IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.11.2016

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.37485 & 37486 of 2016
&
W.M.P.Nos.32104 & 32105 of 2016

S.Elangovan ... Petitioner in both Writ Petitions

Versus

1. The Commissioner of Prohibition and Excise,
   Chepauk, Chennai-600 005.

2. The Assistant Commissioner (Excise),
   Office of the District Collector,
   Dindigul, Dindigul District. ... Respondents in both Writ Petitions

Prayer in both Writ Petitions: These Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus to call for the records relating to the order of the first respondent dated 02.09.2016 in Che.Mu.Order Ma(Ma) Aa 9 (2) / 28966 / 2007 confirming the order of the second respondent dated 20.09.2007 in Letter No. Ne. Mu. Ka. Na. Ka. 35860/2007/J2 and quash the same and consequently direct the respondents to forthwith refund the security deposit of Rs.1,50,000/- to the petitioner in respect of the IMFL License Nos.15/2002-2003 & 3/2002-2003 respectively.

For Petitioner in both Writ Petitions : Mr.K.Selvaraj

For Respondents in both Writ Petitions : Mr.K.J.Shivakumar Government Advocate

C O M M O N   O R D E R

Heard Mr.K.Selvaraj, learned counsel appearing for the petitioner in both Writ Petitions and Mr.K.Shivakumar, learned Government Advocate appearing for the respondents in both Writ Petitions.

2. These Writ Petitions have been filed challenging the order passed by the first respondent dated 02.09.2016, refusing to refund the security deposit paid by the

petitioner, while he was granted IMFL license by the second respondent during 2002-03. The petitioner carried on business in retail sale of Indian Made Foreign Liquor from 03.10.2002 to 28.11.2003. The petitioner has been making repeated requests for refunding the security deposit for the shop and the board, viz., Rs.1,50,000/- for several years and ultimately approached this Court and filed Writ Petitions in W.P.Nos.6916 and 6917 of 2011. This Court, by order dated 18.03.2011, directed the appeals to be considered by the first respondent within a period of eight weeks. Though this order was passed in the year 2011, the said direction was not complied with. Contempt Petition was filed and after ordering notice in the contempt petition, the impugned order has been passed.

3. The only reason for withholding the security deposit is on the ground that the petitioner has not lifted the minimum quantity as fixed by TASMAC for the months of August 2003 and September 2003. The impugned order contains in a tabulated statement in respect of the petitioner's license bearing Nos.03/2002-03 and 15/2002-03. What is interesting to note that consistently both the petitioners have been lifting more than what has been prescribed as the minimum off take, i.e., from commencement of the license period i.e., October 2002. Curiously enough, the minimum off take was increased by almost double the quantity during the month of August 2003 and September 2003. There is no explanation in the impugned order as to why TASMAC had fixed such high quantity for those two months alone. In fact, the Assistant Commissioner of Prohibition of Excise, vide letter dated 07.04.2011 addressed the Managing Director of TASMAC calling upon him to furnish full details as to why the minimum off take was fixed at such level only for those two months. There is no reply from the Managing Director of TASMAC, nor in the impugned order, there is any reference to the communication.

4. In fact, identical case came up for consideration before this Court in the case of A.Manickam Vs. The Assistant Commissioner (Excise) reported in MANU/TN/2712/2011, wherein, the same reason was assigned to another licensee for withholding the refund of the security deposit. The Court, after taking into consideration Rule 25 of the Tamil Nadu Liquor (Retail Vending Rules), 1989, held that the order withholding the security deposit is illegal and accordingly issued a Writ of Mandamus to refund the security deposit within a time frame. The operative portion of the said order reads as follows:-

> "7. On consideration, I find force in the contentions raised by the learned counsel for the petitioner. It cannot be disputed that this Court while allowing the Writ Petition, the Division Bench of this Court had permitted the respondents to fix the minimum take off compensation / amount adjusted against the claim of security. However, the

respondent in spite of specific direction have not chosen to fix any compensation for minimum take off, till date. It is not disputed that till date no notice has been issued by the State for adjudication.

8. The Rule 25 of the Tamil Nadu Liquor (Retail Vending) Rules, 1989 reads as under:

> 25. Forfeiture of Security deposit: The Collector or the licensing authority may forfeit the security deposit either in part or in full for any violation of the provisions of the Act or the rules or the conditions of the license or failure to comply with the directions issued by the Government or the Commissioner or the Collector or the licensing authority;
>
> Provided that no forfeiture of security deposit shall be made without providing a reasonable opportunity including personal hearing to the licensee to show-cause against such forfeiture.
>
> Provided further that the licensee shall recoup the forfeited amount within 7 days from the date of receipt of the forfeiture order.

A reading of the rules shows that before ordering the forfeiture of security on part there off a reasoned order to be passed after giving personal hearing. The exercise power under Rule 25 is quasi judicial power. Failure to initiate proceeding for last eight years now discloses the State to seek any recovery either by way of compensation or penalty.

9. Even if the amount is to be claimed is by way of penalty minimum take off then for failure to achieve very penalty would envisage judicial determination of the amount.

10. It is now too late in a day to permit the respondents to adjudicate the question of penalty, as eight years have elapsed. There is admittedly order of penalty or compensation for failure to achieve minimum take off. For the reasons stated there is no justification whatsoever with the State, to withhold the security amount. The impugned order is based on no material, thus, on the face of it, is arbitrary and not sustainable in law.

11. Consequently, the Writ Petition is allowed and the impugned order is set aside. A Writ in the nature of Mandamus to the respondents is issued to refund the security amount to the petitioner, within fifteen days from the date of receipt of a certified copy of this order."

5. The learned counsel for the petitioner has invited the attention of this Court to the affidavit filed in support of the Writ Petitions, wherein it has been specially pointed out that the order and direction in the case of A.Manickam Vs. The Assistant Commissioner (Excise) has been implemented. This averment has not been denied by the respondents in the counter affidavit. In fact, the learned Government Advocate strenuously sought to sustain the impugned order by referring the averments set out in the counter affidavit. In fact averments set out in the counter affidavit are verbatim repetition of the findings rendered in the impugned order and the only difference is the counter affidavit is in English language. Admittedly, more than eight years had lapsed, even the license period had come to an end, immediately after the expiry of the license period, no action was taken against the petitioner for short lifting and the respondent did not resort to power under Rule 25. Therefore, at this distant point of time, the respondent cannot withhold the security deposit on the ground raised in the impugned order.

6. Hence, for all the above reasons , it is held that the impugned order is an arbitrary exercise of power, clearly illegal and unsustainable. Accordingly, the Writ Petitions are allowed and the impugned orders are set-aside and Writ of Mandamus is issued to the respondent to refund the security deposit amount to the petitioner within a period of 30 days from the date of receipt of a copy of this order. There is no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

r n s

To

1. The Commissioner of Prohibition and Excise,
   Chepauk, Chennai-600 005.

2. The Assistant Commissioner (Excise),
   Office of the District Collector,
   Dindigul, Dindigul District.

+1cc to the Government Pleader, S.R.No.70113

W.P.Nos.37485 & 37486 of 2016
&
W.M.P.Nos.32104 & 32105 of 2016

MP(CO)
CA(28/12/2016)