(2013) 12 AP CK 0113

In the Andhra Pradesh High Court

Case No : Writ Petition No. 28436 of 2008

Durga Wines APPELLANT

Vs

Government of Andhra Pradesh and Others RESPONDENT

Date of Decision : 20-12-2013

Acts Referred:

Citation : (2014) 1 ALT 229

Hon'ble Judges : A. Ramalingeswara Rao, J

Bench : Single Bench

Advocate : K. Rama Koteswara Rao, for the Appellant;

Judgement

A. Ramalingeswara Rao, J.—Heard the learned Counsel for the Petitioner and the learned Government Pleader for Excise for Respondents. The Petitioner was a Wine Shop dealer. He was a successful auction purchaser of shop No. 176 of Kolanukonda Village, Tadepalli Mandal, within the limits of Mangalagiri Prohibition and Excise Station. He got the lease of the shop for the period 2006-2008 in Phase. II auction held on 30-06-2006. He quoted his tender for Rs. 14,94,999/- against the upset price of Rs. 14,76,200/-. He was issued A-4 licence on 06-07-2006 and commenced his business under the name and style of M/s. Durga Wines in D. No. 3-155/B of Kolanukonda village, Tadepalli Mandal. He faced opposition from the villagers. In those circumstances, he submitted a representation on 09-07-2006 seeking permission of Respondent Nos. 2 and 3 to shift his shop from Kolanukonda village to Undavalli in the same Tadepalli Mandal. He also gave an undertaking on 29-07-2006 to pay the additional amount of licence fee or any other incidental fee as may be fixed by the 1st Respondent for such shifting.

2. The 1st Respondent in his proceedings in Cr. No. 11780/2006/CPE/M2, dated 19-08-2006 gave permission for shifting of the Petitioner''s shop from Kolanukonda village to Undavalli center and directed the 3rd Respondent to take necessary action by collecting the prescribed fee as per the Rules. The 3rd Respondent issued consequential proceedings vide L.Rc. No. 176/2006/A1 dated

21-08-2006 according permission for shifting of the shop as aforesaid but fixing a higher license fee. The Petitioner paid an amount of Rs. 3,50,000/- towards differential licence fee and shifting fee balance of Rs. 11,000/- on 21-08-2006 and also submitted a bank guarantee. One Lanka Krishna Mohan filed W.P. No. 18027 of 2006 challenging the shifting proceedings and three licensees of Bar and Restaurants of Tadepalli Mandal also filed a revision before the Hon''ble Minister challenging the said shifting and obtained an order of stay on 01-09-2006. Challenging the said stay proceedings in revision before Government the Petitioner filed W.P. No. 18776 of 2006 before this court. This court heard both W.P. Nos. 18027 and 18776 of 2006 on 26-10-2006 and dismissed the former writ petition while allowing the latter. W.A. Nos. 1262 and 1320 of 2006 were filed by unsuccessful parties and the same were dismissed.

3. The Petitioner submitted a representation to the 2nd Respondent on 07-04-2007 stating that the 3rd Respondent pressurised him to pay his A-4 licence fee as equivalent to 2-B licence fee per year @ Rs. 18 Lakhs and the Petitioner in those circumstances paid Rs. 36 Lakhs for the two year period, thus he paid an excess amount of Rs. 21,05,000/- for the licence fee of A-4 shop and also paid Rs. 11,000/- excess amount for shifting charges. A-4 licence is covered by Andhra Pradesh Excise (Lease of Right of Selling by Shop and Conditions of licence) Rules 2005; whereas 2-B licence is covered by Andhra Pradesh Excise (Grant of License of Selling by Bar and Conditions of Licence) Rules, 2005. The Petitioner filed the present writ petition seeking a direction to the Respondents to refund the excess amount of Rs. 21,16,000/- with interest @ 12% per annum.

4. This court while admitting the writ petition on 29-12-2008 directed the Respondents to dispose of the representation dated 07-04-2007 submitted by the Petitioner. It appears that the Government initially issued a Memo. No. 52495/ Ex. III. 2/2008-6, dated 06-04-2009 according permission to the 2nd Respondent to refund excess payment of licence fee of Rs. 21,60,000/-. But, subsequently the said Memo. was reviewed and the request was rejected in Memo. No. 52495/Ex. III(2)/2008-7, dated 17-08-2009. The writ petition was consequentially amended seeking setting aside of the said Memo dated 17-08-2009.

5. A counter-affidavit was filed by the 3rd Respondent admitting the facts leading to the shifting of the shop but stating that the Petitioner voluntarily paid the shifting fee and other amounts to get the shifting effected and there was no pressure to pay A-4 licence fee equivalent to 2-B licence fee. The Petitioner in his undertaking dated 29-07-2006 specifically stated that he will not raise any claim for damages and for return of additional fee that may be fixed by him. The amount of Rs. 21,05,000/- paid by the Petitioner is towards fulfillment of the conditions for shifting of the licensed premises but not an excess amount as alleged by the Petitioner. It was also stated that it is not correct to state that Rules of 2B(Bar) were applied to the Petitioner''s A-4 shop. The Petitioner asked for shifting of his business premises from an area having lower business potential

to an area having disproportionately higher business prospects. Accordingly payment of higher amounts in addition to shifting fee was accepted by the Petitioner as a precondition for shifting and accordingly the proposal for shifting was accepted. Now the Petitioner after gaining higher profits at the post shifting place is planning to get the amount refunded by making false allegations. In view of the undertaking given by the Petitioner for shifting A-4 shop on 29-07-2006, the Petitioner was permitted to shift the same and now he cannot turn around and say that the Respondents have collected more licence fee and that he is entitled for the refund of the same.

6. It is contended by the learned counsel for the Petitioner that the licence conditions of A-4 shop are governed by A.P. Excise (Lease of Right of Selling by Shop and Conditions of Licence) Rules, 2005 as notified in G.O. Ms. No. 998, Revenue (Ex. III) Department, dated 24-05-2005. Shifting of premises is dealt under Rule 29(3) and it reads as follows:-

Shifting of the licensed premises maybe permitted for valid reasons within the notified area and subject to conditions as may be specified by the Commissioner of Proh. & Excise, subject to payment of 1% of the lease amount or Rs. 25,000/- whichever is higher.

It is his contention that in view of the above Rule, the competent authority is Commissioner of Prohibition and Excise and the 3rd Respondent has no authority to impose any other condition not specified by the Commissioner. The Commissioner unconditionally accepted the proposal for shifting of A-4 shop from Kolanukonda village of Tadepalli Mandal to Undavalli centre of Tadepalli Mandal and directed the 3rd Respondent to take necessary action by collecting the prescribed fee as per the Rules and permit shifting and in view of the same the 3rd Respondent cannot impose any condition and collect any higher amount either towards licence fee or for shifting the shop and hence the subsequent Memo dated 17-08-2009 issued by the 1st Respondent is not valid.

7. On the other hand, the learned Government Pleader for Excise states that there is no A-4 shop in Undavalli centre and the Petitioner himself gave an undertaking on 29-07-2006, which reads as follows:-

Due to non-viability of the shop in the village, request the Prohibition and Excise Superintendent, Guntur to consider shifting of my A-4 shop from Kolanukonda village to Undavalli Centre of the same Mandal.

I undertake to state that I am ready to pay any amount of additional licence fee, or any other incidental fee whatsoever, as may be fixed by the respected Commissioner for shifting my A4 shop to Undavalli Centre, which falls within the periphery of Vijayawada Municipal Corporation and I will not raise any claim for damages, return or additional licence fee, or during claim converted thereof.

In view of the said undertaking he paid the differential licence fee of Rs. 3,50,000/- and shifting balance fee of Rs. 11,000/- on 21-08-2006 and undertook to pay the balance licence fee through bank guarantee within one week. The learned Government Pleader submitted that in view of the undertaking and subsequent payment of licence fee, the order of the Government dated 17-08-2009 is valid.

8. Now it has to be seen whether the impugned Memo dated 17-08-2009 is valid or not.

9. A reading of the impugned Memo shows that the Petitioner herein and one Y. Satyanarayana licensee of M/s. Kanakadurga Wines requested for permission for shifting the premises of their A-4 shops from Kolanukonda Village of Tadepalli Mandal and Nidamarru village in Mangalagiri Mandal to Mangalagiri Municipality of Guntur district respectively due to their business problems. Their request for shifting of shops was considered by the Commissioner of Prohibition and Excise and permission was accorded. After completion of their lease period both the licensees requested for refund of the excess licence fee amount paid on the ground that they sustained losses. Their request was rejected by the Government vide Memo No. 52495/Ex. III. 2/2008-2, dated 02-12-2008. They filed another representation and the Government considered their representation and passed orders on 06-04-2009 according permission to the Commissioner of Prohibition and Excise for refund of excess payment of licence fee on the ground that there is no provision for collecting additional licence fee for shifting the premises under the Rules. Then the Commissioner addressed a letter on 13-04-2009 to the Government stating that shifting to place with higher licence fee was permitted on the request of the licensees only on payment of the additional fee as per their own promise, and, therefore, their request for refund of excess payment of licence fee is without any merit and does not deserve any consideration and hence requested the Government to review the orders. The earlier order dated 6-4-2009 was reviewed and the request was rejected under the impugned memo. on the ground that conditional licence fee can be taken as the condition set by the Commissioner of Prohibition and Excise considering the distinct advantage conferred on the two shops due to the said shifting.

10. As per the Rules applicable to A-4 shop cited above, the Commissioner is the competent authority. The Commissioner while granting permission to shift the shop on 19-08-2006 has not imposed any condition but the 3rd Respondent, who is merely the executing authority of the orders of the Commissioner, passed orders on 21-08-2006 directing payment of difference of licence fee on par with the licence fee of the Vijayawada Municipal Periphery i.e., Rs. 18 Lakhs. The licence fee was calculated on par with the licence fee of 2-B shop in Undavalli centre. Thus it is clear that consequent to the shifting of the shop to Undavalli centre, the licence fee of 2B shops in Undavalli centre was collected from the Petitioner. The ground urged by the learned Government Pleader is the undertaking given by the Petitioner before seeking shifting of the shop. The undertaking specifically states that he would pay the additional licence fee "as may be fixed by the respected Commissioner". As already stated above, the

Commissioner has not imposed any condition of fixing any additional licence fee and such fixation consequent to the shifting of the shop from one centre to another centre within the same Mandal is not warranted by the Rules also. The undertaking given by the Petitioner also does not speak of payment of additional licence fee on the orders of the 3rd Respondent, but only if a condition was imposed by the Commissioner. Rule. 29(3) also states that such shifting of licensed premises may be permitted subject to the conditions as may be specified by the Commissioner and in the instant case no such condition was placed by the Commissioner. The impugned Memo dated 17-08-2009 of the Government in para. 8 states that payment of differential licence fee can be taken as the condition set by the Commissioner considering the distinct advantage conferred on the two shops due to the said shifting and the said understanding of the 1st Respondent cannot be correct in view of the absence of any condition in the order of the 2nd Respondent dated 19-08-2006. The Government cannot read something which is not present in the order of the 2nd Respondent.

11. Accordingly, the impugned Memo. No. 52495/Ex. III(2)/2008-7 dated 17-08-2009 so far as the Petitioner is concerned is set aside and the Respondents are directed to refund the excess licence fee collected from the Petitioner within a period of three (3) months from the date of receipt of a copy of this order. The writ petition is accordingly allowed to the extent indicated above. In the circumstances, there shall be no order as to costs. Miscellaneous Petitions pending, if any, shall stand closed.