HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

W.P.No.26611 of 2016
&
W.V.M.P.No.3395 of 2016 in W.P.M.P.No.32932 of 2016

ORDER:

In this Writ Petition, petitioners assail proceedings in Cr.No.2072/2016/CPE/TS/F1 dt.20-07-2016 of the 2nd respondent in proposing to grant A4 licence under the Telangana Excise (Grant of Licence of Selling by Shop and Conditions of Licence) Rules, 2012 to 8th respondent.

Petitioner Nos.1 to 3 are A-4 licence holders in Malakajgiri area, petitioner Nos.4 to 6 are A-4 licence holders in L.B.Nagar and petitioner No.7 is A-4 licencee in Attapur, in the city of Hyderabad in Ranga Reddy District.

2. Grant of A-4 licence for selling of liquor is governed by the above rules framed under Section 72 read with Sections 17, 28 and 29 of AP Excise Act, 1968.

3. Pursuant to the procedure stipulated in G.O.Ms.No.164 dt.11-09-2015, for the years 2015-17, the petitioners were granted A-4 licence for their respective shops. In Malakajgiri, at that time, three shops were notified in Ward No.137. In L.B.Nagar, two shops were notified in Ward No.12. In Attapur, two shops were notified. All the shops were disposed of in 2015 and licences were issued to the

petitioners for the period 01-10-2015 to 30-09-2017. Thus there were no shops left in the said Wards.

4. The above rules were amended by 1st respondent vide G.O.Ms.No.59 Revenue (Excise-II) Department dt.04-04-2016 and for sub-rule (1) of rule 18, the following rule was substituted:

> *"(1) Sale by outlets of TSBCL and by the licence holder of a IMFL & FL manufactory/Brewery/Company: the District Collector, with the approval of the Commissioner of Prohibition and Excise, may permit the TSBCL/Agency or a licencee of IMFL & FL manufactory/brewery under the Act to open outlets for the sale of IMFL & FL, in such areas/localities where the privilege of sale by shop/Unit could not be disposed off through selection or when a licence already granted is cancelled and the same could not be re-allotted for any reasons. Further, the District Collector, with the approval of the Commissioner of Prohibition and Excise, may permit a company having a turnover of more than Rs.1000 crores in a financial year, to open outlets for the sale of IMFL & FL, in such areas/localities where the privilege of sale by shop could not be disposed of through selection or when a licence already granted is cancelled and the same could not be re-allotted for any reasons."*

5. It appears that 8th respondent approached the respondent Nos.3 to 6 for grant of A-4 licence claiming that it has a turnover of more than Rs.1000 crores and under the amended sub rule (1) of rule 18 as set out above, it should be granted A-4 licence.

6. Under the impugned proceedings dt.20-07-2016, 2nd respondent interpreted the said rule to grant permission to respondent no.8 to open A4 shops in above 3 areas where allegedly certain shops

could not be disposed of and addressed a letter to 7th respondent for grant of approval of his action under the said sub rule.

7. Learned counsel for the petitioners contended *firstly* that the reading of sub rule (1) of rule 18 empowers only the 7th respondent to grant permission to an applicant such as the 8th respondent subject to approval of 2nd respondent, but the 2nd respondent is not empowered to directly grant permission to 8th respondent. He contended that it is the 7th respondent who grants permission after the approval of the 2nd respondent and the 2nd respondent cannot arrogate to himself the power of 7th respondent and grant permission to 8th respondent himself.

8. He also contended that all the shops which were notified for the three areas of Attapur, Malakajgiri and L.B.Nagar had been disposed of and the petitioners were granted A-4 licence for the three areas and since exercise of power under sub rule (1) of rule 18 is dependent on the availability of the shops *which could not be disposed through selection or where licence granted were cancelled and the same could not be re-allotted*, the very exercise of power under sub rule (1) of rule 18 is without jurisdiction since this condition precedent is not fulfilled.

9. He also contended that in the impugned proceedings, reference has been made by the 2nd respondent to three undisposed shops (1) Ward No.139, Old Malakajgiri No.1 of Ranga Reddy

District, (2) G.Sl.No.94 Keesara/Ward No.134, Yapral No.2 of Ranga Reddy District and (3) Dhoolpet G.Sl.No.36, Ward No.75 of Hyderabad District and direction was issued to shift/ re-locate them in order to make an allotment in favour of 8th respondent and the same is also not legal, arbitrary and without jurisdiction. He contends that before fixing licence fee for A4 shops, the respondents have to take into consideration the minimum profits an A-4 licencee would make; that as per rule 16 (9) of the Rules, a licencee is required to pay privilege fee at 8% + applicable Value Added Tax on the sale of IMFL and FL purchased from AP Beverages Corporation Limited when the cumulative value of his/her purchases during licence year exceeds seven times of the annual licence fee; that thus there is an expectation that a licencee would make reasonable profits on the investment if his turnover is up to seven times; and basing on this, petitioners had participated in the drawl of lots and have taken licences. They contend that the action of 2nd respondent in proposing an additional shop in the area would put the petitioners to financial hardship. It is alleged that 2nd respondent has not applied his mind to this and other relevant considerations. Therefore, his order is to be set aside.

10. Counter affidavit is filed by 2nd respondent justifying the issuance of the impugned order. The 2nd respondent contends that the petitioner should have questioned G.O.Ms.No.59 dt.04-04-2016 and without challenging it, they cannot be given any relief. The

2nd respondent contended that on the basis of amended sub rule (1) of rule 18, the request of 8th respondent was examined, and since it was found viable and since he had discretionary power as administrative head of excise matters, the impugned notification is issued. According to him, this was done in the interest of extending the privilege of selling IMFL and FL in a hyper market, to facilitate customers to get choice of their brand in walk-in stores housed in one large building and purchase their choice stock in a good and decent atmosphere instead of being part of the mob in front of the local shops. The learned Government Pleader for Excise relied on Section 30 of the Act and contended that a mere technical defect or irregularity in grant of licence would not render it invalid.

11. Sri P.Venugopal, learned Senior Counsel, appearing for 8th respondent also supported the issuance of impugned order by the 2nd respondent. He pointed out that under Section 3 of the Act, 2nd respondent is the Chief Controlling Authority in all matters connected with the administration of the Act and under sub section (2) of Section 3 of the Act, 2nd respondent was competent to exercise powers of 7th respondent under the Act and therefore there is nothing wrong with the impugned order.

12. I have noted submissions of both sides.

13. Section 3 of the Act no doubt states as under:

*"**3. Appointment of Commissioner:-***

(1) The Government may, by notification, appoint an officer as the Commissioner of Prohibition and Excise for the State, who subject to the general or special orders of the Government in this behalf, shall be the chief controlling authority in all matters connected with the administration of this Act.

(2) The Commissioner shall be competent to exercise all the powers of the Collector under this Act and shall have the control of the administration of the Prohibition and Excise Department."

14. The amended sub rule (1) of rule 18 specifically makes the 7th respondent as the competent authority to grant permission for licence under the said Rules and does not confer the said power on the 2nd respondent though it contemplates approval of the 2nd respondent for grant of such permission by the 7th respondent.

15. Therefore, it is clear that the Rule making authority felt it necessary that in circumstances attracting sub rule (1) of rule 18 as amended by G.O.Ms.No.59 dt.04-04-2016, the primacy should be with the 7th respondent and not with the 2nd respondent though the 7th respondent acts after approval of the 2nd respondent.

16. In view of the specific language employed in amended sub rule (1) of rule 18, though the 2nd respondent might be the Chief Controlling Authority in all matters connected with administration of the AP Excise Act, 1968 and though in other situations, he could exercise all the powers of the 7th respondent (as per sub section (2) of

Section 3), the 2nd respondent cannot exercise the power which has been conferred on the 7th respondent explicitly.

17. In other words, in the circumstances attracting application of sub rule (1) of rule 18 as amended by G.O.Ms.No.59 dt.14-04-2016, the 2nd respondent cannot exercise powers of the 7th respondent notwithstanding the language of sub section (2) of Section 3 since the intention of the Rule making authority appears to be that 7th respondent should independently apply his mind in deciding whether or not to grant permission in A-4 licence.

18. Even in the impugned order, 7th respondent had sought to circulate a note to the 7th respondent for the purpose of approval of his action under the impugned order. So even the 2nd respondent has no intention to bypass 7th respondent.

19. So, having regard to the language of sub rule (1) of rule 18 as amended by G.O.Ms.No.59, it was not open to the 2nd respondent to grant permission to 8th respondent straight away since the jurisdiction to grant permission is not conferred on the 2nd respondent by the said sub rule (1) but is vested in the 7th respondent. So only the 7th respondent should have accorded permission to persons like 8th respondent and the 2nd respondent cannot arrogate to himself the powers of the 7th respondent and the action of the 2nd respondent is thus clearly without jurisdiction.

20. There is no necessity for the Writ Petitioners to question G.O.Ms.No.59 dt.04-04-2016 as contended by 2nd respondent because the petitioners are relying on the amended sub rule (1) of rule 18 introduced by the said G.O. Therefore, the contention of the 2nd respondent in this regard is rejected.

21. It is also not open to the learned Government Pleader relying on Section 30 of the AP Excise Act, 1968 and plead that at best the action of the 2nd respondent in issuing permission to 8th respondent is only a technical defect or irregularity or omission which is saved by Section 30. In my considered opinion, the action of 2nd respondent is one without jurisdiction and it cannot be termed as a mere technical defect, irregularity or omission which could be saved under Section 30 of the said Act.

22. More importantly the allegations made by the petitioners that they are already licencees of shops in Attapur, Malakajgiri and L.B.Nagar Districts, that they have been allotted such A-4 licence by the competent authority under G.O.Ms.No.164 dt.11-09-2015 for the periods 2015-17, which dealt with disposal of retail liquor outlets (A-4) shops, is not denied. It is not in dispute that 8th respondent is seeking three shops, one each in Attapur, Malakajgiri and L.B.Nagar. Amended sub rule (1) of rule 18 empowers the 7th respondent to grant A-4 licence to persons like 8th respondent who have turnover more than Rs.1000 crores in a financial year *only in areas/localities where privilege of sale by shop could not be disposed of through selection*

under G.O.Ms.No.164 dt.11-09-2015 (by drawl of lots) or when a licence already granted is cancelled and the same should not be re-allotted for any reasons. This condition precedent for exercise of power should exist for either the 2nd or 7th respondent to consider cases of applicants like 8th respondent. Admittedly such condition precedent was not fulfilled.

23. But in order to accommodate 8th respondent, the 2nd respondent has proposed re-location of shops in (1) Ward No.139, Old Malakajgiri No.1 of Ranga Reddy District, (2) G.Sl.No.94 Keesara/Ward No.134, Yapral No.2 of Ranga Reddy District and (3) Dhoolpet G.Sl.No.36, Ward No.75 of Hyderabad District. The action of the 2nd respondent in relocating these shops from these localities to other localities while directing respondent Nos.3 to 6 to grant licence in favour of 8th respondent is also therefore arbitrary and without jurisdiction because there is no power conferred on the 2nd respondent to relocate an A4 licencee of a shop to another area to facilitate the grant of licence to 8th respondent.

24. I also find considerable force in the submission of the learned counsel for the petitioners that the action of the 2nd respondent in proposing an additional shop in the areas where the petitioners are operating their A-4 licence shops would affect the petitioners' business and would cause the financial hardship to them.

25. Therefore, for the above reasons, the Writ Petition is allowed; the impugned order dt.20-07-2016 passed by the 2nd respondent is set aside; and the respondent Nos.1 to 7 are directed to strictly follow the law, if they wish to consider the case of the 8th respondent for grant of A-4 shop licence keeping in mind the observations made above.

26. Consequently W.V.M.P.No.3395 of 2016 in W.P.M.P.No.32932 of 2016 is dismissed. No costs.

27. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 12-09-2016
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