

SUPREME COURT OF INDIA

Ropan Sahoo

Vs.

Ananda Kumar Sharma

C.A.No.615 of 2013

(K. S. Radhakrishnan and Dipak Misra JJ.)

22.01.2013

JUDGMENT

DIPAK MISRA, J.

1. Leave granted in both the special leave petitions.
2. Questioning the legal acceptability of the order dated 16.9.2009 passed by the Division Bench of the High Court Orissa at Cuttack in WP(C) No. 3913 of 2009 whereby the High Court entertained the writ petition preferred by the first respondent herein and quashed the grant of exclusive privilege and the licence granted in favour of Ropan Sahoo and Mukesh Kumar, the respondent Nos. 5 and 6 in the writ petition, the present appeals have been preferred by the grieved persons as well as by the State.
3. Shorn of unnecessary details the facts which are requisite to be stated are that Mukesh Kumar, the respondent No. 6 before the High Court, had submitted an application for grant of licence to open an IMFL “Off” shop in Ward No. 16, Bargarh Town for the year 2007-08 on 28.1.2008. As a report was submitted that the proposed site was violative of sub-rule 1(c) of Rule 34 of Orissa Excise Rules, 1965 (for short “the Rules”), the said respondent chose to withdraw the application for the aforesaid year by indicating personal reasons. In respect of the next financial year he again submitted an application for grant of licence at the same place. The Collector, Bargarh, invited objections and pursuant to the same the writ petitioner filed his objection on 18.10.2008. The Inspector of Excise submitted a report on 2.2.2009 stating about the existence of a bathing ghat, Vishnu temple,

bus stand and petrol pump within the prohibited distance, but recommended for relaxation of restrictions. The Collector, Bargarh, recommended for opening of the shop for remaining part of the year 2008-09 in relaxation of the restrictions and the Excise Commissioner also recommended to the Government on 19.2.2009 for sanction by relaxing of the restrictions. As the factual matrix would reveal, the State Government on the basis of the recommendations invoked the power of relaxation under Rule 34 of the Rules and granted licence in favour of the said respondent for the remaining period of 2008-09. Be it noted, in a similar manner relaxation was granted for opening of the IMFL/Beer ('ON' shop) at Hotel Sawadia for the period from 2.3.2009 to 31.3.2009.

4. Being grieved by the grant of said licences, the first respondent invoked the jurisdiction of the High Court under Article 226 of the Constitution principally contending that the report submitted by the Excise Inspector with regard to certain aspects, namely, location of the bathing ghat, etc. were not factually correct; that the recommendations made by the authorities were highly improper and unwarranted; and that the relaxation had been granted in an extremely arbitrary manner and, therefore, the grant of exclusive privilege and the licence deserved to be axed. The High Court perused the documents brought on record, called for the record to satisfy itself in what manner the power of relaxation was exercised, and after perusal of the record and on consideration of to various recommendations, came to hold that as far as the respondent No. 5 was concerned for sanction of a beer parlour 'ON' shop licence for the remaining period of 2008-09, no order was passed relaxing the Rules before the grant of exclusive privilege. As far as the sanction of IMFL Restaurant licence in respect of 6th respondent was concerned, the High Court expressed the similar view. We think it apt to reproduce the ultimate conclusion recorded by the High Court: -

“13. Proviso to Rule 34 specifically prescribes that restriction on the minimum distance as mentioned in Clause (d) and (e) may be relaxed by the State Government in special circumstances. There being no order by the State Government relaxing the aforesaid two Clauses in relation to the minimum distance between the proposed shops and the place of worship i.e. the Vishnu Temple, petrol pump and bus stand, the order of the State Government approving the sanction/grant of exclusive privilege in favour of opposite parties 5 and 6 cannot be sustained in law.”

5. After so stating the High Court referred to Section 41 of the Bihar and Orissa Excise Act, 1915 (for brevity “the Act”) and observed as follows: -

“Rule 34 of the Rules casts a statutory duty on the Department to pass order with reasons relaxing the restrictions. When there has been infraction of such statutory duty, the same cannot be covered under Section 41 of the Act.”

6. Being of the aforesaid view, the High Court quashed the privileges and the licences granted in favour of the private respondents therein.

7. We have heard Mr. Bhaskar P. Gupta, learned senior counsel for the beneficiaries of the grant, Mrs. Kirti Renu Mishra, learned counsel for the State and Mr. G. Ramakrishna Prasad, learned counsel appearing for the respondent No. 1 in both the appeals.

8. At the very outset we may note that it is the admitted position that both the proposed sites come within the prohibited area as envisaged under Rule 34(1)(d) and (e) of the Rules. Rule 34 of the Rules stipulates that the places in respect of which licences for consumption of liquor on vendor’s premises should not be granted. The said Rule reads as follows: -

“34. Licences for shops for consumption of liquor on vendor’s premises not to be granted at certain places : (1) No new shop shall be licensed for the consumption of liquor on the vender, premises –

a) in a marketplace, or

b) at the entrance to market place, or

c) in close proximity to a bathing-ghat, or

d) within at least five hundred meters from a place of worship, recognized educational institution, established habitant especially of persons belonging to scheduled castes and labour colony, mills and factories, petrol pumps, railway stations/yard, bus stands, agricultural farms or other places of public resort, or

e) within at least one kilometer from industrial, irrigation and other development projects areas, or

f) in the congested portion of a village :

Provided that the restriction on the minimum distance as mentioned under clauses (d) and (e) may be relaxed by the State Government in special circumstances.

(2) So far as practicable, an established liquor shop licensed for the consumption of liquor on the premises shall not be allowed to remain on a site which would not under sub-rule (1) be permissible for the location of a new shop.

(3) In areas inhabited by Scheduled Tribes, country spirit shops shall not be licensed to be placed immediately on the side of a main road or in any other prominent position that is likely to place temptation in their way.”

9. On a perusal of the aforesaid Rule, it is crystal clear that the State Government has been conferred with the power to relax the restriction on the minimum distance as mentioned in clauses (d) and (e) pertaining to the minimum distance. As has already been indicated hereinbefore there is no cavil that the material on record pertained to the relaxation of the restriction as prescribed under clauses (d) and (e) of sub-rule (1) of Rule 34 of the Rules. The High Court, as the impugned order would reflect, has quashed the order of approval/sanction and the consequent grant of licences on the foundation that there has been no order relaxing the restrictions on the minimum distance as mentioned in Clauses (d) and (e) relating to the proposed shops in exercise of powers of the said Rule by the State Government and, in any case, no reasons have been ascribed. Thus, the question that emanates for consideration is whether the High Court has appositely appreciated the note sheet in the file and arrived at the correct conclusion or not.

10. The High Court, as demonstrable, has reproduced the communications made by the Joint Secretary to the Government by fax vide memo No. 1159/Ex. dt. 2.3.2009 addressed to the Excise Commissioner about the Restaurant “ON” shop licence in favour of Mukesh Kumar at “RASSOI RESTAURANT” in the premises of Hotel ‘Sawadia Palace’, Ward No. 11, Bargarh Municipality over Plot No. 1622, Khata No. 2542/362, in the district of Bargarh for the remaining period of 2008-09 and also the memo No. 1161/Ex. dated 2.3.2009 in respect of Beer Parlour “ON” shop licence in favour of Ropan Sahoo over Plot No. 1391/2260, Khata No. 393 in Ward No. 16 of Bargarh Municipality, in the district of Bargarh for the remaining period

of 2008-09. The communication that has been made in favour of Mukesh Kumar reads as follows: -

“In inviting a reference to your letter No. 1214 dt. 19.2.09 on the subject cited above, I am directed to say that Govt. after careful consideration have been pleased to grant IMFL Restaurant “ON” shop Licence in favour of Sri Mukesh Kumar at “RASSOI RESTAURANT” in the premises of Hotel “Sawadia Palace”, Ward No. 11, Baragarh Municipality over Plot No. 1622, Khata No. 2542/362, in the district of Baragarh for the remaining period of 2008-09 by relaxing rule 34 of the Orissa Excise Rules, 1965 and fixation of MGQ as per Excise Duty, Fee Structure and Guidelines for 2008-09. The Excise Administration may be held responsible if the existing nearby excise shops are affected by the new “ON” shop.”

As far as grant of beer parlour “ON” shop in favour of Ropan Sahoo is concerned, the communication vide memo No. 1161/Ex. dated 2.3.2009 is as follows: -

“In inviting a reference to your letter No. 1380 dt. 25.02.09 on the subject cited above, I am directed to say that Govt. after careful consideration have been pleased to sanction Beer Parlour “ON” shop Licence in favour of Sri Ropna Sahoo over Plot No. 1391/2260, Khata No. 393/330 in Ward No. 16 of Bargarh Municipality, in the district of Bargarh for the remaining period of 2008-09 subject to condition that the district excise officials will be held responsible if the nearby existing excise shops are affected by opening of the new shop.”

11. As no reasons were assigned, the High Court called for the file. On a perusal of the file the High Court referred to the recommendations and, eventually, opined that no order had been passed relaxing the Rule in respect of the said shops by the Commissioner-cum-Secretary to Government, Department of Excise. The thrust of the matter is whether any order has been passed relaxing the restrictions imposed by the Rules and does it contain reasons. As the first communication would reveal, it is clearly mentioned therein that the Government has relaxed the restrictions under Rule 34 and as far as the second communication is concerned, it has been stated that the Government has sanctioned grant of licence. The learned counsel for the State has referred to the note sheet to highlight that the orders had been passed in consonance with the proviso to Rule 34(1) of the Rules and on that basis the communications were issued.

12. We have bestowed our anxious consideration and carefully perused the note-sheet. On a studied scrutiny of the same it is luculent that the Excise Commissioner, Orissa, Cuttack, had recommended the proposals and in support of the same had furnished seventeen documents. The note sheet has referred to the report which states that the proposed site exist at 350 meters from Vishnu Temple, 250 meters from the petrol pump, 200 meters from the private bus stand and 50 meters from the irrigation canal. The recommendation which forms part of the note sheet reads as follows: -

“The Collector, Bargarh, in his report at P-84/C has stated that the local consumers demand for consumption of liquor within the hotel premises. Illegal liquor cases have been booked in the nearby area and hence, there is demand for the “ON” shop. The apprehension that the existing IMFL “OFF” shop will be affected after opening of the proposed “ON” shop is ruled out, because the consumers of “OFF” shop are different from “ON” shop. The customers of “ON” shop has to consume liquor inside the Hotel premises with peg system and pay service charge, whereas such a facility is not available with “OFF” shops. Besides, the bathing ghat is not nearby as objected. But only one irrigation canal is flowing at a distance of about 50 meters. Therefore, Collector has recommended for relaxation of rule 34 of Orissa Excise Rules, 1965 for sanction of the proposal in the interest of Govt. revenue and to check illegal liquor trade.”

13. The objections of A.K. Sharma and that of the Secretary, Human Society, Bargarh have also been considered. Thereafter, the Joint Secretary has recommended thus: -

“In the above circumstances and in view of recommendation of the Excise Commissioner, Orissa, Cuttack, it may kindly be considered to grant IMFL Restaurant “ON” shop licence in favour of Sri Mukesh Kumar at “Rasooi Restaurant” in the premises of Hotel “Sawadia Palace” Ward No. 11, Bargarh Municipality over Plot No. 1622, Khata No. 2542/362, in the district of Bargarh, for the remaining period of the year 2008-09 by relaxing rule 34 of Orissa Excise Rules, 1965 and MGQ fixed as per the Excise Duty, Fee Structure and Guidelines for 2008-09. The District Excise Administration may be held responsible if the existing nearby excise shops are affected by the new “ON” shop.”

14. The Commissioner-cum-Secretary to Government, Excise Department, has endorsed the same in the following terms: -

“Notes from P.10/N explain. We had received a representation from Shri A.K. Sharma, Exclusive Privilege Holder of IMFL ‘Off Shop’ No. 4 of Bargarh (P.23-22/C) against the proposal received from Collector, Bargarh and endorsed by the Excise Commissioner, Orissa for opening of IMFL ‘On Shop’ at Rasoi Restaurant in the premises of Hotel Sawadia Palace, Ward No. 11 of Bargarh. The objections raised by Shri Sharma have been enquired into by the District Administration. In this regard, the letter received from Collector, Bargarh at P.34-32/C may please be glanced through. The objections of Shri Sharma are found to be devoid of merit. The report received from the Excise Commissioner, placed below, may also be perused. The Excise Commissioner had recommended to consider the sanction of IMFL ‘On Shop’ at Rasoi Restaurant in favour of Shri Mukesh Kumar situated in the premises of Hotel Sawadia Palace, Ward No. 11 of Bargarh. The proposal may kindly be considered and approved.”

15. The same has been signed by the Minister of Excise and Tourism, Orissa. As far as the second shop is concerned, the note sheet referred to the recommendations of the Collector, which reads as follows: -

“...the Collector, Bargarh has reported that both the petrol pumps are situated in such a manner that the shops will have no effect at all on the proposed Bar and hence he has suggested for relaxation of restrictive provisions of rule-34 of Orissa Excise Rules, 1965.

The Collector, Bargarh has also reported that the proposed Beer Parlour shall cater to the needs of the consuming people of the locality besides fetching Govt. revenue and checking illicit sale of Beer, since the population of the area is increasing. Only 3 (three) IMFL “OFF” shops, one IMFL ‘ON’ and one Beer Parlour are functioning in the entire town area having population of more than one lakh. There is feasibility and potentiality for opening of the Beer Parlour ‘ON’ shop, since illegal sale of liquor has been detected in the area. The proposed shop will check illicit trade of liquor. He has also stated that the opening of new Beer Parlour will not affect the nearby IMFL shops in the Municipality.”

16. The Joint Secretary after referring to the objections and the recommendations of the Excise Commissioner has passed the following order in the note sheet: -

“In the above circumstances and in view of recommendation of the Excise Commissioner, Orissa, Cuttack, it may kindly be considered to sanction Beer Parlour ‘ON’ shop licence in favour of Sri Ropna Sahu over plot No. 1391/2260, Khata No. 393/330 in Ward No.16 of Bargarh Municipality in the district of Bargarh for the remaining period of 2008-09 subject to condition that the district excise officials will be held responsible if the nearby existing shops are affected by opening of the new shop.

Government orders may kindly be obtained in the matter.”

17. Thereafter, the Commissioner-cum-Secretary to Government in the Department of Excise has endorsed the same and the Minister, Excise and Tourism has signed in approval thereof and thereafter the movement of the file took place. On the basis of the aforesaid orders the communications have been sent.

18. On a keen scrutiny of the entire note sheet we have no hesitation in our mind that the Commissioner-cum-Secretary had accepted the recommendations of the Collector and the Excise Commissioner, and upon perusal of the note sheet of the Joint Secretary had recommended for consideration and approval by the Minister of Excise and Tourism. The Minister, as stated earlier, has signed and thereafter, the file had travelled back for communication. We really fail to fathom the reasons ascribed by the High Court that there is no order whatsoever relaxing the Rules before the order of grant of exclusive privilege was passed. After the Minister had signed on the file on the basis of the recommendations sent by the Commissioner-cum-Secretary which was founded on the recommendations of the Joint Secretary who had concurred with the recommendations of the Collector and the Excise Commissioner, communications were made by the Joint Secretary. The note sheet clearly indicates application of mind to the relevant facts which pertain to the restrictions on the distance from the proposed site and the endorsement by the Minister. In this context, we may refer with profit to the decision in *Tafcon Projects (I) (P) Ltd. v. Union of India and others*[1], wherein the High Court, after taking note of the order passed by the Secretary who, in anticipation of the formal approval by the Minister concerned, had allowed the party to go ahead for appointing the appellant therein as “Event Manager”. This Court referred to the earlier order passed by the Secretary granting permission and the latter order in which he had mentioned that the party may be allowed to go ahead with the

proposal for making the preliminary arrangement in anticipation of the formal approval of the Minister and expressed the view that the High Court had erred in coming to hold that the Secretary had not taken any final decision with regard to the appellant therein as the Event Manager. Thereafter, the Court adverting to the justification of the conclusion of the High Court that no final decision had been taken by the Minister expressed thus:-

“12. It appears also from the record as noted by the High Court, that the file had been pending with the Minister for some time and despite expressions of urgency, the Minister did not sign the file since he was busy with “elections and other important matters”. What the High Court has overlooked is that the relevant file was again placed before the Minister on 30.8.1999 by JSFA with a note which stated that Tafcon had been appointed as the “Event Manager” for three years. This was signed by the Minister with the endorsement “file returned”.

13. The High Court deduced from this signature of the Minister that no approval was in fact granted by him to the appointment of M/s. Tafcon either expressly or impliedly. We are unable to agree. Where the Minister has signed the various notes put up before him seeking his approval, his signature, without more, must mean that he has approved the steps taken by the Department.”

19. Be it noted, in the said case, the Court referred to Rule 3 of the Transaction of Business Rules, 1961 which provided for all business to be conducted on general or special directions of the Minister-in- charge.

20. In the case at hand, Rule 7 of the Orissa Government Rules of Business made under Article 166 of the Constitution confers the power on the Minister to pass an order in respect of a matter pertaining to his portfolio. The effect of such a delegation has been dealt with by a three-Judge Bench in *Narmada Bachao Andolan v. State of Madhya Pradesh*[2] wherein it has been held that: -

“The decision of any Minister or Officer under the Rules of Business made under Articles 77(3) and 166(3) of the Constitution is the decision of the President or the Governor respectively and these Articles do not provide for ‘delegation’. That is to say, that decisions made and actions taken by the Minister or Officer under the Rules of Business cannot be treated as exercise of delegated power in real sense, but are deemed to be the actions of the

President or Governor, as the case may be, that are taken or done by them on the aid and advice of the Council of Ministers.”

21. The Bench to fructify its opinion has placed reliance on State of U.P. Ors. v. Pradhan Sangh Kshetra Samiti Ors.[3] and pronouncement by the seven-Judge Bench in Shamsher Singh v. State of Punjab Anr.[4] For the sake of completeness, we may note with profit what has been stated in paragraph 27 of the aforesaid decision: -

“27. In Dattatraya Moreshwar v. The State of Bombay Ors.[5], a Constitution Bench of this Court held that an omission to make and authenticate an executive decision in the form mentioned in Article 166 does not make the decision itself illegal, on the basis that its provisions were directory and not mandatory.”

22. In this regard we may quote a passage from Sethi Auto Service Station and another v. Delhi Development Authority and others[6] : -

“14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.”

23. In State of West Bengal v. M. R. Mondal and another[7] it has also been held that an order passed on the file and not communicated is non-existent in the eye of law.

24. In the present case it is luminous that the file had travelled to the concerned Joint Secretary of department who had communicated the order. The High Court has opined that there is no order by the State Government relaxing the restrictions enshrined in clauses (d) and (e) of Rule 34(1) of the Rules in relation to the minimum distance between the proposed shops and the Vishnu Temple, petrol pump and bus stand and at a latter part of the judgment has expressed the opinion

that there has been infraction of statutory Rule, namely, Rule 34 which casts a statutory duty on the department to pass on order with reasons relaxing the restrictions. We are disposed to think that the High Court, as far as the first part of the opinion is concerned, has been guided by the factum that the Commissioner-cum-Secretary in his recommendation to the Minister of Excise and Tourism had not specifically referred to clauses (d) and (e) of Rule 34(1) of the Rules. It is pertinent to state here that it is perceptible from the note sheet that the Secretary had referred to the proposal received from the Collector, endorsement made by the Excise Commissioner, the objections raised by the objectors and also expressed the view that the said objections were devoid of merit and, accordingly, recommended for approval. The cumulative effect of the note sheet goes a long way to show that every authority was aware of the distance and recommended for relaxation of clauses (d) and (e) of sub-rule (1) of Rule 34 and the concerned Minister had endorsed the same. Non-mentioning of the Rule or sub-rule, in our considered opinion, does not tantamount to non-passing of an order. The dominant test has to be the application of mind to the relevant facts. The second part of the order, if properly appreciated, conveys that no reasons have been ascribed. The proviso to Rule 34(1) lays a postulate that the distance as mentioned under clauses (d) and (e) may be relaxed by the State Government in special circumstances. The recommendations made by the Collector refers to the circumstances, namely, that there is a demand for consumption of liquor within the hotel premises; that illegal liquor cases have been booked in the nearby area; and that the proposal is in the interest of the Government revenue. The said recommendations, as is reflectible, have been concurred with by the higher authorities and, hence, there can be no trace of doubt that they constitute the special circumstances.

25. In view of our aforesaid analysis, the appeals are allowed and the order passed by the High Court is set aside. It is further clarified that if the Government, if so advised, can invoke the power under the proviso to Rule 34(1) of the Rules for the purpose of relaxation for grant of exclusive privilege and licence pertaining to the said shops in respect of current and subsequent financial years. In the facts and circumstances of the case, the parties shall bear their respective costs.

[1] (2004) 13 SCC 788

[2] AIR 2011 SC 3199

[3] AIR 1995 SC 1512

[4] AIR 1974 SC 2192

[5] AIR 1952 SC 181

[6] (2009) 1 SCC 180
[7] AIR 2001 SC 3471