(2005) 05 AHC CK 0072

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 826 of 2005

Vijay Kumar Singhal APPELLANT

Vs

The State of Uttar Pradesh and Others RESPONDENT

Date of Decision : 24-05-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 164
Uttar Pradesh Number and Location of Excise Shops Rules, 1968 — Rule 2A, 5(2)

Citation : (2005) 4 AWC 3867(2) : (2005) 4 AWC 3867

Hon'ble Judges : Rajes Kumar, J;R.K. Agrawal, J

Bench : Division Bench

Advocate : Shashi Nandan and R.M. Saggi, for the Appellant; S.P. Kesarwani and Neeraj Sharma and S.C., for the Respondent

Final Decision : Dismissed

Judgement

R.K. Agrawal, J.—World over, the 21st Century has ushered a new era in the economic front. In order to attract foreign investment and to take their country towards development and industrialisation, the developing countries with the avowed object to establish it in the rank of the developed countries are vying with each other to open up their economy. The phenomena of global liberalisation is taking place. Most of the developing countries have signed the General Agreement of Tariff and Trade (GATT) and have become members of the World Trade Organisation (WTO). Our country is no exception. It has also opened up its economy except in certain specified fields where security of the nation is involved. It is encouraging competition in business activities in every field as compared to state control. The license Raj is gradually being phased out. However, when it comes to individual interest, persons are yet to get over the feeling of monopoly and find it difficult to adjust to the changing times. To protect their interest they take recourse to all steps which are available including legal proceedings. The present writ petition is one such example, where in order to protect the monopoly of selling foreign liquor, the opening of another shop of retail vend of foreign liquor in the nearby locality is being thwarted by all means.

2. By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioner, Vijay Kumar Singhal seeks the following reliefs:

(i) "issue a writ order or direction in the nature of certiorari calling for record and quashing the impugned order dated 03-5-2005 (Annexure-5 to the writ petition).

(ii) issue a writ, order or direction in the nature of mandamus commanding the respondents not to shift Shamli Shop No. 2, Shamli, Muzaffarnagar between location Minakshi Chowk to Purani Alu Mandi, Civil Lines, Muzaffarnagar City.

(iii) issue any other writ, order or direction as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case.

(iv) Award cost of the petition in favour of the petitioner."

3. Briefly stated the facts giving rise to the present writ petition are as follows:

According to the petitioner, he has been granted licence for retail vend of foreign liquor for a shop situated in Civil Lines, Muzaffarnagar. He was the licencee for the Excise Year 2004-05. For the Excise Year 2005-06 his licence has been renewed. The State Government has parted with its privilege by granting licence for retail vend of foreign liquor in favour of the petitioner for a sum of Rs. 19,83,800/- towards basic licence fee apart from Rs. 16,000/- deposited by him towards renewal fee and Rs. 2,000/- towards process fee. An advertisement was issued for the settlement of foreign liquor shop under the lottery system for the Excise Year 2005-06. It was published on 19th March, 2005 in the local newspaper, namely, ''Shah Times''. Licence for the shop in the name of Shamli Shop No. 2 which was situated in the Nagar Palika area was also advertised for being settled. Two persons, namely, Sri Sanjay Kumar and Sri Satya Vijay had applied for grant of licence for the said shop. The basic licence fee was fixed at Rs. 10,58,000/-. Sri Sanjay Kumar had offered a sum of Rs. 10,58,000/- whereas Sri Satya Vijay at Rs. 10,68,000/-. The licence was settled in favour of Sri Satya Vijay without the draw of lottery which was in contravention of the advertisement itself. It is alleged by the petitioner that an advertisement was issued on 30th March, 2005 by the office of the District Excise Officer, Muzaffarnagar which was published in ''Muzaffarnagar Bulletin'' dated 31st May, 2005 in which it was stated that the request for change of site of Shamli Shop No. 2 was rejected by the Excise Commissioner, U.P. Allahabad and thus the location of Shamli Shop No. 2 will remain the same as notified earlier i.e. between S.C. Palace to Karmu Kheri. However, pursuant to the order dated 3rd May, 2005 passed by the Excise Commissioner, U.P. Allahabad, the shop has been opened by Sri Satya Vijay, respondent No. 6, between Minakshi Chowk and Alumandi in the city of Muzaffarnagar which is very close to the petitioner''s shop thus effecting his business. The order dated 3rd May, 2005 is under challenge in the present writ petition. In the supplementary affidavit filed by Pradeep a salesman of the petitioner, it has been stated that the distance between the petitioner''s shop and the shop of the respondent No. 6 is only 400 meters. The guidelines laid down by the order dated 15th February, 2004 has also not been followed.

4. In the counter affidavit filed by Sri Sri S.N.Sharma on behalf of respondent Nos. 1 to 5, it has been stated that during the Excise Year 2002-03 an advertisement for settling the licenses for retail vend of foreign liquor in the entire district of Muzaffarnagar was published in the Hindi Daily Newspaper ''Dainik Jagran'' on 17th March, 2002 which has a wide circulation in the district of Muzaffarnagar and the adjoining areas. During the Excise Year 2002-03 the petitioner had been granted licence for retail vend of foreign liquor shop known as ''Civil Lines'' Muzaffarnagar to be opened between Roadways Bus Stand and Ajai Hotel and the licence has been renewed from year to year in accordance with the Rules. Thus, location of the shop of the petitioner and his area of operation was between Roadways Bus Stand and Ajai Hotel in the city of Muzaffarngar. By the order dated 3rd May, 2005 the licence has been granted to the respondent No. 6 to open the foreign liquor shop between Purani Alu Mandi and Minakshi Chowk which is outside the area of operation of foreign liquor shop of the petitioner and is at a distance of about 1 km. It has also been stated that the shop known as Shamli Shop No. 2 was earlier settled with Shri Kulwant Rai and Sandeep Kumar and during the year 2004-05 they had opened a model shop in the same locality under the Model Shop Rules and thus the foreign liquor shop ''Shamli Shop No. 2'' became vacant. It had to be settled on daily basis as no application was received for permanent licence in spite of advertisement. This was the position during Excise Year 2004-05. The Excise Commissioner, U.P. Allahabad vide order dated 7th June, 2004 and 8th July, 2004 had directed the District Magistrate Muzaffarnagar to take steps for settling of two shops in lieu of the model shops at a suitable place with the same amount of licence fee. For the Excise Year 2005-06 the shop being Shamli Shop No. 2 was also advertised on 19th March, 2005 in the daily newspaper ''Shah Times''. However, no application was received for the said shop, upon which a report was submitted by the Excise Inspector, Circle II, Shamli to the District Excise Officer to shift the shop in question to Muzaffarnagar Palika Kshetra. The District Excise Officer sent a proposal on 28th March, 2005 to the Excise Commissioner, U.P. Allahabad for shifting of site of Shamli Shop No. 2 from Shamli to Nagar Palika area of Muzaffarnagar. The District Magistrate, Muzaffarnagar, vide letter dated 26th April, 2005 also recommended for the shifting of the site and for opening of foreign liquor shop between Purani Alu Mandi and Minakshi Chowk. The Excise Commissioner, U.P. Allahabad after considering the proposal made by the District Excise Officer and the District Magistrate had approved the new site for Shamli Shop No. 2. It may be mentioned here that another advertisement was puslished on 25th March, 2005 in the daily newspaper ''Suraj Keshri'' inviting application for settlement of licence of the foreign liquor shop of Shamli Shop No. 2 in which it was specifically mentioned that shifting of place of Shamli Shop No. 2 is under

consideration. Pursuant to the aforesaid advertisement dated 25th March, 2005 two applications were received, one of Sri Sanjay Kumar who is the real brother of the petitioner in which he had offered a sum of Rs. 10,58,000/- while other application was made by Sri Satya Vijay, respondent No. 6 ottering a sum of Rs. 10,68000/- which being higher was accepted and the licence in question was settled in favour of respondent No. 6. The applications were filed by Sri Sanjay Kumar, brother of the petitioner as also by the respondent No. 6 on 30th March, 2005.

5. Sri Satya Vijay, respondent No. 6 has also filed a counter affidavit in which it has been stated that recommendation for the change of the site of foreign liquor shop, namely, Samli Shop No. 2, Shamli to a place between Purani Alumandi and Minakshi Chowk, Muzaffarnagar city was known to all the probable applicants including the petitioner and his brother and that is why the petitioner''s brother had also made an application for the settlement of the said shop. The locus to challenge the settlement by the petitioner has also been questioned. Moreover the distance between the two shops is 1.25 kms. and not 400 meters as alleged. The allegations made in the two counter affidavits have been denied by the petitioner in his separate rejoinder affidavit.

6. We have heard Sri Shashi Nandan, learned senior counsel assisted by Sri R.M.Saggi for the petitioner, Sri S.P.Kesarwani, learned standing counsel, appearing on behalf of respondent Nos. 1 to 5 and Sri Neeraj Sharma, learned counsel appearing for respondent No. 6.

7. Sri Shashi Nandan, learned senior counsel for the petitioner submitted that the settlement of licence for retail vend of foreign liquor in respect of Shamli Shop No. 2 was advertised in the daily newspaper ''Shah Times'' on 19th March, 2005 and vide advertisement dated 30th March, 2005 published in ''Muzaffarnagar bulletin'' dated 31st March, 2005, it was specifically mentioned that the site of Shamli Shop No. 2 will remain as notified earlier, i.e. between S.C.Palace to Karmu Kheri therefore, the transfer of site of Shamli Shop No. 2 to a new place between Purani Alumandi and Minakshi Chowk, Muzaffarnagar is wholly illegal and contrary to law. According to him under sub-rule (2) of Rule 5 of the U.P. Number and Location of Excise Shop Rules, 1968 (hereinafter referred to as the 1968 Rules) it is incumbent upon the authorities to record cogent reasons while permitting the change of site of any shop and as in the present case the order dated 3rd May, 2005 does not give any reason whatsoever, the change in the site cannot be permitted. The order, therefore, is liable to be set aside. He further submitted if no reason is mentioned in the order permitting change of the site, it cannot be supplemented by reasons mentioned in the affidavit. In support of his aforementioned submission, he has relied upon a decision of the Apex Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,

8. Sri S.P.Kesarwani, learned standing counsel submitted that the petitioner is a licencee for the retail vend of foreign liquor for the shop situated in the Civil

Lines, Muzaffarnagar whose location and area of operation has been well defined when it was first advertised on 17th March, 2002 being from Roadways Bus Stand to Ajay Hotel. The petitioner is the licencee for the aforesaid shop since the Excise Year 2002-03 and his licence has been renewed every year. Thus the petitioner is well aware about the area of operation and its site. The shifting of Shamli Shop No. 2 from the existing site to the present site between Purani Alumand and Minakshi Chowk in the city of Muzaffarnagar has been necessitated on account of the Shamli Shop No. 2 having been converted into model shop and as no person was coming forward to take out licence for the said shop on the existing site, it had become necessary to shift the site of the shop as basic licence fee for the said shop was huge amount, i.e. Rs. 10,58,000/- without which the State would have suffered a huge loss of Revenue. The site has not been shifted under Sub-rule (2) of Rule 5 of the 1968 Rules and on the other hand it has been done under Rule 2-A of the said Rules. According to him sub-rule (2) of Rule 5 of the 1968 Rules is applicable only in a case where the change of the site is to be done during the currency of the settlement; In the present case the site has not been changed during the currency of the settlement but before the settlement itself. He further submitted that as no application was received for the existing site the advertisement was issued with a specific note that the change in the site is under consideration and the applicants including other persons were well aware about the proposal having been made by the District Excise Officer for changing the site between Purani Alumandi and Minakshi Chowk in the city of Muzaffarnagar. The proposal was sent by the Excise Inspector on 24th March, 2005 and by the District Excise Officer to the Excise Commissioner U.P. Allahabad on 28th March, 2005. Only after coming to know about the proposed new site both the applicants namely, the brother of the petitioner and respondent No. 6 made their application on 30th March, 2005. Thus, it is not correct to say that the change of site has been done illegally or in contravention of any Rules. He further submitted that the brother of the petitioner himself had made application and if the shop had been settled in his favour, the petitioner would not have had any grievance. It is only because the shop has been settled in favour of respondent No. 6 who was the highest bidder, the petitioner has come forward to challenge the same on the ground of business rivalry.

9. According to him the petitioner has no locus standi to challenge the settlement and the present writ petition is not maintainable.

10. Sri Neeraj Sharma, learned counsel for the respondent no .6 while adopting the arguments advanced by Sri S.P.kesarwani submitted that the petitioner being trade rival has no locus standi to challenge the settlement in favour of his client. In support of his objection he has relied upon an unreported decision of this Court dated 17th October, 2003 given in Civil Misc. Writ Petition No. 1169 of 2003 (Anil Kumar Tyagi v. State of U.P. and Ors.).

11. Having given our anxious consideration to the various pleas raised by the

learned counsel for the parties, we find that the Apex Court in a recent judgment in Sai Chalchitra v. Commissioner, Meerut Mandal and Ors. (2005) 3 SCC 683 has held that a person being in the same trade has a right to seek the cancellation of the licence granted to another person if it is in violation of the Act and the Rules. Thus, the decision of this Court in the case of Anil Kumar Tyagi (supra) is no longer a good law. The Apex Court in the aforesaid case has held as follows:

"4. Learned Single Judge, before whom the writ petition came up for hearing, dismissed the writ petition on the locus standi of the appellant to file the writ petition without going into the other questions of law. It was observed that the appellant could not raise a grievance against his rival in the trade particularly when the rival in trade, as in the instant case, was exhibiting cinematograph films much before the appellant was granted the licence. It was held that the appellant had not been denied or deprived of its legal right to exhibit the films and, therefore, he had not sustained any legally protected interest. It was also observed that the order of the Commissioner did not operate as a decision against the appellant as the appellant had not suffered any legal wrong. The writ petition filed by the appellant was held not to be maintainable.

5. After hearing the counsel for the parties, we are of the opinion that the High Court clearly erred in dismissing the writ petition filed by the appellant on the ground of locus standi. The appellant being in the same trade as Respondent No. 3 has a right to seek the cancellation of the licence granted to Respondent No. 3 being in violation of the Act and the Rules."

12. So far as the facts are concerned, we find that it is not in dispute that initially when the settlement of licence for Shamli Shop No. 2 was advertised in daily newspaper ''Shah Times'' published on 18th March, 2005 nobody had applied for settlement of the licence for the said shop. In the previous Excise Year i.e. 2004-05 the shop could not be settled permanently on account of existing shop being converted into a model shop and it was being settled on daily basis. In order to avoid the huge loss of revenue of more than rupees ten lac in a year, the authorities in their wisdom decided to shift the site of the existing shop being Shamli Shop No. 2 to the new site situated between Purani Alumandi and Minakshi Chowk, Muzaffarnagar for which a proposal was sent by the District Excise Officer on 28th March, 2005. The intention to shift the shop in question was also mentioned in the fresh advertisement issued on 25th March, 2005. We take judicial notice of the fact that all the persons in the trade of liquor are well aware about every thing that is going on in the Excise Department in the State of U.P. The proposal for shifting the shop from Shamli to Muzaffarnagar city was thus well known to all concerned including the brother of the petitioner and the respondent No. 6 and that is why they had applied for settlement of licence for the shop. It may be mentioned here that the State Government has exclusive right and privilege to deal in intoxicants. It is well settled by the numerous decisions of the Apex Court that there is no fundamental right to do trade or business in intoxicants and the State, under its regulatory powers, has the right

to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. See, The State of Bombay v. F.N. Balsara, AIR 1951 SC 318 ; Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, The State of Assam Vs. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong, Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others, State of Orissa and Others Vs. Harinarayan Jaiswal and Others, Nashirwar and Others Vs. State of Madhya Pradesh and Others, Lakhanlal and Others Vs. The State of Orissa and Others, Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others, Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others, State of M.P. and Others Vs. Nandlal Jaiswal and Others, Doongaji & Co. (I) v. State of M.P., 1991 (2) SCC 313 ; Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, Rajendra Singh Vs. State of Madhya Pradesh and others, and State of Orissa and others Vs. Narain Prasad and others, etc. etc.,

13. The Apex Court in the case of Government of Maharashtra and Others Vs. Deokar''s Distillery, has once again reiterated the above principle. Paragraphs 43 to 45 of the report is reproduced below :-

"43. Concededly, a citizen of India in view of "a catena of decisions of this Court has no fundamental right to carry on trade or business in potable liquor. The State indisputably has a right to regulate or prohibit business in potable liquor as a beverage or otherwise keeping in view the fact that the same is dangerous and injurious to health and is, therefore, an article which is res extra commercium being inherently harmful. The State is, therefore, entitled to completely prohibit a trade or business in liquor and create monopoly either in itself or in an agency created by it or take over such activities itself. For the purpose of selling the licence it can adopt any mode with a view to maximize its revenue so long as the method adopted is not discriminatory.

44. However, when the State permits trade or business in potable liquor, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business (See Khoday Distilleries Ltd. (supra)).

45. Although a citizen has no fundamental tight to carry on trade or business in potable liquor, but when he is permitted to carry on such business, he would be entitled to claim equal right as against other citizens. In absence of the State imposing any prohibition or monopolizing the business, the same may be carried on by the licensee without being subjected to any discrimination. Such a right although may not be elevated to the status of a fundamental right but all the same it is a right."

14. In "American Jurisprudence", Volume 30, it has been stated at page 538-541 that while engaging in liquor traffic is not inherently unlawful, nevertheless it is a privilege and not a right, subject to government control. This power of control is an incident of the society''s right to self-protection and it rests upon the right of the State to care for the health, morals and welfare of the people. Liquor traffic is a source of pauperism and crime.

15. Thus a person has no fundamental right to carry on trade or business in potable liquor, but when he is permitted to carry on such business he is entitled to claim equal rights granted to other similarly situated persons and can challenge any arbitrary or actions not supported by law.

16. So far as the question regarding recording of cogent reasons for transferring the site as required under sub-rule (2) of Rule (5) of the 1968 Rules is concerned , it is well settled that if a statute provides that an act that has to be done in a particular manner than it has to be done in that manner alone or not at all. The Apex Court in the case of Dhanajaya Reddy v. State of Karnataka (2001) 4 SCC 9 , Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, Mehsana District Central Cooperative Bank Ltd. and Others Vs. State of Gujarat and Others, and Ram Phal Kundu Vs. Kamal Sharma, has held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The Apex Court in the case of Ram Phal Kundu (supra) has held as follows:

"The rule laid down in Taylor v. Taylor that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, was adopted for the first time in India by the Judicial Committee of the Privy Council in Nazir Ahmad v. King Emperor. The question for consideration was whether the oral evidence of a Magistrate regarding the confession made by an accused, which had not been recorded in accordance with, the statutory provisions viz. Section 164 Cr.P.C. would be admissible. The First Class Magistrate made rough notes of the confessional statements of the accused which he made on the spot and thereafter he prepared a memo from the rough notes which was put in evidence. The Magistrate also gave oral evidence of the confession made to him by the accused. The procedure of recording confession in accordance with Section 164 Cr.P.C. had not been followed. It was held that Section 164 Cr.P.C. having made specific provision for recording of the confession, oral evidence of the Magistrate and the memorandum made by him could not be taken into consideration and had to be rejected. In State of U.P. v. Singhara Singh a Second Class Magistrate not specifically empowered, had recorded confessional statement of the accused u/s 164 Cr.P.C. The said confession being impossible, the prosecution sought to prove the same by the oral evidence of the Magistrate, who deposed about the statement given by the accused. Relying uponthe rule laid down in Taylor v. Taylor and Nazir Ahmad v. King Emperor it was held that Section 164 Cr.P.C. which conferred on a Magistrate the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him. This principle has been approved by this Court in a series of decisions and the latest being by a Constitution Bench CIT v. Anjurri M.H. Ghaswala (SCC para 27)"

17. Thus for the shifting a shop during the currency of the settlement cogent reasons are required to be recorded and its absence would vitiate the order.

18. It is also well settled that if an order does not contain reasons it cannot be supplemented by fresh reasons given in the form of affidavit or otherwise. The Apex Court in the case of Mohinder Singh Gill (supra) has held that when a statutory functionary makes an order based on certain grounds its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

19. However, the question is as to whether the order elated 3rd May, 2005 can be said to have been passed in exercise of powers conferred under Sub-rule (2) of Rule 5 of the 1968 Rules or not. For a ready reference we are reproducing the said sub-rule (2) which reads as follows:

"(2)No change in the site of any shop shall, except for every cogent reasons to be recorded in writing shall 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."

20. From a bare reading of the aforesaid sub-rule it is clear that reasons are required to be recorded while permitting change in the site of any shop if it is to be changed during the currency of settlement. In the present case the change in the site has not been done during the currency of the settlement but before the settlement itself. Reliance placed by Shri Shashi Nandan on the advertisement dated 31st May, 2005 regarding settlement of the shop at the existing site is of no help for the reasons that the said advertisement only says that as no order has been received from the Excise Commissioner, U.P. Allahabad regarding change of the site, the site would remain the same. As orders had been received on 3rd May, 2005 the settlement of the shop has rightly been made at the present site. The present transfer of site has been made prior to the settlement of the shop as such, Rule 2A of the 1968 Rules is applicable in the present case, which reads as follows:

"2-A. Determination of the distribution of location of shops and sub-shops.--Subject to the control of the State Government and of the Excise Commissioner and to the limitations expressed in these rules, the distribution and general local of shops and sub-shops shall be determined by the Collector provided that in military cantonments the Collector shall exercise this power only with the consent of the Officer commanding the Station.

21. In our considered view the Excise Commissioner has not acted arbitrarily or illegally while transferring the site of Shamli shop No. 2.

22. Moreover, we find that the affidavit in support of the writ petition has been affirmed by Sri Sanjay Kumar Singhal, who is the real brother of the petitioner and one of the unsuccessful applicants. Thus, the present writ petition appears to be a cover to indirectly protect the interest of his brother who for reasons best known has not challenged it directly. Thus, we are of the considered opinion that the present writ petition is nothing but an abuse of the process of the Court. In such circumstances the writ petition filed by the petitioner is not maintainable.

23. In view of the foregoing discussions, we do not find any merit in the writ petition. It is dismissed with exemplary cost. As the petitioner has abused the process of the Court we assess the costs at Rs. 50,000/- payable by the petitioner out of which half of the amount shall be payable to the respondent No. 6.

