

**(2006) 08 CAL CK 0008****Calcutta High Court****Case No:** F.M.A. No. 1719 of 2003

Nirmal Sarkar

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

**Date of Decision:** Aug. 21, 2006**Acts Referred:**

- Bengal Excise Act, 1909 - Section 85, 86
- West Bengal Excise (Selection of New Sites and Grant of Licence for Retail Sale of Spirit and Certain other Intoxicants) Rules, 1993 - Rule 13(1), 2, 3(1), 5(1)

**Citation:** (2007) 2 CHN 707**Hon'ble Judges:** Prabuddha Sankar Banerjee, J; Bhaskar Bhattacharya, J**Bench:** Division Bench**Advocate:** Arunaba Ghosh and Joydip Kar, for the Appellant; Sandip Srimani and Supriyo Roy Chowdhury, Ganesh Srivastava and Sukanta Das for Respondent No. 5 and Debaditya Chattopadhyay, for the Respondent**Final Decision:** Allowed**Judgement**

Prabuddha Sankar Banerjee, J.

Three writ applications namely W.P. No. 17894 (W) of 2002, W.P. No. 16851 (W) of 2002 and W.P. No. 17895 (W) of 2002 were brought by three persons, namely, Sri Chiranjeeb Ghosh, Sri Kashi Nath Saha and Sri Nirmal Sarkar respectively

2. The said three writ applications were taken up by the learned Single Judge as two of them, namely, Kashi Nath Saha and Chiranjeeb Ghosh challenged the selection of Sri Nirmal Sarkar whereas Sri Nirmal Sarkar prayed for issuance of license in his favour with respect to "Off shop" excise license at new site.

3. On the basis of advertisement for grant of new Excise License "Off shop" at new site (Baguihati), the petitioner along with other submitted their applications in prescribed form for grant of license The said advertisement was made on the basis of order as per West Bengal Excise (Selection of Person for Grant of License at New

Site for Retail Sale of Spirit and certain other intoxicants other than Foreign Liquor on Category of Licenses and Licenses for Denatured Spirit) Order, 2000 (hereinafter referred to as "the 2000 Order")

4. On the basis of applications, there was preliminary scrutiny and the authority thereafter prepared a list of applicants who were found to be eligible for consideration Thirteen applications were rejected One of the writ petitioners, namely, Chiranjeeb Ghosh mentioned in column 9 of the application that his father was holder of a liquor license but his application was not rejected

5. Thereafter the name of the applicants was forwarded to the Director of State Lottery and a lottery was conducted on March 27, 2001 On the basis of result of the lottery, the list of three persons was prepared and of the three petitioners, Nirmal Sarkar, figured as s1. No. 1 in the panel Another petitioner, namely, Kashinath Saha was placed at s1. No. 3 whereas, the other petitioner, namely, Chiranjeeb Ghosh was not enlisted in the panel

6. After the list was prepared, there was enquiry by the department and at that time, it was detected that the mother of Nirmal Sarkar who was at s1. No. 1 was holding license for denatured spirit. The said fact was not disclosed in the application against column No. 9 and it was simply mentioned against column No. 9-"No". The matter was referred to the Secretary who on the basis of "no objection" by the Excise Department, gave his consent for granting of foreign liquor "off shop license" in favour of the said Nirmal Sarkar subject to the condition that his mother, Smt. Krishna Sarkar, who held the OD spirit license surrendered the same to the appropriate authority.

7. Subsequently, Smt. Krishna Sarkar submitted a prayer for surrender of her OD spirit license.

8. The appellant by filing the writ application prayed for writ of mandamus commanding the respondents and each one of them forthwith to issue license of foreign liquor "off shop (unreserved)" at Baguihati in terms of memo No. 1142/N(E) dated 5.11.2001 and other consequential relief.

9. The learned Single Judge took up the three writ petitions and by the order impugned, allowed the writ application No. 16851(W) of 2002 in part brought by Kashinath Saha thereby cancelling and setting aside the impugned letter dated 11.06.2002 which is Annexure "P-7" issued by the State respondents and passed consequential direction upon the State respondents to act in accordance with law with respect to offering of excise license to the next suitable candidate in order of seniority in the panel in question. The other two writ petitions, namely, W.P. No. 17894(W) of 2002 brought by Chiranjeeb Ghosh and W.P. No. 17895 (W) of 2002 brought by Nirmal Sarkar were dismissed.

10. Being dissatisfied and aggrieved by the order impugned, these two mandamus appeals have been preferred by Sri Nirmal Sarkar who was the writ petitioner in W.P. No. 17895(W) of 2002 and a respondent in W.P. No. 16851 (W) of 2002 filed by Kashinath Saha.

11. It is to be mentioned here that other two writ petitioners did not prefer any appeal against the said common judgment.

12. Sri Kar, the learned Counsel for the appellant at the time of argument challenged the order passed by the learned Single Judge on the following grounds:

i) That the learned Single Judge did not consider that Rule 2 of the West Bengal Excise (Selection of New Site and Grant of License for Retail Sale of Spirit and Certain Other Intoxicants) Rule, 1993 (hereinafter referred to as "the 1993 Rules") clearly provides that those rules are applicable regarding grant of license for retail sale of spirit and intoxicants other than denatured spirit.

ii) That the learned Single Judge failed to appreciate the interpretation of statute by the Hon"ble Supreme Court in the case of State of West Bengal and Another Vs. Madan Mohan Ghosh and Others,

iii) That the learned Single Judge did not consider that "the 1993 Rules" is to be read with Excise Department Notification No. 66-Ex/O/IM-88/99 dated 4.2.2000.

13. Sri Kar at the time of his argument pointed out that the mother of the appellant is running the business of polishing furniture for which denatured spirit (methelated spirit) is required. For the said purpose, the mother of the present appellant got a license and this fact is not disputed. Sri Kar further pointed out that methelated spirit is not fit for human consumption and it comes under the purview of denatured spirit. Sri Kar further pointed out that the finding of the learned Single Judge to the effect that the words "any other license" as mentioned in Rule 5(1) of Order dated 4.2.2000 by the Excise Department includes the license granted for denatured spirit is wrong because denatured spirit is excluded from the operation of "the 1993 Rules" by Rule 2 thereof.

14. Sri Kar further pointed out that the subsequent order dated 4.2.2000 by the Excise Department by notification was on the basis of power conferred by Sections 85 and 86 of Bengal Excise Act, 1909 read with Sub-rule (1) of Rule 13 of "the 1993 Rules". He further pointed out that "the 1993 Rules" was also made on the basis of power conferred by Sections 85 and 86 of Bengal Excise Act, 1909.

15. He drew our attention to the notification dated 4.2.2000 which runs as follows:

In exercise of the powers conferred by Section 85, and Section 86 of the Bengal Excise Act, 1909 (Ben. Act V of 1909) read with Sub-rule (1) of Rule 13 of the West Bengal Excise (Selection of New site and Grant of License for Retail Sale of Spirit and Certain Other Intoxicants) Rule, 1993 published under this department notification

No. 148-Ex dated the 22nd March, 1993, and in supersession of the order issued under this department No. 315 Ex. Dated the 25th April, 1991, the Governor has been pleased to make, with immediate effect the following order:

ORDER

1. This order may be called the West Bengal Excise (Selection of Person for Grant of License at New Site for Retail Sale of Spirit and Certain Other intoxicants other than foreign liquor on category of licenses and licenses for Denatured Spirit) Order, 2000. (hereinafter referred to as "the 2000 Order")

(Emphasis supplied)

16. On the basis of the same, Sri Kar contended that any other license as mentioned in Rule 5(1)(d) does not include denatured spirit as the same has been excluded from the operation of "the 1993 Rules" by Rule 2 thereof and consequently, from the operation of the 2000 Order.

17. Sri Kar further contended that as license of denatured spirit has been kept outside the purview of "the 1993 Rules", the appellant was under no obligation to mention the existence of the said license in favour of her mother against column No. 9 of the prescribed form which he filled up at the time of submission of the application. Accordingly, Sri Kar submitted that there was, no suppression of fact.

18. At the same time, Sri Kar further submitted that the findings of the Hon'ble Supreme Court in the case as referred to earlier was not properly-interpreted by the learned Single Judge in its true perspective and as such, the said findings of the learned Single Judge should be set aside.

19. In this regard, the findings of the learned Single Judge as mentioned in page 58 of the Paper Book run as follows:

In its aforesaid judgment Supreme Court in para "5" observed that the High Court by the order which was subject of appeal held that the restrictions imposed by the Government Order of 2000 of not granting more than one excise license would not operate as a bar against the holder of an existing excise license from seeking grant of another license. The Judgment and order of the High Court was set aside and the appeal filed by the State of West Bengal was allowed by the Supreme Court.

20. The Hon'ble Supreme Court further came to the conclusion that the notification of the year 2000 by the Excise Department was made on the basis of power conferred under Sections 85 and 86 of Bengal Excise Act and the said notification was within the delegated power of the Government. The Hon'ble Supreme Court further opined that the said order reflected the policy of the State Government which is in conformity with the Constitutional obligation and though the said notification says that it is an order, in real sense it has the force of rule.

21. Sri Srivastava, the learned Counsel appearing for the respondent No. 5 strenuously argued that the intention of the Government has been made clear by the 2000 Order in which it has been specifically mentioned as per Rule 5(1)(d) that application for grant of new license for opening off shop business should be rejected, if it is found that any of his family member is holder of "any other license". He gave emphasis upon the words "any other license" and on the basis of the same it was argued by Sri Srivastava that existence of license for denatured spirit in the name of the mother of the petitioner, namely, Smt. Krishna Sarkar will disqualify him from getting any new license. Sri Srivastava further submitted that non-mentioning of existence of a license in the name of the mother of the present appellant against column No. 9 of the prescribed form will tantamount to suppression of fact and the same will automatically debar him from getting fresh license at a new site.

22. Sri Srivastava drew our attention to the abovementioned referred case and on the basis of the same it was argued by Sri Srivastava that the point has been set at rest on the basis of interpretation of the statute by the Hon'ble Supreme Court and the learned Single Judge rightly applied the same in his judgment. Accordingly, Sri Srivastava contended that the learned Single Judge correctly dismissed the writ application of the present appellant and as such, there is no necessity to interfere with the said findings.

23. Sri Srivastava lastly contended that in view of definition of "license" as per "the 1993 rules", "any other" license granted for denatured spirit is to be treated as license" under the said Rule and as such, possession of the said license by the mother of the appellant will stand as a bar to obtain fresh license. Sri Srivastava further contended that had there been any such intention of the Government that license for denatured spirit should be excluded from the rule, the same would have been mentioned in the definition of license as mentioned under Rule 3(1)(v). We cannot agree with Sri Srivastava in this regard. We have already discussed and came to the opinion that "the 1993 rules" as stated earlier were applicable with respect to sale of various intoxicants other than denatured spirit. Accordingly, the said plea as raised by Sri Srivastava cannot be accepted.

24. Sri Debaditya Chattpadhyay, learned Counsel appearing for the State supported the case of Sri Kar at the time of hearing.

25. We have gone through the said reported decision. On perusal of the same we are of clear opinion that the fact of the said case is quite different from the instant case.

26. In the said Supreme Court case, the question was whether the respondent therein who was holding a license for selling 50 UP Rum and Beer issued by the State was entitled to get a fresh license for selling Indian-made Foreign Liquor in view of "the 2000 Order". As 50 UP Rum and Beer came within the purview of "the

1993 rules", the Apex Court held that the respondent was not entitled to get a further new license. In the case before us, denatured spirit being kept outside the purview of the aforesaid "the 1993 rules" vide Rule 2, holding of such license is immaterial for getting a license under "the 1993 rules" as the word "license" as per Rule 3(1)(v) is restricted to those items to which the said rules apply. Even according to Clause 2 of the 2000 Order, unless there is anything repugnant in the subject or context. words and expressions used in the said 2000 Order and not defined therein, shall have the meaning respectively assigned to them in the 1993 rules.

27. We have already stated that Rule 2 of "the 1993 rules" clearly provides that the said rule shall apply to grant of license for retail sale of spirit and intoxicants other than denatured spirit and even the title of 2000 Order expressly excludes denatured spirit from its operation.

28. It is, therefore, crystal clear that holding of a license with respect to denatured spirit by family member of the appellant can never be a bar for grant of new license at a new site to the present appellant.

29. The Excise Department unnecessarily asked the appellant for surrendering the license granted in favour of her mother with respect to denatured spirit. We are of the view that the same was not necessary as existence of a license with respect to denatured spirit in the name of mother of the present appellant will not hinder the appellant from getting the fresh license at a new site.

30. In view of the above discussion, we are of clear opinion that there was error on the part of the learned Single Judge in rejecting the writ petition by the present appellant.

31. Accordingly, we allow the mandamus appeal preferred by one of the writ petitioners, namely, Sri Nirmal Sarkar and dismiss the writ application filed by the private respondent No. 5. We direct that the State-respondent to issue license of foreign liquor off shop at Baguihati in terms of prayer (a) of the writ application within fortnight. The State-respondent will not insist on surrendering the license of denatured spirit held by the mother of the appellant and will restore the same as the same was surrendered on the illegal demand of the State-respondent.

32. In the facts and circumstances, there will be, however, no order as to costs.

Bhaskar Bhattacharya, J.

33. I agree.