

Ghaio Mall & Sons

Vs

The State of Delhi & Others

Civil Appeal No. 481 of 1957

(CJI S. R. Dass, N. H. Bhagwati, B. P. Sinha, K. Subha Rao, N. H. Wanchoo JJ)

30.09.1958

JUDGMENT

DAS C.J. -

The facts material for the purpose of disposing of this appeal by special leave are shortly as follows : The appellants, before us claim to have been dealers in foreign liquor since 1922 and to have, before the partition of the country, held licenses in forms L-1, L-2, L-10 and L-11 at Amritsar, Sialkot and Multan. The appellants allege that in 1945 they had also secured a license in Form L-2 in respect of some premises in Chawri Bazar, Delhi, but that the operation of the said license had to be suspended on account of the unsuitability of the Chawri Bazar premises. Then came the communal riots in the wake of the partition of the country and that license could not be renewed. In 1951 the appellants applied to the Chief Commissioner, Delhi, (Ex. 1) for licenses both in Forms L-1 and L-2 in respect of Karolbagh or at any place in Delhi. On May 17, 1951, the Home Secretary to the Chief Commissioner by letter (Ex. 2) conveyed to the appellants the sanction of the Chief Commissioner to the grant to them of license in Form L-2 in respect of Karolbagh, Delhi. This license has ever since then been renewed from year to year. In 1954 a vacancy arose in respect of a license in Form L-2 on account of the closure of the business of Messrs. Army and Navy Stores of Regal Buildings, New Delhi, which held such a license. Accordingly on January 21, 1954, the appellants submitted an application (Ex. 4) to the Deputy Commissioner for the grant of a foreign liquor license in Form L-2 in the aforesaid vacancy. In that application the appellants stated, inter alia, that they were "prepared to operate it in such a part of Delhi as may be determined by the authorities". Not having received any reply for nearly 3 months and apprehending that interested persons were endeavouring to cause hindrance in the matter of the granting of the license to them on the plea that the appellants had no premises in Connaught Place, the appellants, on March 11, 1954, wrote a letter (Ex. 5) to the Chief Commissioner in which, after pointing out that Karolbagh where they had their L-1 license was in New Delhi, the appellants stated : "In any case, we have already made it clear in our application which we made to the Deputy Commissioner, Delhi on the 21st January, 1954, that we are prepared to operate this license in any locality which the authorities might deem proper". This letter was acknowledged by the Personal Assistant to the Chief Commissioner who, on March 15, 1954, stated (Ex. 6) that the "application No. Nil dated 18-3-1954 on the subject of grant of foreign liquor license in Form L-2" had been forwarded to the Home Secretary, Delhi State, for disposal. Exhibit 7 to the petition is an important document. It is a letter dated May 21, 1954, addressed by the appellants to the Excise and Taxation Commissioner stating that "with a view to avoiding any possible objection as to locality etc., we have secured suitable premises also in the Connaught Place area, New Delhi, in which area has occurred a vacancy on account of the surrender of this license by Messrs. Army and Navy Stores". The letter concluded with the request that early orders be passed on their application. On July 30, 1954, the appellants

wrote a long letter (Ex. 8) to the Chief Commissioner claiming justice in the matter of their application for the L-2 license. In the second paragraph of that letter it was stated : "It is now being acclaimed by the party concerned and their friends that they have succeeded in removing the only obstacle that stood in the way of their getting the said L-2 license by so arranging matters that our application has been kept back by the Excise Commissioner and that only five or six other applications of firms without much merit in them have been forwarded to you in order that they might have a smooth sailing as against those applicants". The appellants prayed that the Excise Commissioner might be directed to forward all records concerning the case to the Chief Commissioner so that the latter might be able to arrive at a just conclusion and they asked for a hearing to explain their claim fully. A copy of this letter appears to have been endorsed to the Excise Commissioner on August 13, 1954, by the Under Secretary, Finance. The Excise Commissioner then wrote a letter No. 295/C/54 dated August 31, 1954, to the Under Secretary, Finance, a copy of which was produced by the learned Solicitor General at the hearing before us. In this letter the Excise Commissioner explained why the application of the appellants was not considered by him to be a good and proper one and stated that reasons why, according to him, the applications of two other applicants, including Messrs Gainda Mall Hem Raj (respondent No. 5), should be given the preference. In the penultimate paragraph of this letter of explanation it was stated : "In the end it may also be added that the applicant has no premises in New Delhi and as such he had no claim. The license in Form L-2 is granted in respect of certain premises." The conclusion was that "under the circumstances there is no force in the application of Messrs. Ghaio Mall and Sons." It is apparent that the Excise Commissioner did not remember that the appellants had, by their letter (Ex. 7) of May 21, 1954, addressed to him, stated that they had secured suitable premises also in the Connaught Place area, New Delhi. Be that as it may, on September 11, 1954, the appellants wrote another letter (Ex. 9) to the Chief Commissioner pressing their claim. In this letter reference was made to their letter to the Excise Commissioner of May 21, 1954, (Ex. 7) in which it had been stated that the appellants had secured suitable premises in the Connaught Place area in New Delhi. A copy of this letter was sent to the same Under Secretary, Finance, to whom the Excise Commissioner had written his letter of August 31, 1954, alleging that the appellants had no premises in New Delhi. Exhibit 9A is the postal acknowledgment by the Under Secretary, Finance, of the letter containing the copy of the appellants' letter but it does not appear from the record that the Under Secretary, Finance, thought it necessary to remind the Excise Commissioner that the appellants were maintaining that they had secured suitable premises in New Delhi. This was followed by a letter (Ex. 10) from the appellants to the Excise Commissioner intimating that an application had been made to the Collector on September 11, 1954, for a change of their premises for L-1 license from Karolbagh, New Delhi to H. 32 Connaught Circus, New Delhi. Although this letter had been written in connection with the change of L-1 license, it certainly did specify that the appellants had secured the premises H-32 Connaught Circus. The personal Assistant to the Excise Commissioner replied (Ex. 11) that the matter was under consideration. There was a reminder (Ex. 12) sent to the Excise Commissioner on December 8, 1954, about the change of L-1 license from Karolbagh to Connaught Circus. It appears from papers, for the first time produced before us at the hearing of this appeal, that on September 3, 1954, a note was put up by the Under Secretary, Finance, before the Finance Secretary, Shri S. K. Mazumdar. At the forefront of this note we find the following statement : "The applicants (Messrs. Ghaio Mall and Sons) have no premises in Connaught Circus. For these reasons, if for no other, their claim has to be rejected." The note concluded with the recommendations that, in case it was decided that the vacancy should be filled, the recommendation of the Excise Commissioner should be accepted, that is to say, the L-2 license should go to Messrs. Gainda Mall Hem Raj (Respondent No. 5). On September 8, 1954, the Finance Secretary simply endorsed the file to the Chief Minister who, on September 14, 1954, recorded the following order on the file :

"Commissioner's recommendation may be accepted". There is nothing on the record produced before us to indicate that the matter was sent up to the Chief Commissioner or that his concurrence was obtained under section 36 of the Government of Part C States Act (No. 49 of 1951). On December 14, 1954, the Under Secretary, Finance, wrote to the Excise Commissioner a letter which was for the first time produced at the hearing before the High Court and to which detailed reference will be made hereafter. On January 15, 1955, the appellants were informed that the charge applied for by them in respect of their L-1 license had been allowed. The appellants were not told anything about the rejection of their application for L-2 license, but evidently they came to know that the L-2 license, for which a vacancy had arisen on account of the closure of Messrs. Army and Navy Stores, had been granted to Messrs. Gainda Mall Hem Raj (respondent No. 5). On December 24, 1954, the appellants wrote severally to the Home Secretary (Ex. 14) Finance Secretary (Ex. 15) and the Under Secretary, Finance (Ex. 16) asking for a copy of the order or orders granting license to Messrs. Gainda Mall Hem Raj and/or rejecting their own application for L-2 foreign liquor license. Three postal acknowledgments (Exs. 16A, 16B, 16C) relating to those three letters are on the record. The appellants got no reply from any of them.

Not having received any reply the appellants on December 21, 1954, moved the Punjab High Court (Circuit Bench) under Art. 226 for appropriate writs or orders, but as it was not then quite clear whether the order granting the license to Messrs. Gainda Mall Hem Raj had actually been made, the Circuit Bench summarily dismissed that writ application as premature. There were proceedings taken by the appellants to obtain leave to appeal first from this Court under Art. 136 which was adjourned sine die and then from the High Court under Art. 133, but it is not necessary to go into further details of those proceedings. After the appellants had definitely ascertained that the L-2 license had been granted to Messrs. Gainda Mall Hem Raj, the appellants, instead of proceeding with their application for leave to appeal to this Court, filed a fresh writ petition in the High Court (Circuit Bench) out of which the present appeal has arisen.

In the present writ petition the appellants have impleaded 7 respondents, namely, (1) The State of Delhi, (2) The Chief Minister, Delhi, (3) The Excise and Taxation Commissioner, Delhi, (3A) Secretary, Delhi State, (3B) Under Secretary, Finance, (4) The Chief Commissioner, Delhi and (5) Messrs. Gainda Mall Hem Raj. The principal grounds urged by the appellants in support of this petition are that the applications of the appellants and of the other applicants had never been placed before the Chief Commissioner who, under r. 1 of Ch. 5 of the Delhi Liquor License Rules, 1935, framed under section 59 of the Punjab Excise Act (Punjab 1 of 1914), as extended to Delhi, was the only competent authority empowered to grant L-2 license for wholesale and retail vend of foreign liquor to the public and that the Chief Commissioner had never applied his mind to the applications and did not in fact make any order and that jurisdiction and power which were not vested in them by law and that their decision, if any, had not received the concurrence of the Chief Commissioner, as required by the proviso to section 36 of the Government of Part C States Act. The appellants pray for the issue of appropriate writs, orders or directions (a) quashing and setting aside the order of granting L-2 license to respondent No. 5, (b) directing the respondent No. 4 (the Chief Commissioner) to hold proper enquiry regarding suitability of premises etc., to hear both the parties and to decide the application of the petitioner before taking up the application of the 5th respondent. There is a prayer in the nature of a prayer for further and other reliefs and there is the usual prayer for costs.

A written statement verified by the affidavit of Shri S. K. Majumdar, the Finance Secretary, has been filed on behalf of respondents 1 to 4. In paragraph 5 of that written statement it has been averred that all the applications including the appellants' application were in fact considered; but it

is significant that it has not been stated by whom the applications had been considered. Messrs. Gainda Mall Hem Raj have filed an affidavit only stating that they had been informed that the Chief Commissioner had sanctioned the grant of the license to them. The appellants, with the leave of the High Court, filed a consolidated affidavit setting out facts including the fact that although they had written to the Home Secretary, the Finance Secretary and the Under Secretary, Finance, asking for a copy of the order granting the license to Messrs. Gainda Mall Hem Raj, no copy of the order or even a reply to the letters had been received. In reply to the consolidated fresh affidavit an affidavit affirmed by the Finance Secretary (Shri S. K. Majumdar) has been filed. In paragraph 13 of this affidavit it has been stated that, since no appeal lies against the order of the Chief Commissioner, the question of supplying a copy of the order to the appellants does not arise. Statements of this kind cannot but leave an impression in the mind of the Court that the respondents were not squarely dealing with the case made by the appellants, but were evading the production of the order of the Chief Commissioner which it was obviously insinuated not to have been made at all. In order to compel the respondents to produce the original order, if any, the appellants made an application to the High Court supported by an affidavit. Paragraph 2 of the petition which was quite precise reads thus :

"2. That with reference to paragraphs 7 & 8 of the written statement and paragraphs 10 and 11 of the affidavit of the Finance Secretary it is submitted that the respondents have not filed any proper return to the rule issued by the Court inasmuch as the original order sought to be quashed with nothings etc., which led to those orders have been withheld by the respondents. The respondents have not even stated that the Chief Commissioner, Delhi, who is admittedly the only competent authority for the grant of an L-2 license passed any orders himself. The replies are evasive. It is not stated who considered the application of the petitioner i.e. whether it was a clerk who was doing the nothing or whether the Collector or the Finance Secretary or the Chief Minister who did it."

On this application the High Court on April 11, 1955, made the following order :

"Let the order rejecting the petitioners' application be brought to court by an officer or official of the department concerned."

The Finance Secretary filed a reply paragraph 3 of which was in the terms following :

"3. That I have carefully gone through the relevant papers. The case of the petitioner was considered along with that of other applicants and it was finally decided to issue the license in favour of Messrs. Gainda Mall Hem Raj. It was not considered necessary to send an intimation of rejection to all those who had not been granted the license in question. There is therefore no specific order rejecting the petitioner's application as ordered to be produced by the Hon'ble Court."

Although it was obvious what order of the Chief Commissioner the appellants were insisting on being produced, the respondents were prompt in taking advantage of the wording of the High Court's order directing the production of the order rejecting the appellants' application and stated that there was no specific order rejecting the appellants' application. This is nothing short of what may be called swearing by the card. The deponent overlooks the fact that the order granting the license of Messrs. Gainda Mall Hem Raj was in effect tantamount to a rejection of the appellants' application. The appellants moved the High Court again on August 8, 1955. After stating how the

respondents were evading the real issue, the appellants in paragraph 5 of the petition categorically stated that their case was that the Chief Commissioner, Delhi, the competent authority, had not passed any order sanctioning the license in favour of Messrs. Gainda Mall Hem Raj and prayed that the respondents be directed to file the original record of the case including the actual sanction for the grant of the license to Messrs. Gainda Mall Hem Raj. On August 19, 1955, the Court ordered the relevant records to be called for. The only thing the respondents could, at long last, produce before the High Court was the letter of the Under Secretary, Finance, to the Excise Commissioner dated December 14, 1954, to which reference has already been made.

Learned Solicitor-General appearing for respondents 1 to 4 pointed out that the order which is sought to be quashed was the grant of L-2 license for the year 1954/1955 which has long expired and suggested that the writ petition and consequently the appeal had become infructuous. It appears that the usual practice in such matters is that once a license in Form L-2 is granted by the Chief Commissioner, it is almost automatically renewed by the Collector from year to year, unless, of course, the licensee is found guilty of breach of any excise rule and that in such cases of renewal there arises no question of vacancy entitling any outside competitor to apply for a license in Form L-2. That being the position - and this is not in dispute - it is vitally important for the appellants that we should consider the validity of the grant of the L-2 license for 1954/1955 to Messrs. Gainda Mall Hem Raj, for the case of our holding that the order granting the same was a nullity on account of its not having been made by the competent authority, the vacancy caused by the closure of business by Messrs. Army and Navy Stores will still remain to be filled up and the appellants will yet have a chance of having their application considered by the competent authority. We accordingly proceeded to hear the appeal on merits.

The principal question urged before us, as before the High Court, is whether the Chief Commissioner of Delhi made any order under r. 1, of Ch. 5 of the Delhi Liquor License Rules, 1935. It is significant that although the Chief Minister, the Excise Commissioner, the Secretary of Delhi State, the Under Secretary, Finance, and the Chief Commissioner have been impleaded in the present proceedings as respondents Nos. 2, 3, 3A, 3B and 4 respectively and although they or at least some of them could have deposed to the material facts of their own personal knowledge, none of them ventured to file an affidavit dealing with the categorical statement of the appellants that no order had at any time been made by the Chief Commissioner for granting the L-2 license to Messrs. Gainda Mall Hem Raj or rejecting the appellants' application. Instead of adopting the simple and straight forward way these respondents have taken recourse to putting up the Finance Secretary to give obviously evasive replies which are wholly unconvincing. It is needless to say that the adoption of such dubious devices is not calculated to produce a favourable impression on the mind of the court as to the good faith of the authorities concerned in the matter. We must also point out that when a superior court issues a rule on an application for certiorari it is incumbent on the inferior court or the quasi-judicial body, to whom the rule is addressed, to produce the entire records before the court along with its return. The whole object of a writ of certiorari is to bring up the records of the inferior court or other quasi-judicial body for examination by the superior court so that the latter may be satisfied that the inferior court or the quasi-judicial body has not gone beyond its jurisdiction and has exercised its jurisdiction within the limits fixed by the law. Non-production of the records completely defeats the purpose for which such writs are issued, as it did in the present case before the High Court. We strongly deprecate this attempt on the part of the official respondents to by-pass the court. We are bound to observe that the facts appearing on the records before us disclose a state of affairs which does not reflect any credit on the administration of the erstwhile State of Delhi. We must, however, say, in fairness to the learned Solicitor-General, that he promptly produced the entire records before us during the hearing of this appeal.

As already stated the principal question, on which arguments have been addressed to us, is whether the Chief Commissioner had made any order for granting the L-2 license to Messrs. Gainda Mall Hem Raj. The High Court answered the question in the affirmative on two grounds, namely, (1) that the Finance Secretary had made an affidavit stating that the decision regarding the grant of the license of Messrs. Gainda Mall Hem Raj had been taken by the Chief Commissioner, and (2) that the learned Solicitor General stated in specific terms that the matter had in fact been decided by the Chief Commissioner. On the facts as they now emerge it appears to us that the High Court was under some misapprehension on both these points. We have already summarised all the statements and affidavits affirmed by the Finance Secretary and it is quite clear that the only thing that he did not say was that the Chief Commissioner had considered the applications or made any order. The learned Solicitor General, with his usual fairness, also informed us that except relying on the letter of December 14, 1954, he did not say that the Chief Commissioner had taken any decision in the matter. This being the position we are free to go into the matter and come to our own decision thereon.

The records, including the documents now produced before us, do not show that the applications had ever been placed before the Chief Commissioner. There is nothing in the files showing any order or note on the subject made or signed or initialled by the Chief Commissioner. What transpires is that the Excise Commissioner (respondent No. 3) had by his letter dated August 31, 1954, recorded the reasons why the appellants' applications could not be entertained, one of the reasons being that they had no premises in the Connaught Place area in New Delhi, that a note was then put up by the Under Secretary, Finance, on September 3, 1954, suggesting that the appellants' application should be rejected, if for nothing else, for their not having any premises in New Delhi (which according to the appellants was not a correct statement in view of their letters referred to above) and that the L-2 license should be granted to Messrs. Gainda Mall Hem Raj, that the Chief Minister on September 14, 1954, made an order on the file accordingly and finally that the Under Secretary, Finance, wrote the letter dated December 14, 1954, to the Excise Commissioner intimating that the Chief Commissioner had been pleased to approve the grant of the license to Messrs. Gainda Mall Hem Raj. There is nothing on the record to show that the concurrence with the order of the Chief Minister was obtained from the Chief Commissioner. The inexorable force of the aforesaid facts, now appearing on the record, inevitably led the learned Solicitor General to concede that, on the records as they are, it is not possible for him to say that the Chief Commissioner had actually made the order, but he contends that, in view of the letter of the Under Secretary, Finance, dated December 14, 1954, the fact that the Chief Commissioner had made the order could not be questioned in any court. In other words the learned Solicitor General submits that letter embodies the order of the Chief Commissioner and the court cannot be asked to go behind it and enquire whether the Chief Commissioner had in fact made the order.

In order to succeed in this contention the learned Solicitor General has to satisfy us that this letter is the embodiment of the Chief Commissioner's order and that it has been duly authenticated. On the second point he is clearly right, for under a rule made on March 17, 1952, by the then Chief Commissioner, in exercise of powers conferred on him by section 38(3) of the Government of Part C States Act (49 of 1951), an Under Secretary is also a person competent to authenticate an order or instrument of the Government of Delhi. The only question that remains for us to consider is whether the letter in question is the order of the Chief Commissioner. The letter on which the entire defence of the respondents rests is expressed in the following words :

# "DELHI STATE SECRETARIAT, DELHI STATE No. F. 10(139)/54-G A & R  
Dated the 14th December, 54. From Shri M. L. Batra, M.A., P.C.S., Under Secretary

Finance (Expenditure) to Government, Delhi State. To Shri Dalip Singh, M.A., I.R.S.,  
Commissioner of Excise, Delhi State, Delhi. Subject :- Grant of L-2 License.##

Sir,

With reference to your letter No. 295/C/54 dated the 31st August, 1954, on the above subject, I am directed to say that the Chief Commissioner is pleased to approve under Rule 5. 1. of Delhi Excise Manual Vol. II the grant of L-2 license of Messrs. Gainda Mall Hem Raj, New Delhi, in place of the L-2 License surrendered by Messrs. Army & Navy Stores, New Delhi. Necessary License may kindly be issued to the party concerned under intimation to this Secretariat.

# Yours faithfully, (Sd.). M. L. Batra, Under Secretary, Finance (Exp.) to  
Government, Delhi State.##

In the first place it is an inter-departmental communication. In the second place it is written with reference to an earlier communication made by the Excise Commissioner, that is to say, ex facie, it purports to be a reply to the latter's letter of August 31, 1954. In the third place the writer quite candidly states that he had been "directed to say" something - by whom, it is not stated. This makes it quite clear that this document is not the order of the Chief Commissioner but only purports to be a communication - at the direction of some unknown person - of the order which the Chief Commissioner had made. Indeed in paragraph 7 of the respondents' statement filed in the High Court on February 2, 1955, this letter has been stated to have "conveyed the sanction of the Chief Commissioner of the grant of license to the 5th respondent". A document which conveys the sanction can hardly be equated with the sanction itself. Finally the document does not purport to have been authenticated in the form in which authentication is usually made. There is no statement at the end of the letter that it has been written "by order of the Chief Commissioner". For all these reasons it is impossible to read this document as the order of the Chief Commissioner.

Learned counsel for Messrs. Gainda Mall Hem Raj relied on our decision in *Dattatreya Moreshwar Pangarkar v. The State of Bombay* ([1952] S.C.R. 612). In that case there was ample evidence on the record to prove that a decision had in fact been taken by the appropriate authority and the infirmity in the form of the authentication did not vitiate the order but only meant that the presumption could not be availed of by the State. That decision did not proceed on the correctness of the form of authentication but on the fact of an order having in fact been made by the appropriate authority and has thus no application to the present case where it is conceded that the Chief Commissioner had not in fact made or concurred in the making of an order granting the license to Messrs. Gainda Mall Hem Raj.

In the view we have taken it is not necessary for us to consider whether the action taken under the Excise Act and the rules thereunder was a judicial or an executive action, for even if it were of the latter category the letter of December 14, 1954, cannot be treated as an order properly authenticated to which the presumption raised by Art. 166 of the Constitution will attach. For reasons stated above we hold that there was no valid order granting the L-2 license to Messrs. Gainda Mall Hem Raj and that in the eye of the law the vacancy arising on the closure of the business by Messrs. Army and Navy Stores still remains unfilled. The applications of the appellants and other applicants were for a grant of L-2 license for 1954/1955. That year has gone past and accordingly in the changed circumstances we direct the Chief Commissioner to fill up the vacancy caused by the closure of the business by Messrs. Army and Navy Stores by inviting applications from intending licensees including the appellants and Messrs. Gainda Mall Hem Raj and granting the same to the most

suitable party. We, therefore, accept this appeal, reverse the order of the High Court and issue a mandamus to the effect aforesaid and also direct the respondents Nos. 1 to 4 to pay the appellants' costs of this appeal and of the proceedings in the High Court out of which this appeal had arisen. Messrs. Gainda Mall Hem Raj are to bear their own costs throughout.

Appeal allowed.

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