kumar Sahu, the income tax return of 06-07 could not be produced and similarly no dues certificate of Sale Tax Authority was not submitted by Shri K. Sankar Naryan Subhudhi. Thus the Collector Ganjam told applicant namely Shri Manoj Kumar Sahu that there is no meaning of filing prayer petition dt.7.03.2008 to avoid defaulting person of documents as he himself is also a defaulted person in submission of documents of I.T. return for 2006-07. Even though the opportunity was given to him to show the said document but he failed to do so. Considering the position of non fulfilment of all documents by both of applicants, the Collector Ganjam announced in the lottery hall the lottery winner of shop is required to produce the wanting documents within seven days from the date of lottery or else the license so granted in his/their favour would be cancelled for the remaining period of 2007-08 forthwith. All the participants of Excise shops were present in the lottery procedure of excise shops told unanimously that they will produce the wanting documents as

per the letter issued by Collector Ganjam.

... .."

Indisputably, the lottery for allotment of the site took place on

10th March 2008. Both, the appellant as also the 1st
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respondent, participated therein. On the next day, i.e., 11th March 2008, the 1st respondent filed the aforementioned writ petition before the High Court, inter alia, contending that the appellant had not complied with the statutory requirements for grant of licence.

Having been taken through the said writ petition, it appears to us that the main thrust therein was in relation to non-submission of the Sales Tax clearance Certificate and the affidavit as was required under the notice dated 05th July 2007 along with the appellant's application. The High Court, however, having regard to the provisions contained in clause 3(ix) of the notice inviting applications for settlement of IMFL Off shop as also Rule 45 of the Orissa Excise Rules, 1965 (for short, 'the Rules') opined :

"7. From the result of scrutiny of the application received from the petitioner as well as opposite party No.5 it appears that though the petitioner had filed the affidavit as required under clause 3(ix) and (xi)(d) of the notice inviting applications, as quoted above, that he was not a convicted person in any criminal case, opposite party No.5 had not mentioned in any of his affidavits that he has not been convicted in any criminal case being tried in any court of competent jurisdiction. In the result of scrutiny against column No.11 whether the applicant is eligible to go for lottery whereas in respect of the petitioner the answer is 'yes' in respect of opposite party no.5 the answer is the negative. Rule 45 of the Orissa Excise Rules, 1965 provides that licences for the retail sale of intoxicant shall not ordinarily be granted to a person who has been convicted by a Criminal Court of a non-bailable offence. In this context the affidavit as required under clause 3(xi)(d)

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of the notice in Form A assumes importance. Therefore, in any case, opposite party no.5 having not mentioned the essential requirement whether he is convicted or not by any court of law, he should not have been allowed to take part in the lottery and the licence could not have been granted in his favour. We are not considering the procedure of drawing of lottery as it has not been disputed by any of the parties; rather both of them have given in writing that the lottery was drawn properly.

In the result, we allow the writ petition, quash the result of the lottery held on 10.03.2008 and the exclusive privilege granted to opposite party no.5 pursuant to such lottery.

There would be no order as to costs."

Mr. G. Ramakrishna Prasad, the learned counsel appearing on behalf of the appellant would submit that the High Court committed an error in passing the impugned judgment insofar as it failed to take into consideration that there has been substantial compliance of law as the appellant, along with the application, had submitted three affidavits, one in respect of the sales tax clearance certificate, the second in respect of the filing of income-tax return and the third in respect of pendency of the criminal case.

Mr. Roy, the learned counsel appearing on behalf of the respondent no.1, on the other hand, would contend that filing of an affidavit in terms of Rule 45 of the Rules being imperative in character, the impugned judgment does not warrant any interference.

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Rule 45 of the Rules reads as under :

"Rule 45 - To whom licences for sale of intoxicants not to be granted - Licence for the retail sale of intoxicants shall not ordinarily be granted

(1) to a person, who has been convicted by a criminal court of a non bailable offence; or

(2) to a former licensee who -

(a) is in arrear to Government; or

(b) whose conduct has been found to be unsatisfactory or

(c) who has been found guilty within the previous five years of any serious breach of the conditions of his licence; or

(3) to a person who is known to be insolvent or who fails to provide adequate proof in support of his insolvency.'

It is not in dispute that before the lottery was held, a verification report was submitted before the Collector by the competent authority, from a perusal whereof, it appears that in the local enquiry anything adverse against the persons named therein including the appellant herein was not

found.

Appellant, in support of his application, as indicated hereinbefore, filed three affidavits. In the first affidavit, which was filed on 18 th July 2007, he stated that he was not a sales tax assessee under VAT and CST and, thus, no sale tax case pending against him. Another affidavit of same date pertained to the filing of the income tax return. So far as the matter relating to conviction in a cognizable and non-bailable case is

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concerned, in his affidavit affirmed on 18th July 2007, the appellant stated as under :

"2. That there is no Civil or Criminal case or cases pending against me in any court of law inside of India and there is also no essential commodities case or cases pending against me in anywhere."

Insofar as the affidavit dated 07th March 2007 is concerned, he stated as under :

"2. That I am not involved in spurious liquor trade and no Civil or Criminal Cases pending against me in any criminal court under the Act and not charged of a non-bailable offence under the provisions of the IPC, 1860 (Act XLV of 1860) and there is also no essential commodities case or cases pending against me in anywhere."

The short question which, thus, arises for consideration is whether, by reason of the averments made in the said two affidavits, the appellant had substantially complied with the requirements of Rule 45 of the Rules. The 1st respondent, either before the Collector or in the writ application, did not categorically state that the appellant's application for grant of licence in respect of IMFL Off shop in question should not be considered, inter alia, on the premise that he had not affirmed any affidavit that he had not been convicted in a criminal case.

Such a question appears to have been raised for the first time before the High Court during hearing as from a perusal of

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the writ petition it does not appear that such a contention had specifically been raised therein.

We have noticed hereinbefore that the Collector proceeded on the basis that both the appellant as also the 1st respondent did not fully comply with the requirements of Rule 45 and only in that view of the matter he directed that all the deficiencies in regard to the compliance of the rule may be completed within seven days from the date of holding of the lottery.

The 1st respondent accepted the suggestion of the Collector. He participated in the lottery without any demur whatsoever. Had his offer been accepted, he could have remedied the deficiencies found in his application by taking appropriate steps in that behalf within seven days from the date thereof. He, however, when found himself to have not succeeded in the said lottery, he filed the writ petition on the next day. Appellant, therefore, did not get any opportunity to comply with the order given by the Collector on 10th March 2008.

Rule 45, in our opinion, must be read with clause 3(ix) of the notice inviting applications for settlement of IMFL off shop, which reads as under :

"3(ix) 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 the Indian Penal Code, 1860 (Act 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 the Board's Excise Rules 1965."

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Appellant, in his affidavit, affirmed on 18th July 2007, in no uncertain terms, stated that no civil or criminal case was pending against him. He, in his affidavit affirmed on 07th March 2007, had also stated that he was not involved in spurious liquor trade and no civil and criminal cases were pending against him in any criminal court under the Act nor had he been charged of a non-bailable offence under the provisions of IPC.

If the appellant had never been charged for commission of a non-bailable offence under the provisions of IPC and no other criminal cases

including the essential commodities case had been filed against him, in our opinion, he had substantially complied with the requirements of Rule 45 as also clause 3(ix) of the notice inviting applications.

We, therefore, are of the opinion that the High Court committed an error in passing the impugned judgment. It is, therefore, set aside and the appeal is allowed. The State of Orissa is directed to grant licence in favour of the appellant for the remainder of the term.

Sd/-
.....J.
[S.B. SINHA]

Sd/-
.....J.
[DR. MUKUNDAKAM

SHARMA]

New Delhi.
January 13, 2009.

Sd/-
.....J.
[ASOK KUMAR GANGULY]