

---

**(2017) 03 KL CK 0019**  
**In the High Court Of Kerala**  
**Case No : WP(C).No. 18277 of 2016**

Cochin Tourist Corporation

APPELLANT

Vs

Commissioner of Excise

RESPONDENT

---

**Date of Decision :** 22-03-2017

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2017) 2 ILRKerala 554 : (2017) 2 KLT 194

**Hon'ble Judges :** Mr. Dama Seshadri Naidu, J.

**Bench :** Single Bench

**Advocate :** Sri. M.K. Dileep Kumar, Advocate, for the Petitioner; Smt. Vidhya A.C., Government Pleader, for the Respondents No. 1 and 2

**Final Decision :** Allowed

---

## Judgement

Dama Seshadri Naidu, J.—Fact

The petitioner, a partnership firm ("the Firm"), initially was running a bar and restaurant in a rented building. In December 2013, the Revenue Department wanted to acquire the building as a part of its metro project. On 10.12.2013, the revenue authorities—according to the petitioner, without notice—seized the building and sealed it, assisted by the police and excise officials. As much stock had been left unused, the Firm represented to the revenue authorities to permit it to exhaust the stock and continue running the business until the authorities actually needed the building for the metro project.

2. The revenue authorities—to be specific, the District Collector—permitted the Firm to re-open the shop. It was with an express condition that the Firm should surrender the building when the authorities required it. On 22.12.2013, it reopened the shop. Later, as the revenue authorities did not insist on the Firm's closing the business, it applied to the Excise Department ("the Department") to have the licence renewed. And it got the licence renewed through Ext.P1, with effect from 01.04.2014. Soon thereafter, on 10.04.2014, the revenue authorities

once again seized the building, took it over and, in the course of time, demolished it. The Firm's effort to stall the officials' efforts proved futile, despite its approaching this Court and filing W.P.(C) No. 8549 of 2014. The writ petition was dismissed.

3. On 09.03.2015, the Department, through Ext.P2, officially terminated the Firm's FL-3 licence for "non-use." Thereafter, on 21.05.2015, the Firm requested the Department to refund the proportionate licence fee for the unused period. In turn, the Excise Commissioner, the first respondent, rejected the Firm's request. Aggrieved, the Firm has filed this writ petition impugning the Ext.P4 order of rejection.

Submissions:

Petitioner's:

4. In the above factual backdrop, the learned counsel for the Firm has submitted that the Firm could run the business hardly for a week's time and that thereafter it had to shut up shop because the very building was taken over by the revenue officials. He has further contended that the excise officials have fully known of this: that the Firm's bar was closed and that the Firm could not use the licence.

5. Drawing my attention to the Ext.P2 order of termination and also the counter affidavit filed by the Department, the learned counsel would strenuously contend that the Department ought to have acceded to the Firm's request and refunded the proportionate licence fee. To support his contentions, he has relied on *Jayadevan v. Varghese* 1999(1) KLT 351.

Department's:

6. On the other hand, the learned Government Pleader, with equal vehemence, has contended that the Firm initially had its shop reopened only to exhaust the stock. Suppressing that fact, the Firm, argues the learned Government Pleader, requested the Department to renew its licence. Unaware of the developments, the Department renewed the licence.

7. The learned Government Pleader further asserts that, when the Firm wanted to have the licence renewed, it did not, in the first place, appraise the Department of the factual position: the shop was permitted to reopen for a limited purpose. Second, so long as the Department has not prevented the Firm from carrying on its business, according to the learned G.P., the Department cannot be compelled to refund the amount for the fault, if any, on the very licensee's part. So, she urges this Court to dismiss the writ petition.

8. Heard the learned counsel for the Firm and the learned Government Pleader, besides perusing the record.

Issue:

9. The Firm had its FL-3 licence renewed for the excise year 2014-15; it could,

however, use the licence only for one week. The shop closed, the Department cancelled the Firm's licence, a year later. One of the licence-conditions stipulates that once the licence cancelled, the licensee may have the licence fee proportionately refunded. Is the Firm entitled to refund of the proportionate licence fee-from the date of the Shop's closure?

Discussion:

10. Indeed, the facts are not in dispute. The Firm had FL-3 licence to run the bar for the Excise year 2012-2013. At the very end of that licence year, the Revenue officials seized the building, in which the Firm had its business. The seizure took place in the Department officials' presence. Later, the District Collector permitted the Firm to reopen the shop, however, for the Firm's exhausting the stock. He seems to have imposed a condition that the Firm should hand over the building when the Revenue Department required it for the metro work.

11. True, the Firm did not inform the Department of the Collector's condition, when it wanted the licence renewed. The Firm got the licence renewed after paying Rs. 23 lakhs as a licence fee. As seen from the Ext.P1 licence, clause 16 reads thus:

"After giving a notice of 15 days, the Excise Commissioner can cancel any licences of any kind. If it is done so, the proportionate amount of the licence fee so remitted shall be refunded."(translated from the vernacular, as suggested by the learned counsel.)

12. When queried, neither of the counsel could bring to my notice any specific legal provision dealing with the refund of the proportionate licence fee for the unused period-whatever be the reason for the licensee's failure to use the licence. But clause 16 of the Ext.P1 licence, extracted above, amply reveals that the licence terminated, the licensee is entitled to a licence-fee refund for the unused period.

13. So the only issue to be determined is whether the Department must refund the amount even when the licensee on its own fails to use the licence. Put it differently, so long as the Excise Department has nothing to do with the licensee's failure to use the licence, can this Court compel the Department to refund the amount?

14. To one question, the answer is obvious: If the licensee invites a situation because of which he could not use the licence, the Department need not refund the licence fee for whatever duration. It is too well established to be contradicted that no person shall be allowed to take advantage of his own fault. The maximum of equity that echoes that principle is this: *commodum ex injuria sua nemo habere debet* (a wrongdoer should not be enabled by law to take advantage from his own actions.)

15. To another question, the answer is not so obvious: if the licensee, for the reasons beyond his control, could not use the licence, should he still be dis

entitled to refund merely because the Department did not contribute to the resulting situation? Is it inequitable to order refund?

16. In Jayadevan, the licensee could not use his liquor licence because of a Court's interim stay. He wanted the Department to refund the licence fee for the period the stay was in force. A learned Division Bench of this Court has held that the licensee was entitled to refund for he could not carry on the business owing to judicial intervention. Indisputable as the proposition is, but the ratio of the judgment emerges from a different factual setting. Since a judicial directive has prevented the licensee from carrying on the business, the licensee cannot be made to suffer, for *actus curiae neminem gravabit*: what the Court does ought not to prejudice a litigant. So, equitably, obvious is the justification that a licensee cannot be made to suffer when the circumstances beyond his control prevented him from carrying on his legitimate business.

17. Here, as I have already observed, the facts are not in dispute. The second time, when the revenue officials seized the building and closed the Firm's shop, as has been admitted fairly by the Department in its counter affidavit, the Revenue officials informed it. The District Collector even questioned why the Department renewed the licence when the Revenue Department had wanted to acquire and demolish the building.

18. In the counter affidavit, the Department unfolds the chronology of events: on 31.03.2014 the Firm applied for renewal of the FL-3 Bar licence for the year 2014-15; it had the licence renewed soon. Later, on 05.04.2014, the District Collector wanted the Deputy Commissioner of Excise to explain why the licence was renewed and why the Firm was allowed to reopen the shop, though the Department permitted the Firm on 23.12.2013 only to clear the stock. Most important, the Collector attested to the fact that building had been taken over. Indeed, the Firm did not inform the Department about these developments. Instead, it went on litigating, but without success.

19. Though the District Collector informed the Department in April 2014 itself about the closure of the Firm's business, the Department nevertheless chose to formally cancel the licence only on 09.03.2015-almost a year later. True, in April 2014, the Department issued a show cause notice to the Firm, which simply replied to the Department that it had already challenged the acquisition before this Court.

20. But the fact remains that at no point in time after 10.04.2014 did the Firm carry on its business. And throughout the Department had fully known of this fact. Absent the Firm's intimating the Department, if the revenue officials, too, had not informed it about the closure, the situation would have been entirely different. Intimation to the Department from any source-be it the Firm or the Revenue Officials-is only to supply knowledge to the Department that the shop was not running, and the licence had not been used. Anyhow, the Department did get that information from some other source; that is, the District Collector.

21. Now, from the above discussion three contingencies, hypothetical as they may be, emerge: (1) A licensee disabling himself-say, of his own fault-from using the licence; (2) a licensor preventing the licensee-say, through an action declared to be illegal-from using the licence; and (3) a licensee being unable to use the licence for the fault of neither he himself nor the licensor, but because of circumstances beyond the control of both.

22. I reckon that the answers to the first two contingencies are self-evident: In the first, the licensor need not refund; in the second, it must. In the final contingency, there is no straight forward answer. It depends on the facts and circumstances, as is our wont to say. Differently put, the licensee needs to fulfil two conditions to get the refund: (1) First, he must have failed, without his fault, to use the licence; second, the Department must have had the knowledge at the earliest about the licensee's failure to use the licence.

23. Here the licensee has indisputably failed, without its fault, to use the licence beyond a week's time. The acquiring authorities permitted the Firm only to clear the stock, but it went ahead and had the licence renewed. This does not, to me, appear to be a vitiating factor. Equally indisputable is the Firm's not informing the Department about its inability to use the licence. If the march of events had stopped there, this discussion would have ended here, with a predictable outcome: the licensee was not entitled to refund. But it was not to be. If not the Firm, the revenue authorities informed the Department about its sealing the building, and later demolishing it.

24. Clause 16 of the Ext.P1 licence stipulated that, if a licence is cancelled, "the proportionate amount of the licence fee so remitted shall be refunded." This clause, in fact, has not specified under what circumstances the proportionate licence fee should be refunded. Put differently, the licencing conditions have not contemplated any penal circumstances to deprive the licensee of the refund.

25. As seen from the record, because of the shop's closure, the Firm wanted the Department to provide to it succour, in the alternative: either to issue an FL-11 licence (Beer & Wine Parlour) in continuation of the defunct FL-3 licence or to refund the licence fee for the unused period. The Department felt that the regulations would not permit it to give FL-11 licence to the Firm as a recompense. As to the alternative relief-the refund-the Department's rejection, gathered from Ext.P4, reveals no reason.

26. In these circumstances, equities adjusted, I reckon that it is indeed harsh and onerous to inflict on the Firm the pain of losing the entire licence fee even for the unused period. Going by clause 16 of Ext.P1, since the Firm could not run its business from 10.04.2014, and the Department had fully known of this fact, the Firm, in my view, is entitled to be refunded the proportionate licence fee for the unused period, i.e., almost the entire year, save one week.

27. The shop closed on 10.04.2014, the Department formally cancelled the licence on 09.03.2015. I may further hold that it may have no impact on the

Firm's entitlement to the refund of the licence fee for the unused period. For, all along, the Department has known about the closure. Nor does the refund-clause in the Ext.P1 licence impose any criteria which the Firm has failed to meet.

28. As a result, I allow this writ petition, directing the first respondent to process the Firm's Ext.P3 request, notwithstanding its earlier rejection, and pass appropriate orders, keeping in view the observations in this judgment. No order on costs.