

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3877 OF 2013

Prakash S/o. Mannulal Jaiswal,
Age : 42 Years, Occu. : Business,
R/o. : HUDCO, Aurangabad

.. **Petitioner**

Versus

1. The State of Maharashtra,
Through the Secretary,
State Excise Department,
Mantralaya, Mumbai - 32
2. The Collector,
Aurangabad
3. The Superintendent of State Excise,
CBS Road, Near Hotel Janki,
Aurangabad
4. The Commissioner of Police,
Aurangabad

.. **Respondents**

Shri Ramesh R. Mantri, Advocate for the Petitioner.
Smt. A. V. Gondhalekar, Addl. G. P. for Respondents.

CORAM : S. V. GANGAPURWALA AND
K. K. SONAWANE, JJ.

CLOSED FOR JUDGMENT ON : 25.07.2016.
JUDGMENT PRONOUNCED ON : 08.08.2016.

JUDGMENT (PER S. V. Gangapurwala, J.) :-

1. The Petitioner seeks writ of certiorari for quashing the order dated 27.05.2011 passed by Respondent No. 2 to the extent it

restricts the Petitioner to sell liquor only for 'off' consumption i.e. in sealed bottles in respect of his CL-III licence held at Shahnoorwadi, Aurangabad. The Petitioner also seeks refund of the excise licence fee recovered for the years, 2011 – 2012, 2012 – 2013 and from 01.04.2013 till the date the condition to sale in sealed bottles is continued.

2. Mr. Mantri, the learned counsel for the Petitioner submits that, the Petitioner possesses the CL-III licence and was running his business at Bhavsingpura, Aurangabad. In the year, 2004 some miscreants demolished the shop of the Petitioner and since then the business of the Petitioner was closed. The Petitioner was paying the licence fee every year. The Petitioner was not in a position to run his business because of the illegal acts of some miscreants and also because of the Respondent / State not protecting the property of the Petitioner. On or about 06.05.2010 the Petitioner applied to the authority to transfer his CL-III licence from Bhavsingpura to the ground floor shop Nos. 2 and 3 at Renuka Complex, Shahnoorwadi, Aurangabad. In spite of the fact that the police reports were in favour of the Petitioner the Collector, Aurangabad rejected the application of the Petitioner for transfer of the said licence only on the opposition of the Corporator and some interested persons, the same was illegal. The Petitioner had to approach this court by filing Writ Petition No. 365 of 2011. This court set aside the order dated 10.12.2010 rejecting the application of the Petitioner for transfer of CL-III licence and directed the Collector, Aurangabad to hear the Petitioner again and to pass the appropriate orders in the matter as per the Maharashtra Country Liquor Rules, 1973.

3. The learned counsel further submits that, thereafter, again the Collector rejected the application and maintained his earlier

order vide order dated 30th March, 2011. The Petitioner was again required to challenge the said order by filing Writ Petition No. 2880 of 2011. The Petitioner expressed his willingness to sell liquor in sealed bottles. This court by its order dated 5th May, 2011 directed the authority to look into such a proposal. The Collector thereafter vide order dated 27.05.2011 allowed the transfer of the said CL-III licence from Bhavsingpura to shop Nos. 2 and 3, Renuka Complex, Shahnoorwadi with a condition that the Petitioner shall sell the liquor through sealed bottles only to the persons possessing necessary permit.

4. The learned counsel submits that, thereafter, the Petitioner has abided by the condition of selling liquor in sealed bottles to the Persons possessing permit.

5. The learned counsel further submits that, though, the Petitioner was permitted to sell the liquor in sealed bottles at the transferred place still the Respondents were charging the licence fee as was applicable for retail sell of country liquor in loose. The learned counsel submits that, there is a vast difference with regard to the fees for retail sell of country liquor and for sell of country liquor in sealed bottles under "off" consumption. The licence fee is almost twice for retail sell of country liquor than for selling in sealed bottles and "off" consumption. As the Petitioner was directed to sell country liquor in sealed bottles and for "off" consumption the Respondents could not have levied the licence fee as applicable for sale of retail country liquor. It was only in compelling circumstances Petitioner had agreed to sell liquor in sealed bottles and "off" consumption, as such, the excess licence fee recovered be directed to be refunded, so also, the Respondents be directed to levy licence fee as is applicable for sale of country liquor in sealed bottles and for "off" consumption.

6. Mr. Mantri, the learned counsel further submits that, right since the date of order transferring the CL-III licence of the Petitioner and allowing Petitioner to sell country liquor in sealed bottles and for "off" consumption at the transferred site there is not a single complaint against the Petitioner, the Petitioner has abided by the condition. Just near the shop of the Petitioner the bear shop is in existence, as such, the condition imposed of selling the country liquor in sealed bottles be removed and withdrawn. The Petitioner be allowed to sell the retail country liquor as is permissible in the case of CL-III licence.

7. The learned counsel further submits that, the Petitioner had made such a request to the Respondent / Collector to permit the Petitioner to sell country liquor in loose as per the licence. The Respondents have also forwarded said request for calling the police report. On 18.10.2012 the Assistant Commissioner of Police was pleased to call the Petitioner and the Senior Inspector of Osmanpura Police Station to attend before him on 22.10.2012 to discuss about the issue of permitting the loose / retail sell. The Osmanpura Police Authorities also did not object to the said prayer, however, the Respondent / Collector has not permitted the Petitioner as yet to run his business for retail sale of CL-III licence. The Respondent be directed to permit the Petitioner to sell the country liquor in loose. The condition in the order dated 27.05.2011 restricting the Petitioner to sell country liquor in sealed bottles and for "off" consumption be removed and quashed.

8. Mrs. Gondhalekar, the learned A. G. P. submits that, the application of the Petitioner to transfer the CL-III licence from Bhavsingpura to Shahnoorwadi was rejected. Even in Writ Petition No. 2880 of 2011 this court did not set aside said order but as the

Petitioner showed his readiness and willingness to sale country liquor in sealed bottles directed the Collector to consider the said proposal. Pursuant to the said directions dated 05.05.2011 in Writ Petition No. 2880 of 2011 the collector has granted request for shifting of CL-III licence at the transferred place to sell liquor in sealed bottles and for "off" consumption. The Writ Petition No. 2880 of 2011 is dismissed as withdrawn. The Petitioner is not entitled for refund of any licence fees. The Petitioner cannot ask to charge licence fee for CL-III licence possessed by him on par with the fees prescribed for CL/FL/TOD-III licences. The licence fee prescribed is different for different licences.

9. The learned A. G. P. further submits that, the order dated 27.05.2011 passed by Respondent No. 2 is appealable U/Sec. 138 (2) of the Bombay Prohibition Act, 1949, the Petitioner has an alternate remedy and the request of the Petitioner to allow him retail sell cannot be considered.

10. We have considered the submissions canvassed by the learned counsel for respective parties.

11. The order dated 30th March, 2011 rejecting the application of the Petitioner for transfer of his CL-III licence from Bhavsingpura to Renuka Complex, Shahnoorwadi, Aurangabad was challenged by the Petitioner by filing Writ Petition No. 2880 of 2011. The said order is not set aside by the court in the said writ petition. However, vide order dated 5th May, 2011 the learned single judge of this court on the basis of the readiness and willingness expressed by the Petitioner to sell country liquor in sealed bottles had directed the Collector to consider the proposal of the Petitioner permitting him to sell the country liquor in sealed bottles. The Collector pursuant to the said direction considered

the request of the Petitioner to sell the country liquor in sealed bottles at the transferred place and allowed the shifting of the CL-III licence at shop Nos. 2 and 3, Renuka Complex, Shahnoorwadi, Aurangabad and directed to sell the country liquor only in sealed bottles to the permit holders. Subsequently, the Writ Petition No. 2880 of 2011 is dismissed as withdrawn.

12. It needs to be considered that the order of the Collector, Aurangabad rejecting the application of the Petitioner to shift the licence at Shahnoorwadi was rejected, the said order was not set aside. It is only on the basis of the readiness and willingness expressed by the Petitioner this court had directed the Collector to consider the proposal of the Petitioner to allow him to sell the country liquor in sealed bottles and the same was considered by the Collector. The Petitioner on his own volition gave a proposal to sell country liquor in sealed bottles under his CL-III licence. The Petitioner wanted to retain his CL-III licence and it is on the CL-III licence of the Petitioner as per his request is allowed to sell country liquor in sealed bottles at the new place. The form of licence to sell country liquor in sealed bottles is different than for retail sell of country liquor. As at the request of the Petitioner the CL-III licence of the Petitioner has been shifted and on his own request he was allowed to sell country liquor in sealed bottles under his CL-III licence. It is not because of the Government the Petitioner is required to sell country liquor in sealed bottles under CL-III licence. For retail sell of country liquor in sealed bottles the form of licence is different i.e. in CL/FL/TOD-III. The Petitioner wanted to retain his licence in CL-III form and as per the willingness shown by him of selling country liquor in sealed bottles only under CL-III licence the request was accepted. The licence fee is charged for a particular licence. The Petitioner

cannot claim any refund of the said licence fee on the ground that he is required to sell country liquor in sealed bottles. The Petitioner has not asked for a licence in form CL/FL/TOD-III for sale of country liquor in sealed bottles for “off” consumption. The Petitioner wants to retain his licence in form CL-III. The Government is not responsible and the Petitioner on his own volition had agreed to sell country liquor in sealed bottles only under his CL-III licence. The Petitioner cannot claim refund of the licence fees in view of the judgment of the Full Bench of this court in a case of, **Jitendra S/o. Manindranath Bose V/s. State of Maharashtra and another** reported in **2011 (5) Mh. L. J. 412.**

13. It appears that after the order dated 27th May, 2011, allowing the Petitioner to sale the country liquor in sealed bottles at the transferred place, the Petitioner is doing his business. The Petitioner has filed on record the reports of the Inspector, State Excise Department so also the communication of the Assistant Commissioner of Police that the Petitioner is doing his business properly and no untoward incident has taken place. Thereafter, the Petitioner had given representation permitting him to sell loose. Even, it appears that the communication was made by the Superintendent, State Excise to the Commissioner of Police on 07.08.2012. It appears that even Petitioner was called in the office of Assistant Commissioner of Police pursuant to his representation to allow him to sell country liquor in loose.

14. Whether the Petitioner can be permitted to sell the country liquor in loose has to be considered and decided by the authorities after considering all the relevant provisions and the rules and arriving at the subjective satisfaction based on objective assessment of the facts. It is almost 5 years the Petitioner is doing his business of selling country liquor in sealed bottles under

his CL-III licence, some reports of the police authorities and the authorities under the excise are filed to the effect that no untoward incident has taken place and the Petitioner is abiding by the conditions of selling country liquor in sealed bottles.

15. Considering the aforesaid, it would be appropriate for the Petitioner to file an application with the concerned authority allowing him to sell the retail country liquor in loose at shop Nos. 2 and 3, Renuka Complex, Shahnoorwadi. In case, such an application is made by the Petitioner the concerned authority shall consider the said application on its own merits, in accordance with law, after obtaining all the concerned reports from various authorities / departments as may be required by law and considering the existing situation shall take decision on the said application on its own merits, in accordance with law, rules and policy preferably within six (6) months from the date of receipt of the said application.

16. The Writ Petition is accordingly disposed of with aforesaid observations and directions, however, with no orders as to costs.

[K. K. SONAWANE, J.]

[S. V. GANGAPURWALA, J.]

sam/July.16