Sisir Kumar Dey and Others Vs State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: May 5, 1973

Citation: 78 CWN 216

Hon'ble Judges: Debiprasad Pal, J

Bench: Single Bench

Advocate: Ranjit Ghosh and Rama Banerjee, for the Appellant;Ganendra N. Roy, for the Respondent

Judgement

Debiprasad Pal, J.
The petitioners in this application are the inhabitants of the village Jagadanandapur Bethuadahari within Nakashipara

Police Station in the District of Nadia. The respondent No. 5, Rasomoy Saha holds a licence for retail sale of country liquor through a shop at

Bethuadahari for the last 35 years. The said liquor shop is situated at the outward countyard of the residential house of the said respondent No. 5

at Khidirpur in the village of Bethuadahari. The petitioners allege that on or about 29th October, 1968, the petitioner No. 5 made an application to

the Collector of Nadia (Excise Department), Krishnanagar, the respondent No. 3, praying for shifting the aforesaid country-liquor-shop from its

existing site to another site in plot No. 1486, khatian No. 117, Mouza Jagadanandapur, P.S. Nakashipara. When the petitioners came to know

that on the basis of the existing excise licence granted in favour of the said respondent No. 5, a country liquor shop is going to be opened at the

premises of one Kshitish Mallick in front of the Police Station and by the side of the National Highway No. 34, by the order of the respondent No.

4, Additional District Magistrate, Krishnanagar, a mass petition signed by 40 persons including the present petitioners was submitted before the

District Magistrate and Collector, Nadia, on or about 7th December, 1968, raising serious objection against opening the proposed country liquor

shop at the aforesaid site, primarily on the ground that the only Girls'' School of the village is situated very close to the said proposed shop and

there is a conch-shell bangle shop adjacent to the shop. It was pointed out in the said petition that everyday a large number of girls go to the school

through that way and the womenfolk of the village come to the said bangle shop for purchasing bangles. It was further pointed out that the

proposed site for the shop was surrounded by residential houses. A copy of the said mass petition, it is alleged, was also sent to the Governor,

West Bengal. The petitioners allege that on 28th December, 1968, they received a Memorandum No. 7046E dated 23.12.1968 from the

Additional District Magistrate, respondent No. 4, informing them that no action could be taken on the said petition because on enquiry it was found

that the proposed site would be more suitable for opening the country liquor shop than its present site. An affidavit affirmed by Mr. Sunil Mukharji,

Superintendent of Excise on 31st July, 1969, has been filed on behalf of the respondent Nos. 1-4. In paragraph 7 of the said affidavit it is stated

that there was a mass petition on 5.12.67 with a copy to the Governor, the Chief Minister of West Bengal and the Commissioner of Excise, West

Bengal. On the basis on the enquiry, the Additional Magistrate in his capacity as a licensing authority decided that the licensee should be given one

month time to shift the shop from its existing site to an alternative suitable site and the licensee was informed accordingly. Meanwhile another mass

petition by one Subal Chandra Das and others of Bethuadahari was filed praying that the country liquor shop should not be shifted from the existing

site at Khiderpor. On a report submitted by the Superintendent of Excise on 8.4.68 the Additional District Magistrate approved the suggestion

made by the Superintendent of Excise that the licensee should shift his country liquor shop to Kanthalberia Mouza. The licensee thereafter by his

petition dated 29th October, 1968, offered a site within Jagadanandapur mouza appertaining to dag No. 1486 in khatian No. 117 for the purpose

of shifting his country liquor shop from the existing site at Khidderpur to that place. It is further stated on behalf of the respondents that on the basis

of mass petition filed by the petitioners an enquiry was made and the allegations of the petitioners were found to be of very little substance. The

licensee was therefore directed under the Excise Office Memo. No. 7065E dated 23rd December, 1968 to shift the country liquor shop to the

aforesaid site within 7 days from the receipt of the letter and then construct the surrounding wall within a month. The main grievance of the

petitioners in this case is that when the alleged enquiry was made by the Excise Superintendent, none of the signatories of the mass petition was

called. It has been further contended that the aforesaid site was never used for the retail sale of spirit and as such the procedure laid down in

Sections 30 to 33 of the Bengal Excise Act, 1909 (hereinafter referred as the Act) was not complied with. The further allegation is that no list was

prepared by the Collector of Excise showing what licence was proposed to be granted for the retail sale of spirit, no date was prescribed for

receipt of objections and the Collector did not consider the same as required u/s 34(1) of the Act. It is further contended that the petitioners''

petition and the opinion of the Collector have not been submitted to the Excise Commissioner as required under the law and as a result the Excise

Commissioner would not consider the list, objection and opinion and pass any final order.

2. In my view there is a considerable force in the contention raised on behalf of the petitioners. Chapter 6 of the Act lays down the procedure to

be followed in granting a licence for the retail sale of spirit. Section 30 of the Act requires the Collector to prepare a list in a form prescribed by the

Excise Commissioner, showing what licence it is proposed to grant for the retail sale of spirit, for consumption on the vendor''s premises, for the

next period of settlement. Such list is to be prepared before the period for which the existing licence for the retail sale of spirit is in force expires.

u/s 31 a notice to the effect that it is proposed to grant a licence for the retail sale of spirit at the shop is to be affixed conspicuously upon the site of

each shop. If the site referred to in the said list is not at the time used for the retail sale of spirit, the notice should indicate that it is proposed to

grant a licence for the retail sale of spirit at the new site or in the vicinity, for the next period of settlement. Such notice is to be caused by

proclamation in the locality by beating of drum. u/s 33 objections to such proposal may be received at any time prior to the prescribed date from

ratepayers and also from persons owing or occupying land or residing in the vicinity of the shop. Such objections are require to be submitted to the

Collector. The Collector after the date prescribed for the receipt of objections shall consider the same and shall, if necessary, revise the said list

and decide for what place licence for the retail sale of spirit shall be granted. The Collector then is required to submit the said list and the

objections and his own opinion to the Exercise Commissioner who u/s 35 of the Act on a consideration of the list, objections and opinion sent to

him may modify or annual any order passed or licence granted by the Collector. The learned Counsel for the respondents contend that the

procedures laid down in Sections 30 to 33 of the Act are not intended to apply to a case where the licence is already granted and merely the place

from where the licensee has to carry on his business is shifted. According to the learned Counsel for the respondents such power can be exercised

by the Collector under Rule 26 of the West Bengal Excise (Licensing Board) Rules, 1950. The above Rules have been framed for the purpose of

regulation of the transaction of business by Excise Licensing Board appointed under Sec. 7 (2) (b) of the Act. It is the admitted position in the

present case that the licence has not been granted by the Excise Licensing Board appointed under the aforesaid provision of the Act. It is also the

common case that in matter of granting licence, the Excise Licensing Board is not functioning in the area and the powers of granting licence are

exercised by the Collector. Rule 26 of the said Rules provides that notwithstanding anything contained in the aforesaid Rules, the Collector may in

urgent cases consider and decide application for transfer of existing licence to the new site. The proviso to Rule 26 however requires that all such

applications and the order of the Collector thereupon shall be placed before the Licensing Board in its next meeting, for approval or for such order

as the Board may deem fit. The present licence has not been granted by the Licensing Board. I fail to see how Rule 26 of the aforesaid Rules can

be of any application to the present case. Rule 26 comes into operation when the Licensing Board appointed u/s 7(2)(b) of the Act functions and

the powers and duties conferred and imposed on a Collector by or under the Act are exercised by such Licensing Board either concurrently with

or in subordination to or to the exclusion of the Collector. As I have already pointed that the Licensing Board in the present area has not been

functioning and in such a case, in my opinion, Rule 26 of the said Rules cannot be invoked to justify the action of the respondents. The learned

Counsel for the respondents made an alternative contention that even if the power has not been exercised by the Collector under the aforesaid

Rules such power of shifting the place from where the licensee can carry on his business can be exercised as an incidental and implied power to

grant a licence. In my view this contention has little substance. When the statute specifically provides for a procedure to be followed in the matter

of granting licence, the doctrine of implied power cannot be invoked. The entire scheme of Chapter 6, in my opinion, negatives such contention.

When a licence is granted there are two important things to be considered, viz. what licence it is proposed to grant for the retail sale of spirit and

secondly the site or the place wherefrom the licensee has to carry on his business. In my opinion, the place from where a licensee is allowed to

carry on his business of retail sale of spirit is of considerable importance and significance so far the public affected by such licence are concerned.

In granting such a licence to a new shop, it is to be considered whether the shop is in a market place or at the entrance to a market place or in

close proximity to the dwelling huts, schools, hospitals, places of worship, factories, or other places of public risk or in the congested portion of the

village. The place from where a licensee has to carry on his business under the Act therefore is to be considered by the Collector after inviting

objections In accordance with procedures laid down in Sections 30 to 33 of the Act. He has therefore to send his opinion along with the list and

objections to the Excise Commissioner who is the final authority to decide on the matter. These are statutory safeguards and I see no reason why

these statutory procedures are not to be followed when a new site is selected for the tarrying on of the business of a licensed retail seller. The

learned Counsel for the respondents contends in that event that the various provisions of the Act will be unworkable inasmuch as objections are

filed by the public in respect of a particular place and a new place is decided by the Collector the entire gamut of the procedure laid down in

Sections 30-33 is to be followed. The Counsel for the petitioners contends that the difficulties suggested are more apparent than real. In such type

of cases it is open to the authorities to exercise their power u/s 37 and grant a licence for the retail sale for a period not exceeding 6 months. If

power is exereised u/s 37 of the Act, the procedure laid down in Section 30-33 need not be complied with. I need not examine this aspect in

details. In my opinion an argument ab inconvenienti is not a decisive argument. If the statute prescribed a procedure to be followed, the courts can

administer the law as they find them. I need not however express any final opinion on this point. It is an admitted position that if Sections 30 to 33

of the Act apply to the present case there have been no compliance with the statutory requirements as no list was prepared nor such a list was

affixed upon the site nor any objections were invited by the Collector. The Collector admittedly did not send his opinion to the Excise

Commissioner as required under Sec. 35 of the Act. The whole procedure, in my opinion, was an irregular one.

In these circumstances the rule is made absolute. There will be a writ in the nature of certiorari quashing the order dated 23rd December, 1968,

contained in Memorandum No. 7064. There will be a writ in the nature of mandamus commanding the respondents not to give effect to the said

order also. There will be no order as to costs.