SUPREME COURT OF INDIA

State of Kerala

Vs.

B. Six Holiday Resorts (P) Ltd.

C.A.No.983-990 of 2003

(R.V.Raveendran and Surinder Singh Nijjar JJ.)

13.01.2010

ORDER

R.V. Raveendran, J.

1. The appeals relate to non-grant of FL-3 Licence under the Foreign Liquor Rules (`the rules' for short) framed under the Akbari Act. The appeals arise from the common judgment dated 16.7.2002 of the Kerala High Court in a batch of cases wherein the amendment dated 20.2.2002 to Rule 13(3) of the Rules and consequential rejection of applications for FL-3 licences were challenged. CA Nos. 983-990 of 2003 are filed by the State and the other appeals are by the applicants for FL-3 licences.

2. For convenience, we will refer to the facts of the case of M/s. B.Six Holiday Resorts (P) Ltd. (referred to as `the applicant' for short), who is the respondent in C.A. No. 983 of 2003 and the appellant in C.A. No. 998 of 2003.

3. The applicant constructed a resort hotel at Munnar.

> The applicant's restaurant therein was classified by the Ministry of Tourism, Government of India, as an approved restaurant. On 11.12.2000, the applicant made an application for a FL-3 licence under the Rules. As the said application was not considered, the applicant approached the High Court. The High Court, disposed of the writ petition (O.P.No.824/2001) by order dated 9.1.2001 with a direction to the excise authorities to consider and dispose of the application within three weeks. The application was considered and rejected by order dated 19.5.2001 on the ground that the Managing Director of the applicant had been convicted in an excise offence. The said rejection was 3 challenged in O.P. No. 17106/2001 contending that the person convicted was not the Managing Director when the application was made. The second writ petition was allowed on 20.6.2001 with a direction to re-consider the application and pass a fresh order, taking note of the fact that the convicted Managing Director was no longer in office and there was new Managing Director at the time of the

application. The Special Secretary (Taxes), Government of Kerala, reconsidered the application and by order dated 6.10.2001 rejected the application on following four grounds: (i) the applicant was not a classified restaurant as contemplated under Rule 13(3) of the Rules; (ii) the facilities contemplated under Rule 13(3) were not available in the applicant's hotel; (iii) only hotels run by Kerala Tourism Development Corporation and India Tourism Development Corporation were entitled to FL-3 licences; and (iv) the current policy of the government was not to grant any fresh licences. The applicant filed yet another writ petition (O.P. No. 31993/2001) challenging the rejection. A learned Single Judge dismissed it by order dated 6.11.2001.

He held that though the first three grounds of rejection were not tenable, in view of policy of the Government not to grant FL-3 licences for the time being, a mandamus could not be issued to the State Government to grant a licence 4 contrary to its policy. The writ appeal filed by the applicant was allowed on 14.12.2001. The Division Bench of the High Court agreed with the learned single Judge that the first three grounds of rejection were not tenable. In regard to the fourth ground of rejection, the division bench felt that the policy put forth, was rather vague and the Government cannot abdicate its function under the Rules to consider and grant licences, by alleging some vague policy. It therefore directed the Excise Commissioner to decide the applicant's application for FL-3 licence within two weeks by a speaking order.

4. Thereafter, the applicant gave a representation dated 19.12.2001. The Excise Commissioner considered it and again rejected the application on 27.12.2001 on the ground that the applicant's hotel was only a restaurant approved by Ministry of Tourism, Government of India, but it was not a classified restaurant (two star and above) as required under Rule 13(3). Feeling aggrieved, the applicant initiated contempt proceedings. The High Court on being informed that a new Excise Commissioner had taken charge, granted an opportunity to the new incumbent to reconsider the matter and pass a fresh order by 22.2.2002. At that stage, by notification dated 20.2.2002, the Foreign Liquor 5 Rules were amended by foreign Liquor (Amendment) Rules, 2002, with retrospective effect from 1.7.2001. By the said amendment, the last proviso under sub-Rule (3) of Rule 13 was substituted by the following proviso:

"Provided that no new licences under this Rule shall be issued."

The notification contained the following explanatory note to indicate the purpose of the amendment:

"Government have decided as its policy not to grant any new FL-3 Hotel (Restaurant) Licences and also decided not to renew any defunct licences of the above category with effect from 1.7.2001 until further orders.

In order to carry out the above decision, necessary amendments have to be made in the relevant rules"

On the same date, i.e. 20.2.2002, the Excise Commissioner considered the application of the applicant and again rejected the request for grant of licence in view of proviso to the amended rule, prohibiting grant of new licences.

5. The applicant challenged the amendment to the Rule and the consequential rejection of its application in O.P. No. 7112 of 2002. The said writ petition (along with other writ petitions and writ appeals involving similar issue) were 6 disposed of by the impugned order dated 16.7.2002. The High Court considered the following four grounds of challenge:

(a) that the repeated rejection of the application by the Excise department and the amendment of the Rules by notification dated 20.2.2002 were unreasonable, arbitrary and was in bad faith and was, therefore, liable to be interfered; (b) that the proviso to Rule 13(3) was invalid as it was violative of the main Rule; (c) that the amendment to the Rules by notification date 20.2.2002, was bad as it was made merely get over the judgment of the High Court directing fresh consideration; and (d) that giving retrospective effect to the Rules was beyond the rule making power of the State Government under the Act. The High Court rejected the ground (a),(b) and (c) and upheld the validity of the amendment. It however accepted ground (d) and declared that the retrospective effect given to the last proviso to Rule 13(3) added by notification dated 20.2.2002 was illegal and unenforceable and that the amendment would be effective only prospectively from the date of issue, that is with effect from 20.2.2002. As a consequence, the court directed the excise authorities to consider the application dated 19.12.2001 (preceded by application dated 11.12.2000) submitted by the applicant (and reiterated on 19.12.2001) on the basis of the rules as 7 were operative as on 19.12.2001. In other words, the High Court held that the application had to be considered with reference to the rules as they existed on the date of application and not on the date of consideration of the application.

6. The State has challenged the said judgment rendered in the case of the applicant and other similar matters in the first batch of appeals (CA Nos. 983 to 990 of 2003). The State has accepted the finding of the High Court that the retrospective operation of the rules is bad and that the amendment should be given effect only prospectively. But it is aggrieved by the direction that the applications filed by the applicants for FL-3 licences should be considered on the basis of the rules as they stood on the date of application. It is submitted by the State that the Court ought to have directed the applications for FL-3 licences to be considered with reference to the rules in force when the application was considered.

7. The applicant, as also other restaurateurs whose applications for FL-3 licences made in the years 2000 and 2001 were also rejected, have challenged the decision of the High Court upholding the validity of the amendment and 8 non-grant of licence in CA No. 998 of 2003 and CA Nos. 999- 1003 of 2003.

8. Two issues arise for consideration on the contentions urged:

> (i) Whether an application for grant of FL-3 Licence should be considered with reference to the Rules as they existed when the application was made or in accordance with the Rules in force on the date of consideration? (ii) Whether the amendment to Rule 13(3) of Foreign Liquor Rules substituting the last proviso is valid? Re : Question (i)

9. This question is directly covered by the decision of this Court in *Kuldeep Singh v. Govt. of NCT of Delhi*[1] relating to grant of licences for sale of Indian made foreign liquor. This Court held:

> "It is not in dispute that the State received a large number of applications. It was required to process all the applications. While processing such applications, inspections of the proposed sites were to be carried out and the contents thereof were required to be verified. For the said purpose, the applications were required to be strictly scrutinized. Unless, therefore, an accrued or vested right had been derived by the 9 Appellants, the policy decision could have been changed. What would be an acquired or accrued right in the present situation is the question.
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> x x x x x x x x In case of this nature where the State has the exclusive privilege and the citizen has no fundamental right to carry on business in liquor, in our opinion the policy which would be applicable is the one which is prevalent on the date of grant and not the one, on which the application had been filed. If a policy decision had been taken on 16.9.2005 not to grant L-52 licence, no licence could have been granted after the said date.

10. We may in this context refer to some earlier decision laying down the principle that applications for licences have to be considered with reference to the law prevailing on the date of consideration.

> 10.1) In *State of Tamil Nadu v. Hind Stone & Ors.*[2], this Court considered the validity of government action in keeping applications pending for long and then rejecting them by applying a rule subsequently made. This Court while holding that such action is not open to challenge observed:
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> "The submission was that it was not open to the Government to keep applications for the grant of leases and applications for renewal pending for a long time and then to reject 10 them on the basis of Rule 8C notwithstanding the fact that the applications had been made long prior to the date on which Rule 8C came into force. While it is true that such applications should be dealt with within a reasonable time, it cannot on that account be said that the right to have an application disposed of in a reasonable time clothes an applicant for a lease with a right to have the application disposed of

on the basis of the rules in force at the time of the making of the application. No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of the application".

10.2) We may next refer to the decision in *Union of India & Ors. V. Indian Charge Chrome & Anr.*[3] wherein this Court held:

"Mere making of an application for registration does not confer any vested right on the applicant. The application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration."

11. The applicant contended that it had a vested right because of the several time-bound orders of the High Court and those orders were deliberately floated by the Excise authorities. An identical contention was rejected by this Court while considering the issue with reference to sanction of a licence under the Building Rules, in *Howrah Municipal Corporation v. Ganges Rope Co.Ltd.*[4]. This Court held:

"Neither the provisions of the Act nor general law creates any vested right, as claimed by the applicant company for grant of sanction or for consideration of its application for grant of sanction, on the then existing Building Rules as were applicable on the date of application.

Conceding or accepting such a so-called vested right of seeking sanction on the basis of unamended Building Rules, as in force on the date of application for sanction, would militate against the very scheme of the Act contained in Chapter XII and the Building Rules which intend to regulate the building activities in a local area for general public interest and convenience. It may be that the Corporation did not adhere to the time limit fixed by the court for deciding the pending applications of the company but we have no manner of doubt that the Building Rules with prohibition or restrictions on construction activities as applicable on the date of grant or refusal of sanction would govern the subject matter and not the Building Rules as they existed on the date of application for sanction. No discrimination can be made between a party which had approached the court for consideration of its application for sanction and obtained orders for decision of its application within a specified time and other applicants whose applications are pending without any intervention or order of the court.

x x x x x x x x The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is

not a right in relation to 12 "ownership or possession of any property" for which the expression "vest" is generally used.

What we can understand from the claim of a "vested right" set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a "legitimate" or "settled expectation" to obtain the sanction.

In our considered opinion, such "settled expectation", if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such "settled expectation" has been rendered impossible of fulfilment due to change in law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules....."

12. Where the Rule require grant of a licence subject to fulfillment of certain eligibility criteria either to safeguard public interest or to maintain efficiency in administration, it follows that the application for licence would require consideration and examination as to whether the eligibility conditions have been fulfilled or whether grant of further licences is in public interest. Where the applicant for licence does not have a vested interest for grant of licence and where grant of licence depends on 13 various factors or eligibility criteria and public interest, the consideration should be with reference to the law applicable on the date when the authority considers applications for grant of licences and not with reference to the date of application.

13. The applicant submitted that it had originally filed an application on 11.12.2000 and in pursuance of the decision of the High Court on 14.12.2001, it submitted an application on 19.12.2001 and that application was considered and disposed of on 27.12.2001. The applicant contended that even if the principle laid down in Kuldeep Singh was applied, the application having been considered and disposed of by the concerned authority on 27.12.2001, the law in force on that day ought to have been applied.

The applicant further contended that the amendment to the rules which came into effect only on 20.2.2002, was not applicable on 27.12.2001 and therefore the rejection on 27.12.2001 was bad and consequently the impugned order of the High Court may be construed as requiring the authority to decide the matter as on 27.12.2001. We find that the said contention does not have any merit. It is true that the application was given on 19.12.2001. It is true that the application was considered and rejected on 27.12.2001 14 on a ground which may not be sound. It is also true that the

amendment to the rules which was introduced by notification dated 20.2.2002 was not in force or effect on 27.12.2001. But the said order dated 27.12.2001 was neither challenged nor set aside by the High Court. The applicant chose to file a contempt application alleging that the excise authorities had disobeyed the order dated 14.12.2001. In the contempt case, the High Court made an order on 12.2.2002 that the new Excise Commissioner should pass an order on the application. Therefore the only question is whether the order passed by the Excise Commissioner on 20.2.2002 was in accordance with the Rules as they stood on 20.2.2002. Under the amended rules, no new FL-3 licence could be issued. Consequently, the rejection of the application by order dated 20.2.2002 was in accordance with the rules and cannot be faulted.

14. Learned counsel appearing for the applicant next contended that the decision in Kuldeep Singh was not with reference to any statutory rules, but with reference to a policy of the executive and therefore inapplicable. We find no force in this argument. It is true that in that case there were no statutory rules and what was considered was with reference to a policy. But the ratio of the decision is that where licence sought related to the business of 15 liquor, as the State has exclusive privilege and its citizens had no fundamental right to carry on business in liquor, there was no vested right in any applicant to claim a FL-3 licence and all applications should be considered with reference to the law prevailing as on the date of consideration and not with reference to the date of application. Whether the issue relates to amendment to Rules or change in policy, there will be no difference in principle. Further the legal position is no different even where the matter is governed by statutory rules, is evident from the decisions in Hind Stone (supra) and Howrah Municipal Corporation (supra).

15. Having regard to the fact that the State has exclusive privilege of manufacture and sale of liquor, and no citizen has a fundamental right to carry on trade or business in liquor, the applicant did not have a vested right to get a licence. Where there is no vested right, the application for licence requires verification, inspection and processing. In such circumstances it has to be held that the consideration of application of FL-3 licence should be only with reference to the rules/law prevailing or in force on the date of consideration of the application by the excise authorities, with reference to the law and not as on the date of application. Consequently the direction by the 16 High Court that the application for licence should be considered with reference to the Rules as they existed on the date of application cannot be sustained.

Re: Question (ii)

16. The applicants for licence submitted that Rule 13(3) contemplates FL-3 licences being granted on fulfillment of the conditions stipulated therein; and the newly added proviso, by barring grant of new licence had the effect of nullifying the main provision itself. It was contended that the proviso to Rule 13(3) added by way of amendment on 20.2.2002 was null and void as it went beyond the main provision in Rule 13(3) and nullified the main provision contained in Rule 13(3).

17. Rule 13(3) provides for grant of licences to sell foreign liquor in Hotels (Restaurants). It contemplates the Excise Commissioner issuing licences under the orders of the State Government in the interest of promotion of tourism in the State, to hotels and restaurants conforming to standards specified therein. It also provides for the renewal of such licences. The substitution of the last proviso to Rule 13(3) by the notification dated 20.2.2002 provided that no new licences under the said Rule shall be 17 issued. The proviso does not nullify the licences already granted. Nor does it interfere with renewal of the existing licences. It only prohibits grant of further licences. The issue of such licences was to promote tourism in the State.

> "The promotion of tourism should be balanced with the general public interest. If on account of the fact that sufficient licences had already been granted or in public interest, the State takes a policy decision not to grant further licences, it cannot be said to defeat the Rules. It merely gives effect to the policy of the State not to grant fresh licences until further orders. This is evident from the explanatory note to the amendment dated 20.2.2002. The introduction of the proviso enabled the State to assess the situation and reframe the excise policy. It was submitted on behalf of the State Government that Rule 13(3) was again amended with effect from 1.4.2002 to implement a new policy. By the said amendment, the minimum eligibility for licence was increased from Two-star categorization to Three-Star categorization and the ban on issue of fresh licences was removed by deleting the proviso which was inserted by the amendment dated 20.2.2002. It was contended that the amendments merely implemented the policies of the government from time to time. There is considerable force in the contention of the State. If the State on a 18 periodical re-assessment of policy changed the policy, it may amend the Rules by adding, modifying or omitting any rule, to give effect to the policy. If the policy is not open to challenge, the amendments to implement the policy are also not open to challenge. When the amendment was made on 20.2.2002, the object of the newly added proviso was to stop the grant of fresh licences until a policy was finalized. A proviso may either qualify or except certain provisions from the main provision; or it can change the very concept of the intendment of the main provision by incorporating certain mandatory conditions to be fulfilled;
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> or it can temporarily suspend the operation of the main provision. Ultimately the proviso has to be construed upon its terms. Merely because it suspends or stops further operation of the main provision, the proviso does not become invalid. The challenge to the validity of the proviso is therefore rejected."

18. In view of the above, the appeals filed by the State are allowed in part and the appeals filed by the applicants for licences are dismissed, subject to the following clarifications:

> (i) If any licences have been granted or regularized in the case of any of the applicants during the 19 pendency of this litigation, on the basis of any further amendments to the Rules, the same will not be affected by this decision;

(ii) If any licence has been granted in pursuance of any interim order, the licence shall continue till the expiry of the current excise year for which the licence has been granted.

(iii) This decision will not come in the way of any fresh application being made in accordance with law or consideration thereof by the State Government.

[1]*(2006) 5 SCC 702*
[2]*(1981 (2) SCC 205*
[3]*(1999) 7 SCC 314*
[4]*(2004 (1) SCC 663*