

CIVIL MISCELLANEOUS

Before D. Falshaw, C. J., and A. N. Grover, J.

THE KARNAL DISTILLERY CO., LTD.,—*Petitioner.*

versus

THE STATE OF PUNJAB AND ANOTHER,—*Respondents.*

Civil Writ No. 472 of 1964.

1964

Oct.,

26th.

Punjab Excise Act (I of 1914) — S. 21 — Distillery Licence in Form D-2 — Conditions of — Clause 9 — Financial Commissioner competent to determine licence by giving one year's notice in writing to the distillery — Notice given but before its expiry kept in abeyance — Whether can be revived later or Financial Commissioner must give fresh notice of one year for determining the licence — Notice issued by the Excise and Taxation Commissioner to whom powers of Financial Commissioner delegated — Whether valid.

~~Falshaw, C.J.~~

Held, that if a notice to determine the licence is given to a distillery under section 21 (b) of the Punjab Excise Act, 1914 and clause 9 of the conditions of the licence in Form D-2 and the period fixed

by the notice expires while the notice has been held in abeyance by the Government, that notice cannot be revived and it will be necessary for the Financial Commissioner to issue a fresh notice fixing a minimum period of one year in case the Government again decides to determine the licence.

Held, that the notice to determine the licence issued by the Excise and Taxation Commissioner, to whom the powers of the Financial Commissioner have been delegated under section 9 of the Punjab Excise Act, is valid.

Petition under Articles 226 and 227 of the Constitution of India praying that an appropriate writ, order or direction be issued restraining the respondents from interfering with the company's right to conduct and continue the business of distillation and manufacture of liquor as hitherto and beyond 1st April, 1964, and the order contained in Memo, dated 19th of August, 1963 that the Distillery will be closed down and will not be allowed to function on its present premises after 31st of March, 1964 and the licence in Form D.2 shall also be determined from 1st April, 1964 be quashed.

M. L. SETHI AND R. S. AMMOL, ADVOCATES, for the Petitioners.

S. K. KAPOOR, ADVOCATE-GENERAL AND D. S. NEHRA, ADVOCATE, for the Respondents.

ORDER

FALSHAW, C.J.—This is a petition filed under Article 226 of the Constitution by a company, the Karnal Distillery Co. Ltd., against the State of Punjab and Exise and Taxation Commissioner. Falshaw, C.J.

The petitioner is an old established distillery company which is at present operating under a licence in the form D-2 granted by the Financial Commissioner on the 5th of November, 1941. It had a licence long before that. There seems to be no doubt that the distillery, which is situated in the town of Karnal, has long been regarded as a nuisance and for years the Government has been trying to have it removed to some place away from the town. Under the terms of the licence, apart from the powers given to the Financial Commissioner to determine the licence on account of any breach of its conditions, there is a provision in clause 9 of the licence under which the

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Financial Commissioner may by notice in writing determine the licence on the expiry of a period of one year, and the then Excise and Taxation Commissioner to whom the powers of the Financial Commissioner had been delegated under section 9 of the Excise Act caused a notice, copy annexure 3, dated the 4th of May 1959 to be served on the company under section 21(b) of the Excise Act and clause 9 of the licence determining the company's licence as from the 15th of May 1960. However, shortly before the year of notice was due to expire the Excise and Taxation Commissioner sent the letter, copy annexure 4, on the 4th of May, 1960 to the company which reads—

“It has been decided by Government that the notice issued under section 21(b) of the Punjab Excise Act (I of 1914) and condition No. 9 of the distillery licence, in form D-2, held by the Karnal Distillery Company Ltd., Karnal, and served on the Managing Director, for closure of the distillery on the 15th of May, 1960, in case of its failure to shift from the present site should be kept in abeyance until further order.”

A further letter, copy annexure 5, dated the 13th of August, 1960, was issued in which a reference was made to the previous notice and its being placed in abeyance; and the company was now informed that unless the distillery was moved to some place outside the municipal limits of Karnal the licence would be determined on the 25th of January, 1961.

However, the Government seems to have pursued a vacillatory policy in the matter, and the letter, copy annexure 6, dated the 25th of January, 1961 was sent to the company informing it that the notice terminating the licence was again being kept in abeyance. A further communication, copy annexure 7, dated the 28th of August, 1962 again informed the company that action with regard to shifting of the distillery from its present site was to be held in abeyance and another communication copy annexure 18, dated the 3rd of November, 1962, perhaps throws some light on the Government's reasons for its apparent

indecision in the matter. The main portion of this document reads—

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"The shifting of the distillery has been held in abeyance till the phased programme for the enforcement of prohibition in the State is worked out."

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I do not propose to cite in detail the contents of the voluminous correspondence between the company and the Excise and Taxation Commissioner which has been annexed to the writ petition, it being sufficient to say that the company was repeatedly explaining its difficulties in the matter of shifting the distillery elsewhere without assistance from the Government in the form of acquiring a site and obtaining the necessary railway facilities, and it is clear that the Government had agreed to help the company by acquiring an alternative site for it, and had actually gone so far as to select such a site and had issued notices under sections 4 and 6 of the Land Acquisition Act. This site was near the railway station at Rathdhana in the district of Rohtak. The correspondence was continuing regarding all these details and the advance payment by the company of the money required for the acquisition of the land when the communication, copy annexure 2, dated the 19th of August, 1963, was sent by the Excise and Taxation Commissioner to the company. It reads—

"The notice issued under section 21(b) of the Punjab Excise Act, 1914, (I of 1914), and condition No. 9 of the licence in form D-2 held by you and served on you for closure of the Karnal Distillery on the 15th of May, 1960, in case of your failure to shift the distillery from the present site, was kept in abeyance from time to time. The above order is modified and you should shift the distillery from the present site by the 31st of March, 1964 failing which your distillery will have to be closed down and the distillery will not be allowed to function on its present premises after the 31st of March, 1964. The licence in form D-2 shall also be determined from the 1st of April, 1964, unless it is considered necessary to cancel or determine the licence at an earlier date under condition No. 7 of your licence."

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 Faishaw, C.J. Some of the correspondence regarding the acquisition of land to which I have referred above was continuing months after this communication was received, but it does not seem that any concrete step was taken to acquire the land for the new site or place the company in possession of it, and the present writ petition was filed on the 19th March, 1964, challenging the notice which was to determine the licence as from the 1st of April, 1964.

When the case was first argued before us it was thought that some opportunity should be given for the parties to arrive at a reasonable settlement and the hearing was adjourned. The efforts to reach a settlement have, however, proved unsuccessful and there appears to be no chance of a settlement by agreement. The utmost concession which the Government was prepared to make was that the company should be allowed two years to build and set in operation a new distillery on another site, the company being left entirely to make its own arrangements regarding the acquisition of the site and other facilities, whereas the company was insisting on its being allowed two years after it had been placed in possession of the new site to be acquired by the Government. Some inkling came from the learned Advocate-General regarding the reasons for the Government's reluctance to carry out the acquisition of the site which had been selected at Rathdhana, as it was said that Rohtak is the only district in the Punjab where complete prohibition is now in force and it would obviously lead to complications if a licensed distillery were to be set up in that district. It is astonishing that nobody thought of this objection before, and the inference seems justified that different influences have been pulling different ways.

The question is, therefore, to be decided whether the notice dated the 19th of August, 1963, is an invalid notice under the provisions of the Excise Act and clause 9 of the licence.

The crux of the matter appears to be whether the notice issued on the 4th of May, 1959, determining the licence as from the 15th of May, 1960, could legally be kept in so-called abeyance and then ultimately revived again in August, 1963, changing the date of the determination of the licence to the 31st of March, 1964, or whether

once the date fixed in the original notice, the 15th of May, 1960, had expired, that notice could not be treated as in abeyance, but must be treated as withdrawn, and then, when the Government finally decided to take action in the matter again, a fresh notice fixing a period of at least a year from the date of the service of the notice had to be issued.

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The question is whether there is such a legal concept as keeping in abeyance a notice terminating a licence of this kind on a fixed date. Neither counsel was able to cite any authority whatever on this point, and the reason for this is not far to seek. The reason is that no Government, so far as I know, has ever behaved in this peculiar manner by issuing a notice, keeping it in abeyance, reviving it again, relegating it to abeyance more, and finally reviving it more than twice within the period when the licence was determined. The nearest legal analogy would appear to be found in the provisions of the Transfer of Property Act relating to determination of a lease. Section 111 of this Act sets out the method by which a lease of immovable property is determined and clause (h) reads—

“On the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.”

This is qualified by the provisions of section 113 which reads—

“A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.”

From these provisions it is clear that if a notice determining a lease is given by the landlord, it would be treated as waived or withdrawn if the landlord had acted in the way in which the Government has acted in this case regarding the notice determining the distillery's licence. Although a lease of immovable property is not quite the

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same as a licence issued by the Financial Commissioner under the provisions of the Excise Act to operate a distillery, it seems to me that the principle embodied in section 111(h) and section 113 of the Transfer of Property Act is one which can suitably be applied to a notice determining a licence under the terms of one of the clauses of the licence, and in the absence of any direct authority I am of the opinion that once the period fixed by the original notice had expired while the notice was held in so-called abeyance by the Government, it became necessary, when the Government finally decided to determine the licence, to issue a fresh notice fixing a minimum period of one year. Therefore, the notice issued on the 19th of August, 1963, purporting to revive the notice of 1959, which had been kept in abeyance and fixing the 31st of March for the determination of the licence, i.e., a little over 18 months, was an invalid notice and the licence was determined until a valid notice has been issued. The period fixed therein has expired.

The learned Advocate-General put forward what appears to me an astonishing argument that in fact it was illegal on the part of the authorities to keep the original notice in abeyance, and, therefore, the licence of the petitioner company was determined on the 15th of May, 1960 and no further notice was necessary. I use the word 'astonishing' advisably in view of the facts which I have set out above regarding the Government's efforts to assist by the acquisition of an alternative site on behalf of the petitioner company and its regular acceptance of the annual licence fee since the 15th of May, 1960, when according to this argument the licence was determined and also because no such plea was ever taken in the written statement. The argument is in fact quite counter to the stand taken in the written statement, which is that it was legal to keep the original notice in abeyance and to revive it in August, 1963 by merely fixing a fresh date for determining the licence. In my opinion this argument ought to never have been raised, and it cannot be allowed.

In view of the decision that the notice, dated the 19th of August, 1963 was invalid and that a fresh valid notice will have to be issued in order to determine the licence it is hardly necessary to go into the other matters raised. I

may, however, deal briefly with one or two of the points also raised on behalf of the petitioner. The first of these was that both the original notice and notice issued in August, 1963, were invalid because they were issued to the petitioner by the Excise and Taxation Commissioner. Reliance was placed on the provisions of section 36 of the Excise Act which begins with the words, "subject to such restrictions as the State Government may prescribe, the authority granting any licence, permit or pass under this Act may cancel or suspend it." The argument is that the licence under which the distillery is at present operating was granted by the Financial Commissioner, and therefore, the Excise and Taxation Commissioner, not being the officer, who granted it, cannot cancel it. The reply to this argument is that section 9 of the Act provides that the State Government may by notification appoint an Excise Commissioner and, subject to such conditions and restrictions as it may deem fit, may invest him with all or any of the powers conferred on the Financial Commissioner by this Act, and there is a notification, dated the 19th of March, 1956, to the effect that in exercise of the powers conferred by section 9 of the Punjab Excise Act (I of 1914) an Excise Commissioner, who will be designated as Excise and Taxation Commissioner, Punjab, has been appointed and invested with all the powers conferred on the Financial Commissioner by the said Act. The argument is that once the Excise and Taxation Commissioner has been invested with all the powers of the Financial Commissioner under the Act, any order passed by him in exercise of these powers is not an order of the Excise and Taxation Commissioner, but an order of the Financial Commissioner. On this point reliance is placed on the decision in *Roop Chand v. State of Punjab and another* (1). The matter dealt with in that case was the delegation of the powers of the Government both under section 21(4) and section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, and the question was whether when an officer delegated with the powers of the Government under section 21(4) had passed an order, any further order dealing with the same matter could be passed under section 42 by the officer delegated with the powers of the Government under

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that section. It was held that this could not be done, the *ratio decidendi* being that where the State Government has under section 41(1) of the Act delegated its powers given under section 21(4) to hear appeals to an officer, an order passed by such officer is an order passed by the State Government itself, and not an 'order passed by any officer under this Act' within the meaning of section 42. This appears to answer the argument of the learned counsel for the petitioner and I do not consider that either of the notices is invalid on the ground that it was issued by the Excise and Taxation Commissioner.

The only other point which needs to be mentioned is an argument based on a sentence contained in the written statement of the respondents. In paragraph 5 of the petition an allegation was made *inter alia* of *mala fides* against the Excise and Taxation Commissioner who was said to have proceeded from prejudice, animosity and improper motives. It was in reply to this allegation that the following passage in reply to paragraph 5 was inserted in the written statement:—

"The notice was, however, kept in abeyance,—*vide* directions contained in D.O. No. E. & T. (VI)-60/1667, dated the 28th of April, 1960, from the Deputy Secretary to Government, Punjab. It was revived under orders of Government as contained in their memorandum No. 3687-E & T(VI)-63/5256, dated the 9th of August, 1963. Thus the order was legal and in conformity with the terms and conditions of the licence. The allegations of *mala fides* are denied as baseless."

The argument is that since according to the provisions of the Act it is for the Financial Commissioner to grant or determine licences of this particular kind it was clear from the references to Government's having directed the keeping of the notice in abeyance and its revival that the Financial Commissioner was not acting in this matter in exercise of his Independent judgment.

In the first place this plea was neither taken in the writ petition, nor even in the replication filed for the

purpose of dealing with points raised in the respondents' written statement, and, therefore, it cannot be allowed to be raised. Even otherwise I do not think there is much force in it, since according to section 8(2) of the Excise Act the general superintendence and administration of all matters relating to excise are subject to the control of the State Government, and it is clear in the present case that the question involved was not merely the granting or determining of a licence, but a question of policy regarding the location of the site of the distillery. The Government was anxious to move the distillery away from the town of Karnal, but had obviously held the notice in abeyance while matters of prohibition policy were being considered. It was apparently thought that it would be useless to allow the petitioner to erect a new distillery on another site if prohibition were to be enforced, and the long delay appears to have been due to the fact that phased prohibition, as it was called, was under protracted consideration. The decision to hold the notice in abeyance and its revival was clearly a matter of policy which was for the Government and not the Financial Commisisoner to decide, and this would clearly fall within the scope of superintendence mentioned in section 8(a).

However, the petitioner succeeds on the principal argument and I would accordingly quash the notice of the 19th of August, 1963, as being invalid. I consider it is a case in which the parties can properly be left to bear their own costs.

A. N. GROVER, J.—I agree.

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