

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
WRIT PETITION No. 38509 of 2018**

Between:

M/s Saketa Restaurent and Bar & two others

... Petitioners

and

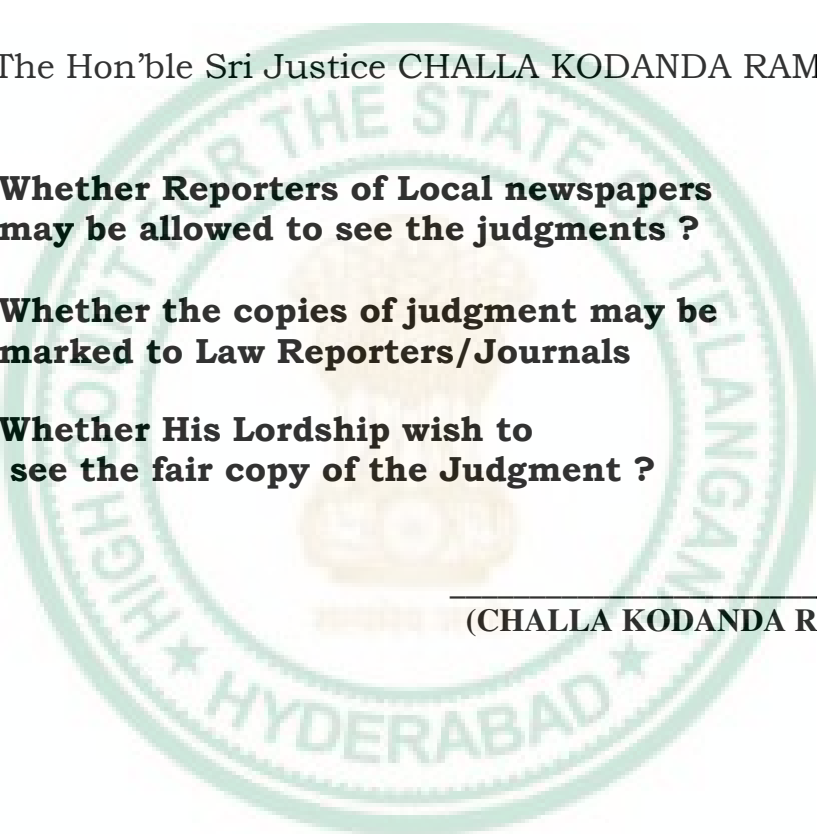
The Prohibition & Excise Superintendent,
Suryapeta Division & others

... Respondents

Date of Judgment Pronounced: 26-02-2019

Submitted for Approval:

The Hon'ble Sri Justice CHALLA KODANDA RAM

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- 1. Whether Reporters of Local newspapers may be allowed to see the judgments ?** No
 - 2. Whether the copies of judgment may be marked to Law Reporters/Journals** Yes
 - 3. Whether His Lordship wish to see the fair copy of the Judgment ?** No

(CHALLA KODANDA RAM, J)

* The Hon'ble Sri Justice CHALLA KODANDA RAM

WRIT PETITION No. 38509 of 2018

% Dated 26.02.2019

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... Petitioners

and

The Prohibition & Excise Superintendent,
Suryapeta Division & others

...Respondents

! Counsel for the petitioners : Sri P.V. Ramana

^ Counsel for Respondents 1 to 5: GP for Prohibition & Excise

Counsel for Respondent No.6 : Sri Voosa Raghu

<GIST:

>HEAD NOTE:

? Cases cited:

(1998) 8 SCC 1

AIR 1996 Supreme Court 1627

AIR 1986 515

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION No. 38509 OF 2018

O R D E R:

This Writ Petition is filed seeking a *mandamus* to declare the Memo dated 05.09.2018, whereby the 6th respondent was granted Elite Bar licence and the consequential order issued by the Commissioner of Prohibition & Excise, Telangana State, the 4th respondent, dated 14.09.2018, granting prior clearance and taking further steps by the Excise Superintendent for granting licence for establishing Elite Bar, as illegal and arbitrary.

The brief facts, which led to filing the present Writ Petition are as follows:

Petitioners, three in number, were granted licence in Form-2B under the Telangana Excise (Grant of Licence of Selling By Bar and Conditions of Licence) Rules, 2005. It is their assertion that, they had paid Rs.42 lacs and odd apart from expending huge amounts for providing facilities conducive for a high-class bar and restaurant. According to them, the licence was granted in their favour taking into account and consideration the population and demand as per the 2011 census which is the basic criteria required to be considered in terms of the excise policy notified under G.O.Ms.No. 223, dated 27.09.2017. However, the petitioners are incurring losses on account of the stiff competition as there are about ten A4 liquor shops altogether in addition to the existing ones with permit rooms. While the things stood thus, the 6th respondent was granted Elite Bar licence, by the 5th respondent, *vide* memo impugned, without applying therefor, in terms of Rule 5 and in Form-1A, at the instance of the Minister and in utter violation of

the excise policy notified in G.O.Ms.No. 223, particularly relaxing para 6 thereof. Hence, the Writ Petition.

When the Writ Petition came up for admission, interim order was passed on 08.11.2018 and the same was extended from to time. When the Writ Petition was taken up for further extension of interim orders, considering the nature and scope of the controversy in issue, at the request of the learned counsel representing the petitioners as well as the official and unofficial respondents, the matter is heard at length.

On behalf of the Excise Department, the 2nd respondent District Prohibition & Excise Officer, Suryapet filed the counter-affidavit, denying the allegation that no Application was made by the 6th respondent in Form-IA. It is asserted that on 23.04.2018, the 6th respondent had made an Application to the Commissioner of Prohibition & Excise requesting to sanction Elite Bar licence as per G.O.Ms.No. 223 and the said Application was forwarded to the Deputy Commissioner of Prohibition & Excise, Nalgonda to examine the same, in terms of the eligibility as per clause 6 of the said G.O. The Deputy Commissioner submitted his report on 16.04.2018 confirming fulfilment of the conditions in terms of G.O.Ms.No. 223, with recommendation to consider the request of the applicant / 6th respondent in the interest of the exchequer. Based on the said report, the Commissioner of Prohibition & Excise requested the Principal Secretary to the Government, Revenue Department to issue bar licence under Elite Bar category, consequently, the impugned memo dated 05.09.2018 was issued as a 'special case' in favour of the 6th respondent, particularly after satisfying the conditions laid down in the G.O. and that there is no

violation of any of the provisions and based on the recommendations of the authorities, permission was granted. It is further stated that since only provisional licence was issued and the dispute relates to granting of elite bar licence, and since there is a remedy of Appeal against the decision taken by the authorities, the Writ Petition is not maintainable and the same is liable to be dismissed.

On behalf of the 6th respondent, a counter-affidavit was filed denying the allegation that no Application was made by them, in Form-IA. It is asserted that such Application was made on 27.07.2018 to the Commissioner of Prohibition & Excise, Hyderabad and that the respondent authorities had followed the norms prescribed therefor and the Elite Bar licence was directed to be granted in their favour, after satisfying the requirements. Hence, it prays for dismissal of the Writ Petition.

Sri P.V. Ramana, learned counsel for the petitioners, drawing attention of this Court to the request made to the Minister and the subsequent correspondence of the authorities, would submit that it is only at the instance of the Minister, the entire exercise of granting permission in favour of the 6th respondent was undertaken which is in utter violation of the very procedure prescribed under the Excise policy and the Rules governing granting of licenses in Form-2B. He adds, the power and discretion vested with the government in terms of para 6 of G.O.Ms.No.223, requires 'special circumstances', which, shall, in the opinion of the Commissioner, who is vested with the authority to recommend granting of Elite Bar licence, be an exception to para 1 to 5 in G.O.Ms.No.223, dated 27.09.2017. The ultimate letter of the Commissioner, dated 27.04.2018 does

not disclose any such 'special circumstances', emphasizes the learned counsel. He also submits that, merely because the 6th respondent is willing to pay an additional fee, as stipulated in para 6 of the said G.O., that, by itself, cannot be a justification to ignore the basic parameters required to be considered for grant of licence in Form-2B, even under the Elite Bar Category; such parameters being population of the area, number of bars that could be granted based on such population, viability and sustainability of the existing licence-holders. Non-consideration of these factors affect the right of the petitioners guaranteed under Articles 14 and 19 of the Constitution of India and thus, the impugned orders granting permission to set up Elite bar in favour of the 6th respondent is liable to be declared as unauthorized and illegal, submits the learned counsel. He further submits that the so-called facilities, which the 6th respondent alleged to have provided, in anyway, do not justify grant of an Elite Bar licence and also do not satisfy the conditions stipulated in Circular No. 3339/2017/CPE(T)/F1, dated 28.03.2018, for, one of the pre-conditions being that Elite bar is required to create facilities equivalent to five-star facilities and the photographs filed along with the Writ Petition do not inspire confidence of any such facilities having been created by the 6th respondent.

The learned counsel for the petitioner as well as learned Government Pleader for Prohibition & Excise also make reference to the judgment dated 16.04.2018 of the Division Bench of this Court in Writ Appeal No. 590 of 2018 and Writ Petition No. 7160 of 2018.

The learned Government Pleader for Prohibition & Excise vehemently opposes the Writ Petition and asserts that the Supreme Court had repeatedly held that it is the exclusive prerogative of the State to formulate the policies with respect to distribution / sale of liquor and its products, and there are no fundamental rights which are guaranteed in the trade of liquor; that there is an alternative remedy available to question the grant of licence, hence, the Writ Petition is misconceived and is liable to be dismissed on the said ground; that the three special circumstances, set out in the judgment of the Supreme Court in ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai***¹ are absent in the present case and thus, there is no justification for entertaining the Writ Petition and the same is liable to be dismissed on this ground also. The report of the Deputy Commissioner and the Commissioner of Prohibition & Excise recommending grant of Elite Bar licence which is entirely a different category from the regular bar licence in Form-2B cannot be found fault as the 6th respondent had fulfilled the criteria for grant of licence in its favour, says the learned Government Pleader. Drawing the attention of the Court to the specific pleadings in the counter-affidavit, the learned Government Pleader asserts that the allegation of the petitioners that there is no Application in Form-IA is incorrect and from the record, it is discernible that challan of Rs.1 lac was paid by the 6th respondent on 14.02.2018 and thus, it cannot be said that the recommendation of the Commissioner is prior to the Application of the 6th respondent. According to him, the 6th respondent approached the Minister, who, except forwarding the

¹ (1998) 8 Supreme Court Cases 1

same to the authorities concerned, as would be done in the case of every representation received by them, has not taken any decision favouring the 6th respondent. He would submit that the recommendation of the Commissioner of Prohibition & Excise is dated 27.04.2018 which was the basis for granting Elite Bar licence and in the absence of challenge to the right to grant an Elite Bar licence, the discretion exercised by the government could not be interfered with.

Learned counsel for the 6th respondent, while reiterating the arguments of the learned Government Pleader, asserts that it is only on account of the trade rivalry, the petitioners are opposing grant of licence in favour of his client and it is only on fulfilment of all the conditions, with respect to the facilities and on payment of the additional fee as required, the licence came to be granted and on account of the stay granted by this Court, the 6th respondent is suffering huge financial losses, hence, he prays for dismissal of the Writ Petition.

In the light of the respective submissions, having regard to the material on record, the principal question which falls for consideration is *“whether grant of permission in favour of the 6th respondent for establishing an Elite Bar by the 1st respondent is contrary to the parameters set out in G.O.Ms.No.223 and hence, is liable to be set aside.”*

The facts in the case are not in dispute. Hence, the specific assertion of the 6th respondent in the counter-affidavit that an Application in Form-IA was made on 27.07.2018 cannot be ignored though it is the assertion of the learned Government Pleader that an Application in Form-IA was deemed to have been made as the 6th respondent paid fee of Rs. 1 lac on

14.02.2018. It is significant to note that in the counter-affidavit filed by the District Prohibition & Excise Officer, the 2nd respondent, though an assertion was made that the 6th respondent had made an Application in Form-IA, the date of Application is conspicuously omitted to be mentioned. Further, in the counter-affidavit, there is no mention of fee of Rs. 1 lac having been paid on 14.02.2018. On the other hand, it is the plea taken in the counter-affidavits filed by the official respondents as well as the 6th respondent that it is only after the letter of the petitioners addressed to the Minister on 07.10.2017, the action was initiated by the Commissioner of Prohibition & Excise on 05.05.2018 directing the Deputy Commissioner to examine the request of the 6th respondent in terms of G.O.Ms.No.223, who, in turn, directed the District Prohibition & Excise Officer to treat the representation of the 6th respondent and submit a report with specific remarks and recommendations explaining the special circumstances, to enable grant of permission to establish Elite bar. A close reading of the entire correspondence, either from the Minister to the Deputy Commissioner or vice versa does not, at any point, mention that there was any Application having been made by the 6th respondent. It is only for the first time in the counter of the 6th respondent, the date of Application having been made on 27.07.2018 was mentioned. In other words, the trigger point for consideration of the Application for grant of licence in favour of the 6th respondent, at best, could be after 27.07.2018. Admittedly, the underlying basis for granting Elite Bar licence in favour of the 6th respondent by the 1st respondent is the recommendation of the Commissioner, dated 24.07.2018 which

was three days prior to the Application made by the 6th respondent. This simple fact itself justifies the specific allegation of the petitioners that the official respondents have yielded to the influence of the Minister and granted licence, but not after fulfilment of the special circumstances as required to be satisfied in terms of G.O.Ms.No. 223.

In this context, it is useful to notice the judgment of this Court dated 16.04.2018 in Writ Appeal No. 590 of 2018 and Writ Petition No.7160 of 2018. The Division Bench dealt with the method and manner of consideration of Applications for grant of Elite bar licences under G.O.Ms.No.223 and held as under:

“ While the concessions provided in Clause VI of Para 2 of G.O.Ms.No.211 dated 01.10.2016, and G.O.Ms.No.223 dated 27.09.2017, for establishing an Elite Bar, are not specified in the 2005 Rules, the Excise Policy notified in the aforesaid two G.Os must be read harmoniously with the 2005 Rules. Consequently, it is only if an application is made to the Commissioner of Prohibition and Excise, in the form prescribed in the 2005 Rules, can such an application be considered, subject to the conditions stipulated in the Excise Policies notified in G.O.Ms.No.211 dated 01.10.2016 and G.O.Ms.No.223 dated 27.09.2017, for grant of an Elite Bar licence. Besides complying with the conditions in Clause VI of Para 2 (fulfilment of which is a pre-condition for grant of permission to establish an Elite Bar license), the Excise Policy, notified in the aforesaid two G.Os, provides for grant of permission for establishing an Elite Bar only in special circumstances, and not for the mere asking. The power conferred on the Government, to relax the requirement of the 2005 Rules in special circumstances, can be exercised only on the recommendation of the Commissioner of Prohibition and Excise, that too in special cases. The Commissioner of Prohibition and Excise is empowered to recommend an applicant's request, to establish an Elite Bar, to the Government only if he is satisfied that special circumstances exist for grant of such permission, and that the applicant's claim is a special case justifying his recommendation to the Government to exercise its special powers of relaxation for establishing an Elite Bar. The condition stipulated in Clause VI of Para 2, of both

G.O.Ms.No.211 dated 01.10.2016 and G.O.Ms.No.223 dated 27.09.2017, is that every application, for establishing an Elite Bar, should be recommended by the Commissioner of Prohibition and Excise. He must record his satisfaction in writing that special circumstances exist which justify his recommendation, and why the applicant's claim must be treated as a special case for grant of permission to establish an Elite Bar. While fulfilment of the conditions in Clause VI of Para 2 is a pre-requisite, even to consider the application for grant of an Elite Bar licence, mere fulfilment of the said conditions would not suffice, and the Commissioner of Prohibition and Excise must, after examining the material placed before him, record his satisfaction in writing that there are special circumstances warranting recommending the applicant's case for establishing an Elite Bar. It would not suffice for the Commissioner to merely state that special circumstances exist. He must, in his recommendation to the Government, detail the special circumstances which necessitate the applicant's case to be treated as a special case for grant of permission to establish an Elite Bar. Further, on receipt of such recommendation, the Government must be satisfied that it is a fit case for the exercise of its special powers to relax the requirement of adhering to the procedure prescribed in the 2005 Rules, and the population and other criteria stipulated for establishing a bar. It is only if all these requirements are satisfied, can permission be accorded for establishing an Elite Bar".

In the present case, the reports of the District Prohibition & Excise Officer, Suryapet, dated 06.04.2018, 24.05.2018 and 22.06.2018 clearly disclose that on account of the poor off-take of the existing bar licensees, and also the A4 licensees, there are no circumstances for permitting Elite Bar on the representation of the 6th respondent were totally ignored and the same is contrary to the Circular instructions of the Commissioner dated 28.03.2018 which require consideration of financial implications for establishment of Elite bar. In other words, the specific parameters which are required to be considered before issuing Elite Bar licence by the Commissioner are not adhered to and more importantly, a careful reading of the Commissioner

recommendation dated 24.07.2018 does not indicate any such satisfaction having been recorded by the Commissioner which was the basis for the 5th respondent issuing the impugned memo. The Commissioner did not express any opinion of his own. In this context, while G.O.Ms.No.223 had taken into consideration the census of 2011 as the basis, the Deputy Commissioner's report mentions about merger of two gram Panchayats, Komaraband and Tamara in Kodad Municipality. Admittedly, such merger was only after the formation of the State of Telangana in 2014. The Commissioner merely had referred to the report of the Deputy Commissioner dated 10.07.2018 in the recommendation dated 24.07.2018. Hence, it can safely be stated that the Commissioner while making recommendations, had failed to exercise due diligence required before making a recommendation which require as a special circumstance to deviate from para 1 to 5 of G.O.Ms.No.223.

While it is true that the Supreme Court had held that there is no fundamental right in dealing with the business of liquor, in ***State of Andhra Pradesh v. Mc.Dowell & Co.***², it has been held, once the State decides to part with the privilege and decides to grant licence in favour of the citizens to carry on the business of liquor trade, the protection available under Articles 14 and 19(1)(g) would be available and such rights cannot be wished away. It is also to be noted that the Supreme Court in a catena of judgments had categorically held that when a case is based on challenge to the violation of Article 14, it is for the party alleging to establish arbitrariness and the burden is heavy on the petitioners. If a challenge is based on Article

² AIR 1996 Supreme Court 1627

19(1)(g), it is for the State to establish that the restrictions are reasonable and do not infringe the rights of a citizen to carry on the trade and the burden is heavy on the State. In the case on hand, the specific pleading of the petitioners that they had paid heavy licence fee of Rs. 42 lacs apart from incurring expenses for establishing a bar and restaurant under 2B licence granted in their favour and they would suffer irreparable loss on account of there being no adequate demand existing as on date which stands confirmed by the reports of the Deputy Commissioner, could not have been ignored, particularly when the very excise policy notified under G.O.Ms.No. 223 mandates the same to be considered. Even viewed from that angle, the action of the 2nd respondent recommending the case of the 6th respondent as special circumstance and issuance of the memo impugned by the 1st respondent is unsustainable and accordingly, the Writ Petition deserves to be allowed.

The argument of the learned Government Pleader as regards the availability of alternative remedy is liable to be rejected, for the simple reason that the very grant in favour of the 6th respondent was emanated from the action of the Minister in entertaining the representation as the Application and the authorities processing the same as an Application made in terms of the Rules which is nothing but ultra vires the provisions of the Act and the Rules. Admittedly, the Appeal lies to the Commissioner of Prohibition & Excise and it is the same authority who violated the procedure prescribed. In those circumstances, no useful purpose would be served in driving the petitioners to avail the so-called alternative remedy. The order date 29.01.2019 in Writ Petition (PIL) No. 176 of 2018 has no

relevance as in the said case what was challenged was the policy of the government in issuing G.O.Ms.No.223, dated 27.09.2017 providing for grant of permission for Elite bars, unlike in the present case, where a challenge is made to the grant in favour of the 6th respondent.

With this order, the Writ Petition is allowed. No costs.

Consequently, the miscellaneous Applications, if any stand closed.

26th February 2019

CHALLA KODANDA RAM, J

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