(1975) 09 SHI CK 0012

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 190 of 1973

Swaraj Suri APPELLANT

Vs

The Excise and Taxation Commissioner etc. RESPONDENT

Date of Decision : 04-09-1975

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Punjab Intoxicants Licence and Sales Order, 1956 — Rule 10, 11, 12, 13, 14
Punjab Liquor Licence Rules, 1956 — Rule 36, 36(1), 36(2), 36(20), 36(3)

Citation : (1975) 4 ILR HP 745

Hon'ble Judges : D.B. Lal, J

Bench : Single Bench

Advocate : T.S. Munjral and R.K. Punshi, for the Appellant; B. Sita Ram, General, for the Respondent

Final Decision : Allowed

Judgement

D.B. Lal, J.—Swaraj Suri partner of Messrs Swaraj Suri and Company, country liquor licensees of Santokhgarh, have filed this petition under Articles 226 and 227 of the Constitution, whereby they have asked for quashing the directions of the Excise and Taxation Commissioner, Himachal Pradesh, (Respondent No. 1) dated November 14, 1973, to auction the country liquor vend at Mehatpur and a further writ of mandamus directing the Collector, Una and the Assistant Excise and Taxation Officer, Una, not to proceed with the said auction.

2. The case of the Petitioners is that they carry on the business of selling country liquor and for that purpose obtained a country liquor vend for Santokhgarh for which they offered the highest bid of Rs. 1,31,000 during auction for the year 1973-74. While conducting the annual auction, the Collector Una (Respondent No. 2) made publicity by a pamphlet entitled '"Announcements to be made at the auction for retail vend of country liquor for the financial year 1973-74", and the said pamphlet was read over and explained at the time of auction. In fact the annual auction was held after following Rule 36 of the Punjab Liquor Licence

Rules, 1956, and after compliance of rules 4 to 14 of the Punjab Intoxicants Licence and Sale Orders, 1956. The number and situation of the shops to be licensed as well as the probable sales in each shop were ascertained and thereafter the pamphlet was prepared denoting the places of shops and the estimated sales in each shop and the price was accordingly fixed and subsequently offered by the bidders. All this was done after ascertaining the wishes of the persons residing as well as the authorities functioning, within the locality and objections were invited under the Punjab Intoxicants Licence and Sale Orders, 1956. It is only after the fmalisation of the place and location of the shops and the estimated sale of each shop that the auction was held. That apart, under paragraph 3 of the Punjab Excise Powers and Appeal Orders, 1956, the shops were licensed and the number of shops was fixed with the prior sanction of the State Government. In the pamphlet aforesaid, the names of such vends which were shifted from the existing places were also given. On the basis of the statements made in that pamphlet and after taking all other factors into consideration, the Petitioners secured the liquor vend of Santokhgarh at a very high cost of Rs. 1,31,000. The Santokhgarh vend was supposed to cater the need of a radius of 7 to 8 miles all round it. After obtaining the vend the Petitioners carried on the business of selling liquor for 7 1/2 months. Subsequently to their surprise, on 17-11-1973 the Respondent No. 3 published a notice indicating thereby that another auction of country liquor vend was to take place for Mehatpur for the period 1-12-1973 to 31-3-1974 and that auction was to be held on 23rd November, 1973 at 8 A.M. in the District Courts compound, Una. According to Petitioners, Mehatpur falls at a distance of 3 miles from Santokhgarh and its need was being catered by the Santokhgarh vend. By opening the vend at Mehatpur the Respondents wanted to affect adversely the sale at Santokhgarh so much so that the latter vend was to be totally ruined and huge loss running into several hundreds of rupees a day was likely to be inflicted on the Petitioners by opening such a new vend.

3. It was understood that the Respondent No. 1 asked the Respondent No. 3 to prepare a scheme for the next financial year sales, and in that connection he asked for new vends which were likely to be opened in the district. The Respondent No. 3 "in his zeal to earn a good name" procured a resolution on or about 31-10-1973 from the village Panchayat Mehatpur that a new vend was to be set up at that place. This the Panchayat did despite a previous resolution of the same Panchayat dated 8-10-1972 that no country liquor vend was to be opened at Mehatpur. On 2-11-1973 the Respondent No. 3 sent that resolution to the Respondent No. 1. Thereafter auction was announced on 17-11-1973 which was to take place on 23-11-1973. According to Petitioners, prior sanction of the State Government was required for opening a new vend under paragraph 3 of the Punjab Excise Powers and Appeal Orders, 1956, This was not done and the auction itself was ultra vires. That apart, the auction at Mehatpur could not be held in contravention of Rule 36 of the Punjab Liquor Licence Rules, 1956, or paragraphs 4 to 14 of the Punjab Intoxicants Licence and Sale Orders, 1956,

which may be mandatory provisions. For these reasons the order regarding auction at Mehatpur was against the statutory provisions. It was also highly unjust and unwarranted in law. The resolution of the Panchayat could only take effect from the following first of April and was not valid for the year 1973-74. However, no notice to show cause was given to the Petitioners who were directly affected by the auction. According to Petitioners, the auction could not take place for part of the year and that the auction could only be held for once during the course of a single financial year.

4. On these grounds, it was prayed that a writ of certiorari be issued quashing the order/directions of the Respondent No. 1 dated 14th November, 1973, for holding the auction of country liquor vend at Mehatpur. A writ of mandamus is also prayed directing the Respondents 2 and 3 not to proceed in accordance with those orders of Respondents No. 1 and to desist from holding the auction at Mehatpur.

5. The Excise and Taxation Commissioner (Respondent No. 1) filed a return and the pleas taken are that the Petitioner Swaraj Suri is one of the partners and as such has no locus standi to institute the petition. It is further averred that Rule 2 (a) of the Punjab Intoxicants Licence and Sale Orders, 1956, enables the Government to open and auction a new excise vend during the currency of any financial year. As such the Government could hold the auction of Mehatpur vend for the period 1-12-1973 to 31-3-1974 under that rule and it was not a requirement of law that only one auction could be held during the course of any financial year. It was pleaded that the approval of the State Government for opening a new vend was duly obtained. It was denied that the need of Mehatpur was at all catered by the Santokhgarh vend. Nangal is nearer to Mehatpur and there was smuggling across Nangal so that there was a definite loss to the department. In order to meet that situation the Mehatpur vend was ordered to be opened. According to Respondents, due publicity was made regarding the Mehatpur auction and the wishes of the local M.L.A. or M.P. were obtained. The Respondents gave several instances of cases of illicit liquor detection. These persons brought liquor from Nangal for consumption at Mehatpur. This would show that the need of the people of Mehatpur was really met from Nangal and not from Santokhgarh. It was pleaded that paragraphs 8 to 15 of the Punjab Intoxicants Licence and Sale Orders, 1956 applied to a retail vend of liquor for consumption "on" the premises and not for consumption of liquor "on and off" the premises. It was not required of the Respondents to have issued a show cause notice to the Petitioners before the vend was to be auctioned. It was, therefore, concluded that the auction order for Mehatpur cannot be quashed for the reasons stated by the Petitioners.

6. In their rejoinder the Petitioners contended that the firm was a registered one and as such the Petitioner Swaraj Suri could file the petition on behalf of the other partners. Besides that, an affidavit is also filed by Swaraj Suri that he has filed the petition on behalf of all the partners of the firm. Regarding Rule 2 (a) of

the Punjab Intoxicants Licence and Sale Orders, 1956, in the rejoinder the plea is that it has to be read along with other rules of the said Orders and also along with Rule 36 of the Punjab Liquor Licence Rules, 1956, and other provisions of the Punjab Excise Powers and Appeal Orders, 1956. It was submitted that the approval of the State Government was obtained after the orders for opening the new vend at Mehatpur were passed by the Respondent No. 1. In fact prior approval of the State Government within the meaning of paragraph 3 of the Punjab Excise Powers and Appeal Orders, 1956, was needed which was never obtained. It is on the representations made by the Government as contained in the pamphlet (Annexure A) that the highest bid was given by the Petitioners and the Respondents were bound to obey these representations and a principle of estoppel can be invoked against them. It was denied as a fact that Mehatpur is not being fed for liquor by Santokhgarh vend. The question regarding smuggling, according to Petitioners, stands on a different footing. It is for the Excise Department to stop smuggling which can take place anywhere if the rules are not rigidly enforced.

7. Before coming straight to the pleas raised by the Petitioners, it may be useful to notice the rules and orders which have been made for conducting annual auctions with particular reference to the places of vends to be auctioned and estimated liquor consumption on each vend leading to fixation of tentative price for such vend. The rules will also disclose the control exercised by the State Government and prior sanction, if any, needed for the opening of a new vend. At first, I shall take up the Punjab Liquor Licence Rules, 1956. Rule 36 prescribes the procedure for the grant of licences by auction. Its Sub-rule (1) provides that in the beginning of December in each year the Collector shall make an estimate of the probable sales for each shop and shall determine the lowest annual fee at which each shop may reasonably be licensed. If there is a proposal to close any existing shop, the orders of the Financial Commissioner have to be obtained. Sub-rule (2) provides that the auctions are to be held once a year by the Collector. Sub-rule (3) lays down the particulars which are to be read at the time of the auction. In the present case these particulars are contained in Annexure-A which is termed as "announcements" to be made at the time of the auction. The number and situation of the shops is one of the particulars to be announced. Similarly at the time of auction of each shop, its locality has to be carefully explained- [Sub-rule (5)]. Under Sub-rule (20) the Collector has to forward to the Financial Commissioner a statement showing the locality of each shop sold, the probable sales in the year, the lowest fee determined and the fee obtained after auction. Thus, the number of shops and the situation of each shop and the probable sale at each shop are some of the important factors to be determined and the auction is made subject to such determination. How the locality of each shop is fixed and what enquiry is made for that purpose are given in the Punjab Intoxicants Licence and Sale Orders, 1956. Rule 4 deals with the villages or the wards or quarters of towns where the shop is to be situated and the Financial Commissioner subject to the control of the State Government, has to determine

it. The demand of liquor for each shop depends upon the locality concerned. The object is to counteract illicit supply of liquor and smuggling. If a vend is not licenced during a preceding year, the Collector has to ascertain the opinion of persons residing in that locality. For that notice is to be given and published. The municipality or the notified area or gram panchayat has to be consulted. Similarly the opinion of the Superintendent of Police has to be obtained. If there is a Railway Station or a factory nearby the Collector has to ask the opinion of the authorities of these institutions. If objections are filed, due hearing is given and thereafter decision is taken.

8. Under Rule 3 of the Punjab Excise Powers and Appeal Orders, 1956, no shop can be licensed for the sale of liquor for which previous licence did not exist "without the sanction of the State Government". The number of liquor shops is always subject to the "orders of the State Government". The sanction of the State Government is obviously prior to the order granting the licence.

9. It is undisputed that the Government had auctioned Santokhgarh vend for the financial year 1973-74. The auction obviously took place after compliance of the afore-mentioned rules and orders, and Santokhgarh vend was fixed so as to cater the liquor need of adjoining areas. Rule 36 of the Punjab Liquor Licence Rules, 1956, and paragraphs 4 to 14 of the Punjab Intoxicants Licence and Sale Orders, 1956, were complied with for Santokhgarh vend. The Petitioners admittedly carried on business at the vend for 7 1/2 months. It is also undisputed that the Respondent No. 1 asked the Respondent No. 3 to submit proposals for the next financial year 1974-75 and in that connection the question of opening a new vend at Mehatpur was reopened. It is also undisputed that the Mehatpur Panchayat had refused to sanction liquor vend for that area by a resolution dated 8-10-1972. The subsequent resolution of 31-10-1973 was in direct negation of that notification.

10. The main contention of the Petitioners is that for the opening of a vend at Mehatpur Rule 36 of the Punjab Liquor Licence Rules, 1956, and paragraphs 4 to 14 of the Punjab Intoxicants Licence and Sale Orders, 1956, were not followed. Similarly prior sanction of the State Government was not obtained under paragraph 3 of the Punjab Excise Powers and Appeal Orders, 1956.

11. Whenever a new vend was required to be opened at Mehatpur, verily the procedure prescribed under Rule 36 of the Punjab Liquor Licence Rules, 1956 was to be followed. The demand of Mehatpur was to be ascertained and the estimate of probable sale was to be obtained. Similarly determination of the lowest annual fee was to be made. Thereafter the pamphlet entitled "Announcements to be made at the time of the auctions" was to be drawn up containing all the relevant information. Besides Rule 36, it was sine qua non to follow paragraphs 4 to 14 of the Punjab Intoxicants Licence and Sale Orders, 1956. The village and the ward or the quarter of the town was to be ascertained. The demand of liquor for consumption was to be found and known. Thereafter the other important factor was the ascertainment of the wishes of the gram

panchayat, notified area or the municipal area, and objections if any were to be received from others. At that stage the Petitioners would have objected that the demand of Mehatpur was met with by Santokhgarh vend and hence no vend was needed at Mehatpur. It is obvious that by following all this procedure the vend at Santokhgarh was established. Considering the situation of that vend and the estimated consumption of liquor, the bid was offered by the Petitioners. How could the Government open a fresh vend without following the procedue laid down in the rules or the orders of 1956? Above all the prior sanction of the State Government was needed under the Punjab Excise Powers and Appeal Orders, 1956. This prior sanction was obviously not taken. It was not sufficient that subsequent to the decision taken by the Financial Commissioner, that the State Government concurred with the proposal. When these rules and orders of 1956 were not followed and the vend at Mehatpur was decided to be opened, the action of the Government was beyond its power. It was ultra vires the rules and orders of 1956. In a similar situation in three of the cases of Punjab and Haryana High Court of which the references are Civil Writs 996 and 1139 of 1969 decided on January 6, 1970 and Civil Writ No. 162 of 1970 Lachhman Singh Gurnam Singh and Co. v. The State of Punjab and Ors. decided on May 21, 1970 and Letters-Patent Appeal arising therefrom decided by a Division Bench on December 14, 1971, their Lordships have taken the view that such new vends cannot be opened nor auctioned to the detriment of the Petitioners who, to quote the language of their Lordships, were "entrapped" to give higher bids. This will directly affect the income likely to be accrued to the Petitioners. They are definitely put to a clear loss which can only be sustained by them, provided rules and orders of 1956 are followed and their objections are duly heard and decided. This was never done in the instant case. The following remark of the Division Bench in the decision dated January 6, 1970, (supra) is significant in this connection:

The Constitution having guaranteed rule of law in this country, it does not appear to be either fair or just for the Government to adopt the policy of entrapping liquor licensees by making certain representations and then acting contrary to those.

12. The State Government has thus unauthorisedly opened the vend at Mehatpur a non-scheduled place and auctioned it in favour of a third person against the interest of the Petitioners without even caring to conform to the requisite provisions of the relevant rules and without even issuing a public notice of the sale of this vend. In K.N. Guruswamy Vs. The State of Mysore and Others, the sale of a liquor vend was knocked down to highest bidder. It was, however, subject to confirmation by the Deputy Commissioner. The Excise Commissioner received a higher offer and cancelled the sale without following the procedure laid down. The procedure adopted to accept the new auction was new and different than the method prescribed. It was held that the auction in favour of any third party could not be accepted as it was adopted in the secrecy and in direct negation of the sanctioned procedure. The ratio of this case also applied to

the present situation.

13. There was a lukewarm argument that L-14 licence was ''''off'''' premises and therefore the procedure which related to licence for consumption "on" premises will not apply. There is a flaw in this argument. If L-14 licence was for "on" and "off" premises both, the procedure prescribed for "on" premises consumption has to be followed. It was then stated that Rule 36 of the Punjab Liquor Licence Rules, 1956, applied to annual auctions. Nevertheless that rule had to be observed even if during the course of any particular financial year a new vend was to be opened and auctioned. If the auction of a vend is required to be made in accordance with a prescribed procedure, the same has to be followed; otherwise it would result in a clear miscarriage of justice.

14. It was stated on behalf of the Respondents that mid-term auction of a new vend was permissible under paragraph 2 (a) of the Punjab Intoxicants Licence and Sale Orders, 1956. A licence may be given from any date to the 31st of March following. Be it as it may, nevertheless the procedure prescribed under paragraphs 4 to 14 has to be followed of the said Orders of 1956. This procedure was not followed and hence the action must be struck down. It is also significant that the very same panchayat had previously decided not for a vend at Mehatpur. Subsequently the decision was changed and the vend at Mehatpur was recommended. It is admitted case of the Respondents that the Financial Commissioner had only asked for a scheme to be prepared for the following year, i.e. for 1974-75. The Respondent No. 3 rather suggested, may be with the best of intentions, that a new vend be opened even during the course of the current financial year. This he could do, provided the Government followed the prescribed procedure under the rules and orders of 1956. It is stated that smuggling was required to be stopped and hence the vend at Mehatpur was necessary. The learned Advocate-General further contended that no specific area of operation was earmarked for Santokhgarh vend and the Petitioners could not stop the Government from opening a new vend at Mehatpur. It is true that no area of operation was specified for Santokhgarh, but still the Petitioners were told at the time of auction that there was no intervening vend upto a distance of 3 to 4 miles. It was naturally expected of the people residing in that area that they would purchase liquor from Santokhgarh. The Government may have a right between two prescribed vends to open a new vend, but for that they have to follow the procedure, and especially decide objections, if any, to be preferred by the owners of the two vends. This is not the case of the Respondents that they were opening a new vend at Mehatpur between two prescribed vends for any fiscal reason. The case of the Respondents is that they want to stop smuggling from Nangal and so a vend at Mehatpur is necessary. This can hardly be a reason to open a new vend because smuggling can take place within any area as it depends upon the negligence of the excise staff which is supposed to keep a watch over smuggling. While opening the vend at Santokhgarh this fact must have been taken into consideration that the people residing at Mehatpur will purchase liquor from Santokhgarh and perhaps instances of smuggling will be

avoided, if that could not be done, the default lies with the vigilance of the excise staff and not with the situation of the vend at Santokhgarh. Moreover it is a question of fact not to be gone into in a writ petition that the distance of Nangal is nearer from Mehatpur as compared to Santokhgarh or to what extent instances of smuggling take place simply for the reason that no vend is opened at Mehatpur [although a vend exists at Santokhgarh. At any rate a representation was made to the Petitioners that Santokhgarh vend will cater the needs of the people of Mehatpur and the Petitioners offered the highest bid taking regard to that fact. The State Government cannot now turn round and go against that representation by forcing the Petitioners to incur loss without following the prescribed procedure. In this connection the Respondents relied on M. Ramanatha Pillai v. The State of Kerala and Anr. etc. 1974 (1) S.L.R. 225. The doctrine of estoppel, as held by their Lordships, is applicable against State only where it is necessary to prevent fraud or injustice. In the present case, injustice has definitely resulted, and therefore the doctrine of estoppel can be applied.

15. It is then contended that the Petitioners are enforcing a contract and hence no relief can be granted. In fact the Petitioners are not enforcing their contract, but they are seeking to strike down an action of the Government whereby a new vend has been created without following the rules and orders of 1965. They have a locus standi obviously for the reason that they are directly affected by the opening of the new vend. As such the relief sought for does not arise from the contract received by the Petitioners from the Government. That apart, even contractual remedies are not necessarily barred for a remedy under the writ. In The The D.F.O., South Kheri and Others Vs. Ram Sanehi Singh, it was held that where the action of a public authority invested with statutory powers is challenged, the writ petition is maintainable even if the right to relief arises out of an alleged breach of contract.

16. There was a preliminary objection that the Petitioner was one of the partners and hence he could not file the writ petition on behalf of others. For this, the Petitioner has filed an affidavit that the petition is instituted for the benefit of the entire body of partners. Basides this, a partner of a firm can very well act on behalf of other partners especially in a situation where the intended action is for the benefit of the entire body of the partners. Therefore, the petition cannot be thrown on any such preliminary objection. The Petitioners have no doubt a legal right to compel the Respondents to sanction the new vend and auction the same in accordance with law. If the rules and orders of 1956 have not been followed, the auction of the new vend has to be set aside. The Petitioners are not claiming any relief against those persons in whose favour the new vend has been sanctioned. There is already an order made by this Court, which is to the effect that no licence is to be granted to the purchaser of the new vend, provided the Petitioners deposit Rs. 32,000/-said to be the licence fee for the new vend. In case the Petitioners have deposited this amount, it shall be withdrawn by them. As the licence has not been granted to the new purchasers, they are not supposed to carry on the business at Mehatpur. As such the Petitioners do not

claim any relief against the purchasers of the new vend and therefore they are not parties to the writ petition.

17. The writ petition is, therefore, allowed and the order dated 14th November, 1973, of the Respondent No. 1 for auction of country liquor vend at Mehatpur is quashed. As such the auction made for country liquor vend at Mehatpur is also quashed.

18. In the special circumstances of the case, no order is made as to costs.