(1970) 11 AHC CK 0012

In the Allahabad High Court

Case No : Special Appeal No''s. 798 and 799 of 1970

Sushil Chandra and Another — APPELLANT

Vs

The State of Uttar Pradesh and Others — RESPONDENT

Date of Decision : 30-11-1970

Acts Referred:

- Constitution of India, 1950 — Article 226
- Uttar Pradesh Excise Act, 1910 — Section 10
- Uttar Pradesh Number and Location of Excise Shops Rules, 1968 — Rule 2

Citation : AIR 1971 All 290

Hon'ble Judges : R.S. Pathak, J;R.L. Gulati, J

Bench : Division Bench

Advocate : V.P. Mishra and R.R. Agarwal, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Gulatt, J.—This and the connected Special Appeal arise out of Civil Misc. Writ Nos. 1370 and 3600 of 1970 decided by a learned Single Judge of this Court by a common judgment dated September 30, 1970, both filed by the appellants in these appeals.

2. Briefly stated the facts are these. Sometime in the month of February, 1970, the District Excise Officer, Lucknow, took a decision that the excise shop situated in Ganneywali Gali in the city of Lucknow shall continue to be at its old place and that shop along with others was auctioned on February 26, 1970. The appellants were the highest bidders, their bid being for a sum of Rs. 4,28,000/-. The bid was accepted by the District Excise Officer, Luck-now. The appellants complied with the conditions of the auction and on 3lst March, 1970 purchased from the previous licensee all the furnitures and fittings of the shop and also the balance of the country liquor which remained unsold in the shop. Their licence was to start from April 1, 1970 and was to continue in force upto March 31, 1971. According to the appellants, Sushil Chander, appellant No. 1, went to the office of

the District Excise Officer on April 1, 1970, to collect a provisional licence which is issued in accordance with the normal practice pending the final sanction of the bid by the Excise Commissioner, The provisional licence, however, was not granted to him because of certain instructions received from the Government. An order dated 31st March, 1970 was served upon the appellants to shift the shop by May 1, 1970, and in case that was not done, the shop was to be closed. Later on the same day another order was served upon the appellants requiring them to close the shop forth with. Thus the appellants'' shop was not allowed to function.

3. Thereupon on April 7, 1970, the appellants filed Civil Misc. Writ No. 1370 or 1970, against the order of the District Excise Officer requiring the appellants to shift their shop to some other place. On April 13, 1970, a learned Single Judge of this Court passed the following ex parte interim stay order:

"Till further orders of this Court, the respondents are restrained from interfering with the petitioners selling country liquor in the existing shop, provided the petitioners are otherwise entitled to sell country liquor but without taking into account the order directing to shift their shop. The respondents will be at liberty to move this Court at any time for vacating this order, if necessary."

According to the petitioners'' allegation when they received on April 21, 1970 a copy of the counter-affidavit filed on behalf of the Excise Department, they found a mention therein of an order of the State Government dated April 1, 1970, a copy whereof was annexed to the counter-affidavit as Annexure ''C-A 1'', directing the District Magistrate, Lucknow, to close the appellants" shop forthwith. The appellants have alleged mat this order of the State Government was not served upon them and they came to know of it for the first time on April 21, 1970, when a copy of the counter-affidavit was served upon them. This led to the filing of the second Writ Petition No. 1600 of 1970 which was filed on April 23, 1970 and was directed against the order of the State Government dated April 1, 1970 requiring the appellants to close their shop forthwith.

4. In the meantime the Excise Commissioner passed an order dated April 29, 1970, refusing to accept the appellants" bid on the ground that the Government having already closed the shop with effect from April 1, 1970, the question of the approval of the bid did not arise. Thereupon the appellants moved an application for amendment of the Writ Petition No. 1600 of 1970 and as a result of the amendment allowed by the Court on May 21, 1970, the order of the Excise Commissioner dated April 29, 1970 was also challenged and a prayer was added for quashing that order of the Excise Commissioner. The appellants also moved an application dated May 7, 1970 for an interim relief and by an order of that date this Court stayed the operation of the order of the Excise Commissioner dated April 29, 1970 till further orders. Finally the two writ petitions were consolidated and were rejected by Hon''ble D. S. Mathur, J., on September 30, 1970. Hence these two, appeals.

5, The main points urged by the learned counsel for the appellants are:

1. that the Government had no jurisdiction to usurp the function of the District Excise Officer in respect of the location of the shop.

2. that the location of the shop could only be decided before the auction for the shop had taken place. Its location could not be changed, except, in exceptional circumstances, the shop could be closed u/s 35 of the U. P. Excise Act.

3. that the power u/s 85 could not be exercised in the instant case as there did not exist any cause for the closure of the shop.

4. that the orders passed by the District Excise Officer and the Excise Commissioner were not independent orders, but had been passed at the behest of the Government so that no individual discretion had been exercised by them and for that reason the order passed by these two authorities were illegal, and lastly

5. that the discretion exercised by the State in the matter of the closure of the shop was arbitrary and was illegal for the further reason that the same had been passed against the principles of natural justice inasmuch as before passing the order the State had issued no notice to the appellants and had afforded no opportunity to them of being heard.

6. As regards point No. 1 relating to the location of the excise shop, the learned counsel has referred to The U. P. Number and Location of Excise Shops Rules, 1968, which were made in exercise of the powers under Clauses (e) and (f) of Sub-section (2) of Section 40 of the U. P. Excise Act, 1910 and were published in the Gazette of March 25, 1968. Rule 2 of these rules provides that subject to the control of the State Government and of the Excise Commissioner and to the limitations expressed in the rules, the distribution and general location of retail shops shall be determined by the Collector, provided that in military cantonments the Collector shall exercise this power only with the consent of the Office Commanding the station. A reference was then made to Rule 5 which provides:--

"5. The following principles shall be observed in determining the location and the sites for retail shops;

(1) The location and the sites of all shops shall be decided by the Collector.

(2) No change in the site of any shop shall, except for very cogent reasons to be recorded in writing, be permitted during the currency of a settlement. The location of all shops shall be clearly defined at settlement in order to prevent any shifting of sites.

(3) The sites of all shops shall be selected with regard to police control especially in case of cities, towns and large villages and traffic regulation needs.

(4) No new shop shall be licensed in close proximity to a place of public resort, school, hospital, place of worship or factory, or to the entrance to a bazar or a residential colony. All objections to the licensing of a shop made by persons affected, shall receive full consideration.

(5) .....

(6) In the case of the existing shops, periodical enquiry shall be made as to whether their position is in conformity with policy tinder these rules. If, their location is found to be objectionable, such steps as are possible shall be taken to select a more suitable site and to arrange for its removal.

Then follow Rules 7, 8 and 9 with which we are not concerned.

7. The rules quoted above have been issued for the guidance of the authorities of the Excise Department in order to carry out provisions contained in the U. P. Excise Act. A reference may be made to Chapter II of the Act which deals with the establishment and control. Section 10 provides:

"10. (1)'' The administration of Excise Department in any district shall, unless the State Government otherwise directs, be under the charge of the Collector of that district.

(2) The State Government may by notification applicable to the whole of Uttar Pradesh or to any district or local area comprised therein--

(a) appoint an officer hereinafter referred to as the Excise Commissioner, who shall, subject to the orders of the State Government have the control of the administration of the Excise Department.

(b) ...."

From a reading of the foregoing provisions it is obvious that the number and location of the shops for the sale of country liquor and other intoxicants is to be determined by the Collector subject to the control of the Excise Commissioner and of the State Government having regard to the various restrictions enumerated in the rules of 1968 referred to above and in accordance with the general policy of the State. The contention of the learned counsel for the appellants that the location and number of the shops is within the exclusive jurisdiction of the Collector thus appears to be wholly untenable. It is true that in accordance with the general procedure a list of such shops and location is drawn up by the Collector and is published by the Excise Commissioner after the same has been finalised. But that does not mean that the State Government cannot intervene either before or after the finalisation of such list. From the scheme of the Act and the policy underlying the auction of the licenses for the sale of country liquor, it is clear that the ultimate decision rests with the State Government and it is open to the State Government to change the location of a shop or to close it altogether, before it is finally settled. This position becomes obvious when one refers to certain other provisions of the U. P. Excise Act, which deals with the cancellation or suspension of a licence after the shops have been settled. Section 84 provides for the cancellation and suspension of the licence for certain reasons specified therein. u/s 35 power has been preserved for the cancellation of a licence for reasons other than mentioned in Section 34. Section 35 reads as under:

"35. (1) "Whenever the authority granting a licence under this Act considers that such licence should be cancelled for any cause other than those specified in Section 34, it shall remit a sum equal to the amount of the fees payable in respect thereof for fifteen days, and may cancel the licence either,

(a) on the expiration of fifteen days", notice in writing of its intention to do so, or

(b) forthwith without notice.

(2) If any licence, be cancelled under Clause (b) of Sub-section (1) in addition to the sum remitted as aforesaid, there shall be paid to the licence such further sum by way of compensation as the Excise Commissioner may direct.

(3) When a licence is cancelled under this section, any fee paid in advance or deposit made by the licence in respect thereof shall be refunded to him, less the amount (if any) due to the State Government."

8. It is thus amply clear that it is open to the authorities granting licence to cancel the same at any time it likes. The licence can be cancelled either by giving fifteen days notice to the licence or forthwith without notice. When the licence is cancelled without notice, the licence is entitled besides the remission of the sum mentioned in Sub-section (1) to such compensation as the Commissioner may determine. The power u/s 35 can be exercised after a licence has been granted. As has been pointed out by the learned Single Judge, every licence who wishes to carry on the business in country liquor tinder a licence granted under the Excise Act, is supposed to be fully aware of the conditions that his licence can be cancelled u/s 34 or 35 at any time. He has no vested right in such a licence and as such he cannot insist that he should be allowed to carry on business for the entire period for which the licence is valid. At the most he is entitled to some compensation when his licence is cancelled without notice.

9. That being the position with regard to the licence which had been granted, there is no reason why it is not open to the authority concerned to refuse to issue a licence even if the shop had been auctioned. After the licence has been granted, the licence gets some sort of right which can be taken, away in accordance with Section 35 but where the licence has not, in fact, been granted the licencee acquires no right whatsoever and, therefore, he has no locus standi to complain if the licence is refused to him on the ground that the Government no longer wants a particular shop to function for reasons of policy.

10. So far as the grant of a licence is concerned reference may be made to paragraph 373 of the Excise Manual. That paragraph provides:--

"373. The following conditions shall apply to all sales under the auction system, and will be inserted at the foot of the sale proclamation if such proclamation is issued by the Excise Commissioner:

(1) The officer conducting the sales is not bound to accept the highest or any bid. In any case when the highest or any bid is not proposed to be accepted the

next highest bid should also be reported to the Excise Commissioner.

(2) The final acceptance of any bid is subject to the sanction of the Excise Commissioner which in its turn is subject to the decision by the Government in appeal or revisions, if any.

(3) ....

(4) ...."

It is clear that the final acceptance of the bid before which no settlement of the shop can be said to have taken place, rests with the Excise Commissioner. Now the Excise Commissioner may refuse to accept the bid on any ground which appears to him to be relevant. He may refuse to accept the bid because it is inadequate or he may do so on the ground that he does not desire to have a particular shop in the locality. The Excise Commissioner always functions under the ultimate control of the State Government, and therefore, he may refuse to accept a bid if the State Government in the meantime takes a decision to close down that shop. Any instructions issued to the Excise Commissioner by the State Government in that behalf shall be binding upon him.

11. In this counter-affidavit, filed in Writ Petition No. 1600 of 1970, Sri J. L. Shah has deposed in paragraph 11 that there had been a persistent demand on the Government from the residents of the locality for abolition of the country liquor shop situated in Ganne Wall Gali, Aminabad, Lucknow. The residents had complained that the situation of the shop was responsible for creation of very vulgar and unhygienic surroundings in the area and also deterioration in the situation of law and order inasmuch as it had become difficult for the ladies to move about without any sense of security.

It was also represented that the persons who come to drink at the said shop indulge in filthy and vulgar abuses and it has a very bad effect. The Government had been requested that it was not desirable to continue the country liquor shop in such a thickly populated society. He has further stated that the demand for shifting of the site and closure of the shop situated in Ganne Wali Gali, Aminabad, had been made for many years, and that the demand, for the removal of the shop became more serious when questions were asked on the floor of the Legislative Council by the members. A deputation of the residents had also met the then Excise Minister and the then Deputy Chief Minister. He has also referred to certain news items which appeared in the Daily Pioneer of July 4, 1967. He then goes on to say that the residents of the locality made a representation in the year 1969 when auction of the shop was to take place.

12. It further appears from the affidavits on the record that the Government had decided to shift the shop to another locality, but on being apprised by the Collector of the fact that it was not possible to find an alternative accommodation in Aminabad, the Government decided to close the shop forthwith.

13. From the reasons disclosed in the counter-affidavit, it is plain that the State

Government had good and cogent reasons for closing the shop. After all the State cannot indefinitely turn a deaf ear to the protests or representations by the residents of a locality. The Government in fact should have taken a decision for the closure of the shop much earlier but it kept on postponing the matter in order not to lose revenue. But the consideration of revenue in a matter like this cannot indefinitely override the legitimate demand of the residents of a locality and, in our opinion, the State Government did not act arbitrarily when it took the decision to close down the shop. In view of these developments, the Excise Commissioner had been left with no option except to decline to accept the appellants bid.

Learned counsel for the appellants does not dispute that so far as the Commissioner is concerned, he had a valid ground for refusing to sanction the bid of the appellants. His grievance is that the State Government took the decision to close down the shops without affording any opportunity of hearing to the appellants. That grievance does not carry any force. At the stage when the State Government decided to close down the shop the appellant''s bid had not been accepted by the Excise Commissioner. After the bid had been accepted and the shop had been settled, the cancellation of the petitioners'' licence could have only been effected under Sections 34 and 35 of the Excise Act and in that case, the petitioners would have had the right of an appeal to the Commissioner and of revision to the State Government, and in such a case they could have claimed a right of hearing. On the facts of the case, it is clear that in the instant case, there was no question of cancellation of a licence and Section 35 had not been invoked.

14. So far as the principles of natural justice are concerned, they cannot override the effect of statutory provisions and rules. The statute, either by express provision or by necessary implication, may exclude the operation or one or the other principles of natural justice. It is within the administrative discretion of the State Government and the Excise authorities to close down a shop. When that action is taken before a licence has been granted, no notice is necessary.

15. In its latest pronouncement in Union of India (UOI) Vs. Col. J.N. Sinha and Another, the Supreme Court while dealing with the compulsory retirement of a Government servant under fundamental Rule 56 (i) observed:--

"Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law but supplement it. It is true that if a statutory provision can be read consistently with the principles of natural justice, the courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But if on the other hand a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred the purpose for which it is conferred and the effect of the exercise of that power."

16. Now coming to the facts of the present case, the learned counsel has not been able to point out any statutory provision which requires a notice to be given before the Government or any of the Excise authorities takes the decision to alter the location of the shop or to cancel it altogether. In the circumstances it is futile for the appellants to contend that the shop in question could not have been cancelled without notice to them or that the cancellation of the shop infringes any of the principles of natural justice.

17. As to the complaints of the appellants that the District Excise Officer and the Excise Commissioner did not apply their mind independently but passed the orders on the behest of the Government, the same is equally without force. The District Excise Officer and the Excise Commissioner were bound to comply with the decision or, the State Government that the shop should be closed down. In this matter, as we have shown, both the officers were under the ultimate control of the State Government. The decision having been taken to close down the shop, then, even though, it be conceded that the District Excise Officer and the Excise Commissioner had to apply their mind independently of the State Government in the matter of granting a licence, the discretion could not but be exercised against the grant of the licence when there was no shop in respect of which it could be granted.

18. In this connection a reference was made to A.K. Kraipak and Others Vs. Union of India (UOI) and Others, That was a case where certain officers of the Forest Department were aggrieved by the selections made from amongst the officers serving in the Forest Department of the State of Jammu and Kashmir to the Indian Forest Service. There one of the Officers who was a Member of the selection committee was himself a candidate for a post in the Indian Forest Service. In that case it was, of course, observed that "the dividing line between an administrative power and the quasi-judicial power is quite thin and is being gradually obliterated. But the Supreme Court made it amply clear that for determining whether a power is an administrative power or a quasi-judicial power, one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the frame-work of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised." The Supreme Court further laid down that "the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry is held and the constitution of the Tribunal or body

of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of the case,

19. We have already shown that, according to the policy underlying the Excise Act and the Statutory provisions contained therein as also the rules framed thereunder, the settlement of licenced shops for the sale of country liquor and other intoxicants is a purely administrative act to be performed by certain officers of the Department under the over-all control of the State Government, and as such when the State takes a decision, for good and valid reason, to cancel a particular shop without notice to the prospective purchasers, no rules of natural justice are infringed; the decision being purely an administrative one.

20. Learned counsel for the appellants very strongly relied upon a decision of the Supreme Court in State of Punjab and Another Vs. Hari Krishan Sharma, That is a case which is clearly distinguishable. That was a case of grant of a licence for the construction of a cinema house under the provisions of the Punjab Cinema (Regulations) Act. According to the Supreme Court, the scheme of the Statute was that when an application for licence was made, it had to be considered by the licencing authority and dealt with u/s 5 (1) and (2) of the Act. The licence had to be granted by the licensing authority and against its order an appeal was provided to the State Government. Under that Act also the licensing authority was to act under the control of the State Government. But the State Government issued instructions that all the applications for the construction of cinema houses should be forwarded to it for disposal so ,as to supersede altogether the functions of the licensing authority.

The Supreme Court held that such instructions were not in conformity with the scheme of the Statute inasmuch as the Government was not justified in assuming jurisdiction which had been conferred upon the licensing authority. That was a case where preference was given to one of the applicants out of a number of applicants and the grievance of the persons whose applications had been rejected was that the State Government had granted the licence to one of the candidates on extraneous considerations. In the instant case no such general instructions had been issued by the State usurping the powers of the Excise authorities nor had the State shown any preference to a person other than the appellants. In the instant case, the State, had decided to close down the shop altogether. The shop had not been allotted to some one else out of extraneous consideration. This case, therefore, affords no assistance for the solution of the question involved in the present case.

21. In view of the fact that we have dismissed these appeals on merits, we need not deal with the preliminary objection of the learned counsel for the respondents that the appellants had no locus stand to maintain the writ petitions as no right had accrued in their favour which could be said to have been infringed,

22. In the circumstances the appeal fails and is dismissed with costs.

