

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 907 OF 2019

Shyam Sundar Mal

Vs.

State of West Bengal & Ors.

For the Petitioner : Mr. Jaydip Kar, learned Senior Advocate
Mr. Debdeep Sinha,
Mr. Prasenjit Sahaadvocates

For the Respondent
No. 9 & 10 : Mr. Anant Kumar Shaw,
Mr. Mainak Gangulyadvocates

For the State : Mr. A. Ray, learned G.P.,
Mr. Debasish Ghosh,
Mr. Debraj Sahu advocates

Reserved on : 01.03.2023

Judgment on : 17.03.2023

Hiranmay Bhattacharyya, J.:-

1. The petitioner has prayed for a writ of mandamus commanding the respondents to forbear from giving effect to and/or further effect to the application of the respondent nos. 9 and 10 for shifting of their licensed liquor shop from the existing place at Mouza Tajpur to the proposed area at Mouza Barankua in the district of Purba Medinipur.

2. Shorn of unnecessary details the facts relevant for the purpose of deciding this writ petition in a nutshell are as follows- The private respondents are running liquor shop in plot no. 99 within Mouza Tajpur in the district Purba Medinipur. They applied for shifting of the existing liquor shop from Mouza Tajpur to the proposed site at Mouza Barankua. Petitioner raised an objection against the prayer for shifting of the licensed liquor shop from Mouza Tajpur to Mouza Barankua and prayed for cancellation of the prayer for shifting on the ground that an educational institution namely Balisai Jelepara Sishu Siksha Kendra and an Anganwadi Centre are situated within 100 feet of the proposed site at Barankua.
3. The respondent no. 9 and 10 filed an affidavit-in-opposition denying the material allegations contained in the writ petition. It was specifically stated therein that Excise license was granted in favour of the respondent nos. 9 and 10 in the year 2005 in respect of the site at Mouza Barankua and the private respondent continued to run the business of liquor shop from the site at Mouza Barankua till the year 2017. Subsequently the Hon'ble Supreme Court passed an order imposing a distance restriction in respect of liquor shops from a National or State Highway. The private respondents had to shift the liquor shop from the site at Mouza Barankua to the site at Mouza Tajpur in compliance with the order of the Hon'ble Supreme Court. Subsequently the Hon'ble Supreme Court

modified its earlier order and the State Government issued notifications dated 06.03.2018 and 20.03.2018 allowing opportunity for re-shifting of licensed liquor shop to the original existing approved sites which became restriction free. Pursuant thereto the respondent nos. 9 and 10 applied for re-shifting of their licensed liquor shop from Mouza Tajpur to Mouza Barankua and vide order dated 08.01.2009 passed by the respondent no. 4, the private respondents were allowed to re-shift their liquor shop to the original existing approved site at Barankua and started functioning therefrom since 20.01.2019.

4. State also filed an affidavit in opposition stating that the petitioners cannot object to the shifting of the liquor shop from Tajpur to Barankua as the process of shifting as well as re-shifting were made in terms of the orders of the Hon'ble Supreme Court.
5. Mr. Kar learned Senior Counsel appearing in support of the writ petition referred to various provisions of the West Bengal Excise (Selection of New Sites and Grant of Licence for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003 (for short "the 2003 Rules") more particularly Rule 8 thereof wherein a restriction has been imposed on grant of license for retail sale of liquor or any other intoxicants at a new site where the new site is situated in the vicinity of an educational institution. He referred to the Explanation which explains the

word “vicinity” to mean a distance of one thousand feet to be measured from a particular point of the building at the new site to a particular point of the educational institution. He next contended that the prayer for shifting of the liquor shop of the respondent nos. 9 and 10 was considered by the State Government in terms of the West Bengal Excise (Shifting of Existing Site or Change of Premises of Excise License) Rules 2009 (for short “the 2009 Rules”) and referred to Rule 4 thereof wherein the procedure for shifting has been laid down. Mr. Kar contended that for the purpose of considering the prayer for shifting of the existing license liquor shop from Mouza Tajpur to the proposed site at Mouza Barankua, it was incumbent upon the excise authorities to consider whether the proposed site is objection free in terms of Rule 8 of the 2003 Rules. Thus, according to Mr. Kar the restriction on grant of license as laid down under Rule 8 of the 2003 Rules could not have been ignored by the excise authorities while considering the prayer for shifting of the license liquor shop from the site at Tajpur to the site at Barankua. Mr. Kar concluded by submitting that since the excise authorities allowed the prayer of the respondent nos. 9 and 10 for shifting of the license liquor shop from the site at Mouza Tajpur to the site at Mouza Barankua without taking note of the existence of educational institutions within 100 feet of the proposed site at Barankua, the excise authorities failed to perform their legal duties for which the order allowing the prayer for shifting of the license

liquor shop from Mouza Tajpur to Mouza Barankua is liable to be set aside and quashed.

6. Mr. Shaw, learned advocate representing the respondent nos. 9 and 10 seriously disputed the contentions made by Mr. Kar. He raised an objection as to the maintainability of this writ petition on two fold grounds. Firstly, that the order passed by the authority allowing the prayer for shifting is an appealable one in view of Section 8 of the Bengal Excise Act 1909 (for short “the 1909 Act”) read with the Consolidated Rules made under Section 85 of the said Act. The other objection on the maintainability of the writ petition is that several writ petitions challenging the issue of shifting of the license liquor shop from Mouza Tajpur to Mouza Barankua stood dismissed by orders passed by co-ordinate benches of this Court and, therefore, such issue of shifting to Barankua cannot be reopened. Mr. Shaw further contended that the site at Barankua being an existing site as per Rule 3(1)(iii) and also that the private respondents had to shift their business from the existing site at Barankua to Mouza Tajpur in order to comply with an order passed by the Hon’ble Supreme Court of India coupled with the fact that restriction imposed by the Hon’ble Supreme Court being lifted subsequently, the procedure laid down under Rule 8 of the 2003 Rules cannot be applied to the case on hand. He further contended that the private respondents carried on the business of licensed liquor shop at Barankua

from 2005 till 2017 and the educational institution has been set up only in the year 2012 i.e., subsequent to the issuance of licence for running liquor shop at Mouza Barankua, therefore, the said restriction under Rule 8 cannot be applied to the case on hand.

7. Mr. Ghosh, learned advocate representing the State contended that the writ petitioner has no *locus standi* to raise any objection against the shifting of the licensed liquor shop from Mouza Tajpur to Mouza Barankua. He further contended that since the private respondents prayed for re-shifting of their licensed liquor shop to the original existing approved site at Mouza Barankua in terms of the order passed by the Hon'ble Supreme Court of India, Rule 8 of the 2003 Rules need not be complied with in the instant case. He submitted that the excise authorities allowed the prayer of the respondent nos. 9 and 10 for shifting of the license liquor shop from the site at Mouza Tajpur to the site at Mouza Barankua after complying with necessary formalities and, therefore, this Court should not interfere with the decision of the excise authorities.
8. Heard the learned advocates for the parties and perused the material placed.
9. Before entering into the merits of the writ petition, this Court shall first decide the issue of maintainability of this writ

petition in view of objection raised by the private respondents herein.

10. It is not in dispute that the order passed allowing shifting of the license liquor shop from the site at Mouza Tajpur to the site at Mouza Barankua is an appealable order under Section 8 of the 1909 Act before the forum specified under the Consolidated Rules made under Section 85 of the said Act.
11. It is well settled that existence of an alternative remedy by itself does not oust the jurisdiction of the High Court from exercising its powers under Article 226 of the Constitution of India. High Court has the discretion not to entertain a writ petition where an effective alternative remedy is available to the aggrieved person. The rule of exhaustion of alternative remedy is, however, a rule of policy and not a rule of law and the Courts have imposed a restriction upon itself not to entertain a writ petition in case the party approaching the Court has not exhausted the alternative remedy. Certain exceptions to the aforesaid rules have now been judicially accepted. Existence of alternative remedy may not be a bar in exercising the powers under Article 226 where the writ petition been filed for enforcement of fundamental rights, or there has been a violation of the principles of natural justice, or the order or proceedings are wholly without jurisdiction or the vires of a legislation is challenged.

12. It is the case of the writ petitioners that his objection against shifting of the liquor shop was not taken into consideration by the concerned authorities which amounts to violation of the principles of natural justice. The order of shifting, according to the petitioner is without jurisdiction as it was passed de hors the provisions laid down under the relevant Rules. That apart, this Court finds that when this petition was moved on 06.02.2019, in the presence of the State respondents and the private respondents, no objection as to the entertainability of the writ petition was raised and the Co-ordinate Bench permitted the parties to exchange their affidavits. The writ petition has now come up for final hearing after exchange of affidavits.
13. This Court, therefore, holds that this case falls within the exceptions to the rule of exhaustion of alternative remedy and the same being entertained by the Co-ordinate Bench 4 years earlier, this Court is not inclined to relegate the petitioner to the alternative remedy.
14. Mr. Shaw learned advocate for the private respondent, however, failed to satisfy this Court that the issue with regard to shifting of the licensed liquor shop from the site at Mouza Tajpur to the site at Mouza Barankua was decided by this Hon'ble Court on earlier occasion. Mere filing of the writ petitions cannot be a bar in proceeding to decide with the issues raised in this writ petition as such issues do not appear

to have been decided earlier. For all such reasons this Court is inclined to consider the merits of the claims and counter claims raised by the respective parties.

15. Before entering into the factual aspect, it would be relevant to take note of the decisions rendered by the Hon'ble Supreme Court which is the foundation of this writ petition.
16. The Hon'ble Supreme Court of India in the decision reported at (2017) 2 SCC 281 in the case of *State of Tamil Nadu represented by its Secretary Home, Prohibition and Excise Department and Ors. vs K. Balu and Anr.* (hereinafter referred to as K.Balu-1) passed certain directions and orders under Article 142 of the Constitution of India. The paragraph 29.5 of the said reports would be relevant for the case on hand and the same is therefore extracted herein below.

“29.5. No shop for the sale of liquor shall be (i) visible from a national or State highway; (ii) directly accessible from a national or State highway; and (iii) situated within a distance of 500m of the outer edge of the national or State highway or of a service lane along the highway.”

17. The decision in the case of K. Balu-1 was subsequently clarified by the Hon'ble Supreme Court in the case of *State of Tamil Nadu Represented By Secretary and Ors. vs. K. Balu and Anr.* reported at (2017) 6 SCC 715 (hereinafter referred to as K.Balu-2). In paragraph 25 of the said reports, the Hon'ble Supreme Court directed insertion of a paragraph after

direction (v) contained in paragraph 29.5 of the directions contained in the judgment dated 15.12.2016 in K.Balu-1.

18. The said paragraph which was to be inserted after paragraph 29.5 is extracted hereinbelow-

“In the case of areas comprised in local bodies with a population of 20,000 people or less, the distance of 500m shall stand reduced to 220m.”

19. Further clarification was made by the Hon’ble Supreme Court in the case of *State of Tamil Nadu Represented By Secretary and Ors. vs. K. Balu and Anr.* reported at (2018) 3 SCC 336 (hereinafter referred to as K.Balu-3). The Hon’ble Supreme Court in the said decision expressed the view that the State Governments would not be precluded from taking decisions consistent with the object of the orders passed by the Hon’ble Supreme Court. The Hon’ble Supreme Court in the said decision held thus-

“9. We are inclined to allow the State Governments to make this determination since it is a question of fact as to whether an area covered by a local self-governing body is proximate to a municipal agglomeration or is sufficiently developed as to warrant the application of the same principle. In deciding as to whether the principle which has been set down in the order dated 11.07.2017 should be extended to a local self-governing body (or statutory development authority) the State Governments would take recourse to all relevant circumstances including the nature and extent of development in the area and the object underlying the direction prohibition the sale of liquor on national

and the State highways. The use of the expression “municipal areas” in the order dated 11.07.2017 does not prevent the State Governments from making that determination and from taking appropriate decisions consistent with the object of the orders passed by this Court. We leave it open to individual licensees to submit their representations to the competent authorities in the State Governments if they are so advised upon which appropriate decisions may be taken by the State Governments.”

20. After the decision of the Hon’ble Supreme Court in K.Balu-3, the State Government issued a notification no. 271-Ft dated 06.03.2018 and another notification no. 24-Exc dated 20.03.2018.

21. In the notification dated 06.03.2018 it was stated that no license for retail sale of liquor shop shall be granted at a site if,-

(i) such site is situated within 20 metres from the outer edge of any National or State Highway or of a service lane along such highway;

(ii) such site is situated within 500 metres but above 220 metres from the outer edge of any National or State Highway or of a service lane along such highway except any areas comprised in local bodies with a population of 20000 people or less.

22. A fourth proviso after the third proviso in the notification dated 06.03.2018 was added vide notification dated 20.03.2018 wherein it was provided that the restrictions

contained in the notification dated 06.03.2018 shall not apply to sites located within a radius of 5 kilometers from any block headquarters or 3 kilometers from any gram panchayat office.

23. The aforesaid notifications are not under challenge in this petition. It is not the case of the writ petitioners that the site at Mouza Barankua falls within the restrictions imposed in the notification dated 06.03.2018 as amended by notification dated 20.03.2018. The only grievance of the petitioners is that the site at Mouza Barankua cannot be said to be an objection free site in terms of Rule 8 of the 2003 Rules in view of existence of educational institutions alleged to be within 100 feet of the said proposed site. The writ petitioners are aggrieved because of non consideration of their objection against shifting of the licensed liquor shop from Mouza Tajpur to Mouza Barankua which amounts to failure on the part of the excise authorities to perform their duties vested upon them by the 1909 Act and the Rules framed thereunder more particularly Rule 8 of the 2003 Rules.
24. The only issue that falls for consideration in this writ petition is whether the private respondents 9 and 10 should be allowed to shift their licensed liquor shop from the site at Tajpur to site at Barankua.
25. For the purpose of deciding the said issue it would be profitable to extract Rule 3(1)(iii) of the 2003 Rules.

3. Definitions :- (1) In these Rules, unless there is anything repugnant in the subject or context :-

(i)

(ii)

(iii) "existing site" means,-

a site for which a licence has been granted under section 30 or is required to be granted under section 31 on the expiry of a licence granted under section 30, as the case may be, for retail sale of liquor or any other intoxicant specified in sub-rule (1) of rule (2);

a site for the retail vend of Tari, for which a license has been granted under section 14, and where such license has been settled for two consecutive licensing periods during 2013-14 and 2014-15 in favour of a single license holder. A site for the retail vend of Tari for which a license has been granted, or is required to be granted, under section 14, in accordance with the provisions of the West Bengal Excise (Selection of Sites and Grant of License for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003, as subsequently amended, shall be considered to be an existing site:

Explanation - An "existing site" shall continue to remain an existing site even if retail sale of liquor or any other intoxicants specified in rule 2 under a license is stopped or closed from the existing site for whatever reasons for any period, or even if the license is cancelled or suspended or withdrawn or surrendered, or even when the license lapses on the death of person(s) to whom with or without others, it was granted;”

26. It is not in dispute that the license was granted in favour of the respondent nos. 9 and 10 in the year 2005 for running the liquor shop at the site at Barankua Mouza. The said

respondents continued their business at the said site at Mouza Barankua till the year 2017. Thereafter, the retail sale of liquor from the said site at Barankua under such license had to be stopped pursuant to an order passed by the Hon'ble Supreme Court of India in the case of K. Balu-1.

27. In view of the restrictions imposed in the order passed by the Hon'ble Supreme Court in the aforesaid reported decision the private respondents had to stop the retail sale of liquor from the site at Barankua Mouza. Thereafter, the private respondents were allowed to shift their license liquor shop to the newly approved site at Mouza Tajpur.

28. However, the restriction imposed by the Hon'ble Supreme Court in its initial order was subsequently lifted pursuant to which the State Government issued a notification dated 06.03.2008 which was subsequently amended by a further notification dated 20.03.2018. Therefore, even though the private respondent nos. 9 and 10 had to shift their business from the site at Mouza Barankua to the site at Mouza Tajpur, the site at Mouza Barankua still continued to remain an "existing site" in view of the definition of "existing site" under Rule 3(1)(iii) of the 2003 rules as explained by the explanation added thereto.

29. In the case on hand the private respondent nos. 9 and 10 applied before the excise authorities for shifting their license

liquor shop to the original existing site at Mouza Barankua from the earlier approved site at Mouza Tajpur. Therefore, it is not the case of shifting of an existing site for the retail sale of liquor to the proposed new site.

30. Rule 4 of the 2009 Rules lays down the procedure for shifting of an existing site for the retail sale of liquor to a proposed new site. In cases of shifting of an existing site to a proposed new site, Rule 4 of the 2009 Rules mandated that the proposed new site shall have to be an objection free one in terms of Rule 8 of the 2009 Rules. This Court finds that Rule 4 deals with shifting from the existing site to the proposed site. Rule 8 of 2003 Rules however lays down the restrictions on grant of license at certain new sites. Upon a harmonious construction of the aforesaid Rules, this Court is of the considered view that the restrictions under Rule 8 of the 2003 Rules shall apply in case of shifting to the proposed site which is other than the existing site. The case on hand relates to shifting to the existing site. This Court is, therefore, of the considered view that the provisions relating to Rule 8 of the 2003 Rules more particularly the distance restriction from an educational institution cannot be applied to the case on hand. This Court accordingly holds that the objection raised by the petitioner against shifting of the licensed liquor shop to the original existing site at Mouza Barankua has no legs to stand upon.

31. It is not the case of the petitioners that the site at Mouza Barankua is hit by the restrictions imposed by the State vide notification dated 06.03.2018 as amended by the subsequent notification dated 20.03.2018. The retail sale of liquor under the license issued by the excise authority had to be stopped from the existing site at Mouza Barankua on account of the restrictions imposed by the initial order of the Hon'ble Supreme Court in the case of K. Balu-1. However, after issuance of the notifications dated 06.03.2018 as amended by the notification dated 20.03.2018 issued in terms of the subsequent order of the Hon'ble Supreme Court in the case of K. Balu -3 there cannot be any impediment for the running of the business of the licensed liquor shop from the existing site at Mouza Barankua.

32. Record reveals that pursuant to an application made by the respondent nos. 9 and 10 for re-shifting of their licensed premises to the original existing approved site, an enquiry was conducted by the excise authorities and suitability of the same was examined by taking into consideration the definition of the existing site under Rule 3(iii) of the 2003 Rules as well as other factors and thereafter the competent authority approved the proposal for shifting of the licensed premises of the liquor shop of the private respondents from its newly approved site at Mouza Tajpur to the original existing site at Mouza Barankua. After going through the materials on record this Court is of the

considered view that there was no failure on the part of the excise authorities to perform their duties under the relevant statute and the rules framed thereunder. The said order also cannot be said to be without jurisdiction as sought to be urged by Mr. Kar.

33. For all the reasons as aforesaid this Court holds that the writ petition is devoid of any merit and the same is accordingly dismissed.

34. There shall be, however, no order as to costs.

35. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)

(P.A.-Sanchita)