

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS**

MONDAY, THE 2ND DAY OF MARCH 2015/11TH PHALGUNA, 1936

WA.No. 276 of 2015 () IN WP(C).32335/2014

**AGAINST THE ORDER/JUDGMENT IN WP(C) 32335/2014 of HIGH COURT OF KERALA
DATED 11-12-2014**

APPELLANT(S)/PETITIONER IN WPC:

**K.G.A.HOTELS & RESORTS PVT.LTD.
7/311-C, KUNDANOR, NH-47 BYE PASS
MARADU P.O. ERNAKULAM REPRESENTED BY ITS
CHIEF EXECUTIVE OFFICER AND AUTHORIZED
SIGNATORY SRI.V.T.MATHEW**

**BY ADVS.SRI.T.A.SHAJI (SR.)
SMT.NAMITHA JYOTHISH
SRI.V.VINCENT DIDACOSE**

RESPONDENT(S)/RESPONDENTS IN THE WPC:

- 1. STATE OF KERALA
REPRESENTED BY THE PRINCIPAL SECRETARY TO THE GOVERNMENT
TAXES (G) DEPARTMENT
GOVT.SECRETARIAT THIRUVANANTHAPURAM.**
- 2. THE EXCISE COMMISSIONER, KERALA
THIRUVANANTHAPURAM.**
- 3. THE DEPUTY EXCISE COMMISSIONER
ERNAKULAM.**
- 4. MARADU MUNICIPALITY,
MARADU P.O, ERNAKULAM DISTRICT
REPRESENTED BY ITS SECRETARY.**

**R4 BY ADV. SRI.T.R.RAJAN SC,MARADU MUNICIPALITY
BY SPL.GOVERNMENT PLEADER SRI.TOM K.THOMAS**

**THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 02-03-2015,
ALONG WITH WA. 359/2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

WA NO.276/15

APPENDIX

APPELLANT'S EXHIBITS NIL

RESPONDENT'S EXHIBITS

ANNEXURE R4(a): TRUE COPY OF the COMMUNICATION DATED
20/2/14 ISSUED BY THE KERALA PRADESH CONGRESS COMMITTEE
(I) .

//True Copy//

PA to Judge

Rp

ANTONY DOMINIC & ALEXANDER THOMAS, JJ.
=====

Writ Appeal Nos. 276 & 359 of 2015
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Dated this the 2nd day of March, 2015

J U D G M E N T

Antony Dominic, J.

These writ appeals arise from the judgment of the learned single Judge in WP(C) No.32335/14. The writ petition was filed by M/s.K.G.A.Hotels & Resorts Pvt. Ltd., (hereinafter referred to as 'Company' for short), the appellant in WA No.276/15. In the writ petition, the challenge was primarily against Ext.P10, a communication issued by the Maradu Municipality (hereinafter referred to as 'Municipality' for short), the appellant in WA No.359/15, whereby, the Company was informed that their application for permission to obtain a FL-3 licence was rejected for “policy reasons” and also on account of the “possibility of complaints from the general public”. By the judgment under appeal, the learned single Judge held both the reasons stated in Ext.P10 untenable and directed that the application made by the company be considered afresh. Aggrieved by the judgment, the Company and the Municipality have filed these appeals.

2. We shall refer to the relevant facts of the case. M/s.K.G.A.Hotels & Resorts Pvt.Ltd, the appellant in WA No.276/15, is a private limited company incorporated under the provisions of the Companies Act. It is stated that, in 5.64 Acres of land in Maradu Village, investing ₹248 crores, the Company established a hotel by name 'CROWNE PLAZA' which is situated within the jurisdiction of the Maradu Municipality. Ext.P2 produced by the company shows that the Government of India, Ministry of Tourism have, by their communication dated 15/1/14, classified the hotel in the Five Star Deluxe Category for a period of five years from 15/1/14 to 14/1/19. On an application made by the company, the Municipality has issued Ext.P1, a trade licence, which also mentions that the hotel is a Five Star Deluxe Hotel.

3. By the Kerala Municipality (Amendment) Ordinance, 2013 (Ordinance No.39 of 2013), among other provisions of the Kerala Municipality Act, Section 447 was also amended with effect from 25.11.2012. Sub Section (7) added to Section 447 provided that notwithstanding anything contained in the Abkari Act, 1077 (1 of 1077) or in any other law for the time being in force, no person shall, without previous permission in writing of the

Municipality and otherwise than in accordance with the conditions specified in the permission, establish an Abkari shop within a municipal area.

4. According to the Company, in view of the amendment to the Kerala Municipality Act, it made an application to the Municipality for the grant of previous permission as provided in Section 447 (7) of the Kerala Municipality Act for obtaining a licence in Form FL-11 under the Foreign Liquor Rules, for the privilege of possession and vending of beer/wine for consumption in its premises. The Municipality considered the application and issued Ext.P4 dated 17/7/13 granting previous permission applied for. On the strength of Ext.P4, the company obtained Ext.P3 licence in form FL-11.

5. It is stated that subsequently, on 23/1/14, the company submitted Ext.P5, an application to the Commissioner of Excise for a FL-3 licence. When the application was pending, by Kerala Municipality (Amendment) Act, 2014 (Act 8 of 2014), Section 447 of the Kerala Municipality Act was amended with effect from 25/11/2012 incorporating sub sections 7 to 10 and repealing Ordinance No.39 of 2013. Sub section (7) provided that

notwithstanding anything contained in the Abkari Act or in any other law for the time being in force, no person shall, without previous permission in writing of the Municipality and otherwise than in accordance with the conditions specified in the permission, establish an Abkari shop within a municipal area. In this Amendment Act, an explanation has been added whereby a bar hotel, meaning thereby a hotel to which FL-3 licence is issued, is also defined as an abkari shop.

6. The Company states that they applied to the Municipality for previous permission as provided in Section 447(7) of the Kerala Municipality Act to obtain the FL-3 licence. Their application was considered and the Municipality rejected their request and the decision was conveyed to the company by Ext.P6. This communication reads thus;

“നയപരമായ ചില കാരണങ്ങളാൽ കെ.ജി.എ ഹോട്ടൽസ് & റിസോർട്ട്സ് പ്രൈവറ്റ് ലിമിറ്റഡിന്റെ എഫ് .എൽ-3 ലൈസൻസിനുള്ള എൻ .ഒ.സി നൽകേണ്ടതിലാല എന്ന് കൗൺസിൽ ഐക്യകണ്ഠേന അംഗീകരിച്ച് തീരുമാനിച്ചു.”

7. Subsequently, by Ext.P7 dated 27th of August, 2014, the Foreign Liquor Rules were amended by the Government and

as per the amended rule, FL-3 licence was decided to be issued to hotels which have obtained Five Star and Five Star Deluxe classification from the Ministry of Tourism, Government of India. In the light of the Rules as amended by Ext.P4, on 29/8/14, the company again submitted Ext.P8, a letter to the Secretary of the Municipality requesting that in the changed circumstances, their application for written permission may be reconsidered. Thereafter, complaining of non-consideration of their application for permission, the company filed WP(C) No.23102/14. That writ petition was disposed of by Ext.P9 judgment rendered on 18th of September, 2014. Reading of the judgment shows that when the case came up, the Municipality submitted that the rejection of the writ petitioner's request was on account of the then prevailing abkari policy of the State and that the Municipality did not have any objection in considering the application on merits. On that basis, directing consideration of Ext.P8 application submitted by the petitioner in accordance with law and to pass appropriate orders thereon, the writ petition was disposed of.

8. In the purported compliance of the directions contained in Ext.P9 judgment, the Municipality reconsidered the

application of the Company in their meeting held on 20/11/14 and resolved to reject the application. This decision of the Municipality was conveyed to the company by Ext.P10, which reads thus;

“നഗരസഭ 11/641 എ നമ്പർ കെട്ടിടത്തിൽ
(പവർത്തിക്കുന്ന കെ.ജി.എ ഹോട്ടൽസ് &
റിസോർട്ട്സ് എന്ന സ്ഥാപനത്തിന് എഫ് .എൽ-3
ലൈസൻസ് എടുക്കുന്നതിന് എൻ .ഒ.സി
ലഭിക്കുന്നതിനായി കെ .ജി.എ ഹോട്ടൽ സമർപ്പിച്ച
അപേക്ഷയിൻമേൽ നയപരമായ കാരണങ്ങളാലും,
പുതുതായി ഒരു ബാർ അനുവദിക്കുന്ന കാര്യത്തിൽ
പൊതുജനങ്ങളിൽ നിന്ന് എതിർപ്പ് വരുവാൻ സാധ്യത
ഉള്ളതിനാലും എൻ .ഒ.സി നൽകേണ്ടതില്ല എന്ന്
കൗൺസിൽ തീരുമാനിച്ചു.”

9. Reading of Ext.P10 shows that, despite undertaking before this Court to consider the application on merits, once again, the application of the company was rejected for policy reasons and also in view of the possibility of complaints from the general public. It was in this background, the company filed WP(C) No.32335/14. In its counter affidavit, the Municipality justified Ext.P10 by stating thus;

“The request of the petitioner was declined due to policy reasons namely it was the policy of the fourth respondent Municipality not to grant NOC to establish FL3 Bars within its territorial limits

as well as considering the possibility of objections from the public in the event of grant of permission to open FL3 Bar."

10. Parties were heard and the writ petition was disposed of by the learned single Judge holding that both the reasons stated in Ext.P10 are untenable and directing reconsideration of the matter. It is aggrieved by this judgment, both sides are in appeal before us.

11. According to the Company, the learned single Judge ought to have issued a writ of mandamus directing the Municipality to issue an NOC as provided in Section 447 of the Kerala Municipality Act, while according to the Municipality, the learned single Judge erred in quashing Ext.P10 and directing the Municipality to reconsider the matter.

12. When this appeal came up for consideration on 18th of February, 2015, taking note of the submissions made by both sides, this Court passed an order which reads thus;

"On behalf of the appellant, it is submitted that the Maradu Municipality is being ruled by members in alliance to Congress party and

that the Kerala Pradesh Congress Committee had issued a circular preventing the municipalities ruled by the members of that party from issuing NOC under section 447 of the Kerala Municipalities Act. It is also pointed out that alleging non-compliance of the aforesaid circular, disciplinary actions were initiated against the members of two municipalities in Kerala. However, the factual issue now raised is not covered by the pleadings and therefore, we are unable to take cognizance of the same. But, if there is truth in the aforesaid submissions, that certainly is a matter to be considered.

In the aforesaid circumstances, we direct the standing counsel for the Maradu Municipality to clarify the actual position in relation to the above submissions made on behalf of the appellant and file an affidavit before this Court."

13. In compliance with the order, the Chairman of the Municipality has filed affidavit dated 24/2/15 producing circular dated 20/2/14 of the President of the Kerala Pradesh Congress Committee (I), which reads thus;

“KERALA PRADESH CONGRESS COMMITTEE (I)

V.M.Sudheeran,
President

20.2.2014

(പിയ സുഹൃത്തേ,

കേരളത്തിൽ ലഹരിയുടെ ഉപയോഗം ഭയാനകമാംവിധം വർദ്ധിച്ചുവരികയാണല്ലോ. സമൂഹത്തിന് വളരെ ദോഷകരമായിട്ടുള്ള ഈ കാര്യം നേരത്തേതന്നെ കെ.പി.സി.സി.യുടെ (ശ്രദ്ധയിൽവന്നിട്ടുള്ളതാണ്. അതിന്റെ അടിസ്ഥാനത്തിലാണ് പൊതുവായി ചില നിയന്ത്രണങ്ങൾ ഇക്കാര്യത്തിൽ ഏർപ്പെടുത്തണമെന്ന് സർക്കാരിനോട് അഭ്യർത്ഥിച്ചിരുന്നത്. അതിനെത്തുടർന്നാണ്, ബാർ ഉൾപ്പെടെയുള്ള മദ്യവിൽപനശാലകൾക്ക് അനുമതിവാദം കൊടുക്കുന്നതിനുള്ള അധികാരം തദ്ദേശസ്വയംഭരണ സ്ഥാപനങ്ങൾക്ക് നൽകിയത് സ്വാഭാവികമായും ഈ വിഷയത്തിൽ പൊതുതാല്പര്യത്തിന് മുമ്പുണ്ടാകുന്ന നൽകിക്കൊണ്ട് ഉചിതമായ രീതിയിലുള്ള തീരുമാനം തദ്ദേശസ്വയംഭരണ സ്ഥാപനങ്ങൾക്കെക്കൊള്ളുമെന്ന (പ്രതീക്ഷയാണ്, ഇപ്രകാരം അധികാരം നൽകുമ്പോൾ പൊതുവേ ഉണ്ടായിരുന്നത്. നിർഭാഗ്യവശാൽ ചില തദ്ദേശസ്വയംഭരണ സ്ഥാപനങ്ങൾ ഈ അധികാരം പൊതുതാല്പര്യത്തിന് വിരുദ്ധമായി ദുരുപയോഗം ചെയ്യുന്നുവെന്ന് വ്യക്തമായി ആക്ഷേപം ഉണ്ടായിട്ടുള്ളത് കെ.പി.സി.സി.യുടെ ശ്രദ്ധയിൽപ്പെട്ടിട്ടുണ്ട്. ഇക്കാര്യത്തിൽ കോൺഗ്രസിന്റെ നിലപാട് വീണ്ടും വ്യക്തമാക്കാൻ ആഗ്രഹിക്കുന്നു. ഒരു കാരണവശാലും കോൺഗ്രസ് ഭരണനേതൃത്വം നൽകുന്ന ഒരു തദ്ദേശസ്വയംഭരണ സ്ഥാപനവും മേലിൽ മദ്യവിൽപന ശാലകൾക്ക് അനുമതിവാദം നൽകാൻ പാടുള്ളതല്ല. കോൺഗ്രസ് ഭരണത്തിലില്ലാത്ത തദ്ദേശസ്വയംഭരണ സ്ഥാപനങ്ങളിൽ ഇക്കാര്യത്തിൽ ഭരണപക്ഷം ഏകകക്ഷിയായി തീരുമാനവുമായി മുന്നോട്ടുപോയാൽ അതിന്മേൽ വിമോചിപ്പ് രേഖപ്പെടുത്തുകയും അക്കാര്യം പൊതുജനങ്ങളെ അറിയിക്കുകയും ചെയ്യേണ്ടതാണ്.

സ്നേഹപൂർവ്വം,

(ഒപ്പ്)

വി.എം.സുധീരൻ

ബന്ധപ്പെട്ടവർക്ക്”

(emphasis supplied)

14. In so far as the allegation of the counsel for the company that alleging non compliance of the circular, disciplinary action was initiated against the members of two Municipalities in Kerala, the Chairman has vaguely stated in the affidavit that “*I have no information except those gathered from the newspapers.*” It is in this background, these appeals are coming up for hearing before us.

15. We heard the learned counsel for both sides and have considered the submissions made before us.

16. Section 447(7) of the Kerala Municipality Act, as amended by Act 8 of 2014, is effective from 25th November, 2012, the date with effect from which Ordinance No.39 of 2013 was implemented. This sub section provides that notwithstanding anything contained in the Abkari Act or any other law for the time being in force, no person shall without the previous permission in writing of the Municipality and otherwise than in accordance with the conditions specified in the permission, establish an abkari shop within a municipal area. Under Sub section (8), the Municipality is obliged to comply with the distance limit prescribed in the Abkari Act while granting permission to establish

an abkari shop and Municipality shall not grant such permission within the said distance limit. It also cannot be disputed that in view of the explanation added by this Amendment Act, abkari shop would include a hotel with FL-3 licence issued under the Abkari Act, 1077 and the rules made thereunder.

17. Therefore, except with the previous permission in writing of the Municipality and otherwise than in accordance with the conditions specified in the permission, no person shall establish an abkari shop within a municipal area. This, therefore, shows that by this provision, the Municipality has been statutorily conferred the discretionary power to grant written permission for the establishment of an abkari shop. This necessarily implies that the Municipality is also conferred with the discretionary power to decide whether such written previous permission should not be granted.

18. The concept of discretionary power and the mode of its exercise by statutory functionaries was an issue considered by the Apex Court in **UOI v. Kuldeep Singh** [(2004) 2 SCC 590], where in paragraphs 20, 21 and 22, it was held thus;

“20. When anything is left to any person, judge or Magistrate to be done according to his discretion, the law intends it must be done with sound discretion, and according to law. (See Tomlin's Law Dictionary). In its ordinary meaning, the word “discretion” signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty or power of acting without control other than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore, whoever hath power to act at discretion, is bound by the rule of reason and law. (See Tomlin's Law Dictionary.)

21. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or

understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (per Lord Halsbury, L.C., in Sharp v. Wakefield [(1891 AC 173: (1886-90) All ER Rep 651 (HL)]. (Also See S.G.Jaisinghani v. Union of India (Air 1967 SC 1427).

22. *The word “discretion” standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in it implies vigilant circumspection and care; therefore, where the*

legislature concedes discretion it also imposes a heavy responsibility. ”

19. Again in **Clariant International Ltd v. Securities & Exchange Board of India** [(2004) 8 SCC 524], the Apex Court reiterated these principles thus;

“27. In Kruger v. Commonwealth of Australia [(1997) 146 Aus LR 126] it is stated:

“Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention.....”

28. The discretionary jurisdiction has to be exercised keeping in view the purpose for which it is conferred, the object sought to be achieved and the reasons for granting such wide discretion (See Narendra Singh v. Chhotey Singh [(1983) 4 SCC 131].

29. A discretionary jurisdiction, furthermore, must be exercised within the four corners of the statute. [See Akshaibar Lal (Dr.) v. Vice-Chancellor, Banaras Hindu University (AIR 1961 SC 619) and also para 9-022 of de Smith, Woolf and

Jowell: Judicial Review of Administrative Action, 5th Edn., p.445].

20. Therefore, when Municipality is conferred with the discretionary power to grant permission, it being a repository of statutory power, is obliged to consider each application independently and in accordance with law and to decide whether the permission sought for should be granted or declined. Such a statutory authority is not entitled to take a blanket policy decision that it would not exercise its discretion under any circumstances and thus deny itself the discretion statutorily conferred on it. In this context, it is most apposite to refer to the Apex Court judgment in ***U.P.S.R.T.C. v. Mohd. Ismail***[(1991) 3 SCC 239] where, it was held that;

“It may be stated that the statutory discretion cannot be fettered by self-created rules or policy. Although it is open to an authority to which discretion has been entrusted to lay down the norms or rules to regulate exercise of discretion it cannot, however, deny itself the discretion which the statute requires it to exercise in individual cases.”

21. The above principles of Administrative Law have been explained by H.W.R.Wade and C.F.Forsyth in their book on Administrative Law (Ninth Edition) at page 324 thus;

“An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time. The Greater London Council was criticised for disregard of this principle when it proceeded to make a large subsidy to the London bus and underground services as a matter of course because the ruling party had promised to do so in their election campaign. They regarded themselves as irrevocably committed in advance, whereas their duty was to use their discretion. Nor may a local authority lawfully refuse all applications for housing for children of families considered to be 'intentionally homeless', since the power to provide housing implies a duty to consider the different circumstances of each child. Nor, for the same reason, may they automatically proceed to recondition sub-standard houses as soon as the

owner has failed to comply with an improvement notice. Nor may they refuse to repay rates overpaid if their policy is based upon advice which interprets their statutory discretionary power too narrowly. Where the Secretary of State's policy was to disallow all merely local objections to the allocation of land for gipsies, the court held it unlawful for undue rigidity. Where he made a rule that he would refuse grants to all projects already started before the grant application he fettered his discretion unlawfully. The Court of Appeal has held that a local council's resolution might be quashed if councillors voted for it in obedience to the orders of their political party, but not if they conscientiously decided to prefer the party's policy to their own opinions."

22. Therefore, self imposed policy decision taken by a statutory authority denying itself the discretion statutorily conferred on it, would be condemned by courts as a case of abdication of the statutory power. In so far as this case is concerned, Ext.P10, the decision communicated to the company and the affidavit filed by the Municipality show that the Municipality has taken a rigid policy decision not to grant permission for any licence within the Municipal area. This is

reiterated in the counter affidavit also. Though the policy decision allegedly taken is not produced before this Court, by confessing that it has taken such a decision not to grant permission for any licence within its area, the Municipality has denied to itself the statutory discretion and thus abdicated its statutory duties. Such a decision as reflected in Ext.P10, is totally illegal and cannot be sustained.

23. The second reason stated in Ext.P10 to reject the application of the petitioner is the possibility of complaints from the general public. In our view, this ground stated by the Municipality in Ext.P10 cannot be a reason in the eye of law. It is trite that even a statute cannot be held invalid on the assumed possibility of misuse or abuse of power. When statutory power is exercised and the competent authority deals with an application made, the authority cannot take its decision on the assumed and uncertain future possibilities. In this context, we should also take note of the fact that neither in the counter affidavit of the Municipality nor in Ext.P6 or Ext.P10, the Municipality has a case that anybody has objected to the grant of permission to the company or complained against it. It also did not have such a

case when Ext.P9 judgment was rendered by this Court on the undertaking of the Municipality to consider the application on merits. Therefore, this reason now invented, as rightly held by the learned single Judge, cannot be sustained.

24. In so far as the circular issued by the KPCC President which has been produced by the Chairman of the Municipality is concerned, reading of this document shows that by this circular, Municipalities such as Maradu Municipality, which are ruled by the alliance led by Congress Party, are completely interdicted from granting the written permission as provided under Section 447 of the Kerala Municipality Act. It is common knowledge that elections to local bodies are fought on political lines and those elected are mostly those sponsored by political parties. Even if it is so, once they are elected and make and subscribe oath or affirmation as provided under section 143 of the Kerala Municipality Act, such councillors are statutorily ordained with the duty to discharge statutory functions, which, in this case, are the duties under the Kerala Municipality Act. They are required to discharge such statutory duties, in accordance with law and guided by the dictates of their own judgment and not at the

behest of anybody else. Law does not recognise any such extra constitutional intervention in the exercise of statutory discretion and it is to ensure such unfettered freedom that section 548 of the Act provides that except with previous sanction of the Government, they cannot even be prosecuted for what they do in discharge of their official duties. Any such interference amounts to dictation from political superiors and has been condemned by courts on more than one occasion.

25. In this context, it would be profitable to refer to the judgment in ***State of U.P. v. Maharaja Dharmender Prasad Singh*** {(1989) 2 SCC 505}, where the Apex Court has held thus in para 55;

“55. It is true that in exercise of powers of revoking or cancelling the permission is akin to and partakes of a quasi-judicial complexion and that in exercising of the former power the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority cannot permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the

authority's discretion that is exercised, but someone else's. If an authority "hands over its discretion to another body it acts ultra vires". Such an interference by a person or body extraneous to the power would plainly be contrary to the nature of the power conferred upon the authority. De Smith sums up the position thus:

The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the

basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive."

26. Further, **Tarlochan Dev Sharma v. State of Punjab** [(2001) 6 SCC 260], is another case, where it was held thus;

"16. In the system of Indian Democratic Governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his

official superior. In Anirudhsinhji Jadeja (1995) 5 SCC 302 : (1995 AIR SCW 3543 : AIR 1995 SC 2390), this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in the Purtabpore Company Ltd., AIR 1970 SC 1896, are instructive and apposite. Executive Officers may in exercise of their statutory discretions take into account considerations of public policy and in some context, policy of a Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them.....”

27. Similar are the principles laid down in ***Joint Action Committee of Air Line Pilots' Association of India v. Director General of Civil Aviation*** [(2011) 5 SCC 435], where it has been held that;

“26. It is a settled legal proposition that the authority which has been conferred with

the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere with the functioning of the statutory authority. In a democratic set-up like ours, persons occupying key positions are not supposed to mortgage their discretion, volition and decision-making authority and be prepared to give way to carry out commands having no sanctity in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal. (Vide Purtabpore Co. Ltd. v. Cane Commr. of Bihar (AIR 1970 SC 1896), Chandrika Jha v. State of Bihar (AIR 1984 SC 322), Tarlochan Dev Sharma v. State of Punjab (AIR 2001 SC 2524) and Manohar Lal v. Ugrasen (AIR 2010 SC 2210). 27. Similar view has been reiterated by this Court in Commr. of Police v. Gordhandas Bhanji (AIR 1952 SC 16), Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia (AIR 2004 SC 1159) and Pancham Chand v. State of H.P (AIR 2008 SC 1888) observing that an authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is

wholly unwarranted in law. It violates the constitutional scheme.

28. In view of the above, the legal position emerges that the authority who has been vested with the power to exercise its discretion alone can pass the order. Even a senior official cannot provide for any guideline or direction to the authority under the statute to act in a particular manner.”

28. Similar principles have also been laid down by the Apex Court in ***Dipak Babaria v. State of Gujarat*** {(2014) 3 SCC 502}.

29. Further, H.W.R.Wade on Administrative Law under the heading Surrender, Abdication and Dictation has summarised the principles thus;

“The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative

arrangements which must seem quite natural and proper to those who make them. In this class might be included the case of the cinema licensing authority which, by requiring films to be approved by the British Board of Film Censors, was held to have surrendered its power of control and also the case of the Police Complaints Board, which acted as if it were bound by a decision of the Director of Public Prosecutions when only required to 'have regard' to it. This doctrine has even been applied to voting by local councillors.

Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise. The Minister of Housing and Local Government made it a rule to refuse planning permission for gravel-working on top-class agricultural land whenever the application was opposed by the Minister of Agriculture. The court held that this was to put the decisive power into the hands of the wrong minister and that a decision so taken must be quashed."

30. Power to issue whip is one weapon in the armoury of political parties to rein in their members. Even this power cannot rescue the circular because the power to issue whip to members of local bodies can be exercised only in respect of the matters

expressly specified in Section 3 of the Kerala Local Authorities (Prohibition of Defection) Act, 1999, as amended by Act 6 of 2013 and cannot be used to influence the exercise of statutory power.

This section reads thus;

“3. Disqualification on ground of Defection -

(1) Notwithstanding anything contained in the Kerala Panchayat Raj Act, 1994 (13 of 1994), or in the Kerala Municipality Act, 1994 (20 of 1994), or in any other law for the time being in force, subject to the other provisions of this Act.

(a) if a member of local authority belonging to any political party voluntarily gives up his membership of such political party, or if such member, contrary to any direction in writing issued by the political party to which he belongs or by a person or authority authorised by it in this behalf in the manner prescribed, votes or abstains from voting.

(i) in a meeting of a Municipality, in an election of its Chairperson, Deputy Chairperson, a member of standing Committee or the Chairman of a standing committee; or

(ii) in a meeting of a Panchayat, in an election of its President, Vice President, a member of a Standing committee; or the Chairman of the Standing Committee; or

in an voting on a no-confidence motion against any one of them except a member of a Standing Committee;

(b) if an independent member belong to any coalition withdraws from such coalition or joins any political party or any other coalition, or if such a member, contrary to any direction in writing issued by a person or authority authorised by the coalition in its behalf in the manner prescribed, votes or abstains from voting,-

(i) in a meeting of a Municipality, in an election of its President, Vice President, a member of Standing committee or the Chairman of the Standing committee; or

(ii) in a meeting of a Panchayat in an election of its President/Vice President, a member of a Standing committee or the Chairman of the Standing Committee; or in a voting on a no confidence motion against any one of them except a member of a Standing Committee;

(c) if an independent member not belonging to any coalition, joins any political party or coalition; he shall be disqualified for being a member of that local authority.

Explanation- For the purpose of this section an elected member of a local authority shall be deemed to be a member belonging to the

political party, if there is any such party, by which he was set up or given support as a candidate for the election.

(2) The direction in writing issued for the purpose of clauses (a) and (b) of sub-section (1) shall be given to the members concerned in the manner as may be prescribed and copy of such direction in writing shall be given to the Secretary of the Local Self Government Institution concerned.

(3) Where any dispute arises regarding the direction issued under this section between the political party or coalition concerned and the member authorised in this behalf as prescribed under sub-section (2), the direction in writing issued in this regard by the person authorised by the political party from time to time to recommend the symbol of the political party concerned for contesting in election shall be deemed to be valid."

31. Therefore, anybody who is reasonably instructed in law could easily conclude that the circular which interdicts the local body concerned in granting permission under any circumstances, is nothing but dictation on the exercise of statutory discretion. At any rate, the Municipality cannot be guided by such circulars.

32. In the affidavit dated 24th of February, 2015, the Chairman of the Municipality has omitted to deal with the allegation of the counsel for the Company about the disciplinary actions taken against members of the two Municipalities for non compliance of the circular. In fact, he has avoided answering it by saying that he has no information on that aspect except those gathered from the newspapers. That apart, in this affidavit, although the Chairman has produced the circular, he has not asserted that while considering the application of the Company leading to Ext.P10, he or his fellow travellers were not influenced by the Circular. These, therefore, indicate that this circular had its impact in the decision making process leading to Ext.P10.

33. Now, the surviving question is whether, as contended by the company, the learned single Judge should have directed the Municipality to grant the permission instead of directing reconsideration of the matter. Facts we have stated show that, on an earlier occasion, the Municipality considered the application made by the company and rejected the same by Ext.P6 relying on policy considerations. When the issue came up before this Court in WP(C) No.23102/14, the Municipality itself undertook to

consider the application of the company on merits. It was accordingly that this Court directed the Municipality to reconsider the matter. Instead of honouring the undertaking and considering the application of the Company on merits, this time, the Municipality rejected the application inventing new reasons such as its own policy decision not to grant any licence within the Municipal area and also the possibility of complaints from general public. It was accordingly that Ext.P10 was issued. In coming to this decision, the injunction contained in the circular also had its role. These facts clearly show that, on both the occasions, on totally irrelevant and extraneous considerations, the application of the company was rejected by the Municipality.

34. The company has established a Five Star Deluxe Hotel. As is evident from para 34 of the Apex Court judgment in ***State of Kerala v. Surendra Das*** (2014(1) KLT 948), FL-3 licence is a mandatory requirement for Five Star Deluxe classification. Municipality has no case that anyone from general public has complained against grant of permission to the Company. Further, Municipality has conceded that almost opposite to the Company's hotel, there is a luxury hotel which is having FL-3 licence which

has been functioning without any objections. Ext.P5 application was made by the Company as early as on 23/1/14 and the abkari year 2013-14 has already expired and 2014-15 is about to expire. Directions to reconsider applications made to statutory authorities cannot be a repeated exercise and citizens cannot be left at the mercy of such authorities for long. Taking into account all these circumstances, we are satisfied that any direction requiring the Municipality to again reconsider the application would be an exercise in futility and that therefore, the learned single Judge ought to have issued a writ of mandamus requiring the Municipality to issue prior written permission as provided in Section 447(7) of the Kerala Municipality Act.

35. We, therefore, dispose of these writ appeals with the following directions:

- (1)WA No.276/15 filed by the Company will stand disposed of modifying the judgment of the learned single Judge and requiring the Maradu Municipality, the appellant in WA No.359/15, to issue prior permission as contemplated under Section 447(7) of the Kerala Municipality Act to the

appellant herein to obtain FL-3 licence under the Foreign Liquor Rules. This shall be done by the Municipality, at any rate, within two weeks of production of a copy of this judgment.

(2)WA No.359/15 filed by the Maradu Municipality will stand dismissed.

Sd/-
**ANTONY DOMINIC
JUDGE**

Sd/-
**ALEXANDER THOMAS
JUDGE**

Rp