THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.15409 of 2011

O R D E R:

Challenge in the present writ petition is to the order passed by the first respondent State Government vide Memo No.39137/Ex.III.1/2009-2, dated 29.12.2009. By virtue of the said memo, the first respondent State Government declined the request of the petitioner for refund of the proportionate license fee.

2. This writ petition arises under the A.P. Excise Act, 1968. Petitioner herein made an application for grant of renewal of Form-2B license for the period from 01.07.2008 to 30.06.2009. The Prohibition and Excise Superintendent/third respondent herein, vide proceedings Rc.No.B1/275/2006, dated 23.06.2008, granted renewal of the lease for a period of one year commencing from 01.07.2008 to 30.06.2009 subject to payment of license fee. There is no dispute that the petitioner herein paid the said amount. Assailing the said order of renewal dated 23.06.2008 passed by the third respondent in favour of the petitioner, one B.Venkata Subba Reddy filed W.P.No.16013 of 2008. This Court, on 28.07.2008, in WPMP.No.20751 of 2008, granted interim order.

3. Pursuant to the above said order, the third respondent/Excise Superintendent vide proceedings Rc.No.B1/275/2008 dated 31.07.2008, suspended the order of renewal granted earlier. Subsequently, the State Government brought in amendment to the Rules deleting Rule 6 (5) of A.P. Excise (Grant of Licence of Selling by Bar and Conditions of Licence) Rules, 2005 (hereinafter called 'the Rules') and substituted by the following:

> "Unless the applicant produces trade license from the local authority concerned for grant of 2B License."

4. Subsequently, the third respondent issued an order dated 11.02.2009, revoking the order of suspension dated 31.07.2008 passed earlier pursuant to the interim orders of this Court.

5. After restoration of the license, petitioner submitted a representation to the fourth respondent for refund of the proportionate license fee for the period from 01.08.2008 to 10.02.2009. The said representation was forwarded to the Government through the Commissioner and the State Government vide the impugned Memo turned down the request of the petitioner and the third respondent communicated the same vide proceedings dated 01.02.2010.

6. This Court, issued *rule nisi* on 09.06.2011 and responding to the same, a counter affidavit deposed by the third respondent has been filed on behalf of the respondents, denying the averments in the affidavit filed in support of the writ petition and justifying the impugned action.

7. Heard Sri O.Manohar Reddy, learned counsel for the petitioner and the learned Government Pleader for Excise for respondents apart from perusing the material available on record.

8. It is contended by the learned counsel for the petitioner that the impugned action on the part of the respondents in rejecting the claim of the petitioner is highly arbitrary, illegal and opposed to the provisions of the A.P. Excise Act, 1968; that the reasons assigned in the impugned Memo are neither valid nor cogent; that neither the provisions mentioned in the impugned order nor the judgments referred to therein are relevant to the facts and circumstances of the case. It is lastly contended by the learned counsel that for no fault of the petitioner, he should not be made to suffer.

In support of his submissions and contentions, learned counsel for the petitioner places reliance on the judgments of this Court in

*K.K.V.VEERABHADRARAO v. SUPERINTENDENT OF EXCISE, VISAKHAPATNAM*[1], *MANCHIKA SRINIVAS v. COMMISSIONER OF PROHIBITION AND EXCISE*[2] and the judgements of the Hon'ble Apex Court in *CHITRA v. STATE OF KERALA*[3].

9. On the contrary, it is vehemently contended by the learned Government Pleader appearing for the respondents that the respondents are perfectly justified in refusing to consider the request of the petitioner and the impugned memo is in accordance with the Act and the Rules. It is further submitted by the learned Government Pleader that the licensee is required to anticipate and foresee any consequences and cannot make any request for refund of the proportionate fee and that in view of the law laid down in the judgments referred to in the impugned memo, the petitioner herein is not entitled for any relief from this Court under Article 226 of the Constitution of India.

10. In the above backdrop, now the issues which this Court is called upon to consider and determine are_

(1) Whether the first respondent/State Government is justified in issuing the impugned Memo dated 29.12.2009, declining to consider the request of the petitioner for refund of the proportionate license fee? and

(2) Whether the petitioner is entitled for any relief from this Court under Article 226 of the Constitution of India?

11. On the factual scenario, there is absolutely no controversy in the present writ petition. It is quite evident from the impugned memo dated 29.12.2009 that the State Government refused to refund the proportionate license fee on three grounds; they are (1) request is contrary to sub-sections (1) (e) and (3) of Section 31 of the Act; (2) claim is contrary to condition No.9

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[1] 1981 (1) AWR 346
[2] 1999 (4) ALT 698
[3] (2016) 1 SCC 685

of Form-2B license and (3) claim cannot be considered in view of the law laid dwon in the case of *SRI NARSIMHA WINES AND OTHERS v. PROHIBITION AND EXCISE SUPERINTENDENT, MEDAK DISTRICT*[4] and *S.L.V.WINES, CUDDAPAH DISTRICT v. STATE OF A.P AND OTHERS*[5].

12. In order to consider the sustainability of ground No.1, it may be apposite to refer to the above quoted provisions of law. Section 31 of the A.P. Excise Act, 1968 reads as under:

> "SECTION 31 : Power to cancel or suspend licence etc.
>
> (1) Subject to such restrictions as may be prescribed, the authority granting any licence or permit under this Act may cancel or suspend it irrespective of the period to which the licence or permit relates.
>
> (a) if any duty or fee payable by the holder thereof is not duly paid; or
>
> (b) in the event of any breach by the holder thereof, or by any of his servants or by any one acting on his behalf with his express or implied permission, of any of the terms and conditions thereof; or
>
> (c) if the holder thereof or any of his servants or any one acting on his behalf with his express or implied permission, is convicted of any offence under this Act, or
>
> (d) if the holder thereof is convicted of any cognizable and non-bailable offence or of any offence under the Narcotics Drugs and Psychotropic Substances Act 1985 (Central Act 61 of 1985) or under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 or under the Trade and Merchandise Marks Act, 1958 or under Section 481, Section 482, Section 483, Section 484, Section 485, Section 486, Section 487, Section 488, Section 489 of the Indian Penal Code or of any offence punishable under Section 112 or Section 114 of the Customs Act, 1962, irrespective of the fact whether such conviction relates to the period earlier or subsequent to the grant of licence or permit; or

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[4] 2001 (6) ALT 240 FB=2002 SUPPL (1) ALD 375

[5] 2009 (5) ALD 170 (FB)

(e) if the conditions of the licence or permit provide for such cancellation or suspension at will :

> Provided that no licence or permit shall be cancelled or suspended unless the holder thereof is given an opportunity of making his representation against the action proposed.

(2) Where a licence or permit held by any person is cancelled under clause (a), clause (b), clause (c) or clause (d) of sub-section (1), the authority aforesaid may cancel any other licence granted or permit issued to such persons under this Act, or under the Opium Act, 1878.

(3) The holder of licence or permit shall not be entitled to any compensation for its cancellation or suspension nor to the refund of any fee paid or deposit made in respect thereof."

13. It is very much evident from a reading of the above mentioned provisions of law that the same are required to be pressed into service only in the case of suspension of license on the ground of violation of conditions of license and other conditions stipulated therein but not as a consequence of the orders passed by this Court, as such, the said provisions of law have absolutely no relevance to the case on hand and the impugned action basing on the said provisions of law cannot be sustained. It is also significant to note that the impugned action cannot be sustained under Section 3 (3) also and the said provision of law speaks of consequence of earlier provisions of law and the above said provisions of law are required to be read together and cannot be read in isolation. Though the learned Government Pleader for Prohibition and Excise tried to justify the impugned action on the ground that the petitioner failed to produce the no-objection certificate from the local authority, the counter affidavit filed by the respondents at so many places categorically and clearly states that as a consequence of the order passed by this Court the impugned memo came to be issued by the State Government.

14. Ground No.2, assigned by the first respondent in the impugned memo is also untenable as the said condition No.9 of Form-2B deals with the

suspension at will and in the instant case the order of suspension was passed as a consequence of the orders of this Court. It is also relevant to note in this context that W.P.No.16013 of 2003 was closed by this Court by way of an order dated 07th December, 2010, taking note of the subsequent event of revocation of the suspension after the advent of the amended Rule 6 (v) of 2005 Rules.

15. Coming to ground No.3, the first respondent turned down the request of the petitioner by placing reliance on the judgements of this Court in *SRI NARSIMHA WINES AND OTHERS (supra 4)* and *S.L.V.WINES, CUDDAPAH DISTRICT (supra 5).* In *SRI NARSIMHA WINES AND OTHERS (supra 4),* the petitioner therein knowing fully well that the period of lease was less than one year, participated in the auction and thereafter claimed the refund of amount. In that contingency, this Court turned down the request of the petitioner therein. In the case of *S.L.V.WINES, CUDDAPAH DISTRICT (supra 5),* as a consequence of the order passed under Section 31 (3), the request of the petitioner was turned down, but in the instant case, as observed supra, the order of suspension was not as a consequence of the order under Section 31 of the Act. Therefore, the said judgments in the considered opinion of this Court, having regard to the facts and circumstances of the present case, have no relevance. Therefore, Ground No.3 shown by the first respondent for turning down the request of the petitioner is also neither tenable nor sustainable in the eye of law.

16. Coming to the judgments cited by the learned counsel for the petitioner in the case of *K.K.V.VEERABHADRARAO (supra 1),* this Court at paragraph 7, held as under:

> "7. The writ petition filed by Surayanarayana was ultimately dismissed. In fact the stay was vacated after three days. The prevention of the petitioner from exploiting his lease cannot therefore

be described as justified by any law. In the absence of any legal justification for prevention of the petitioner from doing his business, it must be held that the orders of this Court preventing the present petitioner for three days from exploiting his lease did cause legal injury to the petitioner. The next question that arises is whether the action of this Court preventing the petitioner from doing his business can be described as an action of the State? It is elementary that when one of the parties to a contract breaches the contract causing loss to the other party to the contract law requires that the other innocent party should be compensated by the party responsible for the breach. So far there can be no difference of opinion. But what can plausibly be argued on behalf of the State is that the State is not responsible - in any way for the action of this Court and that the orders of this Court cannot be described as acts of breach of a State contract. This argument compels us to consider the meaning of the concept of the State. The State is an abstract legal concept. In it is concentrated the supreme coercive power. From the point of view of constitutional law the word "State" may be described as a collection of legal powers. These legal powers are exercised by the State through its three well-known great departments of Executive, Legislature and Judiciary. It is not an accident that our Constitution describes and delineates the powers of these three branches under the Chapter heading 'State'. Under a written Constitution, such as ours, the powers and functions of these three organs of the State are defined and derived from the same common source which is the Constitution. In their allotted spheres of activity each one of these organs represents the abstract legal entity called the State as fully as the others. It follows therefore, that by their acts as much as by their omissions these three organs of the State acting in their respective spheres of authority bind the State fully. There cannot therefore be any difference in law between an act of breach of a public contract committed by the Executive and a breach of such a contract committed by orders of a superior Judiciary. In fact Kelsen refused to recognize and vital difference between the Executive and Judiciary, He treated both of them jurisprudentially as indistinguishable. It follows, therefore, that the orders of stay that this Court passed and by which the petitioner was injured were in the ultimate analysis attributable to the State itself. This Court can act only in the name of the State and only for and on behalf of the State. This is particularly so in relation to the power and jurisdiction of this Court under Article 226 of the Constitution which provides for public law remedies. The State is therefore, in my opinion, responsible for the acts of this Court. Thus, the Stale becomes liable to compensate the innocent party that suffered by the acts of this Court. "

17. In the case of *MANCHIKA SRINIVAS (supra 2),* this Court at paragraphs 7 and 10, held as under:

> "7. Tenders were called for grant of lease and licence to sell Indian liquor and foreign liquor for the period from 1-8-1997 to 31-3-1998 and the minimum bid price for the said period was fixed as Rs.2,85,000/-and the petitioner offered the lease amount/ licence fee of Rs.2,87,826/- for the aforesaid period from 1-8-1997 to 31-3-1998. Admittedly, the petitioner was prevented from obtaining the licence and carrying on the business by reason of grant of stay order by this Court and only after dismissal of the writ petition, the licensing authority granted licence, and thus, the petitioner was prevented from carrying on the business from 1-8-1997 to 21-9-1997.
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> 10. Accordingly, the writ petition is allowed directing the respondents to refund the proportionate licence fee for the period from 1-8-1997 to 21-9-1997 in respect of shop No.132, Bhoopalpalli, Warangal district, to the petitioner within three months from the date of receipt of a copy of this order. No costs.

18. In the case of *CHITRA (supra 3),* the Hon'ble Apex Court at paragraphs 5 and 6, held as under:

> "5. The facts are neither disputed nor are they convoluted. The Appellant had submitted an application on 16.3.1990 for the grant of an FL3 licence in respect of her Hotel Chanakya at Trivandrum, which had been granted. However, it transpired that a third party filed a suit in which the Munsif Court, Trivandrum granted an interim injunction restraining the Excise Commissioner from issuing the said licence to the Appellant for user at her said Hotel. This suit, along with another suit similar to it, was eventually dismissed on 29.9.1993. In an ensuing Appeal, the District Judge granted an ad interim injunction on 15.4.1994, which came to be vacated on 3.6.1994. On 23.11.1994, the Respondent rejected the Appellant's application for the FL3 licence due to an amendment to the Foreign Liquor Rules which had resulted in private parties being ineligible for FL3 licences. Consequently, the Appellant filed O.P. no. 18145 of 1994, which was allowed by the Single Judge. Acting in accordance with the Single Judge's directions the Excise Commissioner granted the licence and raised a demand of

only the proportionate licence fee which was duly deposited; but the matter was brought before the Division Bench in the subject Appeal. As already mentioned, it seems most likely that the attention of the Division Bench which passed the impugned Judgment was not brought to bear on the already existing binding decisions in R.Vijaykumar as well as Jayadevan v. Board of Revenue (Excise) 1999 (1) KLJ 87 wherein the Division Bench of the High Court of Kerala has held that the licensee is required to pay only the proportionate licence fee if the delay in granting the licence, or utilizing it, as the case may be, are for reasons not attributable to the said licensee.

6. We are in agreement with the learned senior counsel for the Appellant that the legal principle to the effect that no person can be prejudiced because of an act of a Court is apposite and relevant in the present case. We say this keeping in perspective the position that although the Appellant had applied for the FL3 licence which would ordinarily run the course of one financial year, due to interim orders passed by the Courts, the Appellant could only utilize it for a fraction of that period. We hasten to clarify that the Appellant's application was not made in the duration of that year and was thus initially not for a fraction of the financial year. This Court has already held in R.Vijaykumar, in the circumstances prevailing in that case, that the Department could not interfere with the utilization of the FL3 licence, provided that the licensee complied with all other conditions as well as "payment of annual rental proportionately". It is therefore clear that Rule 14 would not impede or inhibit the charging of annual proportionate fee so long as no failure is placed on the licensee or it is blameworthy itself. We must be quick to clarify that in the event that a party applies for a period which is obviously not effective for the entire financial year, such as applying for a licence mid- way that financial year, the full fee for that year may be claimable or chargeable and, therefore, would have to be paid. In other words, had the Appellant applied for the licence even with the knowledge that because of external factors such as a pre-existing injunction order etc., she would not have been able to exploit it for the entire year, she may not have been liable to pay the licence fee for the entire year. This is not the factual matrix which obtains in the case at hand; the licence could only be granted for the period from 21.12.1999 to 31.3.2000, i.e. till the close of that financial year, owing to unforeseeable circumstances beyond the ken and control of the parties before us. We have already made a mention of the Division Bench Judgment delivered in

> Jayadevan which in turn was referred to in another Division Bench Judgment in Rajagopalan Nair v. Assistant Commissioner of Excise 1989 (1) KLT 800, wherein the Division Bench directed that the licensee was entitled to remission of payment of kisht because of being disabled to conduct its business on account of the interim orders passed by the Court. We affirm the conclusions arrived at in these decisions. We hold that a party is entitled to seek a remission in the payment of licence fee if it is precluded from transacting business on the strength of that licence because of factors and reasons extraneous to it and/or if it is granted the licence on the direction of a Court for only a portion of the financial year."

19. In the considered opinion of this Court, the principles laid down in the above judgments cited by the learned counsel for the petitioner are squarely applicable to the case on hand. Therefore, this Court has absolutely no scintilla of hesitation nor any traces of doubt to hold that the impugned memo dated 29.12.2009 cannot be sustained in the eye of law.

20. For the aforesaid reasons, writ petition is allowed, setting aside the Memo bearing No.39137/Ex.III.1/2009-2, dated 29.12.2009 and consequently the respondents are directed to refund the proportionate license fee for the period 01.08.2008 to 10.02.2009 to the petitioner, within a period of six months from the date of receipt of a copy of this order. As a sequel, pending miscellaneous petitions, if any, shall stand disposed of. No costs.

A.V.SESHA SAI, J

Date:31.10.2016
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THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.15409 of 2011

Dated 31st October, 2016

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