(1977) 05 SHI CK 0011

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No''s. 155 and 156 of 1971

Satya Pal Joginder Nath — APPELLANT

Vs

Excise and Taxation Commissioner etc. — RESPONDENT

Date of Decision : 16-05-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 5
Punjab Excise Act, 1914 — Section 10, 14, 15, 3, 35(1)
Punjab Liquor Licence Rules, 1956 — Rule 4.19

Citation : (1977) 6 ILR HP 258

Hon'ble Judges : T.U. Mehta, J

Bench : Single Bench

Advocate : R.K. Punshi, for the Appellant; A.G., for the Respondent

Judgement

T.U. Mehta, J.—Both are writ applications in which the order passed by the Excise and Taxation Commissioner, Himachal Pradesh imposing different penalties on the Petitioner u/s 36(c) of the Punjab Excise Act, 1914 read with Section 80(2) thereof, has been challenged on two grounds, namely: (1) the Excise Commissioner has no statutory authority to pass such an order and (2) the said order is passed against the rules of natural justice.

2. Short facts of the case are that the Petitioner firm carries on the business of dealing in liquor and holds licence in foreign liquor in Form of L-2 at places called Nalagarh and Baddi. This licence was for the financial year 1971-72 that is from 1-4-1971 to 31-3-1972.

3. On 19-5-1971 the District Excise Inspector along with the Excise Inspector Nalagarh paid a surprise visit to the foreign liquor vends of the Petitioner at both places.

4. So far as the vend at Baddi is concerned, these officers noticed an irregularity inasmuch as two bottles of Orange Gin were found to contain 38.6 U.P. strength instead of 35 U.P. strength.

5. So far as the shop at Nalagarh was concerned, they noticed the following irregularities:

1. Sale of liquor on 18-5-1971 was shown abnormally high.

2. 22 bottles of colour less sprit fitted with P.P. seals of Dry Gin and without any labels were found at the premises. Their strength was noticed at 39.6 U.P. (under proof) instead of 35.0 U.P.

3. 5 bottles of blue seal whiskey were found having 30.6 U.P. strength instead of 25.0. U.P.

6. Thereafter notices were sent with regard to both the shops to the Petitioner firm to show cause why action under law should not be taken against it for the above referred irregularities. These notices further mentioned that if the Petitioner failed to show cause, it would be presumed that it had nothing to say in the matter, and action as warranted under law would be taken without affording any further opportunity. The notices issued in both the cases are at Annexure ''B'' in each case.

7. So far as Baddi shop is concerned, the Petitioner sent a reply to the show cause notice stating that if at all there was any deficiency in the strength prescribed, it was likely to be due to two reasons, (1) the apparatus with which the strength was measured was not correct and (2) there would be a defect from the source of issue, that is the manufacturers. In this reply the Petitioner requested the Excise and Taxation Officer who sent the show cause notice, that the samples from the bottles in question should be sent for chemical analysis and no further action should be taken till report of the chemical analyser as regards these samples was obtained.

8. As regards the irregularities noticed at the Nalagarh shop the Petitioner''s reply was that the quantity of sale on a particular day depended upon the number of customers attended to. So far as the other two irregularities regarding the strength of the liquor were concerned, the Petitioner''s reply was the same, that is, that the apparatus, that is the hydrometer, which was utilised for checking purposes, might be defective or the defect in question might be at the source. In this reply also, the Petitioner requested the authority concerned that the sample in question should be sent for chemical analysis and no decision there on should be taken till the report of the chemical analyser was obtained.

9. No further proceedings were thereafter taken but it appears from the office notes of the Excise and Taxation Commissioner found at Annexure ''F'' that notes Nos. 314 and 318 were put by the office as under:

The penalties recommended by the E.T.O. Simla to be imposed on the excise licensee for the irregularities committed by them including adulteration of liquor as mentioned in No. 315, 316 and 317 on pre-page, may kindly be accepted. The Deputy Excise and Taxation Commissioner (Shri Malhotra) who is Collector for Excise in this case has proceeded on leave. As such Excise and Taxation

Commissioner (Financial Commissioner) may kindly see and pass order as deemed fit.

These notes appear to have been put in the month of July 1971.

10. After these notes, the Excise and Taxation Commissioner, Himachal Pradesh passed the following order on 20th July 1971 as found at Annexure ''E'':

From No.6-26/67 D.E. T.C.18636/8637 Excise & Taxation Department Himachal Pradesh

From

The Excise & Taxation Commissioner, Himachal Pradesh.

To

1. The Excise & Taxation Officer, Simla.

2. The Excise & Taxation Officer, Kangra at Dharamsala. Dated Simla, the 20th July, 1971

Subject.--Irregularities committed at Excise Shops--Imposition of penalties/ additional fee.

Reference.--1. Memo Nos. 903, 904 and 905, dated 10-6-1971. 2. Memo No. 336/Ex., dated 4-6-1971.

MEMO.

The licences in respect of the following wine shops for the year 1971-72 which are liable for cancellation u/s 36(c) of the Punjab Excise Act (1 of 1914) on having committed certain irregularities have been allowed to be retained on payment of additional fee, as indicated against each:

Sr. Name of the Name of shop and licensee Addl. fee No. District imposed 1. Simla L-2 Baddi (Nalagarh unit), M/s Rs. 500 Satya Pal Joginder Nath. 2. -do- L-2 Nalagarh, M/s Satya Pal Rs. 5,000 Joginder Nath. SI. Name of Name of the shop and licensee Addl.fee No. District imposed 3. Simla L-14 Tutu, Shri Dewan Chand Rs. 50 4. Kangra L-14 Damtal, M/s Banarsi Dass Rs. 100 Gurnam Singh. 5. Kangra L-2, Damtal, Shri Nand Kishore Rs. 300

Sd/- Excise & Taxation Commissioner, Himachal Pradesh.

This order shows that so far as the present Petitioner is concerned an additional fee in form of penalty, u/s 36(c) of the Act, of Rs. 500/- has been imposed on the Petitioner for irregularities noticed at Baddi shop, and the additional fee in form of penalty of Rs. 5000/- has been imposed for the irregularities noticed at Nalagarh shop.

11. Being aggrieved by these orders of penalties, the Petitioner has approached this Court by these two writs. The writ application No. 155 of 1971 relates to the

imposition of penalty of Rs. 5000/- with regard to Nalagarh shop, while the writ petition No. 156 of 1971 relates to the imposition of penalty of Rs. 500/-with regard to Baddi shop.

12. As already stated above both these orders of imposition of penalties have been challenged by the Petitioner on two grounds: namely (1) though under the statutory provisions of the Act it is only the Collector, who is also Deputy Excise and Taxation Commissioner, who can impose these penalties, the penalties have been in fact, imposed by the Excise and Taxation Commissioner himself and, therefore, both these orders of penalties are without jurisdiction and ultra vires, and (2) both these orders are also liable to be set aside inasmuch as they are passed in violation of the rules of natural justice because the Petitioner has not been given any hearing, and the orders imposing penalties do not disclose any reason showing why the objections raised by the Petitioner in reply to the show cause notice have been rejected.

13. So for as the first point regarding the jurisdiction of the authority to pass an order u/s 36(c) of the Act is concerned, it would be necessary to first refer to the relevant provisions of the Act. The relevant portion of Section 36 provides as under:

36. Subject to such restrictions as the State Government may prescribe, the authority granting any license, permit or pass under this Act may cancel or suspend it.

(a) x x x x

(b) x x x x

(c) in the event of any breach by the holder of such licence, permit or pass or by his servants or by any one acting on his behalf with his express or implied permission of any of the terms or conditions of such licence, permit or pass.

Thus according to Clause (c) of Section 36 if the holder of a licence commits any breach of any of the terms or condition of such licence the authority granting the licence may cancel or suspend the same. Thus the immediate question which arises is who is the authority granting the licence under the Act. Necessary answer to this question is provided by Section 35(1) which says that subject to the rules made by the Financial Commissioner under the powers conferred by the Act, the Collector may grant licences for the sale of any intoxicant within his district. Thus, according to Section 35(1) it is the Collector who can grant licence and according to Section 36 this Collector being the authority to grant the licence can also cancel or suspend the same.

14. In this connection reference should also be made to Section 80 which refers to the powers of excise officers to compound offences. Sub-section (2) of Section 80 provides that the cancellation or suspension of any licence, permit or pass u/s 36(a), (b) or (c) of the Act may be forgone or revoked by and at the sole discretion of the authority having power to cancel or suspend it on payment by

the holder of such licence permit or pass of such penalty as the authority may fix.

15. The above referred provisions of the Act show that if the holder of a licence commits any breach of the terms and conditions of the licence, his licence becomes liable to be cancelled or suspended, but such cancellation or suspension can be forgone or revoked at the sole discretion of the authority concerned on payment of a sum of penalty as the said authority may fix.

16. It is an admitted position in both these cases that the penalty which is imposed to the extent of Rs. 500/- in one case, and to the extent of Rs. 5000/- in the other case, has been imposed pursuant to the above referred provisions contained in Section 36(c) read with Sub-section (2) of Section 80, because, by committing certain alleged irregularities the Petitioner is said to have committed the breach of licence resulting in liability for cancellation or suspension u/s 36(c) read with Sub-section (2) of Section 80 of the Act. However, all the above referred provisions of the Act show beyond any doubt that the authority who can cancel the licence and who can impose penalty in lieu of cancellation or suspension thereof is only the Collector and no other authority.

17. The real question, therefore, is what is meant by the expression "Collector". This expression is defined in Clause (3) of Section 3 as under:

Collector" includes any revenue officer in independent charge of a district and any official appointed by the State Government to discharge throughout any specified local area, the functions of a Collector under this Act.

This section also gives the meaning of the expression "Excise Commissioner" in Clause (7) thereof as under:

Excise Commissioner" means the officer appointed by the State Government u/s 9.

Section 9, which is referred to above, is in the following terms:

The State Government may by notification appoint an Excise Commissioner and, subject to such conditions and restrictions as it may deem fit, may invest him with all or any of the powers conferred on the Financial Commissioner by this Act.

18. These provisions show that the Collector is not the same authority as the Excise Commissioner. In this connection a reference to Chapter II of the Act, which relates to the establishment and control, would show that this Chapter stipulates the whole hierarchy of officers who are expected to function under different provisions of the Act. Section 8 with which this Chapter II begins stipulates the over all control of the State Government over all matters relating to the excise, and further says that this control shall vest in the Financial Commissioner. According to Clause (b) of Section 8 the Financial Commissioner shall control all other excise officers in his division, and according to Clause (c) thereof the Collector shall control all other excise officers in his district.

19. Thus it is evident that the powers which are statutorily vested by the Act on

the Collector, who is an authority quite distinct from the authority known as Excise Commissioner, can not be exercised by any other officer. Section 10 of the Act stipulates the classes of excise officers other than the Financial Commissioner and the Excise Commissioner. Clause (b) of Section 10 provides that the State Government shall by notification declare what powers under the Act shall be exercised by the excise officers of each class. The Respondents have not relied upon any notification issued under Clause (b) of Section 10 to show that the power to impose penalty contemplated by Section 80(2) read with Section 36(c) has been vested by any notification of the State Government in any officer other than the Collector.

20. In reply to this contention about the jurisdiction to impose penalty which is raised by the Petitioner, the Respondents have stated that since the Excise and Taxation Commissioner is the head of the department, he is "automatically" vested with all the powers which his subordinates including the Collector (who is also Deputy Excise and Taxation Commissioner) possess under the Act. It is worthwhile noting that it is not the case of the Respondents that the impugned order of penalty is passed by the Collector. In fact, though the impugned order Annexure ''D'' states that the Deputy Excise and Taxation Commissioner has imposed the penalty in question, office notes which are found at Annexure ''F'' are clear enough to show that the Deputy Excise and Taxation Commissioner Shri Malhotra, who was the Collector for Excise, was on leave at the relevant time and, therefore, the Excise and Taxation Commissioner was requested to pass the necessary orders. The Respondents justify this position by raising the plea that because the Excise and Taxation Commissioner is an officer superior to the Collector or the Deputy Excise and Taxation Commissioner, it was open to him to pass the order of penalty, and to exercise all the powers which the Collector could have exercised under the Act.

21. This contention of the Respondents is obviously wrong, because statutory authority envisaged by a particular legislation cannot be exercised by any person other than the person authorised by the Act itself. As stated above the Act authorities only the Collector to impose the penalties of this nature. The Collector is, therefore, a statutory authority, and no other authority however high it may be in the hierarchy, can exercise that statutory authority unless specifically empowered to do so under the provisions of the Act. Since the Excise and Taxation Commissioner is not found to have any such power, it was not open to him to exercise the statutory power which the Collector had in this matter.

22. In this connection it is also necessary to note that Section 14 of the Act provides for appeal and Section 15 provides for revision and review. According to Section 14 an appeal shall lie from an original or appellate order of an excise officer in such cases or class of cases and to such authority as the State Government by notification declares. According to Section 15 the Excise and Taxation Commissioner may, suo moto, at any time or on an application made to him, call for the record of any proceedings which are pending before or have

been disposed of by any excise officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of such proceedings or of any order made therein and may pass such orders in relation thereto as he may deem fit.

23. It is thus clear from the provisions contained in Section 14 and 15 that the Excise ad Taxation Commissioner is either an appellate authority or a revising or reviewing authority over the orders passed by the Collector, that is, the Deputy Excise and Taxation Commissioner. Such appellate or revising authority ''can obviously not act as the original authority.

24. Under these circumstances, I find that the Petitioner is correct in his contention that the impugned orders of penalty could not have been imposed by the Excise and Taxation Commissioner as done in this case. The Petitioner, should therefore, succeed only on this ground in both these petitions.

25. After considering the facts of the case I am of the opinion that the Petitioner should also succeed even on the second ground which relates to the violation of rules of natural justice. I will presently deal with this aspect of the matter.

26. As already stated in the facts narrated above, the only step which the authorities have taken before imposing the penalty is to issue a show cause notice in each of these cases. I have pointed out how the Petitioner has shown cause, and has raised contentions challenging the evidence on which the authorities wanted to proceed for the purpose of taking action under the Act. It is an admitted position that after receiving the Petitioner''s reply to the show cause notice issued to it, the concerned authorities have not preferred to make any further inquiry in the matter nor have they given any hearing to the Petitioner before passing the final orders. Even the final orders imposing penalties are not speaking orders and do not disclose on what grounds the objections raised by the Petitioner have been disallowed. It should be noted here that the Petitioner has in his reply challenged the correctness of the hydrometer with the help of which the concerned officers had checked the strength of the liquor found in both the shops. The Petitioner has also challenged the findings of the officers regarding the strength of this liquor and has requested the authorities to sent the samples to chemical analyser. The Petitioner has not been informed as to what happened to its request of sending the samples to the chemical analyser. However, it is found from the affidavit in reply paragraph 8 that according to the Respondents samples were not required to be sent to the chemical analyser in view of rule 4.19 of the Punjab Liquor Excise Manual, Volume III. I have referred to this Manual and I find that Rule 4.19 is not any statutory rule but merely contains the departmental directions in cases wherein prosecutions are ordered in a court of law. This Rule 4.19 on which reliance is placed provides that samples of liquor in regard to which doubt arises should be sent for analysis and opinion of the chemical analyser to the Government of Punjab whose report is admissible in evidence u/s 5 of the Code of Criminal Procedure. Explanation attached to this rule says that unless it is desired by the Court the sample of

sprit which are considerably stronger than 20 U.P. should not be sent to the chemical examiner since it may safely be assumed from its make by the excise staff that they are so much above the licit as to be illicit beyond any possibility of doubt. This provision obviously does not apply to the facts of the case as there is no question of prosecution in court of law. Moreover these provisions have no statutory force of law and are in form of instructions to the officers of the department. Again this explanation is resorted by the Respondents for the first time in this writ petition and it is an admitted fact that the Respondents have not given any such reply to the Petitioner when he made a request to send the samples to the chemical analyser before taking any action. Even the impugned order does not contain any reasoning to show why the Petitioner''s objections as regards the irregularities pointed out by the Inspector were over-ruled. Under the circumstances the question is whether the procedure adopted by the Excise and Taxation Commissioner before imposing the penalties in question offends any rule of natural justice.

27. It is an admitted position that neither the Act nor the Punjab Liquor Licence Rules, 1956, contain any provision prescribing a particular procedure which should be followed before action is taken u/s 80(2) read with Section 36(c) of the Act. There is also no provision either under the Act or under the rules by which the ordinary rules of natural justice are specifically prohibited to be undertaken. Provisions of sections 36 and 80 show that an action which is contemplated by the Act be taken for breach of a condition of licence, results not only in the breach of the licensee''s right to conduct his business but also in some penalty. It, therefore, cannot be disputed that when an action imposing penalty is taken by a competent authority u/s 80(2) of the Act, that action is of a quasi-judicial nature. The fact that against such orders the statute makes provisions of appeal and revisions also strengthens this position. Under the circumstances it cannot be disputed that before taking the final action, rules of natural justice ''should be complied with.

28. So far as the facts of this case are concerned the only rule of natural justice which is complied with by the authorities is to issue a show cause notice to the Petitioner. But after the Petitioner gave its reply the authorities concerned do not seem to have made any inquiry to know whether the contentions raised by the Petitioner in its reply were acceptable or not. The authorities have also not given any hearing to the Petitioner in the matter before passing the final order. Under the circumstances, there is nothing in the record of the case to show what materials, if any, were considered by the concerned authorities for the purpose of imposing this penalty. As held by the Supreme Court in Mahabir Prasad Santosh Kumar Vs. State of Uttar Pradesh and Others, the Petitioner had a right not only to have an opportunity to make representation, but also to have its representation considered, and to be given information which would show that the decision was reached on merits and not on considerations of policy or expediency. In Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, the Supreme Court observed that even

though the Act and the rules framed thereunder do not in express terms require reasoned order to be recorded, it does become necessary, in the context of the subject matter of a particular case for the authority concerned to pass what are called "speaking orders". In my opinion, in this case this was more necessary in view of the fact that though the Petitioner had raised contentions as regards the correctness of the hydrometer with the help of which the strength of the liqour was tested, and though he had made a specific request to send the necessary samples for chemical analysis, the officer concerned did nothing in the matter, and without entering into any further communication with the Petitioner preferred to impose penalty on the presumption that the report made by the Inspector must necessarily be correct.

29. A Full Bench of the High Court of Punjab and Haryana has, in the case of Mulakh Raj Krishan Kumar v. The State of Punjab AIR 1973 Pun 62 taken a view that Section 36 of the Act gives a discretion to the licensing authority to cancel or not to cancel the licence on the fault being committed and, therefore, that discretion should be exercised judiciously after taking into consideration the facts of each case because the proceedings in question are quasi judicial in nature. In another case of Bhagat Singh v. State AIR 1975 Pun 236 the said High Court has further held that the person proceeded against u/s 36 must be afforded an adequate opportunity for defending himself against the charges to prove his innocence and, therefore, an adequate and substantial opportunity of hearing him should be afforded to him.

30. In this case I find that no such opportunities are given by the department to the Petitioner and, therefore, the Petitioner should succeed even on the second point raised by it.

31. In the result I find that both these writ petitions should be allowed and the impugned orders should be set aside. I, therefore, set aside the orders imposing penalties in both the cases and make the rule issued in both the writ petitions absolute with costs. It is, however, clarified that the competent authority is not precluded from proceeding further under the provisions of the Act from the stage of show cause notice and make a proper and legal inquiry if found necessary.