IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CR No.4594 of 2016 (O&M)
Date of decision:01.08.2016

M/s Narendra Singh ... Petitioner

Vs.

M/s Discovery Wines and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Chetan Mittal, Senior Advocate with
Mr. Abhilaksh Grover, Advocate
for the petitioner.

Mr. Arun Jain, Senior Advocate with
Mr. Varun Parkash, Advocate
for the caveator/respondents

AMIT RAWAL J.

Petitioner-defendant No.5 has filed the present revision petition against the impugned orders dated 26.05.2016 and 11.05.2016 passed by the Courts below, whereby, suit instituted at the instance of the respondent-plaintiffs claiming relief of mandatory injunction directing the defendants to measure 'To' and 'Fro' motorable distance between the location of L-2 Liquor Vend of the plaintiffs located in Phase-V, Udyog Vihar, Gurgaon and marked by letters ABCD in the annexed site plan as well as the distance of L-2 Liquor Vends located at Moulsary Avenue, DLF Phase-III, Gurgaon and village Nathupur U-Block, DLF Phase-III, Gurgaon and marked by letters EFGYH and IJKL respectively in the aforesaid site pan, from DLF Cyber Hub in accordance with applicable Excise Policy after giving prior notice to them and consequential relief of permanent injunction restraining the defendants from acting upon in any manner the measurements allegedly conducted on 12.04.2016 with a further direction to the defendants restraining them from issuing any permit or granting any sanction on the basis of the aforesaid measurement in favour of L-2 Liquor Vends located at Moulsary Avenue, DLF Phase- III, Gurgaon and village Nathupur U-Block, DLF Phase-III, Gurgaon.

Mr. Chetan Mittal, learned Senior Counsel assisted by Mr.Abhilaksh Grover, Advocate appearing on behalf of petitioner/defendant No.5 submits that the order dated 26.05.2016 passed by the Lower Appellate Court dismissing the miscellaneous appeal of petitioner/defendant No.5 filed against the order dated 11.05.2016 of the trial Court, whereby, an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure (hereinafter referred to as "CPC") at the instance of the respondent-plaintiffs has been allowed in the form of mandatory injunction.

He further submits that the entire controversy in the present suit is in respect of Clause 9.8.9 of the Excise Policy of Haryana State for the year 2016-17, whereby, the rights to supply were given to the two (2) nearest retail outlets of IMFL L-2 bar licenses located nearby. The grievance of the plaintiff before the Court was that he was not given an opportunity in implementation of the aforementioned clause of the policy while effecting the measurement for the purpose of supply of IMFL from L-2 to the bar licensees, in essence, procurement of stock of liquor/IMFL by the Bar & Restaurants/Eating Joints having L-4/L-5 situated at DLF Cyber Hub. In support of his aforementioned contention, he relies upon Clause 9.8.9 of Excise Policy, copy of which has been attached which reads thus:-

"9.8.9 Procurement of Stock:

Bar licensees, L-4/L-5/L-12C/L-12G, shall be allowed to get their supplies from any two nearest retail outlets of IMFL (L-2) of the district in which L-4/L-5/L-12C/L-12G license(s) is/are located. However,if these two L-2 either belong to the same person/group or make a cartel to exploit the situation, then they can procure liquor from a third nearest L-2 of different person/group as approved by the DETC (Excise). The collector may fix rates whenever necessary. In case costly brands above Rs.500 per bottle or wines are not made available to L-4/L-5/L-12C/L-12G by L-2 licensee of the district then the bar licensee can make a written request to the DETC (Ex.) concerned. The DETC (Ex.) after obtaining a non-availability certificate from the L-2 concerned, shall be required to make requisite arrangement for supply of such brands from any other L-2 of the district or from any other L-2 of the State in case it is not available in the district.

L-2 vend can charge upto 1-% profit on his sale to L-4/L-5 after taking into account his purchase price and incidence of license fee or the retail sale being charged by the L-2, whichever is less. In case, L-2 charges exorbitant rates from bars (L-4/L-5/L-12C/L-12G, L-10E), collector may determine the reasonability of rates and pass an appropriate order keeping in view the EDP rates of the brands, all Government levies and incidence of the retail outlet and his profit margin.

The charging of exorbitant rate by L-2, more than the rates prescribed above, shall constitute a breach case against the licensee. The Collector may compound such breaches by imposing a penalty of not less than Rs.50,000/- for the first breach and double the amount of previous breach for subsequent breaches.

Note: In determining the nearest vends, the sum of 'To' and 'Fro 'motorable distance between the location of the licensee and the L-2 vend shall be the criterion."

He further submits that interim measure in the suit seeking the aforementioned relief, on an application filed by the petitioner, the trial Court, vide order dated 22.04.2016 (Annexure P-7), passed the following order which reads thus:-

"After having heard the arguments advanced by Ld. Counsel for plaintiffs and learned GP for defendants, this Court is of the considered opinion that no doubt compliance of clause 9.8.9 of Excise Policy is mandatory in nature and in order to implement the same, DETC Gurgaon Haryana constituted a committee who gave his report. Ld. Counsel for plaintiff argued that said report is prepared at the back of plaintiff and same was prepared just to give benefit to L-2 Maulsary Avenue. From the perusal of the annexure 21-38, it transpires that all the restaurants/food chains situated at Cyber Hub Gurgaon gave their undertaking that for the requirement of stock of liquor, they exit from exit road of (Parking 1 or

parking 2 or N.H No.8) for getting permit sanctioned by concerned authorities of excise and after getting the stock from unauthorized L-2 with permit, they enter from gate no.3 of cuber hub. The defendants also placed on file a letter signed by authorized signatory of DLF Cyber City Developers wherein it is mentioned that gate no.3 adjacent to parking no.2 is authorized for entering and exit of vehicles engaged by the respective L-4/L-5 licences or delivering liquor to their premises at Cuber Hub Gurgaon. It is clear from report Annexure 40 that measurement from Nathupur, Maulsary Avenue, Udyog Vihar-IV from Cyber Hub Gurgaon not done in the presence of plaintiffs who are going to affect from said measurement/report annexure-40. So, for the purpose of proper adjudication and fair trial, it is ordered that DETC excise Gurgaon shall constitute a committee including one ETO who shall prepare his report regarding determining the nearest vend, the sum of 'To' and 'Fro' motorable distance between locations and licences and L-2 vends.

At this stage no interim injunction is passed in favour of plaintiff and it would be appropriate to pass any interim relief after receiving the report from DETC Excise Gurgaon regarding distance. It shall made clear that abovesaid report shall be prepared by giving prior notice to the plaintiffs and in their presence. Report of DETC Excise Gurgaon is awaited for 28.04.2016. If report not submitted by DETO Excise Gurgaon, *on the date fixed, then interim injunction be decided on the date fixed."*

He submits that as per the order, the official defendants presenting the department placed on record a letter signed by authorised signatory of DLF Cyber City Developers Ltd. mentioning therein that gate no.3 adjacent to parking no.2 is authorised for '**Entering'** and '**Exit'** of vehicles engaged by the respective L-4/L-5 licences for delivering liquor to their premises at Cyber Hub Gurgaon and keeping in view the fact that earlier measurement recorded in the report dated 12.04.2016, was not done in the presence of the plaintiffs and ordered that DETC Excise Gugaon to constitute a committee including one ETO who shall prepare the report regarding determining the nearest vend, i.e., the sum of **'To'** and '**Fro'** motorable distance between locations of licences and L-2 vends. The aforementioned committee conducted the inspection and submitted the report dated 27.04.2015 and gave the details of distances which read thus:-

Sr. No.	*Name of Vend*	*Vend Code*	*Distance from Gate No.3 (Material Gate) DLF Cyber Hub to the vend.*	*Distance from the vend to Gate No.3 (Material Gate) DLF Cyber Hub.*	*The sum of to the fro distance (In Kms)*
1	Nathupur (U Block DLF-III)	GRGFL0174	1.5 KMs	2.1 KMs	3.6 KMs
2	Moulsary Avenue Road	GRGFL0165	3.00 KMs	1.1 KMs	4.1 KMs
3	Udyog Vihar Phase-V	GRGFL0083	3.5 Kms	1.9 KMs	5.4 KMs

He has further drawn the attention of this Court to submit that authorised representatives of the respondent-plaintiffs had raised objection on the measurement criteria by stating that Gate No.3 is being used for entry of material or liquor as per DLF report and **'To'** and **'Fro'** does not mean common point for measurement and thus, it should be measured from the

Exit Gate near parking no.1 as starting point.

Against the aforementioned report, (Annexure P-9), the respondent-plaintiffs moved an application dated 28.04.2016 (Annexure P-10) by making prayer that the concerned official of the departments be asked to measure the motorable distance of the L-2 Vend of the plaintiffs located in Udyog Vihar, Phase V, Gurgaon marked by letters 'ABCD' in the site plan appended with the plaint and as well as, two other L-2 Liquor Vends located at Moulsary Avenue, DLF Phase-III, Gurgaon and village Nathupur U-Block, DLF Phase III, Gurgaon marked by letters 'EFGH' and 'IJKL' respectively, from the Exit Gate of Parking 2 and Exit gate of parking one and exit gate of National Highway Number 8 (NH8). He further submits that the aforementioned application was contested by the petitioner-defendant and the trial Court, vide order dated 3.5.2016 (Annexure P-12), disposed of the application by holding that it would give a clear picture, in case, distance of all three L-2 from Cyber Hub is mentioned for the purpose of adjudication of the controversy, resultantly, the DETC Excise Gurgaon was again directed to constitute a committee excluding the members, who already prepared and submitted report dated 28.04.2016 shall shall also consist of one ETO in the Committee and measurement of all gates of Cyber Hub from all three L-2s was ordered to be done under videograph expenses to be borne by the plaintiff. The report of measurement was submitted by the aforementioned Committee, vide its report 5.5.2016 (Annexure P-13) and the chart giving details of the 'To' and 'Fro' distances in kilometers (kms).

He further submits that even as per the aforementioned chart, the distances for Nathupur U Block Vend, 'To' and 'Fro' Entry Material Gate No.3 and Exit Material Gate 3 are considered as same as these gates are adjacent /next to each other is far less than that of plaintiff is 3.7 and 3.67 k.ms vis-a-vis of plaintiff which is 4.1. Despite the aforementioned report, the trial Court did not refer to the same report and implore and its own guess work while passing the impugned order ignoring the contents of the letter dated 21.04.2016 (Annexure P-8)) wherein it has been specifically mentioned that handling and transportation of liquor shall be done solely by respective L-4 and L-5 licensees and that gate no.3 adjacent to parking no.2 is authorized for entry and exit of vehicles engaged by respective L-4/L-5 licensees for delivering liquor to their premises at DLF Cyber Hub, Gurgaon.

Despite the aforementioned fact and the letter written by the DLF Cyber City Developers Limited to the Deputy Excise and Taxation Commissioner (Excise), Gurgaon, the application of the respondent-plaintiffs was allowed and even the report dated 5.5.2016 has not been taken into consideration for the purpose of **'Entry'** and **'Exit'** of the vehicles from gate No.3, the distance of L-2 license of the petitioner is the nearest to L4/L-5 licensees located at DLF Cyber Hub, Gurgaon. He further submits that the Courts below instead of adhering to the report of the committee had gone into arena of surmises and conjectures by introducing the expression "common sense". In this regard, he had drawn the attention of this Court to para No.13 of the order passed by the Civil Judge (Junior Division), Gurgaon. The same reads thus:-

"*From the above said certificates it is clear that gate no.3 is* *material gate and used by the L-2 Vendors and L-4/L-5 licences for the purpose of entry. It is not disputed that in order to ascertain the two nearest liquor vends "'To' and 'Fro'motorable distance" has to be considered and it is also not disputed that "To and fro" is not defined in Excise Policy 2016-2017 so it is well settled law that when any thing is not defined in Act/Statute/Policy then "common sense" will prevail. In the case in hand there are many gates of DLF Cyber Hub and it is common sense that one person entered from a particular gate should not exit from same gate if others gates are available. In the case in hand there are three exit gates as per the reports of defendants no.1 to 4 so gate no.2 is taken as material gate for the purpose of entry of Liquor for supply of L-4/L-5 licenses or by L-4/L-5 licenses and thereafter loading/unloading they can be exist from any of three (Exits) gates."*

He further submits that during the course of the arguments, the respondent-plaintiffs submitted their own calculations, which the Court below erroneously and perversely relied. He has also drawn the attention of this Court to the site plan Ex.P3 to demonstrate the location of L-2 Vends, i.e., of the plaintiffs, petitioner-defendant No.5 and defendant No.6. He further submits that the licenses are only valid for a period of one year, though the Lower Appellate Court had disposed of the appeal by issuing directions to the trial Court to decide the suit within a period of two months and the petitioner started his business owing to the allotment of licence L-2

Vends w.e.f. 1.4.2016 but owing to the interim order, the petitioner is suffering irreparable loss which cannot be compensated in terms of money as the Courts below have erroneously overlooked the clause aforementioned, i.e., 9.8.9 and the Note prescribly definition/explanation of the word "nearest" thus, impugned orders are wholly fallacious and perverse.

He further submits that the next date before the trial Court is 1.8.2016 and the report came that file was not received by the Lower Appellate Court and there is every possibility that the respondent-plaintiffs may delay the proceedings of the suit under the garb of the interim order. He further submits that the suit was not maintainable in view of the provisions of Section 14 of the Punjab Excise Act, 1914 as applicable to the State of Haryana as an appeal shall lie from an original or appellate order of any Excise Officer, in such cases or classes of cases and to such authority as the State Government shall by notification declare. If at all, the respondent-plaintiffs were aggrieved of the order dated 21.4.2016, they could have availed the remedy of appeal under Section 14 of Excise Act instead of invoking provisions of Section 9 of the Code of Civil Procedure. He further submits that the interim relief, so granted, tantamounts to decreeing the suit, which cannot be passed, in view of the catena of the case law on this point.

Per contra, Mr.Arun Jain, learned Senior Counsel assisted by Mr.Varun Parkash, Advocate for the caveator-respondents has drawn the attention of this Court to Para 15 of the order of the trial Court while deciding the interim application in favour of his clients. Same reads thus:-

"In view of entire detailed discussion above in the considered

opinion of this Court, Gate no.3 is the material gate only for the purpose of entry of liquor for supply to L-4/L-5 licenses or by L-4/L-5 licenses and thereafter loading/unloading they can be exit from any of three (Exits) gates. In this way the exact report regarding distances of all three L-2 vends are as under:-

<u>Plaintiffs L-2</u>

Material Gate 3. from Udyog Vihar = 1.9 Km

Exit Parking 1 to Udyog Vihar = 1.7 Km

Exit Parking 2 to Udyog Vihar = 1.5 Km

Exit Parking 3 to Udyog Vihar = 1.7 Km

Total = 6.8 Km

<u>Defendant no.5</u>

Material Gate 3. from Nathupur = 2.2 Km

Exit Parking 1 to Nathupur U Block = 1.9 Km

Exit Parking 2 to Nathupur U Block = 1.7 Km

Exit Parking 3 to Nathupur U Block = 1.9 Km

Total = 7.7 Km

<u>Defendant no.6</u>

Material Gate 3. from maulsary Avenue = 1.1 Km

Exit Parking 1 to maulsary Avenue = 1.8 Km

Exit Parking 2 to maulsary Avenue = 1.6 Km

Exit Parking 3 to maulsary Avenue = 1.8 Km

Total = 6.3 Km.

In this way L-2 Vend of defendant no.6 is nearest one L-2(6.3

> *Km) and thereafter L-2 Vend of plaintiffs comes on 2nd number (6.8 Km) and L-2 Vend of defendant no.5 comes on 3rd number (7.7 km). Therefore, defendants no.1 to 4 are restrained from acting upon report dated 12.4.2016 and also restrained from issuing any permit/licences to defendants no.5 and 6 on the basis of measurement dated 12.4.2016. Defendants no.1 to 4 are directed to issue permit/licences to plaintiffs and defendant no.6 (2 nearest Liquor Vends) to supply liquor at Cyber Hub, Gurgaon, Injunction application is disposed off accordingly."*

He further submits that the pleadings are already complete and only the replication is to be filed. His clients undertake to comply with the directions issued by the Lower Appellate Court. They will lead evidence and conclude the same within the time frame, thus, no prejudice would be caused to the petitioner-defendant No.1. The petitioners are misinterpreting Clause 9.8.9 of the Excise Policy and the Note given thereunder. He further submits that even the reference to the chart vis-a-vis the distances reproduced in the order of the trial Court is an extraction of the report dated 5.5.2016 (Ex.P13). He submits that identification of L-2 Liquor Vend for the purpose of supply of liquor to the IMFL restaurants and eataries located in DLF Cyber Hub, is required to be made to the official respondents, i.e., defendant Nos.2 to 4 in accordance with applicability of the Excise Policy and in order to determine the nearest Vend the sum of 'To' and 'Fro' motorable distance between the locations of licensee of L-2 Liquor Vend is the criteria, who were expected to discharge their duties in routine in a most fair and transparent manner without any bias or favour. The alleged report dated 12.4.2016 was an outcome of complete favouritism and biasness for when the official defendant Nos.2 to 4 reached the place for measurement and ascertaining the distance, they were accompanied by certain business rivals of the respondent-plaintiffs. There was absolutely no reason for defendant Nos.2 to 4 to selectively called the builders of L-2 Liquor Vend alone for the purpose of conducting the measurement. It is in this background of the matter, the suit aforementioned was filed.

It is settled law that once the two Courts have already applied their mind in adjudication of the ad interim relief sought in the plaint, there is very little scope of interference in the revision by invoking the provisions of Article 227 of the Constitution of India. In fact, the petitioner is not able to find out the ingredients of illegality and order without jurisdiction and, therefore, urges this Court for affirming the findings with a further direction to the concerned District Judge for monitoring the trial in pursuance to the directions contained in the order passed by the Lower Appellate Court.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr.Mittal.

For the sake of brevity, the chart recorded in the report dated 5.5.2016 of the committee constituted by the trial Court reads thus:-

"The details of the 'To' and 'Fro' distances in Kilometers (Kms) so measured from different gates of Cyber Hub are as per the table below:-

Name of Gate	*Name of L-2 Vend*	*Distance (To Vend in Kms)*	*Distance (Fro Vend in Kms)*	*Total to & Fro Distance Kms*	*Remarks*
Entry Parking 1	Moulsary Avenue	1.7	3	4.7	
Exit Parking 1	Moulsary Avenue	1.8	2.9	4.7	
Exit Parking 2	Moulsary Avenue	1.6	3.1	4.7	

Name of Gate	*Name of L-2 Vend*	*Distance (To Vend in Kms)*	*Distance (Fro Vend in Kms)*	*Total to & Fro Distance Kms*	*Remarks*
Entry Parking 2	Moulsary Avenue	1.8	1.1	2.9	Via Parking
Entry Material Gate 3	Moulsary Avenue	2.3	1.1	3.4	Via Basement
Exit Material Gate 3	Moulsary Avenue	1.8	1.7	3.5	Via Basement
Entry Parking 1	Udyog Vihar PH-V	1.6	3.7	5.3	
Exit Parking 1	Udyog Vihar PH-V	1.7	3.6	5.3	
Exit Parking 2	Udyog Vihar PH-V	1.5	3.8	5.3	
Entry Parking 2	Udyog Vihar PH-V	1.7	1.9	3.6	Via Parking
Entry Material Gate 3	Udyog Vihar PH-V	2.2	1.9	4.1	Via Basement
Exit Material Gate 3	Udyog Vihar PH-V	1.7	2.4	4.1	Via Basement
Entry Parking 1	Nathupur U-Block	1.8	1.8	3.6	
Exit Parking 1^	Nathupur U-Block	1.9	1.7	3.6	
Entry Parking 2*	Nathupur U-Block	1.5	2.2	3.7	
Exit Parking 2	Nathupur U-Block	1.7	1.8	3.5	
Entry Material Gate 3*	Nathupur U-Block	1.5	2.2	3.7	
Exit Material Gate 3^	Nathupur U-Block	1.9	1.7	3.6	

The report further indicates that the distances for Nathupur U Block vend 'To' and 'Fro' Entry Parking 2 and Entry Material Gate 3* as well as Exit Parking 1 and Exit Material Gate 3 have been considered as the same as these gates are adjacent and next to each other. The fact remains that no doubt, as per the previous report dated 27.4.2016, the distances measured, reproduced supra, the respondent-plaintiffs were aggrieved of the same and filed an application which was allowed by the trial Court, but sum and substance of both the reports, much less the report dated 5.5.2016, if taken in letter and spirit as per letter dated 21.4.2016, Annexure P-8, language used therein is in consonance with the Excise Policy. For the sake of brevity, the contents of the letter dated 21.4.2016 read thus:-

"Sub: Regarding specifying the entry and exit gate for handling liquor to L-4/L-5 Licensees located at Cyber Hub,

Gurgaon for the year 2016-17.

Sir,

We are in receipt of your letter no.146 dated April 20, 2016. In this regard, we wish to inform you that handling and transportation of liquor is done solely by the respective L-4/L-5 Licensees and that gate no.3 adjacent to parking no.2 is authorised for entry and exit of vehicles engaged by respective L-4/L-5 licensees for delivering liquor to their premises at DLF Cyber Hub , Gurgaon.

Thanking you,

For DLF Cyber City Developers Limited."

On juxtaposition of Clause 9.8.9 along with "Note" extracted supra and as well as the contents of the letter, it is irresistibly concluded that the framer of the Excise Policy has clearly laid down that for determining the nearest vends the sum of 'To' and 'Fro' motorable distance between the location of the licensee and the L-2 vend shall be the criteria.

Once the material gate is gate No.3 for exit and entry, the distance of L-2 licence of the petitioner is 3.7 and 3.6 Kms., whereas that of the plaintiff located in Udyog Vihar Phase-IV is 4.1 and 4.1. It is settled law that the Court should not interfere in the fixation of the criteria while framing the policy by the Government, particularly when the policy is not under challenge and the criteria is confirming to the test of reasonableness.

The aforementioned view of mine is derived from the ratio decidendi culled out by the Hon'ble Supreme Court in Ekta Shakti Foundation's case (supra). In my view, the trial Court and the Lower

Appellate Court have remained oblivious of the expression **"To"** and "**Fro"** distance instead have only taken into consideration distance **"Fro**", as per clause 15 reproduced supra. Even otherwise, as per clause 13, the Courts below are not required to tread on a path of supposition and common sense. The aid of supposition or common sense is to be resorted to only in those circumstances where the policy, statute or law on the point is not settled, clear or vague. However, Clause 9.8.9 and "Note" appended thereto leave no manner of doubt of interpretation of measurement of distance of *nearest* vends and the L-2.

For the foregoing reasons, the impugned orders are hereby set aside. However, direction of Lower Appellate Court for deciding the suit within a period of two months is upheld. It is expected that parties shall adhere to the same and shall not take unnecessary adjournments in adjudication of the suit.

Nothing observed herein shall not be construed as an expression of opinion on the merits of the pending suit.

Accordingly, the revision stands allowed.

(AMIT RAWAL)
JUDGE

August 01, 2016
savita

Wheather speaking/reasoned Yes/No

Whether Reportable Yes/No