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(1970) 11 MP CK 0002

Madhya Pradesh High Court (Indore Bench)

Case No: M.P. No. 69 of 1969

Ganesh Prasad and Baboolal and Company		APPELLANT
	Vs	
State of Madhya Pradesh and another		RESPONDENT

Date of Decision: Nov. 2, 1970

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (1972) MPLJ 672

Hon'ble Judges: H.R. Krishnan, J; G.L. Oza, J

Bench: Division Bench

Advocate: M.A. Khan and S.D. Sanghi, for the Appellant; S.L. Dubey, for the Respondent

Final Decision: Allowed

Judgement

H.R. Krishnan, J.

The petitioners are a firm of excise contractors who had taken in open auction the right to sell country-liquor in 21 shops in course of the financial year 1969-70, the lot being known as "Indore City Shops". On the Government''s withdrawal of permission to sell at one out of the 21 shops, namely, that at Palika, the licensees got into a huff and wrote to the Government refusing to work the licenses in respect of the 20 others as well, and actually closed the shops with effect from the first June 1969, and at the top of it demanded compensation from the Government. On receipt of this letter the Collector prepared to auction the permission for sale at these 20 shops "at the risk and loss" of the original licensees, that is the petitioners. There was some bargaining and private representations by the latter; but ultimately these 20 shops were auctioned, and as it fetched a smaller sum the licensees were called upon to make good the shortage. After certain adjustments and credits the actual amount demanded from the petitioners-original licensees-was of the order of

the four lakhs.

Upon that they have come to this Court with the instant petition urging that the Government''s action was illegal and while they the licensees were justified in refusing to operate the license for the 20 shops because of the Government''s withdrawing or closing down the 21st shop, Government, for its part, was not justified in holding the petitioners responsible for the shortage in the second auction. At later stages, though not in the petition itself, it was urged that either there was no order of cancellation of the original licenses which alone could justify a resale at the risk of the first licensee, or in the alternative, even if there was a cancellation order it had been made by the Excise Commissioner while the authority granting the license was the Collector and therefore it was illegal. Again, that it had been made without the petitioners having been called upon to show cause and for that reason also it is inoperative as against them. Finally, that the cancellation order had not been communicated to them and they were not aware that such an order had been made and accordingly they could not be held responsible for the shortage in the resale.

While conceding that there was a separate remedy by suit the petitioners urged that it was not as expeditious or convenient as a petition under Article 226 of the Constitution, proving the illegality of the order, and praying to this Court to quash the direction that the petitioners should make good the shortage failing which it would be realised from them in the usual manner, that is, as arrears of land revenue.

The points for decision are, firstly, procedural,-viz., whether this is an appropriate case for the exercise by this Court of its powers under Article 226 of the Constitution, in other words, whether on the no controversial or admitted facts there has been such patent illegality or impropriety on the part of the administration in cancelling the licenses and holding the resale that we can straightway hold the claim for the shortage to be unjustified and direct the administration not to realise it; or whether this involves Comverse''s of such kind that can be properly solved only in a suit. Secondly, on the merits, if we are to investigate the legality of the cancellation and resale, whether the petitioners have established any such basic illegality or impropriety as would justify us in holding that the claim for the shortage should not be made.

The facts leading to this are the following: In the City of Indore and the areas immediately adjoining there are 21 places at which Government has permitted the sale of country liquor. The entire lot are collectively known as "Indore City Liquor shops," but actually quite a number of them lie in the district outside the city. The right to sell country-liquor in accordance with the directions and rules made by the Government is leased out to the highest bidder at public auctions. In February 1969 the auction for the sale year April 1969 to March 1970 was held and the petitioners'' bid of Rs. 2231001 was accepted. To operate this lease the Collector gave licenses

mentioning the 21 shops and providing minimum guarantee sale separately at each of them. It is an interesting question whether this was one single lease and one license to operate it or as many leases and licenses as there were shops. Actually there was a written permit in respect of each of the shops and a separate minimum guarantee for each of them; but the licensing fee mentioned on each of the permits was the total of Rs. 2231001. It would be question of some practical importance if and when the department were called upon to fix compensation u/s 32 of the Excise Act for the closure or withdrawal of any one of liquor of the shops how the licensing fee attributable to that shops alone should be worked out,-whether as a simple arithmetical fraction, or the proportion borne by the minimum guarantee for that shop to the total of the minimum guarantees for all the shops put together, or some other formula. This question has been touched upon in the arguments, but as will presently emerge, a direct answer to it is unnecessary for the purpose of this case. Any way, the licensees started operating all the 21 shops paying some part of the licensing fee to the Government, collecting certain quantities of country liquor from Government, and selling them at the respective shops.

About a month or six weeks after the beginning of the finance year Government ordered presumably in implementation of a policy of prohibition that the shop at Palika-one out of the 21 shops should be closed down. The closure of this shop or in effect the withdrawal of the license for this shops was on one of the grounds "other than those contained in section 31 of the Excise Act."" In other words, it was a withdrawal that the Government could make u/s 32 subject to compensation according to the formula mentioned there. But the petitioner, instead of either waiting for the Government to offer compensation or asking for compensation for the closure of one out of the 21 shops, sent a violent representation to Government copy of which has been included in the petition-in effect refusing to operate licenses for all the shops and in addition demanding compensation from Government. That letter itself has been phrased as a notice for a suit but the intention of the petitioners was not to operate any of the licenses, and actually at the end of the month of May they stooped operating the licenses on the 20 shops, the license for the 21st shop, namely, the Palika shop having been already withdrawn in the middle of that month.

Strange and hasty as was the reaction on the part of the licensees, the Government''s own reaction was rather confused. At the time of filing the petition the petitioners have attached a notice by the Collector who is the licensing authority advertising a resale;-the present licensees, that is the petitioners, having refused to operate the licenses and closed the shops the Collector was going to reaction them at the risk and loss of the licensees. Besides publicly advertising this, the Collector also served copies of it on the petitioners. The resale, however, was not held on the first occasion mentioned, but was held after some postponement; even then the amount realized was far short of the original Rs. 2231001. Already the petitioners had made some payments and had in addition certain stocks of country liquor

already paid for by them ; when the Collector took over those shops for departmental management those stocks were sold to the new licensees and the price was adjusted in favour of the petitioners. After making these deductions the net shortage was found to be of the order of four lakhs and the Collector is taking steps for the realization of this amount from the petitioners. It appears some attachments had already been made. The petitioners came to this Court,-with the present petition and on furnishing security the realization was stopped for the duration of the proceedings. But it is clear that they are to be realized as arrears of land revenue and normally a suit for a declaration that the demand is illegal would not be entertained unless the actual claims are deposited.

All that was divulged in the petition and in the return at the first instance is what is mentioned above. But in course of the argument the petitioners wanted to know for the first time whether there had been a cancellation of the licenses in the manner required in section 31 of the Excise Act as a preliminary to a resale under sub-section (4) (b) of the same section. The parties were given opportunity to adduce further material and it came out that between the petitioners'' closing the shops in the end of May and the actual resale in course of June certain events had taken place. They have been incorporated in the memorandum prepared by the Excise Commissioner on 2-6-1969 and produced by the State as evidence that the licenses in favour of the petitioners had been formally cancelled for one of the breaches mentioned in section 31 (1) (b). After sending the "notice" annexure B categorically refusing to operate the licenses sometime in the third week of May the petitioners or their representative waited on two of the Ministers; at the first instance they offered to run the shops though they had given notice that they would not run them. The Excise Commissioner felt that by closing the shops from 1-6-196!) in spite of the assurance that they would run them the petitioners had committed a breach in terms of section 31 (1) (b) of the Act and accordingly called for g, cancellation of the licenses. The Excise Commissioner therefore cancelled the licenses and directed the Collector to put the shops to resale at short notice. As it was, the Collector was actually thinking of resale even before the order of the Excise Commissioner, but the resale that did take place was well after the cancellation dated 2-6-1969. The relevant advertisement or notice of the resale was served on the petitioners: but no copy of the cancellation order one sent to them, and the notice of resale itself did not indicate that their had been a cancellation. If one read those notices he would form the impression that the resale was being held because the licensees had closed the shops and categorically refused to operate the licenses. Having received the notice of the resale the petitioners sent more than one telegram to the Collector stating that while there was no objection to the resale they the licensees-could not be saddled with the risk.

The Indore group shops cannot be auctioned on their risk.

While at this, the petitioners make the following alternative averments : First, there had been no cancellation order at all and the memorandum now produced is a fake, fabricated for the purposes of this case. We may say even here that it is not usual for this Court when the administration produces its order made in due course of official business to doubt it or treat it as a forgery. If a material issue arises whether a particular order produced by Government had been made in due course of official business or is a forgery the proper forum for its decision is a regular civil Court in coarse of a suit with the recording of evidence, and not the High Court in extra-ordinary jurisdiction. We will certainly examine the legality and the propriety of the order : but when an order of Government is produced we would presume its genuineness. The second ground urged is that this order having been made by the Excise Commissioner, it is invalid and inoperative because the licenses had been granted by the Collector. We will examine this presently. The third alternative is that assuming that the Excise Commissioner, as the superior or the "approving" authority over the Collector, was competent to cancel the licenses granted by the Collector, still this order of cancellation is illegal and improper for two reasons; first, that the licensees had not been afforded an opportunity of showing cause. This is essential because a license for the sale of liquor is not a bare permission which the administration can grant or withdraw at its sweet choice, but one for which the licensee pays and the cancellation of which renders him liable to make good the shortage in resale, and in natural justice he should be afforded an opportunity to show cause. The second disability urged is that after the order was made it was not communicated to the petitioners; even while the petitioners were being cautioned that the resale would be at their risk and their loss they were not told that the resale was a consequence of cancellation u/s 31. Had they been apprised of the cancellation they might have taken some steps to avoid or minimize the possible losses. They might, for example, have agreed to operate the licenses or taken steps that the bid in resale did not fall very low. For these reasons the prayer is that the order for realisation of the shortage should be set aside.

Point No. 1:-We will briefly examine whether in the circumstances set out above a writ petition is a proper procedure or the petitioners should be directed to go to the civil Court with a regular suit. Both parties have cited case law which by now is clear and non-controversial, and accordingly it is necessary only to set out the broad principles instead of listing the citations. Where the general law or the special statute concern provides a regular remedy by way of appeal or civil suit, the High Court should at the first instance notice this fact and consider whether that remedy is such as to be practical and convenient. Courts have not accepted the extreme view that whenever statute provides some remedy the party is barred from seeking the assistance of the High Court in writ jurisdiction. What they have laid down is a principle of reasonableness and convenience,-whether in the circumstances it would be reasonable and fair to drive the aggrieved party to a regular civil suit or some such remedy? If, for example, the case involves decision on controversial facts it is

clear that assistance under Article 226 should be refused, for the simple reason that investigation of controversial facts is not practicable in such a proceeding. On the other hand, where the facts are clear and non-controversial and we are called upon only to find out the legality and propriety of the order from non-controversial or admitted facts the party should be given a hearing in a proceeding under Article 226 even though a more elaborate and delayed and costly proceeding is possible in the civil Courts. In a case like this it is possible for the petitioners to file a civil suit either for refund after making the payment or for a declaration of the illegality of the demand subject to paying or providing sufficient security according as the civil Court directs. That remedy is far too costly and elaborate for a party who comes with a straight and categorical assertion that the order of Government is illegal and improper. It is possible in this case for this Court after hearing the parties to give a direct answer to this question. Accordingly we propose to investigate the merits of the allegations.

The order of 16th May closing down Palika shop: Sections 31 and 32 empower the licensing authority to cancel or suspend or withdraw the licenses. Cancellation and suspension are u/s 31 and are essentially of the nature of penal action, the licensee having done something amounting to a breach which alone should justify the licensing authority in ordering cancellation or suspension. But a withdrawal is another matter. In the instant case the permit regarding the Palika shop was withdrawn and not cancelled, the justification being the broad policy of Government in the matter of prohibition. It is not for a Court to sit in judgment over the wisdom of Government if it chooses to apply the principle of prohibition to a very limited area, say, one union or circle. Section 32 provides for the withdrawal for any causes other than those specified in section 31. When the Government does it the licensee is entitled to a remission of a sum equal to the amount of fee payable in respect of the license for 15 days. In a case like the instant one where the licensing fee is a total for 21 shops without any apportionment, there may be some practical difficulty for the administration and the licensee to arrive at an agreed figure for the amount of remission. But a modus operandi can be worked out and in the ultimate analysis the Excise Commissioner would fix the figure. But the point to note is that the withdrawal of the permit for one out of the 21 shops while entitling the licensee to a remission, the figure to be worked out ultimately by the Excise Commissioner, did not in the least manner justify his refusing to operate the 20 other permits. Thus in refusing to operate them, and in closing down the 20 shops the petitioners were definitely in the wrong and the administration was entitled to take note of it and pass appropriate orders subject - if it was necessary - to a hearing being given to the licensee before the final orders. It is also clear that while returning the permits and closing the 20 shops the petitioners were not surrendering the license in the manner provided in section 32. For such a surrender the licensee should pay the fee due for the remainder of the license period or make some arrangement with the Excise Commissioner under which a part of this is remitted. There was neither a

prayer to permit surrender nor one for the remission of the fees payable. So we can get out of our minds any idea of the surrender of the licenses. It was just a plain and categorical refusal on the part of the licensees, that is the petitioners, to operate the licenses. Prima facie it was a breach. Refusal to operate the license need not be set out separately. Section 31 lists from (a) to (g) the various breaches possible; (b) out of them is a general heading. There can be no doubt that closing down the shops and refusing to operate the license is a breach in terms of section 31 (1) (b).

The procedure followed by the Administration: While upto this point the administration was on strong ground certain irregularities have crept in after this stage. When there is a breach by the conduct of the licensee himself the administration can terminate the license; but it would be only fair to call upon the licensee to show cause or to explain why he should not be taken at his own word, and the breach visited with the consequence under the statute, namely, cancellation and resale at the licensee''s risk and loss; case-law has been cited and, as can be expected, they cover cases where the administration gets information of a breach and thereupon takes steps to cancel the license. In all such cases it was absolutely necessary for the administration to call upon the licensee to show cause why in view of the information before the administration the license should not be cancelled. As already noted these licenses are not bare permission but permissions involving the licensee in considerable monetary stakes. It has been urged on behalf of the administration, that where the licensee is being taken at his own word, and has himself stated he is not going to operate the licenses it would be unnecessary for the administration to afford an opportunity for showing cause as long as it does not import in its order any other breach. It can be argued that licensees having said or done something,- and admit having done so,- no useful purpose would have been served by calling upon them to show cause. But in the instant case, obscure as the wording of the order is, it is clear the Excise Commissioner was noticing not merely the categorical refusal of the licensees to operate the license, but also a breach of the undertaking which he thought the licensees had given to the two Ministers-in which circumstances and on what terms is not clear :
The licensee has met the M (SRD, and M S (SRD) and has expressed his desire to run the shops despite having given notices not to run the shops. Since they have closed the shops from 1-6-69 despite these assurances the following orders are passed after consulting the Collector Indore on telephone.

We are not concerned as law courts with the propriety or otherwise of Minister''s personal interference in the departmental administration. But as this incident does show, such interference, though perhaps with good intentions, gives rise to confusion. In effect the licensee is being dealt with for his going back on some promises he had given to the Ministers. There is no written record and it should have been only fair that the Excise Commissioner before passing the cancellation order should have given the licensees an opportunity to explain the circumstances

in which they had on the one hand desired to run the shops and again gone back upon the offer. The whole thing was obscure and all the more was it necessary for the Excise Commissioner to give an opportunity to the licensees. Even if we ignore what seems to have passed between the licensees and the Ministers the categorical refusal to operate the license had been made and now the administration wants to impress on the licensees the consequence of such refusal to operate the licence. To say the least it would have been reasonable if not legally mandatory in the circumstances for the administration to have called upon the licensees to show cause why the licenses should not be cancelled u/s 31 with the patent consequence of a resale at their risk and loss.

Non-communication of the order to the licensees :-There has been a double omission on the part of the administration in this regard. Not only was there not a show cause notice but also was not the licensee informed at any time either orally or by transmission of a copy of the order that there had been a cancellation. Even if we contend that the notice to show cause was unnecessary because the licensee was being taken at his own word it was at least necessary to inform him that the licenses had been cancelled and the resale was not just an arbitrary act on the part of the authorities but a legal consequence imposing on the licensee certain monetary risk. This would have enabled him to come out with further explanations, if he had any. We gave the learned Government Advocate time to ascertain from the department whether the cancellation order of 2-6-1969 was in any manner communicated to the licensee, the learned Government Advocate has been fair enough to concede that there had been no such communication. What he has urged, however, is that the notice about the resale had itself sufficient indication that the licenses had been cancelled. We are unable to agree. The first notice about resale was issued by the Collector on the 31st May, that is, before the cancellation order had been made, and in fact before the actual closing down by the licensees though on that date it was clear that the licensees were going to close down on 1-6-1969. The later notices of resale which were made after the cancellation are in exactly the same terms. In other words, it was not intended in any of them that the licensees should be made aware of a formal cancellation order made either by the Collector or by his superior-"approving" authority- the Excise Commissioner. They had in fact been treating it as just a routine matter. If anything, these notices would create the impression that the resale was under contemplation independently of any cancellation which of course would be illegal. But the point to note is that given such a notice without any indication of a cancellation order, the licensee would be lulled into a sense of security that the proposed resale while in terms "at his risk and loss", was one which could not be at his risk and loss" because there had been no cancellation.

We have considered what the consequences are of this double omission on the part of the administration. In brief, the Government was competent to withdraw the license of one of the shops on the ground of policy. The most the licensee was

entitled to in that regard was a remission of a certain proportion of the license fee to be determined ultimately in case of difference by the Excise Commissioner. He had no justification to stop operating the rest of the licenses and closing down the 20 other shops. Prima facie it was a breach clause (b) of Section 31 (1) of the Excise Act and could be the ground for cancellation of the license provided the licensees had been given a chance of showing cause or if nothing more had been noticed by the administration than the categorical refusal to work the licenses, at least information that the license was being cancelled. Once there was a cancellation which can be considered legal and proper a resale at the risk and loss of the old licensee would be justified. In the instant case the cancellation was defective for two reasons ; first, the failure to offer the licensee a chance of showing cause; even this could be overlooked if the administration noticed nothing more than the bare refusal to operate the licenses. But in the instant case it has noticed certain obscure matters happening between the two Ministers of the Government and the licensees and having noticed them failed to give a chance to the licensees to explain. Another omission was, failure to inform the licensees that their licenses were being cancelled. This is essential because on being informed of it the licensees would be put on guard and would take steps either to reopen the shops or so to conduct themselves in the resale as to minimise the possible loss which would ultimately fall on their head. The basis for this decision is that a license or permission of this kind is not merely a pure leave granted by Government, but a leave for which the licensees have paid and on the revocation of which may be liable to further monetary penalty by having to make good the shortage if any during the resale. Thus, though the administration had a good prima Jack case for cancellation, and though a cancellation order by the Excise Commissioner would not be invalid because the license had been granted by a subordinate authority, still by a double omission the administration has provided a handle to the licensees successfully to challenge the demand for the making good of the shortage on resale.

According the petition is allowed and it is directed that the administration may not seek to realize the shortage demanded from the petitioners. In the special circumstances of this case the parties shall bear their own costs.