S. Gopal Vs. The Commissioner of Excise and Another

S. Gopal Vs. The Commissioner of Excise and Another

SooperKanoon Citation : sooperkanoon.com/1182837

Court : Karnataka

Decided On : Jun-08-2016

Judge : The Honourable Dr. Justice Vineet Kothari

Appeal No. : Writ Petitioner No. 21267 of 2016 (Excise)

Appellant : S. Gopal

Respondent : The Commissioner of Excise and Another

Judgement :

(Prayer: This W.P. is filed under Articles 226 and 227 of the Constitution of India praying to quash the impugned order dt: 6.6.2015 passed by R-2 is illegal as per Annex-A and etc.)

1. The present writ petition has been filed by Mr.S.Gopal, holding CL-9 licence to vend liquor at the address given in Annexure-B i.e., shop No.10 (old No.19), Mavalli Tank Bund Road, Kalasipalya, Bangalore, aggrieved by the order Annexure-A dated 06.06.2016, asking him to shift the said liquor vending shop from the said location to another place which is not objectionable as per the provisions of Karnataka Excise Licences (General Conditions) Rules, 1967, which prohibit the existence of a liquor shop within 100 mtrs of any religious or educational institution or Hospital or any Office of the State Government or Central Government or Local Authorities or in a residential locality as specified in sub-rule(1) of Rule-5.

2. The contention raised by the present petitioner before this Court and as submitted by Sri.B.N.Shetty, learned counsel for the petitioner is that the said shop is being run by the petitioner at the same place for about 30 years and every year renewal of licence has been done by respondent No.2 and the place of the said shop and though the location of the said shop is at the place which is objectionable place as defined in sub-rule(1) of Rule 5, a relaxation has been given to the petitioner by the Deputy Commissioner of Excise with the prior approval of the Excise Commissioner as per Rule 5(2) of the said Rules read with proviso thereof and therefore, the learned counsel for the petitioner has vehemently submitted that when once the said relaxation is given by the appropriate Authorities and the renewal of licence is a matter of right, therefore allowing him to carry on business at the same place is permissible and therefore, the impugned order Annexure-A dated 06.06.2016 again passed by the respondent-Deputy Commissioner of Excise directing him to shift the said shop from the said objectionable place is illegal and the said order deserves to be quashed.

3. On the other hand, Sri.T.K.Vedamurthy, learned AGA for the respondents, controverting the submissions made by the learned counsel for the petitioner, urged that renewal of licence CL-9 every year is a fresh licence and therefore, apart from the relaxation given to the petitioner for year 2011-12 and 2012-13 under Annexure-C, order passed by the Deputy Commissioner with the prior approval of the Excise Commissioner, there is no bar for the Deputy Commissioner to pass such fresh order like Annexure-A dated 06.06.2016 directing him to shift the said liquor vending shop. He submitted that there are 3 Hospitals within the vicinity of 100 mtrs from the said liquor shop of the petitioner namely, Government Referral Hospital (Maternity Hospital) at a distance of 76 mtrs from the Bangalore City Corporation Hospital, 44.5 mtrs distance from Dharma Prakash S.V.Srinivasa Shetty Smt.S.V.Lakshmi Kanthamma General Eye Hospital and 58 mtrs distance from Bangalore West Lions Super Speciality Eye Hospital.

He also submitted that neither the order passed by the learned Excise Commissioner nor Annexure-C, order passed by the learned Deputy

Commissioner of Excise relied upon by the petitioner for the year 2012-13 relaxation, assigns any reason for such relaxation in terms of Rule 5(2) proviso thereof.

He also drew the attention of the Court towards the letter dated 10.07.2012 of one of the Hospitals Bangalore West Lions Super Speciality Eye Hospital, raising the complaint against the existence of the liquor shop of the petitioner in the following terms:-

We have conducted 1,953 Free Eye Camps and have conducted more than 1,20,000 Free Cataract IOL Surgeries and 1.75 million Free Eye Screenings so far. This is an ongoing programme and on an average we do 6000 to 7000 Cataract Surgeries annually absolutely Free of cost.

We bring to your kind notice that just opposite to our hospital there is a bar which supplies all types of liquors. People in the evenings are fully drunk and sit on the staircase of our hospital and create nuisance by vomiting and spoiling the entire area which is not conducive for an eye hospital. They are also a security threat to our patients and Doctors.

The location of the Bar clearly violates the law that prohibits operation of Liquor Shops or Bars near Schools, Colleges or Hospitals. Hence, the situation of the bar opposite our Hospital is a clear violation of law .

He also raised a plea of availability of the alternative remedy by way of an appeal to the petitioner against the impugned order Annexure-A, as per Section 61(2) of the Act, against the order passed by the Deputy Commissioner, an appeal lies before the Excise Commissioner and as per Section 61(3) of the Act, Second Appeal against the order passed by the Excise Commissioner lies before the Karnataka Revenue Appellate Tribunal. He, therefore, submitted that the present writ petition is not maintainable and deserves to be dismissed and on merits also, the petitioner cannot claim the right to carry on the said business at the same place.

4. I have heard the learned counsels at length and perused the record.

5. A bare perusal of Annexure-C, the order of relaxation passed by the learned Deputy Commissioner leaves much to be desired. After narrating the submissions of the petitioner before the Deputy Commissioner and reproducing the extracts of the report of the Excise Inspector dated 18.08.2012, the said Authority-Deputy Commissioner, merely falls back upon the prior approval of relaxation given by the learned Commissioner. The order of the learned Commissioner dated 17.09.2012 which was in vernacular language, but orally translated for the Court by both the learned counsels, does not give any reason as such for the relaxation of the restrictions contained in Rule-5(1) of the General Conditions Rules, 1967 even for 2011-12. It merely contains the words that I hereby relax the said restriction . The said relaxation is relied upon by the learned Deputy Commissioner in the operative portion of the order Annexure-C in the following manner:-

Order No.EXE/IML/Kapava/146/2012-13 dated 24.09.2012

As per the reasons stated above, though the CL-9 licenced premises of S.Gopal which was renewed for the year 2012-13 in respect of the premises bearing No.10, Mavalli Tank Bund Road, J.C.Road, Bangalore, is within a distance of 76 metres from Bangalore City Corporation, H.Siddaiah Road, Referal Hospital (Maternity Hospital) and 58 metres from BW Lions Hospital (Educational Institution), the said restrictions were relaxed by the Excise Commissioner, Government of Karnataka, Bangalore, as per Rule 5(2) of Karnataka Excise Licence (General Condition) Rules and granted prior approval. Hence, the CL-9 licensee is permitted to continue his business in the present premises .

6. The words as per the reasons stated above in the aforesaid extraction of the portion of the order, takes this Court to the reference made by the learned Deputy Commissioner to the report of the Excise Inspector which is also extracted below for ready reference:-

As per Reference (4) the Excise Inspector, Kalasipalya Range once again visited the spot on 18.08.2012 and reported that the said Bar and Restaurant is situated within a distance of 76 metres from Bangalore City Corporation, H.Siddaiah Road, Referral Hospital (Maternity Hospital) and 44 metres from Dharmaprakash S.V.Srinivasashetty, Smt. S.V.Lakshmi Kanthamma Eye Hospital and 58 metres distance from Bangalore West Lions Super Speciality Eye Hospital. The Managing Trustee of Bangalore West Lions Super Speciality Hospital Lion B.L.S. Murthy in his letter dated 30.06.2012 stated that his hospital is having only 16 Bed inpatient facility, hence, the said hospital is not an objectionable place under Rule 5 and Asst. Health Officer (South), Chickpet Range, in his letter has stated that Dharmaprakash S.V.Srinivasasetty, Smt.S.V.Lakshmi Kanthamma Eye Hospital is not registered in BBMP Health Department and in the Lions Hospital building itself, the Para Medical Board is conducting Diploma in Opthamilic Technicians Course, and the National Board of Examination approved DNB Medical Course is also conducting the course, and within a distance of 58 metres B.W. Lions Hospital is situated but the said hospital is having only 16 Bed facility, except this there is no other objectionable places. The licensed premises is having commercial shops and due to the said business no such unpleasant incident has taken place in the vicinity nor it affects the public peace, decency or tranquility. During the enquiry, the public and neighbours have not raised any objection. The CL-9 licence renewed for the year 2012-13 in respect of the building No.10, Mavalli Tank Bund Road, J.C.Road, Bangalore of Shri S.Gopal, Revathi Bar and Restaurant is situated within a distance of 76 metres from Bangalore City Corporation, H.Siddaiah Road, Referral Hospital (Maternity Hospital) and 58 metres from B.W.Lions Hospital/Educational Institution. In view of his recommendation that as it is more than 50 metres from the objectionable places under Rule 5 of the Karnataka Excise Licence (General Condition) Rules, 1967, it is left to the discretion of the Excise Commissioner to relax the restrictions, and if he gives prior approval under Rule 5(2), the licensee may be permitted to continue his business in the same premises, a proposal was sent to the Excise Commissioner to relax the restrictions under the Act and grant prior approval to continue the business of the licensee in the present premises.

S.Gopal, CL-9 licence in respect of Building No.10, Mavalli Tank Bund Road, J.C.Road, Bangalore, renewed for the year 2012-13 is situated within a distance of 76 metres from Bangalore City Corporation, H.Siddaiah Road, Referral Hospital (Maternity Hospital) and 58 metres from BW Lions Hospital (Educational Institution), though it in the objectionable place under Rule 5 of the Karnataka Excise Licence (General Condition) Rule, 1967. The Excise Commissioner of

Karnataka has relaxed the said condition as per Rule 5(2) and granted prior approval to the licensee to continue his business in the said same premises. Hence the following order .

7. The report of the Excise Inspector only discusses one aspect of the matter which was contended by the learned counsel for the petitioner to be sufficient for making this relaxation vide letter dated 30.06.2012 given by the Bangalore West Lions Super Speciality Eye Hospital, since the said Hospital was having only 16 beds in-patient facility as against minimum 30 bed facility required in Municipal Corporation area for treating it as a Hospital to make the place objectionable for Excise licence, therefore, the relaxation given to the petitioner was justified. The said letter dated 30.06.2012 was not available on record of this Court nor in the record produced by the respondent-Department. On the contrary, the letter dated 10.07.2012 of the same Hospital itself, vide portion quoted above, makes a serious grievance against the existence of this shop at the said place. Not only this Hospital, but the liquor shop in question surrounded by two more Hospitals including one of the Government Maternity Hospital, within 100 metre radius of the shop.

8. The relevant extract of Rule-5 of the General Conditions Rules, 1967 are quoted below for ready reference.

5. Restriction in respect of location of shops (1) No licence for sale of liquor shall be granted to a liquor shop or premises selected within a distance of 100 metres from any religious or educational institution or Hospital or any Office of the State Government or Central Government or Local Authorities or in a residential locality, where the inhabitants are predominantly belonging to Scheduled Castes or Scheduled Tribes or within a distance or 220 metres from the middle of the State Highways or National Highways.

[Provided that where a shop is sanctioned to a village the population of which is less than two thousand five hundred, such shop shall be located outside the residential locality of the village.]

[Explanation [(1) For the purpose of this rule National Highway or State Highway shall not include such parts of the National Highway or State Highway as are situated within the limits of a Municipal Corporation, City or Town Municipal Council, or such other authority having a population of twenty thousand or more].

[Explanation (2) For the purpose of this rule the expression Hospital means any Government Hospital, Primary Health Centre or Primary Health Unit and includes a Private Hospital or a Private Nursing Home which has the facility of a minimum of thirty beds for treatment of inpatients.

Explanation (3) For the purpose of this rule the expression Office of the State Government or Central Government or Local Authority means and includes any State or Central Government Office headed by Group A or B grade officers and the main Administrative Offices of Local Bodies like City Corporation, City Municipal Council, Town Municipal Council, Town Panchayat, Zilla Panchayat, Taluk panchayat and Grama Panchayat and such other offices of the State Government, Central Government or Local Authorities as may be specified by the Government from time to time.

The Deputy Commissioner of Excise shall after making such enquiry as he deems fit approve the premises of liquor shop so selected and thereafter the description of the premises of liquor shop shall be entered in the Licence to be issued.

Provided that the Deputy Commissioner of Excise may, with the prior approval of the Excise Commissioner and for reasons to be recorded in writing, permit the location of any shop within a distance of 100 metres, but not less than 50 metres from the institutions, hospital, office or locality specified in sub-rule (1) within the City Municipality or City Corporation limits.

[Provided further that the Deputy Commissioner of Excise may grant licence to locate any liquor shop in a premises situated within a distance of 220 metres from the middle of a State Highway or a National Highway if such premises is located in a predominantly inhabited area, or extension of a town, village, or area the population of which is more than two thousand five hundred and where a licence to locate shop in such premises was granted or was existing during the period commencing from 1st July, 1992 and ending on [30th June, 1994.]]

9. The purpose of providing for these restrictions for setting up of liquor shop within the 100 metres of the Institution like Religious or Educational Institutions, Hospitals or any Offices of the State Government or Central Government or Local Authorities or any residential locality is obvious i.e., to avoid public nuisance which may be caused by the visitors to the liquor vending shop i.e., to maintain public law and order in the year in question.

10. From the perusal of the materials placed before this Court, this Court is satisfied that neither the relaxation given by the Authorities of the respondent-Department under Rule 5(2) proviso were well reasoned or rather assigned no reasons at all nor the relaxation given in the earlier years can enure to the benefit of the petitioner for a indefinite future period to come.

11. There is considerable force in the submission made by learned Counsel for the State that the renewal of the licence for every year is a fresh licence was given to the petitioner and it remains subject to the restrictions under Rule-5 of the 1967 Rules for every year and the principles of res judicata or constructive res judicata cannot applied so as to extend the benefit of relaxation given in earlier year to the present year. When this Court is satisfied that the relaxation was made in the earlier years itself was given without any proper reasons, the question of extending such relaxations for future years cannot arise, which in any case, could not be claimed as a matter of right by the petitioner.

12. The grievance of the Hospital raised against the existence of the shop in question at the same place is of very serious nature and the Authorities of the Department while giving such relaxation, appear to have turned Nelson s eye to that without assigning proper and contra substantial reasons. If the relaxation is held valid for the sake of assumption on the ground that one of the Hospital was only with 16 bed facility as per the report of the Excise Inspector, even that reason cannot suffice to relax the said condition under the proviso to Rule 5(2), as these are two more Hospitals within 100 meters of the shop. This fact is not even disputed by the petitioner. Be that as it may, since no reasons have been assigned by the Authorities concerned, this Court cannot read into those orders the

aforesaid reason at all.

13. The Constitution Bench of the Hon ble Supreme Court in the case of Khoday Distilleries Ltd. And Others vs. State of Karnataka and others [(1995) 1 SCC 574] has held that the business or trade in liquor as a beverage which are res extra commercium cannot be claimed to be a matter of right since trade or business in liquor is res extra commercium. The relevant extract of the said judgment is quoted below for ready reference:-

(a) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(a) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 or our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practicing a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilized societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., res extra commercium, (outside commerce). There cannot be business in crime .

14. Having examined the case on merits also, therefore, at this stage, irrespective of availability of the alternative remedy to the petitioner under Section 61 of the Act, this Court does not find any merit in the present case and no fault can be found in the impugned order Annexure-A dated 06.06.2016 passed by the Deputy Commissioner of Excise directing the petitioner to shift his liquor shop from the objectionable place to any other place.

15. The writ petition is therefore liable to be dismissed and the same is accordingly dismissed. No costs.