

Chief Justice's Court

Case :- WRIT TAX No. - 96 of 2018

Petitioner :- M/S Accurate Foods And Beverages Pvt. Ltd. Through its
Authorized Signatory

Respondent :- State Of U.P. Thru. Prin. Secy. Excise And Others Civil Sectt

Counsel for Petitioner :- Dhruv Mathur

Counsel for Respondent :- C.S.C.

Hon'ble Pritinker Diwaker, Chief Justice

Hon'ble Jaspreet Singh, J.

1. Heard Shri Dhruv Mathur, learned counsel for the petitioner and Shri Rajesh Tiwari, learned Chief Standing Counsel, appearing on behalf of the State-respondents.

2. Brief facts of case, giving rise to the present petition, are that for the ease of administrative convenience and in order to enhance the excise revenue, the Excise Department has divided the entire State of Uttar Pradesh into five zones, namely, Varanasi, Gorakhpur, Lucknow, Meerut and Agra. Later on, in the year 2009, the State Government demarcated the Meerut Zone as a 'Special Zone' under the Uttar Pradesh Demarcation and Regulation of Special Zones for Exclusive Privileges of Excise Shops Rules, 2009. Meerut Zone comprises of eighteen districts, namely, Meerut, Bagpat, Bulandshahar, Ghaziabad, Hapur, Gautam Buddha Nagar, Moradabad, Sambhal, Amroha, Rampur, Bijnore, Saharanpur, Muzaffarnagar, Shamli, Bareilly, Badaun, Pilibhit and Shahjahanpur.

3. *Vide* four separate orders of the same date, i.e. 24.03.2011, in respect of Special Zone, Meerut, the petitioner was granted 'exclusive privilege' for vending country liquor, foreign liquor (IMFL), beer and model shops. This 'exclusive privilege' of the petitioner has been renewed from time to time and lastly, it was renewed by four separate orders of the same date, i.e.,

05.12.2016 for the Excise Year 2017-2018, *vide* which the petitioner was granted separate licenses for the Excise Year 2017-18 to run 5741 outlets in the Special Zone, Meerut. Out of 5741 outlets, the petitioner was already running 5547 outlets, license whereof had been granted to him in the previous year i.e. 2016-2017. For the year 2017-2018, 194 new outlets were licensed to the petitioner. The petitioner, in respect of 194 new outlets, deposited the entire license fee i.e. Rs. 6.58 crores for the Excise Year 2017-2018, and has deposited Rs. 254.99 crores, towards half of the total amount of the license fee in respect of the 5547 old outlets, which the petitioner was licensed to run for the year 2017-2018.

4. The Apex Court in **State of Tamilnadu and others vs. K.Balu, (2017) 2 SCC 281**, *vide* judgment and order dated 15.12.2016, directed the States and the Union Governments, to cease and desist from granting licenses for the sale of liquor along side National and State Highways. In compliance with the said order of the Apex Court in K. Balu (*supra*), the State Government *vide* order dated 06.01.2017, directed all the Divisional Commissioners and the District Magistrates to ensure compliance of the order of the Apex Court. Between 04.02.2017 to 09.02.2017, in compliance with the directions of the Apex Court in K. Balu (*supra*), the District Magistrate/Licensing Authority of various districts, falling under the Special Zone Meerut, cancelled the licenses of 1795 shops of the petitioners. However, it was provided that the request to relocate such vends to another site can be considered by the Licensing Authority within a prescribed time and in accordance with law.

5. The petitioner moved an application to the concerned District Magistrates/Licensing Authorities for relocation of the vends to another places. Acting on the representation of the petitioner, the respective District Magistrates/Licensing Authorities of the Meerut Zone, had relocated only 965 outlets out of 1795, however, 830 outlets were still remained pending which could not be relocated. On the information of the respective District Magistrates of the Special Zone, Meerut, the Excise Department got an

inquiry done to ascertain the possibility of relocating the vends whose relocation was not done. After the aforesaid inquiry, the Excise Department issued directions to ensure that the vends, pending for relocation, be not allowed to operate.

6. On 26.05.2017, the petitioner moved a representation to the Excise Department through the respective Licensing Authorities for refund of the license fee in respect of the vends, which could not be operated on account of Judgment in K.Balu (*supra*), but the same has not been refunded to the petitioner. The Apex Court, *vide* order dated 11.07.2017 in the case of **Arrive Safe Society of Chandigarh vs. Union Territory of Chandigarh and another**, clarified its earlier decision in K.Balu (*supra*) and provided that the restrictions imposed in the case of K.Balu (*supra*) were not applicable to the outlets/vends situated within the municipal area.

7. The District Magistrates/Licensing Authorities, *vide* orders dated 28.09.2017 and 02.10.2017, directed the petitioner to operate 415 outlets/vends out of 830, which fell within the Municipal Area, after depositing the entire amount of the basic license fee. In pursuance of the said order of the Licensing Authority, the concerned authority *vide* different orders dated 04.10.2017, 05.10.2017, 06.10.2017, 07.10.2017, issued notices to the petitioner to deposit the balance dues within a week and in compliance thereof, the petitioner further deposited Rs. 201.37 crores as license fee, in respect of old outlets, which were allotted to operate in the year 2017-18. Thus, the petitioner has deposited a total sum of Rs. 462.94 crores. The petitioner further deposited Rs. 54.20 crores to the Excise Department as license fee in respect of 830 outlets/vends.

8. The petitioner moved representation before the authorities concerned showing its willingness to operate the outlets/vends situated within the Municipal area, but stating that it was not willing to pay the license fee for the period for which, it was not allowed to operate the said vends. A meeting of the Excise Department was held, wherein it was decided that a Committee

shall be constituted to make recommendations regarding payment of license fee for shops, which came to be affected by the judgment in K.Balu (*supra*).

9. The six member Committee of the Government gave its report dated 30.10.2017, wherein it was recommended that the shops within the Special Zone, Meerut, which came to be affected by judgment in K.Balu (*supra*) and could only be operated later after the clarification of the Supreme Court, should be treated as mid-year settlement.

10. The Government, *vide* order dated 29.12.2017 passed two separate orders. By order of the said date passed in No. 80/2017/3315/E-2/13-2017-135/2017, the Government cancelled its earlier decision dated 15.11.2017 and directed the Excise Commissioner to recover the entire balance license fee from the petitioner in respect of outlets/vends which could not be operated in the Special Zone, Meerut and also for fixing the liability on the petitioner for non-operation and, in another order of the same date issued in No. 79/2017/2455/E-2/13-2017-46/2017 TC, the Government directed the Excise Commissioner to redetermine the license fee in respect of the other outlets/vends which could not be operated as a result of the decision of the Supreme Court in K.Balu (*supra*) and thereafter, operated after the clarification order of the Supreme Court dated 11.07.2017, on the basis of Minimum Guaranteed Quantity(MGQ) for the remainder period for which, they were to operate, except the Special Zone, Meerut. In compliance with the aforesaid orders, the Excise Commissioner, *vide* order dated 30.12.2017 issued directions to all the District Magistrate/Licensing Authorities of Special Zone, Meerut to recover the entire balance of license fee in respect of the closed outlets/vends of the petitioner for the entire year 2017-2018 and in case the petitioner failed to pay the same, the exclusive privilege granted to it for the Special Zone, Meerut be cancelled.

11. Further, *vide* order dated 30.12.2017, the Excise Commissioner directed the District Magistrate/Licensing Authority of other four zones (except Special Zone Meerut) to re-determine the license fee in respect of all

other closed outlets/vends for the remainder period that they could operate and permit them to deposit the same and further, the Excise Commissioner issued another order directing the petitioner to deposit the entire balance of license fee for the year 2017-18 in respect of the outlets/vends not operated by it in compliance with the order of the Apex Court dated 06.01.2018, failing which petitioner's 'special privilege' would be cancelled. Thereafter, consequential notices dated 30.12.2017 & 31.12.2017 have been issued by the District Magistrates of various districts of Special Zone, Meerut to the petitioner.

12. Panicked with the above orders and notices, the petitioner has preferred the present writ petition, challenging the aforesaid orders and notices issued by the State Authorities.

13. While the petition was pending before this Court, on account of subsequent events which transpired, the petitioner amended the petition introduced facts, grounds and also sought additional reliefs. Primarily, it was urged that in light of the order dated 30.12.2017 and consequential notices dated 30.12.2017 and 31.12.2017 issued by the Collector of various districts, intimated the petitioner that the security deposited by them for all the outlets relating to country liquor, foreign liquor, beer and model shops of foreign liquor have been forfeited/adjusted against the demand.

14. At this stage, it will now be appropriate to take a glance at the reliefs claimed (post amendment) in the writ petition in the backdrop of the factual matrix as noticed above:-

“(I.) Issue, a writ, order or direction in the nature of certiorari quashing the impugned order dated 29.12.2017 No. 80/2017/3315/E-2/13-2017-135/2017 as contained in Annexure No. 24 with this writ petition.

(II.) Issue a writ, order or direction in the nature of Mandamus restoring the order dated 15.11.2017 as contained in Annexure No. 23 with this writ petition and further directing the Respondents to comply with the same.

(III.) Issue a writ, order or direction in the nature of certiorari quashing the order 29.12.2017 No.79/2017/2455/E-2/13-2017-

(IV.) Issue a writ, order or direction in the nature of Certiorari quashing the orders dated 30.12.2017 No. 36167-361994/10-License-25/Be.

(V.) Issue. a writ, order or direction in the nature of Certiorari quashing the order dated 30.12.2017 Order No. 36053-148/10-License-303/

(VI.) Issue a writ, order or direction in the nature of Certiorari quashing the notices dated 30.12.2017 & 31.12.2017 as contained in Annexure Nos. 29 to 46 with this writ petition.

(VI-A) issue a writ, direction or order in the nature of Certiorari quashing the orders dated 13.01.2018, 14.01.2018 & 15.01.2018 issued by Respondents, as contained in Annexure Nos. 46-A to 46-H of the present writ petition and other similar orders in respect of other outlets/vends after summoning the same.

(VI-B) issue a writ, direction or order in the nature of Mandamus directing the Respondents to refund the security amounts with interest thereon, forfeited/adjusted vide orders dated 13.01.2018, 14.01.2018 & 15.01.2018 issued by the Respondents, as contained in Annexure Nos. 46-A to 46-H of the present writ petition and other similar orders in respect of other outlets/vends after summoning the same.

(VII) Issue a writ, order or direction in the nature of Mandamus restraining the Respondents from taking any action for recovery of the impugned demands and further restraining them from cancelling the vending licenses and the exclusive privilege granted to the petitioner for the Special Zone, Meerut as is being threatened by them.

(VIII) Issue a writ, order or direction in the nature of Mandamus directing the Respondents to refund the license fee, basic license fee, renewal fees, security deposit alongwith interest @ 18 % per annum thereon charged by them from the petitioner for the outlets/vends which could not be operated by the petitioner as a result of the pronouncement of the Hon'ble Supreme Court as detailed in the writ petition and the orders passed by the Respondents in pursuance thereof.

(IX) Issue a writ, order or direction in the nature of mandamus directing respondents to permit commencement of the shops falling in municipal area without insisting for payment for periods during which the shops remained closed and charge as per Rules and also adjust the basic license fee/license fees etc. already deposited with the respondents.”

15. It is also pertinent to mention that during the pendency of the present writ petition, the State authorities issued orders dated 13.01.2018, 14.01.2018 & 15.01.2018, whereby the security amount paid by the petitioner with respect to the liquor vends, was forfeited. *Vide* order dated 05.02.2018, this Court granted an interim order and directed that subject to the petitioner depositing a sum of Rs. 234 Crores with the State authorities, no coercive action shall be taken against it and the petitioner shall be entitled to operate the 415 shops falling within Municipal areas, subject to the final outcome of the present petition. In compliance thereof, the petitioner deposited a sum of Rs. 234 crores and operated 415 shops situated within the Municipal areas for a period of remaining two months, i.e., February and March, 2018. For the ease of reference, the interim order dated 05.02.2018 is being reproduced hereinafter:-

“Heard.

After arguing the matter at some length, the learned Advocate General, submitted that apart from the security amount of Rs. 261/- Crore which has been adjusted towards the dues in question the petitioner should deposit the remaining dues. In response Sri Dwivedi, learned Senior Counsel appearing for the petitioner submits that the petitioner shall deposit in cash the remaining dues of Rs. 190/- Crores plus Rs. 44/- Crores for the month of January, 2018.

In view of the above, subject to the final outcome of the writ petition and without prejudice to the rights of the parties concerned the petitioner shall deposit Rs. 234/- Crores within 7 days in cash.

If such a deposit is made no coercive action shall be taken against the petitioner in pursuance to the impugned orders till the expiry of the the period for which the privilege / license has been granted to the petitioner. The petitioner shall be entitled to operate 415 shops in the municipal area as permitted by the Supreme Court and the petitioner shall deposit the dues in this regard also as and when they fall due.

Learned Advocate General is agreeable to the aforesaid arrangement. List on 2.4.2018.

The parties shall come prepared for final disposal of the petition on the next date.

Copy of the order today.”

16. Learned counsel for the petitioner submits that the orders of the State authorities, directing the petitioner to deposit the entire balance amount of the license fee, even for the period when the shops remain closed, are bad in the eye of law. He submits that Section 31 of the U.P. Excise Act, 1910 (hereinafter referred to as ‘the Act’) provides that every licensee shall be granted a license on payment of fee. Section 31 of the Act, is reproduced hereinbelow:

“31. Form and conditions of licenses, etc. - Every license, permit or pass granted under this Act shall be granted —

(a) on payment of such fees (if any),

(b) subject to such restrictions and on such conditions,

(c) shall be in such form and contain such particulars, as the Excise Commissioner may direct either generally or in any particular instance in this behalf, and

(d) shall be granted for such period as the 3[State Government] may, in like manner, direct”

17. Further, learned counsel for the petitioner has relied upon Sections 24 and 24-A of the U.P. Excise Act, 1910 to submit that the Excise Commissioner may grant to any person an ‘exclusive’ or other privilege for manufacture or for supply or for both of any country liquor and foreign liquor in any locality. Section 24 and 24-A of the Act are reproduced hereinbelow:

“24. Grant of exclusive privilege of manufacture, etc. -

Subject to the provisions of section 31, the Excise Commissioner may grant to any person a license for the exclusive privilege —

(1) of manufacturing or of supplying by wholesale, or of both, or

(2) of selling by wholesale or by retail, or

(3) of manufacturing or of supplying by wholesale, or of both, and of selling by retail,

any country liquor or intoxicating drug within any local area.”

[24-A. Grant of exclusive or other privilege in respect of foreign liquor.-

(1) Subject to the provisions of section 31, the Excise Commissioner may grant to any person a license or licenses for the exclusive or other privilege, —

(a) of manufacturing or of supply by wholesale, or of both ; or

(b) of manufacturing or of supplying by wholesale, or of both and selling by retail ; or

(c) of selling by wholesale (to wholesale or retail vendors) ; or

[(d) of selling by retail at shops (for consumption ‘on’ or ‘off’ the premises or for consumption ‘on’ and ‘off’ the premises) any foreign liquor in any locality.]

(2) The grant of license or licenses under clause (d) of sub-section (1) in relation to any locality shall be without prejudice to the grant of licenses for the retail sale of foreign liquor in the same locality in hotels and restaurants for consumption in their premises.

(3) Where more licenses than one are proposed to be granted under clause (d) of sub-section (1) in relation to any locality for the same period, advance intimation of the proposal shall be given to the prospective applicants for every such license.

(4) The provisions of section 25, and proviso to section 39 shall apply in relation to grant of a license for an exclusive or other privilege under this section as they apply in respect of the grant of a license for an exclusive privilege under section 24”.

18. By drawing the attention of this Court to the provisions of Section 24-B of the Act, learned counsel for the petitioner submits that the license fee is rental or a consideration for the grant of such right or privilege by the State Government. Section 24-B of the Act is reproduced hereinbelow:

“[24-B. Removal of doubts. - For the removal of doubts, it is hereby declared —

(a) that the State Government has an exclusive right or privilege of manufacture and sale of country liquor and foreign liquor;

(b) that the amount described as license fee in clause (c) of section 41 is in its essence the rental or consideration for the grant of such right or privilege by the State Government ;

(c) that the Excise Commissioner as the head of the Excise Department of the State shall be deemed, while determining or realizing such fee, to act for and on behalf of the State Government.]”

19. Learned counsel for the petitioner argues that a conjoint reading of the aforesaid provisions of the Act, makes it clear that license fee is a consideration for grant of license, to vend and in absence of any permission to vend, no license fee can be charged by the State Authorities. He submits that the State cannot be allowed to unjustly enrich itself and take advantage of any fortuitous circumstances on account of which, the permission to vend liquor was withdrawn by the State itself and as a consequence of which, the petitioner could not operate the vends in question.

20. Further submission of the learned counsel for the petitioner is that Section 35 of the Act provides that in case of cancellation of the license on account of other causes, other than those specified in Section 34 of the Act, any fee deposited by the licensee shall be refunded to him by the State Government. Section 34 and 35 of the Act reads as under:

34. Power to cancel or suspend licenses, etc. - *(1) Subject to such restrictions as the State Government may prescribe, the authority granting any license, permit or pass under this Act may cancel or suspend it —*

*(a) if any duty or fee payable by the holder thereof be not duly paid ;
or*

(b) in the event of any breach by the holder of such license, permit or pass or by his servants, or by any one acting on his behalf with his express or implied permission of any of the terms or conditions of such license, permit or pass ; or

(c) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence punishable 1[under the Dangerous Drugs Act, 1930, or] under the Merchandise Marks Act, 1889, or of any offence punishable under sections 482 to 489 (both inclusive) of the Indian Penal Code ; or

(d) where a license, permit or pass has been granted on the application of the grantee of an exclusive privilege under this Act, on the requisition in writing of such grantee ; or

(e) if the conditions of the license or permit provide for such cancellations or suspension at will.

(2) When a license, permit or pass held by any person is cancelled under clause (a), (b) or (c) of sub-section (1), the authority aforesaid may cancel any other license, permit or pass granted to such person by, or by the authority of the State Government under this Act or under any other law for the time being in force relating to excise revenue or under the Opium Act, 1878.

(3) The holder shall not be entitled to any compensation for the cancellation or suspension of his license, permit or pass under this section nor to a refund of any fee paid or deposit made in respect thereof.

35. No compensation or refund claimable or cancellation or suspension of license, etc., under this section. - *(1) Further power to cancel licenses - Whenever the authority granting a license under this Act considers that such license should be cancelled for any cause other than those specified in section 34 it shall remit a sum equal to the amount of the fees payable in respect thereof for fifteen days, and may cancel the license either —*

(a) on the expiration of fifteen days' notice in writing of its intention to do so, or

(b) forthwith, without notice.

(2) Compensation in the case of cancellation. - If any license be cancelled under clause (b) of sub-section (1) in addition to the sum remitted as aforesaid there shall be paid to the licensee such further sum by way of compensation as the Excise Commissioner may direct.

(3) Refund of fee or deposit.- When a license is cancelled under this section, any fee paid in advance or deposit made by the licensee in respect thereof shall be refunded to him, less the amount (if any) due to the State Government.”

21. It is further submitted by counsel for the petitioner that thus, on the basis of the principles of common law as well as statutory provisions of law, the amount of license fee for liquor vends for which license was not even granted, could not be realized from the petitioner and whatever amounts have been charged from the petitioner, are liable to be refunded to the petitioner. Reliance, in this regard, has been placed upon the judgment of this Court in **Hanuman Prasad Jaiswal vs. State of U.P. and others** reported in [(1983) UPTC-362].

22. In support of his contentions, counsel for the petitioner has relied upon the order of this Court dated 31.05.2017 passed in **Misc. Bench No. 12770 of 2017, Har Prasad Jaiswal & others vs. State of U.P. and others** and the order dated 01.08.2017 passed in **Misc. Bench No. 17160 of 2017, Neeraj Jaiswal vs. State of U.P. and others** where, in similar circumstances, the licensees of the liquor vends had approached this Court, seeking refund of license fee deposited by them due to closure of their liquor vends on account of the directions of the Supreme Court in the case of K.Balu (*supra*). The Court directed that the case of the petitioners therein may be decided by the State authorities. It is further submitted that pursuant to the directions of this Court, the State Government has, in fact, taken decisions to waive/refund the amount of license fee to the petitioners therein and the amount of license fee deposited by the petitioners therein, for the period the liquor vends could not operate, has been refunded. However, at the same time, the State authorities have applied a different yardstick to the petitioner and have denied the aforesaid benefit to the petitioner which is a gross violation of its fundamental rights as enshrined in Article 14 of the Constitution of India.

23. It is submitted that the act of the respondents in realizing the license fee from the petitioner for the entire excise year for the liquor vends which could not be operated on account of the directions of the Supreme Court in K.Balu (*supra*), is violative of the doctrine of *Actus Curiae Neminem Gravabit*. To this effect, he has relied upon the judgment of the Apex Court in **Chitra vs. State of Kerala and others, (2016) 1 SCC 685**.

24. The petitioner further submits that in fact, in respect of the shops located in Municipal areas, on the basis of a meeting held on 29.09.2017, the Excise Commissioner, *vide* its letter dated 29.09.2017, written to the State Government, had clearly recommended that the settlement of the liquor vends in question, ought to be treated as mid-term settlements, in view of the orders of the Apex Court dated 15.12.2016 & 11.07.2017, which itself acknowledges that the liquor shops in the Municipal areas could not be

operated from 01.04.2017 till the end of September, 2017 on account of the directions rendered by the Apex Court.

25. It is also submitted by the learned counsel for the petitioner that under the provisions contained in Section 38-A of the Act, it has been mandated that where any excise revenue becomes payable and has not been paid, the interest @ 18% per annum, shall be payable till the date of actual payment. Section 38A of the Act is reproduced hereinbelow:

“38-A. Interest on arrears of excise revenue.- (1) *Where any excise revenue has not been paid within three months from the date on which it become payable, interest at such rate not exceeding twenty-four per cent per annum, as may be prescribed, shall be payable from the date such excise revenue becomes payable till the date of actual payment ;*

Provided that until a higher rate is prescribed, the rate of interest will be eighteen per cent per annum ;

Provided further that in respect of an excise revenue which became payable before the commencement of the Uttar Pradesh Excise (Amendment) Act, 1985 interest at the said rate shall be payable from the date of such commencement if the excise revenue is not paid within 3 months of the said date.

Explanation :— Nothing in this sub-section shall be construed to affect the payment of interest under an agreement, the terms of an auction or, a decree of the court, passed before the date of commencement of the Uttar Pradesh Excise (Amendment) Act, 1985 or which may be passed after the date of such commencement in suits or proceedings filed before the said date.

(2) Provisions of section 39 shall mutatis mutandis apply to realization of such interest as they apply to realization of excise revenue.”

26. Further submission of the petitioner is that it is a settled principle of law that the petitioner would be entitled for the same rate of interest on the amount unduly realized from the petitioner by the State Authorities, which the petitioner would have paid to the State Authorities, had the petitioner defaulted in payment of excise dues to the State Authorities, as stipulated under Section 38-A of the Act.

27. It is further contended by the counsel appearing on behalf of the petitioner that the contention of the respondents that the petitioner was required to pay license fee even for the period when the vends could not be operated, is misplaced and is liable to be rejected as, the Excise Laws do not make any distinction between a shop situated within a Special Zone and a shop situated outside the zone, so far as its licensing and operation is concerned.

28. It is further submitted that once an order has been passed by the Government, approving the decisions of the Excise Commissioner, who is the authority for granting license for 'exclusive privilege' under the Act, a vested right would accrue in favour of the petitioner to obtain refund of fee paid and deposit made. There is no power vested in the Government to review the said order.

29. It is argued that even if it is assumed that the order could be reviewed, the State should have afforded an opportunity of hearing to the petitioner and should have given reasons for cancelling/reviewing the same. Hence, the impugned order is in breach of principles of natural justice which are protected by Article 14 of the Constitution. Reliance in this regard has been placed upon the following judgments:

Kalabharti Advertising vs. Hemant Vimal Nath Narichania, (2010) 9 SCC 437 and Vinod Kumar vs. State of Haryana

30. Lastly, it is submitted, that the contention of the State, that it is for the petitioner to arrange the premises and thus, it was entirely for them to send the proposal and since the petitioners did not send proposal for 830 shops, they are at fault, is not sustainable in the eye of law.

31. It is submitted that the determination of location and site of liquor shops is governed by the provisions of the U.P. Number and Location of Excise Shop Rules, 1968, as amended in the year 2011. Rule 5(5) provides that the location and the site of all shops shall be decided by the Collector.

Rule 2(c) defines location and 2(d) defines site. Location means any village, Mohalla, Ward etc. specified for a shop. Site means boundaries approved for the premises of shop. The location and site of the shops are determined before grant of 'exclusive privilege' by license. The location and site of shops cannot be altered by the petitioners on their own. Proviso to Rule 5(2) of the U.P. Number and Location of Excise Shop Rules, 1968, states that change of location needs prior approval of Excise Commissioner and the change of site of the shop needs prior approval upon the choice of premises made by the privilege holder/licensee and the premises/site cannot be determined/chosen unless the Excise Authorities determine the location with the approval of the Excise Commissioner.

32. It has been argued that the licensee may be requested to give a proposal for change of location, but the law does not contemplate any such proposal and the exercise of the power by the Excise Authorities for determining location exclusively vests in them. The U.P. Number and Location of Excise Shop Rules, 1968 and the radiogram dated 03.04.2017 provide several restrictions for location of shops.

33. ***Per Contra***, the learned Chief Standing Counsel while opposing the submissions made by learned counsel for the petitioner submits that the petitioner is seeking restoration of the order dated 15.11.2017, which is in the form of opinion/recommendation, however, the State Government has reviewed and cancelled it, *vide* order dated 29.12.2017 on the basis of the report of the Committee and directed the Excise Commissioner to recover the entire balance license fee and other dues from the petitioner. It is submitted that on the basis of opinion/recommendation dated 15.11.2017, no right has been accrued in favour of the petitioner, as the same is in the form of an opinion/communication between the State and the Excise Commissioner to proceed/inquire as per the recommendations and the same can be reviewed.

34. He submits that Section 24 of the Act provides grant of exclusive privilege subject to the provisions of Section 31, which provides that the Excise Commissioner may grant to any person a license for the exclusive privilege: (i) of manufacturing or of supplying by wholesale, or of both (ii) or of selling by wholesale or by retail, or (iii) manufacturing or supply by wholesale, or of both, and are selling by retail – any country liquor or intoxicating drug within any local area. Section 24-A relates to grant of exclusive or other privilege in respect of foreign liquor. Section 24-B provides for the removal of doubts, it is hereby declared – Removal of doubts:

(a) that the State Government has an exclusive right or privilege of manufacture and sale of country liquor and foreign liquor;

(b) that the amount described as license fee in clause (c) of Section 41 is in its essence the rental or consideration for the grant of such right of privilege by the State Government;

(c) that the Excise Commissioner, as the head of the Excise Department of the State, shall be deemed, while determining or realizing such fee, to act for and on behalf of the State Government.

It is submitted that the ‘exclusive privilege’ granted under these Sections to any privileged person to hold in custody, manufacture, produce, use dispose of manufacture of the excisable commodity within any specified local area is for a specific end and its use is restricted for the specified area, i.e. Special Zone Meerut, which has been granted.

35. It has been argued by learned counsel appearing on behalf of the State that *vide* notification dated 11.02.2009, the Special Zone Meerut was created under Rule 5 of the Uttar Pradesh Demarcation and Regulation of Special Zones for Exclusive Privilege of Excise Shop Rules, 2009, which has been

amended in 2011 for exclusive privileges for this zone, for the reason that the Meerut Zone, having maximum density of population, did not have per capita revenue from country liquor in comparison to its bordering States. The reason is that certain people of the State often visit bordering States of Haryana, Delhi and Uttrakhand to consume liquor and bring with them personally from such States and as such, the liquor was being smuggled at large scale. The above fact is also not denied by the petitioner in the present petition.

36. Counsel for the respondents further submits that on 12.03.2011, an advertisement was issued inviting applications from all the eligible persons for the grant of 'exclusive privilege' in Special Zone Meerut comprising of 18 districts. The petitioner and several other Companies submitted their applications pursuant to the said advertisement along with affidavit dated 18.02.2011 in the prescribed form. A bare perusal of column 'Kha' of the said advertisement would reveal the fact that the applicant has to submit only one application form for retail sale of all the country liquor, foreign liquor, beer and model shop in Special Zone Meerut. Along with the application form, a basic license fee of 10% of all the country liquor shops of the zone, and a demand draft in favour of Excise Commissioner payable at Allahabad Bank for an amount equal to 10% of the foreign liquor, beer and model shops, has to be enclosed.

The petitioner complied with the said condition and also submitted an affidavit as required, stating therein that it maintains suitable premises for opening a shop at that place in accordance with the provisions of the U.P. Number and Location of Excise Shops Rules, 1968, as amended from time to time, or can arrange suitable premises at that place on rent. The applications of the petitioner and other applicants were considered and a five Members Committee, through lottery on 23.03.2011, made a recommendation in favour of the petitioner and an other firm for granting 'exclusive privilege' in the Special Zone Meerut and, thereafter, on the basis of lottery, the petitioner has been selected as licensee for 'exclusive

privilege' for Special Zone Meerut on 23.03.2011 itself. It is pertinent to mention that except for excluding certain places that were not "suitable places" like schools, hospitals etc. (later on the Highway was included), the petitioner was free to open these shops at any place to maximize its revenue and was granted the sole monopoly in the Zone, excluding all other competitors/licensees of that area.

37. *Vide* order dated 24.03.2011, the petitioner was required to deposit a special zone fee/consideration fee. Though in the said order, number of shops is mentioned and the special zone fee/consideration fee which is called 'license fee', was prescribed, it does not lie in the mouth of the petitioner that because of the non-operation of certain shops, he cannot be held liable for payment of the total privilege fee/consideration fee. The excise duty was fixed as per the number of shops by the Excise Commissioner for the grant of exclusive privilege, and the petitioner Company was required to get the licenses from various District Magistrates on their own, and there was also a provision for penalty and forfeiture in case the licenses were not obtained by the petitioner Company.

38. It has been further argued that, so far as the the allegation of the petitioner that the authorities themselves have stated that the suitable places are not available is concerned, the same is misconceived as Annexure No. 15 to the writ petition speaks only to the extent that due to non-availability of suitable places, it is not possible to relocate 20 shops of country liquor, 9 shops of foreign liquor, 11 shops of beer and 7 model shops, to another place, and hence, it is necessary to close down the said shops in compliance with the order dated 15.12.2016 of the Apex Court. It is submitted that suitable place cannot be judged as per the petitioner's convenience and has to be judged only as per the rules wherein, except for certain places that were found to be unsuitable for opening of liquor stores, there was no limitation for the petitioner as far as the location was concerned. Admittedly, since the petitioner failed to transfer the shops at some other place, it cannot deny the liability for the total privilege/license fees.

39. It is also pertinent to mention here that even though the number of shops is allotted by fixing a number, the location of these shops is not fixed by the Excise Commissioner. It is upon the licensee to find the best locations, suitable to him, as per his business interest and preference and, therefore, the duty to find out the same is of the Company that has been granted the 'exclusive privilege' in the Special Zone under Rule 5 of the U.P. Demarcation and Regulation of Special Zones for Exclusive Privilege of Excise Shop Rules 2009.

40. He further submitted that after the judgment of the Apex Court in **K. Balu (supra)**, the petitioner had closed 46.2% of the shops, while in the other zones, only 6.2% were closed. Further, on perusal of the supplementary counter affidavit dated 12.03.2019, it can be seen that in pursuance of order dated 05.02.2018, the petitioner has started operating 420 shops after depositing Rs. 234 crores at the same location where he said that he was not finding an alternative site and when 830 shops were advertised in 2018-19 in 18 districts, the same were in operation and the revenue earned by State was Rs. 3578.17 crores in January 2018 and Rs. 4675.80 crores by January 2019. For the convenience of the petitioner Company, the date of deposit of 2nd installment was extended considering the special circumstances by Government Orders and time given for reallocating the shops was by 30.06.2017.

41. The State has raised one more ground in their counter affidavit that in compliance with the directions of the Supreme Court, they have not closed the liquor vends and on the contrary, they have directed the petitioner to search for alternate places, which is in consonance and in compliance with the directions of the Supreme Court.

42. Thus, in light of the aforesaid submissions, the contention of learned counsel for the State is that the petitioner is attempting to evade the payment of license fee by trying to twist the facts and blame the respondents whereas it is the petitioner who failed to operate the vends especially when it was

granted exclusive privilege for the entire Meerut Zone comprising of 18 districts, accordingly, the petition deserves to be dismissed.

43. We have heard learned counsel for the parties and perused the record.

44. Having considered the respective submissions, the controversial issues between the parties that requires factual investigation and adjudication, mainly are:-

(I) Whether the petitioner was not at fault as he could not operate the vends solely on account of the decision rendered by the Apex Court in the Case of **(K.Balu Supra)**;

(ii) Whether in light of the agreed terms, conditions and obligations between the licensee and the State viz. a viz. the operation of vends as exclusive privilege holder through the entire Meerut Zone, the petitioner if could not operate the vend at one place then whether it could be done at any other place selected by the petitioner from amongst the 18 districts comprising of the exclusive Meerut Zone and, its impact;

(iii) Whether the petitioner made the payments of the license fee in accordance with the terms and conditions and schedule agreed between the parties as per the exclusive privilege parted by the State in favour of the petitioner.

(iv) Whether after having operated the vends for the entire excise year 2017-18, any amount is refundable to the petitioner and if at all so, then at what rate of interest will accompany the refund and for what period.

45. The aforesaid issues which are at the core of the controversy if seen in context with, the reliefs which have been claimed ought to have been considered by the State-respondents especially when the petitioner had escalated the matter by making a representation.

46. The primary relief sought by the petitioner regarding the refund of the license fee along with interest comprises of two components.

(I) For the vends which could not be operated by the petitioner which were affected by the order passed by the Apex Court in ***K. Balu (supra)***;

(II) For those number of vends which actually became operational but from October, 2017 for which the petitioner was made to pay for the entire license fee for the full 2017-18 excise year;

47. It is also to be ascertained as to whether the exclusive privilege given to the petitioner for operating vends in the exclusive Meerut Zone could be construed as permitting the petitioner to open an outlet at the convenience of the petitioner subject to the rules except for certain places that as per the rules are not suitable for opening the liquor shops. What effort was made by the petitioner to find suitable locations within the entire exclusive Meerut Zone for which the petitioner had been granted the exclusive privilege and merely by not making the necessary efforts of relocation could the petitioner blame or shift the burden on the State and whether that could entitle the petitioner to claim refund.

48. These are all highly volatile questions of fact and in view thereof whether any amount is to be recovered from the petitioner or any amount is to be refunded in light of the provisions which have been highlighted by the petitioner during his course of arguments and already raised by him in the representation made to the State-Authorities are such questions which needs to be decided first at the stage of the State-Government who has exclusively granted such privilege to the petitioner.

49. Even as per the petitioner in the case of ***Har Prasad Jaiswal (supra)*** and ***Neeraj Jaiswal (supra)***, this Court had directed the licensee to approach the State-Authorities who were directed to decide the grievances so raised. In the aforesaid backdrop, this Court is of the clear opinion that in order to get a clear picture on the factual aspect, a decision needs to be taken by the State-Authorities in this regard. Whether there were any disputed questions in the case of ***Har Prasad Jaiswal (supra)*** and ***Neeraj Jaiswal (supra)*** and how the decision taken by the State Government in the said case has a

favourable impact on the instant case of the petitioner, is also a question that can best be considered by the State-Authorities.

50. Moreover, the petitioner-Company has sought restoration of the order dated 15.11.2017, issued by the State wherein the State had opined that it would be unjust to direct the petitioner Company to deposit the money for the period when the shops remained closed, the said relief, claimed by the petitioner, cannot be granted by this Court in exercise of powers under Article 226 of the Constitution of India.

51. Unless and until these contentious issues are decided by taking an objective view of the matter including the claims and contentions of the respective parties, its applicability to the facts of the case, the issue of refund cannot be directed forthwith that necessarily depends on the consideration and decision on the issues aforesaid and its final outcome.

52. Even the issue as raised by the learned counsel for the petitioner whether the State Government had the power to review its order and even if so then as no opportunity was granted to the petitioner is also apparently in violation of Article 14 of the Constitution of India also persuades this Court to relegate the petitioner to the State-Authorities for a comprehensive consideration of the entire matter in a holistic fashion and approach.

53. The issue whether the petitioner is required to pay the license fee for the entire year or only for the period when it was operated and how much would be payable is also a disputed question of fact which the petitioner can raise before the Authority. The effect of the exclusive special privilege given to the petitioner, its other terms and conditions have also to be looked into before arriving at the conclusion that the petitioner is entitled to the refund of license fee during the period the petitioner company could not operate the vends. This entitlement and right of the petitioner has to be seen in light of the terms, conditions and obligations of the Special Zone Policy under which the petitioner was granted the special privilege.

54. In the aforesaid peculiar circumstances, this Court is of the clear opinion that the issues really needs to be considered by the State-Authorities at the first instance as the contentions raised by the respective parties is quite at variance and the Court under Article 226 of the Constitution of India will not go into disputed questions of fact which have been enumerated in the preceding paragraphs, hence, the State-Authorities would be better equipped to undertake a complete scrutiny of the matter and for the aforesaid purpose we grant liberty to the petitioner to raise all its grievances by a comprehensive representation made to the State-Authorities within a period of two weeks from today. Upon receipt of such representation, by the petitioner, the State-Authorities shall after affording a reasonable opportunity of hearing to the petitioner shall decide the same by a reasoned and a speaking order after taking into consideration the observations made by this Court, the submissions of the petitioner, the effect and applicability of the legal provisions pointed out by the petitioner including the impact of Section 34 and Section 35 of the U.P. Excise Act, 1910. The Authority shall also consider and take note of the amount deposited by the petitioner in terms of the interim order passed by the Court dated 05.02.2018 and after considering and accounting for the same a clear decision be taken within a period of four weeks and thereafter, if any refund is found payable to the petitioner then the same shall be refunded to the petitioner along with such rate of interest as provided in the governing rules or statute or if not so provided then as per the interest on lending rates notified by the Nationalized Banks within a further period of four weeks from the date of the decision taken by the Authority. The effect of the demand notices will be subject to the outcome of the decision taken by the Authority on the representation of the petitioner.

55. At this stage, this Court hastens to add that any observations made in this judgment is merely tentative to prima facie examine the contentions of the respective parties and may not be taken as a final expression of opinion

on merits. Subject to the aforesaid directions, the petition stands *disposed of*.
Costs are made easy.

Order date: 20 /11/2023

RKK/Asheesh

(Jaspreet Singh,J.) (Pritinker Diwaker,CJ.)