

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

WRIT PETITION No.11774 of 2018

ORDER:

In this Writ Petition, the petitioners assail the action of respondents in declining to refund deposits made by petitioners along with their applications for grant of license for Retail Liquor Outlets (A4 shops) in Garla village, which is a tribal village of Mahabubabad District.

2. The District Prohibition and Excise Officer, Mahbubabad (3rd respondent) issued a notification No.27/MBD./2017 dt.13-09-2017 inviting applications for grant of license for Retail Liquor Outlets (A4 shops) under the A.P. Excise (Grant of license of selling by shop and conditions of license) Rules, 2012 (as adopted in the State of Telangana by Telangana Adaption Order, 2015) (for short 'the Rules') for 52 shops situated in Mahabubabad District for the period from 01-10-2017 to 30-09-2019. Clause (3) of the said notification prescribed a requirement that an applicant for licence should enclose a demand draft for Rs.1,00,000/- towards *non refundable application registration charges for each application* he files in favor of the 3rd respondent.

3. The said notification specifically stated that the disposal of Retail Liquor Outlets (A4 shops) located in Scheduled area of

Prohibition and Excise District Mahabubabad could be through drawal of lots after receipt of opinion from the concerned Grama Sabha under Panchayats Extension to Scheduled Areas (PESA) Rules, 2011 (for short “the PESA Rules”) which were notified vide G.O.Ms.No.66 dt.24-03-2011.

4. Two such shops mentioned at item Nos.46 and 47 in the above notification were located in Garla village of Mahabubabad District.

5. The petitioners in this Writ Petition had submitted applications for allotting the said Retail Liquor Outlets (A4 shops) in Garla village notified in the notification dt.13-09-2017. The 1st petitioner submitted 2 applications for both shops and deposited Rs.2 lakhs towards *application registration charges* while petitioner Nos.2 to 15 applied for one shop and deposited Rs.1 lakh each towards such charges as per clause (3) of the said notification.

6. Pre selection process was conducted by the 2nd respondent and drawl of lots was held on 23.10.2017 and two persons were picked up for the two A4 shops subject to the condition that licences would be issued after obtaining resolution of the Gram sabha.

7. A resolution dt.06-11-2017 of Grama Sahba of Garla village conveyed it's approval to the grant of A4 licences in the village.

8. This was challenged by the President of Mandal Praja Parishad, Garla village and Mandal in W.P.No.39143 of 2011. He

sought setting aside of the said resolution. He also sought a direction to the District Collector, Mahabubabad District (2nd respondent) and the 3rd respondent not to grant licenses to successful persons in the drawl of lots made pursuant to the notification dt.13-09-2017.

9. The said Writ Petition was allowed by a learned Single Judge of this Court on 18-01-2018 holding that as per the PESA Rules there should be 1/3rd of the total voters in the Gram Panchayat as the quorum of the Gram Sabha, of which 50% must consist of members of Scheduled Tribes; and the quorum required for passing the resolution in question was not available for the resolution passed on 6.11.2017. Also the licence for liquor shops could not be granted to persons who do not belong to the subject gram panchayat. The Court therefore declared the resolution dt.6-11-2017 of the Grama Sabha of Garla recommending for setting up two wine shops in the said village as illegal and in violation of the PESA Rules, set aside the said resolution, and directed the District Collector, Mahabubabad District not to grant licences to the successful parties pursuant to the said resolution.

10. This was assailed by the successful parties to whom provisional licenses were granted for the said two wine shops in W.A.No.366 of 2018. The said Writ Appeal was dismissed by a Division Bench of this Court on 08-03-2018. Thus, the entire process

of selection of licenses for the A4 retail outlets in Garla village was set at naught.

CONTENTIONS OF PETITIONERS

11. Petitioners contend that once the entire process of selecting Retail Liquor Outlets (A4 shops) for 2 shops in question in Garla village has been set aside pursuant to orders in W.P.No.39143 of 2017 and W.A.No.366 of 2018, the respondents are bound to refund the amounts deposited by petitioners towards application registration charges since otherwise it would amount to unjust enrichment and the State cannot forfeit the said amount on any pretext.

12. Petitioners contend that they have given representations dt.07-02-2018 to the respondents and they have not refunded the said amount to the petitioners compelling them to file the present Writ Petition.

THE STAND OF THE RESPONDENTS

13. Counter-affidavit is filed by 3rd respondent opposing the Writ Petition. It is contended that as per the notification dt.13-09-2017 issued by the 3rd respondent, a sum of Rs.1 lakhs is to be deposited towards *registration charges* by every applicant who seeks a license of Retail Liquor Outlets (A4 shops) and the said amount is *non-refundable* as per Rule 12 of the Telangana Excise (Grant of license of selling by shop and conditions of license) Rules, 2012. It is contended

that because of this reason, the representations dt.07-02-2018 made by petitioners for refund of the registration charges were rejected.

14. It is further stated that the earnest money deposit, which was also required to be deposited by each of the applicants, was refunded to the petitioners along with other applicants since the same was refundable.

15. The fact that the resolution dt.6-11-2017 of the Gram Sabha of Garla Village approving grant of retail A4 wine shop licences pursuant to notification dt.13-09-2017 issued by 3rd respondent was set aside by order dt.18-01-2018 in W.P.No.39143 of 2017 and the same was confirmed in W.A.No.366 of 2018 on 08-03-2018 is not disputed by respondents.

THE POINT FOR CONSIDERATION

16. Therefore, the point for consideration is :

“Whether the petitioners are entitled for refund of the amount deposited by each of them towards registration charges once the entire process of selection of Retail Liquor Outlets (A4 shops) for the 2 notified wine shops in Garla village is set aside by this Court?”

17. The A.P. Excise (Grant of license of selling by shop and conditions of license) Rules, 2012 notified vide G.O.Ms.No.319 Revenue (Excise.II) Department dt.18-06-2012 as adopted by the State of Telangana Adaption Order, 2015 mentions that along with applications for grant of Retail Liquor Outlets (A4 shops), a sum of

Rs.25,000/- is to be deposited towards non-refundable *application fee*.

Thus Rule 12 (1)(i) requires applications to be accompanied by a Demand Draft for Rs.25,000/- towards non-refundable *application fee*.

18. Vide G.O.Ms.No.200 Revenue (Excise.II) Department dt.12-09-2017, the Government of Telangana notified Excise Policy 2017-19 for the period from 01-10-2017 to 30-09-2019 for disposal of retail liquor outlets (A4 shops) in the State. Clause (4) thereof stated “non-refundable *registration charge*, shall be Rs.1 lakh per registration.” So the Excise Policy notified vide G.O.Ms.No.200 Revenue (Excise.II) Department dt.12-09-2017, the 1st respondent has mentioned in clause (4) non-refundable *registration charge* of Rs.1,00,000/- .

19. Condition(3) of the notification dt.13-09-2017 stated that every applicant should enclose a Demand Draft for Rs.1,00,000/- towards non-refundable *application registration charge* for each application he files in favour of the 3rd respondent apart from depositing earnest money also. Condition (11) provides of return of earnest money deposited by an applicant in case of a person whose application for a shop is not selected.

20. In the instant case, there is no dispute that the earnest money deposited by each of the petitioners has been refunded to them.

21. The question arises whether the respondents can deny refund of the *application registration charge* for each application filed by the applicants on the ground that it is non-refundable as per Rule 12.

22. The notification No.27/MBD/2017 dt.13.9.2017 issued by 3rd respondent is alleged to have been issued pursuant to both the Rules notified vide G.O.Ms.No.391 Revenue (Ex.II) Department dt.18.6.2012) *and* the Excise policy notified vide G.O.Ms.No.200 Revenue (Excise-II) Department dt.12.9.2017.

23. There is no provision in 2012 Rules for collection of *registration charge* at all and what can be collected is only an *application fee*. Even the application fee payable is only Rs.25,000/- and not Rs.1,00,000/-.

24. When there is conflict between statutory rule and a policy framed under the statute, the statutory rule will prevail over the policy since there cannot be a policy framed in exercise of executive power of the State under Art.162 of the Constitution of India contrary to the statute. This principle has been laid down way back in 1966 in **B.N. Nagarajan v. State of Mysore**¹, where the Supreme Court declared :

“It is hardly necessary to mention that if there is a statutory rule or an Act on the matter, the executive must abide by that Act or rule and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or Act.”

¹ AIR 1966 SC 1942

25. Therefore, the clause (4) of the Prohibition and Excise Policy for 2017-19 for disposal of retail liquor outlets (A4 shops) notified vide G.O.Ms.No.200 Revenue (Excise.II) Department dt.12-09-2017 which authorizes levy of non-refundable *registration charge* is contrary to the statutory Rule 12(1)(i) of Rules 2012, and is *ultra vires* the said Rule.

26. Therefore, the respondents could not have insisted on the petitioners depositing Rs.1,00,000/- towards *registration charges* as per the Excise policy 2017-19 (by describing them in the notification dt.13.9.2017 as *application registration charge*) and could not collected the same from the petitioners. They cannot also refuse to refund it saying that it is non-refundable as per the Excise Policy, 2017-19 since the very collection of the said registration charges is contrary to Rule 12(1)(i) of the 2012 Rules.

27. Also, the term “fee” as is commonly understood indicates there ought to a *quid pro quo* i.e., a correlation between the service and the amount collected; while the term “charge” does not have such a connotation. In **State of U.P. and others Vs. VAM Organic Chemicals Ltd. and others**², the Supreme Court held :

“34. The word “service” in the context of a fee could, therefore, include, a levy for a compulsory measure undertaken vis-à-vis the payer in the interest of the public. This “coercive” measure has been subsequently judicially clarified to mean a “regulatory measure”. But in the case of both kinds of services, whether compulsorily

² (2004) 1 SCC 225

*imposed or voluntarily accepted, there would have to be a correlation between the levy imposed and the “counterpayment or quid pro quo”. However, correlationship between the levy and the services rendered is one of general character and not of mathematical exactitude. All that is necessary is that there should be a reasonable “relationship” between levy of the fee and the service rendered³. Contrariwise when there is no such correlation, the levy, despite its nomenclature is in fact a tax. In **Corpn. of Calcutta v. Liberty Cinema**⁴ the licence fee charged under Section 548 of the Calcutta Municipal Act, 1951 had been challenged on the ground that no service was rendered commensurate with the tax. This Court said that the levy was a tax which the State was competent to impose: (AIR pp. 1116-17, para 20)*

“[T]he Act does not provide for any services of special kind being rendered resulting in benefits to the person on whom it is imposed. The work of inspection done by the Corporation which is only to see that the terms of the licence are observed by the licensee is not a service to him. No question here arises of correlating the amount of the levy to the costs of any service. The levy is a tax. It is not disputed, it may be stated, that if the levy is not a fee, it must be a tax.”(emphasis supplied)

*35. This test of correlationship or “correspondence” has been repeatedly used by this Court either to uphold the fee holding that it was reasonable for the requirement of the authority for fulfilling its statutory obligations (**B.S.E. Brokers’ Forum v. Securities and Exchange Board of India**⁵, SCC p. 505; **Secunderabad Hyderabad Hotel Owners’ Assn. v. Hyderabad Municipal Corpn**⁶, SCC at p. 286; **State of Tripura v. Sudhir Ranjan Nath**⁷; **Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. v. State of Gujarat**⁸ and **Gujchem Distillers India Ltd. v. State of Gujarat**⁹) or to strike it down on the ground that the fee charge was not established to be so commensurate. (See **Indian Mica and Micanite Industries v.***

³ Sreenivasa General Traders Vs. State of A.P. (1983) 4 SCC 353

⁴ AIR 1965 SC 1107

⁵ (2001) 3 SCC 482

⁶ (1999) 2 SCC 274

⁷ (1997) 3 SCC 665

⁸ (1992) 2 SCC 42

⁹ (1992) 2 SCC 399

*State of Bihar*¹⁰, SCC at p. 243 and *A.P. Paper Mills Ltd. v. Govt. of U.P.*¹¹)”.

28. Since the collection of the application fee is to process the application for grant of retail liquor outlets pursuant to notification dt.13-09-2017, once the entire process relating to the 2 shops in Garla village and Mandal was set aside by this Court in W.P.No.34193 dt.18-01-2018 and the same was confirmed on 08-03-2018 in W.A.No.366 of 2018, the respondents cannot justify retention of the said amount deposited by petitioners towards registration charges on the ground that they are *non-refundable* by relying on Rule 12(1)(i) of the 2012 Rules. This is because no service was rendered by respondents to justify its retention once the entire process of selection was set aside by this Court.

29. Only if the process of selection of successful A4 shop licencees is undisturbed, normally the amount collected would be non refundable, but not otherwise.

30. In this view of the matter, the Writ Petition is allowed, and respondents are directed to refund the amounts collected from each of the petitioners towards application registration charges for each of the shops for which they applied pursuant to notification dt.13-09-2017, which was set aside by this Court in W.P.No.39143 of 2017 on 18-01-2018 and confirmed in W.A.No.366 of 2018 on

¹⁰ Indian Mica and Micanite Industries Vs. State of Bihar , (1971) 2 SCC 236

¹¹ (2000) 8 SCC 167

18-03-2018, with interest @ 9% p.a. from the date of deposit till the date of payment and they shall also pay costs of Rs.2,000/- (Rupees Two Thousand only) to each of the petitioners.

31. As a sequel, miscellaneous petitions, if any pending, in this Writ Petition shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 05-06-2018

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