(2020) 01 P&H CK 0154

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 16878 Of 2018(O&M)

Parvesh Kumar And Co. APPELLANT

Vs

State Of Haryana &Ors RESPONDENT

Date of Decision : 24-01-2020

Acts Referred:

Punjab Excise Act, 1914 — Section 59
Haryana Liqour Licence Rules, 1970 — Section 38(16A)
Constitution Of India, 1950 — Article 226

Citation : (2020) 01 P&H CK 0154

Hon'ble Judges : Jaswant Singh, J;Lalit Batra, J

Bench : Division Bench

Advocate : Jagmohan Bansal, Mamta Singla Talwar, Major Jagjit Singh

Final Decision : Allowed

Judgement

Jaswant Singh, J

1. The Petitioner through instant petition under Article 226 of the Constitution of India is seeking quashing of order dated 25.01.2018 (Annexure P-11) whereby Commissioner of Excise and Taxation, Haryana has rejected representation of the Petitioner seeking refund of licence fee paid for the period during which vends remained closed and refund of additional licence fee which has been charged at the time of re-opening of vends on the same location.

Brief facts/Background:

2. In State of Tamil Nadu Vs K. Balu 2017(1) R.C.R. (Civil) 1029 Hon'ble Supreme Court prohibited location of liquor vends within 500 meters from National/State Highways. The Respondent-Excise & Taxation Department prior to inviting bids for allotment of retail liquor vends for financial year 2017-18 vide letter dated 09.01.2017 and 21.02.2017 sought information from National Highway Authority of India (NHAI) and PWD (B&R) about location of National/State highways in district Fatehabad. NHAI did not respond and PWD (B&R) did

not show town Jakhal on the National Highway. The Respondent-Department provided in the Excise Policy of 2017-18 that no liquor vend shall be located within 500 meters from National/State Highway.

The Petitioner participated in the bids invited by Respondent for the allotment of liquor vends for the financial year 2017-18 for the township-Jakhal, District Fatehabad. The Respondent accepted bid of the Petitioner and vide Annexure P-2 awarded licence in respect of Vend Code No. ZFTB15. As per licence, the Petitioner was permitted to open 6 liquor vends in Jakhal on payment of licence fee of Rs.5,44,44,400/-. The location of vends was duly disclosed in the said licence. The permission was granted for the period from 25.04.2017 to 31.03.2018 and Petitioner opened vends on 25.04.2017. The Respondent issued pass in form L-34 (Annexure P-3) to procure different brands of liquor. Subsequently PWD (B&R) vide letter dated 02.05.2017 informed the Respondent-Department that road passing through Jakhal is a National Highway. The Respondent-Department on the basis of letter of PWD (B&R), on 28.06.2017 out of six vends sealed those three vends of the Petitioner, which were located on highway.

3. The Hon'ble Supreme Court vide Order dated 11.07.2017 clarified that restriction of 500 meters for establishing liquor vends on highway does not prohibit licensed establishments located within municipal area. Accordingly, the State of Haryana decided to allow liquor vends abutting the highways passing through municipal areas. The Respondent vide memo dated 15.09.2017 (Annexure P-5) declared as under:

"A licensee who has not established all his allowed vends/sub vends has been allowed to establish vends/sub-vends at locations alongside the NH/SH and Service Lane in municipal areas on payment of additional fee. "

"The additional license fee for shifting/establishing each liquor vend/sub vend, for remaining Period, has been fixed @ 30% of average of the licence fee of one vend in the Zone. The quantum of additional license fee, therefore, would be in proportion to the license fee of a Zone. "

4. On account of clarification dated 11.7.2017 issued by Hon'ble Supreme Court and memo dated 15.9.2017 (P-5) issued by State Government, the Petitioner became eligible to reopen vends on same locations. The Respondent vide Order dated 20.09.2017 (Annexure P-6) permitted the Petitioner to establish vend as per amended provisions of clause 1.2.2 of Excise Policy subject to payment of additional fee. The Petitioner reopened vends w.e.f. 01.10.2017. Accordingly 3 vends of Petitioner remained closed from 28.06.2017 to 30.09.2017, however Petitioner had to pay fee of all the 6 vends for the entire period. The Petitioner at the time of reopening of the said three vends also had to pay Additional Licence Fee of ` 6,80,565/- as per amended Policy of the Respondent.

5. The Petitioner filed CWP No. 25482 of 2017 assailing action of respondent in charging additional licese fee and also for periods the vends were made to

remain closed and this Court vide order dated 08.11.2017 directed the Respondent to decide representation dated 22.09.2017 of the Petitioner. The Respondent vide impugned order dated 25.01.2018 (Annexure P-11) without addressing grievance of Petitioner qua closure of vends for a period of 3 months and wrongful charging of Additional Licence Fee held that once the licensee has opted to operate vends from said location it cannot claim immunity from financial implications laid down in the amended Licence Policy.

6. Mr. Jagmohan Bansal, Counsel for the Petitioner contends that vends remained closed for three months on account of misunderstanding and lapse on the part of Respondent-Department so Petitioner cannot be made to suffer and asked to pay fee for the period during which he could not work. He further contended that location of vend was duly notified in the licence (Annexure P-2) so there was no confusion and Petitioner filed bid knowing in advance location of vends. Jakhal is a very small town and entire strech of road/Highway where bus stand is situated is not more than half (1/2) a kilometre and falls within the Municipal Area, so Petitioner had no place/shop to open vend except on the notified and permitted by the department. The Respondent during April-June' 2017 issued permits wherein address of vend was duly disclosed and Petitioner obtained supply of liquor against those permits. The Petitioner neither established new nor shifted three vends w.e.f. 01.10.2017 whereas vends already established were reopened on the same location thus additional licence fee could not be charged from Petitioner.

7. Mrs. Mamta Singla Talwar, Deputy Advocate General, Haryana stated that in view of Annexure P-2 wherein department has duly disclosed/endorsed location of vends, State has no ground to defend the present petition, however she vehemently contended that in view of directions of Hon'ble Supreme Court and Excise Policy, the Petitioner was not eligible to establish vend on National/State Highway and department has not approved location of vends thus department has rightly sealed three vends and denied refund of licence fee. On the question of refund of additional licence fee charged at the time of reopening of vends, she contended that as per amended policy Petitioner was liable to pay additional licence fee and Petitioner had opted to reopen vends, thus Petitioner was liable to pay additional licence fee in terms of the amended policy Clause (1.2.2) of the Excise Policy for the financial year 2017-18, in view of the Apex Court clarificatory order dated 11.07.2017.

8. It will be advantageous to reproduce the amended notification (R-1) relied upon by the State:-

" HARYANA GOVERNMENT EXCISE AND TAXATION DEPARTMENT

Notification

The 5th December, 2017

No. 134/X-1/P.A.1/1914/S.59/2017.- In exercise of the powers conferred by

Section 59 of the Punjab Excise Act, 1914 (Punjab Act 1 of 1914) and with reference to Haryana Government, Excise and Taxation Department, Notification No. 67/X-1/P.A.1/1914/S.9/2017, dated the 4th August, 2017, I, Ashima Brar, Excise Commissioner, Haryana, exercising the powers of Financial Commissioner hereby make the following rules further to amend the Haryana Liquor License Rules, 1970, namely:-

1. (1) These rules may be called the Haryana Liquor Licence (Second Amendment) Rules, 2017.

(2) They shall be deemed to have come into force with effect from the 15th September, 2017.

2. In the Haryana Liqour Licence Rules, 1970, in rule 38, in sub-rule (16A),-

(i) in clause (aa), for the sign "." existing at the end, the sign ":" shall be substituted;

(ii) after clause (aa), the following provisos shall be added, namely:-

"Provided that licenses for sale of liquor may be granted/renewed to all liquor shops, except liquor vends i.e. L-2 or L-14A or composite liquor vends and their sub-vends, alongside of National or State Highway or Service Lane along the Highway in municipal areas:

Provided further that licensees of liquor vends i.e. L-2 or L-14A or composite liquor vend may be allowed to establish/shift liquor vend(s)/sub-vend(s) alongside National/State Highway or Service Lane along the Highway in municipal areas subject to payment of 30% additional license fee.

Note.- The additional license fee shall be calculated as under:- Total license fee of the Zone (of vend/sub-vend intended to be shifted) divided by number of vends allowed in the Zone = average price of 1 vend. 30% of average price divided by 12 multiplied by number of remaining months.";

(iii) in clause (c), for the sign ";" existing at the end, the sign ":" shall be substituted;

(vi) after clause (c), the following proviso shall be added, namely:- "Provided that the above said conditions shall not apply to shifting of sub-vends done in compliance of second proviso to clause (aa) of this sub-rule.".

ASHIMA BRAR, Excise and Taxation Commisioner Haryana

9. Having heard arguments of both sides and scrutinized record of the case, we find that the Respondent concededly allotted vends after seeking opinion of PWD (B&R) and in the licence (Annexure P-2) location of vends was duly disclosed. Ld. State Counsel though found herself unable to wriggle out of licence (Annexure P-2) wherein location of vends is notified, still unfairly and consistently contended that location of vends was not approved so Petition should be dismissed. Jakhal is a small town and Respondent was well aware at the time of

allotment of vends that there are very limited places to establish liquor vends. In view of directions of Hon'ble Supreme Court and Excise Policy prohibiting location of vends within 500 meters from National/State Highway, the Department could not have permitted opening of vends on the allotted locations. The Petitioner on 25.4.2017 opened vends at allotted locations like Bus stand Jakhal and got permits to obtain liquor. Once Respondent permitted to open vend at locations like Bus stand, it was inbuilt that vend would be opened around the bus stand but there was no place/shop which was falling beyond 500 meters from National Highway. The Respondent was duty bound prior to allotment of vends to verify that whether there is any place near bus stand which does not fall within 500 meters from Highway. It is well known fact that normally liquor vends are opened in the same established sites of shops irrespective of allottees for successive years. The Petitioner was permitted to reopen vends in terms of amendment carried out in the Excise Policy of 2017-18. After clarification being issued by Hon'ble Supreme Court, there was no reason to keep closed vends because Petitioner was granted licence for a particular location who had to reopen vend on the same location, thus amendment of policy had no applicaton/connection with those vends which were already alloted and located on highway passing through Municipal limits. The Respondent in case of doubt was duty bound to seek such type of clarification prior to allotment of vends. Any State Government cannot take advantage of its dominant position at the cost of loss to innocent bidders. The bidders filed their bids knowing that they would be able to establish vend at notified locations like bus stand. Auction price always depends upon location of vend, thus department cannot take advantage of its own wrong. State Government has no authority in law as well equity to charge fee for the period during which vends remained closed due to mistake of the State Authorities. At the first instance, the Respondent to generate revenue allured bidders and as soon as vends were opened, the Respondent took a somersault and left the Petitioner in lurch. State cannot enrich itself at the cost of undesired loss to any bidder.

10. There is another aspect of the matter which needs consideration. Hon'ble Supreme Court vide order dated 11.07.2017 clarified that restriction of 500 meters for establishing liquor vends on highway does not prohibit licensed establishments within municipal area. The Hon'ble Supreme Court clarified the matter on 11th July' 2017 whereas Petitioner was permitted to reopen vends on 30.09.2017 and there is nothing on record which prevented Respondent from permitting Petitioner to reopen vends w.e.f. 11.07.2017. Thus the Petitioner cannot be made liable to pay licence fee w.e.f. 11.7.2017 to 30.9.2017.

11. The Respondent has contended that Additional Licence Fee was charged in terms of memo dated 15.09.2017 (Annexure P-5) read with notification dated 05.12.2017 (Annexure R-2). By Notification dated 05.12.2017, Haryana Liquor Licence Rules, 1970 had been amended whereby proviso after clause (aa) was inserted which reads as under:

"Provided that licenses for sale of liquor may be granted / renewed to all liquor shops, except liquor vends i.e. L-2 or L-14A or composite liquor vends and their sub-vends, alongside of National or State Highway or Service Lane along the Highway in municipal areas:

Provided further that licensees of liquor vends i.e. L-2 or L-14A or composite liquor vend may be allowed to establish / shift liquor vend (s)/sub-vends(s) alongside National/State Highway or Service Lane along the Highway in municipal areas subject to payment of 30% additional payment fee.

Note: The additional fee shall be calculated as under:-

Total licence fee of the Zone (of vend/sub-vend intended to be shifted) divided by number of vends allowed in the Zone=average price of 1 vend. "

From the reading of above proviso, it can be easily culled out that Government has permitted vendors to shift/establish vends to alongside Highway falling in Municipal area. The proviso does not deal with vendors who were earlier permitted to establish vend alongside highway falling in Municipal area. The Petitioner was granted license to establish vend at notified locations and accordingly opened vends on 26.04.2017 which were sealed on 28.06.2017. The Petitioner reopened sealed vends so did not get any advantage which was extended to those vendors who shifted vends from non highway to Highway falling within Municipal area. The Petitioner did not get any advantage of location while reopening three vends so Petitioner could not be subjected to additional licence fee. The Petitioner at the first instance paid higher licence fee because licence was granted to open three vends out of six vends at prime locations. Thus there is no reason to charge additional licence fee which could be charged only in case of change of location.

12. In view of our above findings, we are of the considered opinion that Petitioner was not liable to pay licence fee w.e.f. 11.7.2017 (Date of clarification by Hon'ble Supreme Court) to 30.9.2017. The Petitioner was also not liable to pay additional licence fee. Accordingly, present petition is allowed and Respondents are directed to refund proportionate licence fee charged with respect to 3 vends for the period 11.7.2017 to 30.9.2017 and additional licence fee within four weeks from the date of receipt of certified copy of this order, failing which the petitioner would be entitled to interest at the rate of 9% per annum on the admissible amount w.e.f. the date of order till its realization. The Department would be free to recover the same from the competent/sanctioning Authority concerned apart from the officers making themselves liable to be hauled up in contempt proceedings.

