IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2018

CORAM
THE HONOURABLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.19326 of 2009
and
M.P.No.1 of 2009

Chandrasekaran ... Petitioner

.Vs.

1.The Government of Tamilnadu,
Rep.by its Secretary,
Prohibition and Excise Department,
Fort St.George,
Chennai-600 009.

2.The District Collector,
Salem District,
Salem.

3.The Assistant Commissioner (Excise),
Salem,
Salem District.

4.The Divisional Excise Officer,
Divisional Excise Office,
60, Bretts Road,
Mulluvadi Gate,
Salem-1. ... Respondents

Prayer: Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorari calling for the records relating to the proceedings of the 3rd respondent in his office Ref: NA.KA.No.60125/2007/(67) KA1 dated 10.10.2007, 2nd respondent in his office Ref: NA.KA No.60125/07/KA1 dated 08.07.2009 and the 4th respondent in his office Ref.C.PA.4/08/A dated 25.11.2008, quash the same.

For Petitioner : Mr.P.Mani

For Respondents: Mr.R.S.Selvam
Government Advocate

ORDER

The petitioner sought for a writ of certiorari to quash the proceedings of the 3rd respondent in NA.KA.No.60125/2007/(67) KA1 dated 10.10.2007, 2nd respondent's proceedings in NA.KA No.60125/07/KA1 dated 08.07.2009, and the 4th respondent proceedings in Ref.C.PA.4/08/A dated 25.11.2008.

2. The case of the petitioner is that he is an Ex-licencee/IMFL Retail Vendor with respect to the shop Nos.27/01-02 and 46-01-02, Division 29, Salem town and he was granted licence to the said shop Nos.27/01-02 and 46/01-02 for the exercise year 2001-2002.

3.After the granting of licence to the said shops in the year 2001 and 2002, Sub rule 2 to Rule 30 of The Tamilnadu Liquor (Retail Vending) Rules 1989 was introduced with effect from 02.06.2001.

4.According to the said newly introduced sub Rule 2 to Rule 30, the licensee should lift minimum off-take of liquor and in case of failure to lift the minimum off-take for a period of two months, the licensee should pay penalty in proportion to the loss of revenue to the Government. According to the said Rule, an opportunity of hearing should be given to the licensee before imposing any penalty. The petitioner would further contend that according to amendment in Sub rule 2 to Rule 30, in case of failure of the licensee to lift minimum off-take of liquor, a penalty of 20% value of the deficit in the minimum off-take has to be imposed for the first violation and 30% value of the deficit in the minimum off-take has to be imposed for the second violation.

5.The petitioner would also contend that a batch of writ petitions have been filed before this Court challenging the said Sub Rule 2 to Rule 30 of the Tamil Nadu (Liquor Vending) Rules 1989. The said batch of writ petitions and W.A.No.417 of 2002 were disposed of on 04.11.2003, directing the Government to consider the cases of the petitioners, who are the Ex-licencees for the exercise year 2001-2002, and clarify which of the licencees should pay 20% or 30% penalty for not lifting minimum off-take without deciding the validity of the said Sub Rule 2 to Rule 30 and the Court has also made it clear that Audi Altream Partem Rule has to be followed before fixing the amount, after passing of the Government order. In compliance to the said direction, the Government issued G.O.MS.No.19, Home Prohibition and Excise (VI) Department dated 27.02.2007, identifying the shops in respect of which 20% or 30% penalty have to be levied and issuing directions to adjust the security deposit towards the penalty and recover the balance amount more than the security deposits.

6.The petitioner would further contend that the 3rd respondent issued proceedings dated 10.10.2007 in Na.Ka.No.60125/2007/(67) KA1 informing that the petitioner had to pay Rs.1,42,266/- towards penalty for the alleged failure to lift minimum off-take of liquor, and the security deposits of the petitioner were adjusted for the said penalty amount, and that he should remit an amount of Rs.42,226/- towards the balance penalty amount to be paid, after adjusting the security deposits of the petitioner. The said proceedings of the 3rd respondent was not served on the petitioner. But, he came to the knowledge of the same only after he received notice on 25.11.2008, which was issued by the 4th respondent calling upon him to remit the balance penalty amount and also stating that failure to pay the same, the same will be recovered under the Revenue Recovery Act. After receiving the said notice only, the petitioner came to know the order dated 10.10.2007 passed by the 3rd respondent and after collecting the papers with respect to the said order, the petitioner preferred an appeal before the 2nd respondent on 02.06.2009 against the order dated 10.10.2007 passed by the 3rd respondent. However, the 2nd respondent, by an order dated 08.07.2009, rejected the claim of the petitioner on the ground that the security deposits were adjusted towards penalty amounts as per the Government orders and no appeal has been provided in the Government order.

7.The petitioner while filing an appeal has stated that the doctrine of Audi Altream Partem was not followed as directed by this Hon'ble Court, and the penalty amount was fixed without taking into account the various factors and that at the time of awarding the licence and executing the agreement, lifting of minimum off-take and imposition of penalty for failure were not disclosed. But the 2nd respondent without even deciding the appeal on merits dismissed the same.

8.The petitioner would also contend that the penalty amount fixed by the 3rd respondent is illegal and contrary to the directions issued by the Hon'ble Court and the condition to lift minimum off-take of liquor and imposition of penalty for failure was not at all disclosed at the time of issuing the licence and executing the agreement. The petitioner would also contend that the 2nd respondent ought to have decided the appeal filed by the petitioner on merits and set aside the order of the 3rd respondent, who has imposed penalty.

9.The petitioner would also contend that the penalty amount fixed for the alleged failure to lift the minimum off-take is illegal as the same was fixed behind the back of the petitioner, without considering the various important factors regarding the location of the shops, cost structures with respect to different kinds of products also. At the time of entering into agreement, Sub Rule 2 to Rule 30 of the Tamil Nadu Liquor (Retail Vending)

Rules was not there and it was introduced and substituted later and the petitioner was put to irreparable loss and no notice was issued to the petitioner and the order fixing the penalty was illegal. In the said order/proceedings dated 10.10.2007, there is no whisper about giving any notice to the petitioner while fixing the amount of penalty as per this Hon'ble Court's Order. From the notice dated 25.11.2008, which has been issued under Revenue Recovery Act also, it can be seen no opportunity could be given to the petitioner herein. Hence, the petitioner prayed to quash the impugned order.

10. The 3rd respondent filed counter wherein it has been stated that the licensee shall be bound by the provisions of the Tamil Nadu Liquor (Retail Vending) Rules, 1989 as amended from time to time. Accordingly, when sub Rule (2) to Rule 30 of the Tamil Nadu Liquor (Retail Vending) Rules, 1989, was introduced on 02.08.2001, which would be applicable to each and every licensee as stated in the Government Order, which reads as follows:

> "The licensee should lift the minimum off-take of liquor fixed for the shop by the licensing authority based on the guidelines issued by the Government. In case the licensee fails to lift the minimum off-take so fixed consecutively for two months, the licensee is liable to pay a penalty, which shall be in proportion to the loss of revenue to the Government due to such non-lifting. If the licensee fails to lift such minimum off-take for another two months consecutively, the licence shall be liable to be cancelled and the shop shall be re-notified for grant of privilege:
>
> Provided that the licensing authority shall give the licensee a reasonable opportunity of being heard before imposing such penalty."

A condition prescribing the minimum off-take target was also incorporated in the Retail Vending Licence as below:-

> "The licensee shall lift the minimum off-take of liquor fixed for the shop by the licensing authority. In case of failure to lift the minimum off-take so fixed consecutively for two months, the licensee shall be liable to pay a penalty, which shall be in proportion to the loss of revenue to the Government due to such non-lifting. If the licensee fails to lift such minimum off-take for another two months consecutively, the licence shall be liable to be cancelled."

11.In view of the above mentioned rule provisions, the Government considered that in respect of shops for which the penalty (compensation) amount payable is less than one lakh rupees (3936 shops of the year, 2001-2002 and 3688 shops of the year, 2002-2003) the penalty amount (ie., Rs.3141.59 lakhs) shall be ordered to be forfeited from the security deposit and the balance amount available in the security after the forfeiture shall be refunded. However, in respect of shops for which the penalty (compensation) amount payable is more than one lakh rupees (1365 shops of the year, 2001-2002 and 751 shops of the year, 2002-2003) one lakh rupees (entire security deposit) shall alone be forfeited and the total amount that shall be forfeited would be Rs.2116 lakhs (Rs.1365 lakhs + Rs.751 lakhs). The balance amount is yet to be recovered over and above the one lakh rupees, which works to Rs.1172.79 lakhs (Rs.673.63 lakhs for the year, 2001-2002 and Rs.499.16 lakhs for the year, 2002-2003). The Government accordingly direct that:

i)In respect of shops for which the penalty amount payable is less than one lakh rupees, the penalty amount shall be ordered to be forfeited from the security deposit and the balance amount available after forfeiture shall be refunded and that;

ii)In respect of shops for which the penalty amount (compensation) payable is more than one lakh rupees, the entire security deposit of one lakh rupees shall be ordered to be forfeited and in respect of the balance amount of penalty yet to be recovered, the ex-licensees shall be directed to pay the amount and in case they fail to pay the amount, action shall be taken to recover the same by invoking the provisions of Revenue Recovery Act.

12. The learned Government Advocate appearing for the respondents would further submit that as per the directions of the Government, the Commissioner of Prohibition and Excise worked out the penalty amount due from the Ex-licensees and communicated the same for collection. Accordingly for the said shop No.27 for the excise year 2001-2002 penalty amount of Rs.91,246/- , for the shop No.46 for the excise year 2002-2003 the penalty amount of Rs.50,020/- and one day privilege amount of Rs.1000/- due raised as per Accountant General Audit, and a total amount of Rs.1,42,266/- has to be collected from the petitioner as penalty. Out of the said amount, a sum of Rs.1,00,000/- was forfeited to the Government on 28.02.2008, and the petitioner has been informed to pay the remaining balance of Rs.42,266/-. Despite the proceedings Roc.60125/2007/(67) AB1 dated 11.10.2007 sent to the petitioner, he declined to pay the amount. Hence, as per the instructions of the Commissioner of Prohibition and Excise, Chennai and the instructions of third respondent, in order to recover the amount, two notices were issued by the fourth respondent, the Divisional Excise Officer,

Salem stating that if the due of Rs.42,266/- not paid by the petitioner, the same would be recovered as arrears of land revenue by invoking the provisions of Revenue Recovery Act, 1864. Challenging the same, the petitioner has filed this Writ Petition and stay was also granted by this Hon'ble Court.

13. The learned Government Advocate would further contend that the condition of minimum off-take was not a new one and it was already existing terms and conditions in the license. Since the petitioner has not achieved the minimum target and the same was attracted by the Government Order mentioned supra, the petitioner's security deposit was forfeited on 28.02.2008. Accordingly, an order was passed to adjust the amount of Rs.1,00,000/- as against the due of Rs.1,42,266/- and the petitioner was directed to pay the balance amount of Rs.42,266/-.

14.The learned Government Advocate would also contend that the petitioner has filed an appeal before the District Collector, Salem who is the 2nd respondent herein, and based on the written submissions, the case was decided on merits and was rejected by the District Collector on 06.07.2009. As directed by this Court, an opportunity was given to the petitioner, hence, the allegations of the petitioner that an opportunity was not given to him and the case was not decided on merits, are not accepted by the 3rd respondent. The respondent would further submit that several writ petitions have been filed challenging the validity of sub Rule (2) to Rule 30 and the Hon'ble Division Bench of this Court has passed and order on 04.11.2003 and directed the respondents to consider the case of the petitioners therein by issuance of G.O clarifying the case of retailers of IMFL who have obtained license for the excise year 2001-2002 shall be liable to pay 20% of the value of the deficit in the minimum off-take for the 1st violation and 30% of the value of the deficit for the second and subsequent violations. As per the said order G.O.Ms.No.19, Home Prohibition and Excise Department was passed on 27.02.2007, and the quantum of penalty was worked out for the petitioner and other licensees.

15.The respondent would also contend that the off-take details and shortage of liftment made by ex-licensee were already communicated by the authorities and penalties were also imposed as per the directions and the same were challenged by them including the petitioner. The respondent would further submit that the notices sent by the respondents are legal and non-violative of Article 14 and 19(1) of the Constitution and they are not contrary to the Tamil Nadu Liquor (Retail Vending) Rules, 1989. The condition for lifting of minimum off-take was already in existence in the terms and conditions of the license and all these facts have been incorporated in the Government Order for fixation of the minimum off-take, which is reproduced herein:

> "to the effect that for fixation of the minimum off-take of liquor for a shop in a notified area, the average off-take for the last three years in that area should be arrived at and 30% shall be added thereof. This should be the minimum off-take for all the shops located in that area, which should be equally divided and distributed on monthly basis among the shops located in that notified area and assigned to each licensee."

16. The learned Government Advocate would further contend that the petitioner in order to evade the penalty due to the Government has filed the writ petition and the petitioner has to pay the amount as loss has been caused to the Government.

17. Heard the learned counsel on either side and perused the materials on record.

18. It can be seen from the records that the batch of writ petitions have been filed challenging the requirement of minimum off-take, which is provided under sub Rule (2) to Rule 30 of the Tamil Nadu Liquor (Retail Vending) Rules, 1989, and in another set of cases, show cause notice is questioned on the ground of vagueness and in the third set of cases, orders for payment of loss of revenue are questioned on the ground of violation of Audi Alterum Partem rules. From the year 2000, the Retail Vending of Indian Made Foreign Liquor (IMFL) has undergone a change in the last three years and the system which was prevailing before the year 2000 has been completely changed from the year 2001-02. The last system was introduced for retailers with specification of number of shops all over the State of Tamil Nadu and then the shops were sought to be increased and directions were issued to re-arrange the quantum of the minimum off take. Accordingly, there were several litigations filed in this Court and the Hon'ble Supreme Court challenging the introduction of a new system but while the said cases were pending, the Tamil Nadu Ordinance No.8 of 2003 has been gazetted on 26.10.2003, doing away with the private retails vending by entrusting the same in favour of Tamil Nadu State Marketing Corporation (TASMAC) or by Co-operative Societies. The same was also challenged.

19.When the said rule was challenged as it is ultravirus with regard to constitutionality, the same has kept open an avenue to the petitioners to enable them to plead the application of 20% of the value of the deficit of the minimum off take for the first time and 30% of the value of the deficit of the minimum off take for the second time and this Court also thought fit that the beneficial provisions has to be extended to all those retail vendors, who have failed to lift the minimum off take and also for finding whether this violation is for the first time or the second time and to state the difficulties for not lifting the minimum off take, an opportunity has to be provided which is necessary, hence, the Court has directed the Government to consider the case of the licensees, who have obtained licence for the excise year 2001-2002, by issuing G.O., clarifying which of the retailers shall be liable to pay 20% of the value of the deficit in the minimum off take for the 1st violation and 30% of the value of the deficit in the minimum off take for the 2nd violation and the Court has also made it clear that Audi Alterum Partem Rule has to be followed for fixing the amount. The Government has complied the above direction and accordingly, G.O. has been passed.

20.From the order passed on 10.10.2007, it could be seen that there was no reasons given or no finding given regarding the opportunity given to the petitioner herein and in the 2nd notice dated 25.11.2008 also, there were no reasons or the details regarding the failure memo was given. From the letter of the petitioner to the Collector, Salem, wherein it is seen that, the same has been treated as an appeal by the Collector stating that as per the said G.O. there is no such appeal provision has been provided and hence, the petition was rejected without assigning any reasons, but in the counter they have stated that an opportunity was given by treating the letter of the petitioner as an appeal and the same has been decided. Hence, there is contradiction statement given by the respondents.

21. From the reasons stated above, it is clear that no opportunity was given to the petitioner herein to present his case and hence, the impugned orders are set aside and the respondents are directed to give an opportunity to the petitioner to put forth his case and to hear him and after affording opportunity to both the sides, pass an order in detail, in accordance with law, within three months from the date of receipt of a copy of this order.

22. With the above direction, the Writ Petition is allowed. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

KP

To

1. The Secretary
   Prohibition and Excise Department,
   Fort St.George,
   Chennai-600 009.

2.The District Collector,
   Salem District,
   Salem.

3.The Assistant Commissioner (Excise),
   Salem,
   Salem District.

4.The Divisional Excise Officer,
   Divisional Excise Office,
   60, Bretts Road,
   Mulluvadi Gate,
   Salem-1.

+1cc to Mr.P.Mani, Advocate, S.R.No.76274
+2ccs to the Government Pleader, S.R.No.76446 and 76802.

W.P.No.19326 of 2009

GP(CO)

RRS(25/04/2019)