
(2016) 05 AP CK 0003

In the Andhra Pradesh High Court

Case No : Writ Appeal Nos. 73, 74, 81, 82, 85, 88, 89, 91, 92, 93, 94, 95, 97, 98 of 2009

The Commissioner of Prohibition and Excise

APPELLANT

Vs

Tuta Srinivasa Rao

RESPONDENT

Date of Decision : 19-05-2016

Acts Referred:

Citation : (2016) 4 ALT 649 : (2016) 5 AndhLD 412

Hon'ble Judges : Dilip B. Bhosale, A.C.J. and P. Naveen J.

Bench : Division Bench

Advocate : Govt Pleader for Prohibition & Excise (A.P) and (TG), for the Appellant; Sri O. Manohar Reddy and Sri A. Jagannadha Rao, Ch. Jagannadha Rao, V.R. Reddy Kovvuri, N. Siva Reddy, L.J. Veera Reddy, C.V.R. Rudra Prasad and Mohd. Saleem Pasha, Advocates, for th

Final Decision : Disposed Off

Judgement

Sri P. Naveen Rao, J. - This group of appeals arises from the common judgment of learned single judge dated 21.11.2008. The competent authorities of the state are in appeal. The point for consideration in this group of writ appeals is, whether the State, through Excise Department, entitled to demand differential license fee from the Form IL-24 licensee (liquor retail outlet) on the ground that the location of licensed shop falls within the 5 KMs radius of the concerned Municipal Corporation, as a consequence to up gradation of existing municipality into Municipal Corporation during the subsistence of license. Parties are referred to as arrayed in the writ petitions.

2. The petitioners were granted/extended IL-24 licenses for the excise year 2004-05. The grant of IL-24 license and license fee was regulated by the Andhra Pradesh Excise Act, 1968 (the Act) and "The Andhra Pradesh Indian Liquor and Foreign Liquor Rules, 1970 (Rules, 1970)" made there under. The IL-24 license fee is structured into five slabs depending on the population of the area where the liquor retail outlet (shop) is located. However, if a shop is located within the

radius of 2 KMs of municipality or within the radius of 5 KMs of a Municipal Corporation, irrespective of the population of the place where the shop is located, the license fee applicable to that Municipality or Municipal Corporation as the case may be is required to be paid by the licensee. The license fee payable by the petitioners was determined based on the location of their shops outside the 2 KMs radius of adjoining Municipality. During the subsistence of their licenses, the concerned municipalities were upgraded as Municipal Corporations. In view of the up gradation of adjoining Municipalities into Municipal Corporations, the shops of petitioners were coming within the 5kms radius of the adjoining Municipal Corporations. As a consequence to establishment of Municipal Corporations, the competent authority of the Excise Department demanded petitioners to pay differential amount of license fee.

3. To appreciate the facts in issue, the facts in W.P. No. 9629 of 2005 (against which W.A. No. 73 of 2009 arises) are noted. The retail outlets of petitioners were located in revenue villages of Eluru and Peddapadu Mandals of West Godavari District. At the time of granting licenses to petitioners, Eluru was a Municipality and their shops were located outside the 2 KMs radius. Eluru Municipality was upgraded and Municipal Corporation was established w.e.f. 07.04.2005. As a consequence to Eluru becoming a Municipal Corporation, the places where petitioners' shops were located were coming within the 5 KMs radius (in excise language - belt area) of Eluru Municipal Corporation. The prohibition and Excise Superintendent, Eluru issued notice dated 16.04.2005 informing the petitioners that license fee for municipal corporation is Rs.8,25,000/- which is higher than what was paid by them and demanded petitioners to pay differential license fee. Similarly, Kadapa, Nellore and Karimnagar Municipalities were made into Municipal Corporations. The shops of all petitioners were coming within the 5km radius of Kadapa, Eluru, Nellore and Karimnagar Municipal Corporations. Similar such notices were issued to all the petitioners in the batch of writ petitions. The revised license fee applicable to respective shops was Rs.8,25,000/- except Nellore Municipal Corporation, where license fee was Rs.10,35,000/-.

4. The challenge to the demand for payment of differential license fee is on the ground that once license fee was determined and license was awarded it is not open to revise the license fee on the ground that the place where shops were established fall within the 5 KMs belt area of the newly formed Municipal Corporation. The learned single Judge upheld the challenge and declared such demand as illegal, unauthorized and without jurisdiction. Learned single Judge observed that when petitioners were granted licenses, the shops were situated outside belt area of 2 KMs from the periphery of the Municipality and notification under Section 3 of the A.P. Municipal Corporation Act notifying the respective Municipalities as Municipal Corporation after the commencement of license period should not have any effect on such license as the competent authority was entitled to grant licenses and collect license fee as fixed at the time of grant of licenses.

5. We have heard the learned counsel for petitioners and learned Government Pleaders for Excise, States of Andhra Pradesh and Telengana.

6. At the outset it is appropriate to note that learned Government Pleaders for Excise representing two States asserted that there was no upward revision of license fee and the demand to pay differential amount of license fee was on account of location of the shops established by petitioners falling within 5 km radius of the newly formed Municipal Corporations. Confronted with said submission, learned counsel Sri O. Manohar Reddy fairly submitted that there was no revision of license fee. Other counsels also do not dispute the said statement. Thus, the issue for consideration narrows down to whether it is within the competence of excise authority to demand payment of differential license fee in view of conversion of Municipality into Municipal Corporation during the excise year thereby expanding the belt area to 5km and bringing the location of petitioners' shops within the belt area of the concerned Municipal Corporation.

7.1 The learned counsel for petitioners contend that after coming into effect of excise year, license fee cannot be raised. Petitioners have agreed to pay license fee as determined at the time of granting license. When the licenses were granted to the petitioners the adjoining towns were only Municipalities and the shops of petitioners were located outside 2km belt area of the concerned Municipality. Thus, subsequent upgrade of Municipality to that of Municipal Corporation can have no impact on the license fee already determined for the excise year. Petitioners could not have taken the licenses if they were informed of possible enhancement of license fee. Such upgrade has no consequence to business of petitioners and they cannot be subjected to heavy financial loss without alerting them of such revision before license was granted.

7.2 Learned Government Pleaders would submit that the Schedule appended to Rules, 1970 clearly indicates the slabs and fixes the liability to pay higher license fee if the shop comes within the belt area of Municipal Corporation. No new license fee is levied by the excise authorities. They only asked the licensee to pay the differential license fee by applying the license fee to belt area of Municipal Corporation. The excise authorities were only giving effect to statutory mandate.

8. The State has the absolute right to regulate manufacture, storage and sale of intoxicants and to collect fee/tax from such activity. In matters concerning intoxicants no person can claim fundamental right to carry on business or trade. To regulate all aspects of intoxicants the AP Excise Act, 1968 is made. The Act deals with all aspects of intoxicants, namely, production, manufacture, possession, transportation, purchase, sale and levy of excise duty, etc. It is a complete code on the subject. Chapter VI of the Act deals with 'Licenses and Permits'. Sections 28 and 29 are part of this Chapter. Section 28 mandates that license can be granted subject to payment of fee and for a fixed period as may be prescribed and subject to such restrictions and conditions as may be prescribed. Section 29 of the Act vests power in the competent authority to make counterpart agreement in conformity with the tenor of the license granted.

9. In exercise of power vested by Section 72 of the Act, Rules, 1970 were formulated. These rules apply on various aspects of intoxicants including grant of license to sell Indian and Foreign Liquor. Rule 23 of the Rules, 1970, specifies various categories of licenses that have to be obtained for sale of Indian and Foreign made liquor. Rule 24 speaks of period of license and commencement of business. As per the rules as in force when licenses were granted to petitioners, period of license was one year commencing from first of April. Rule 25 prescribes license fee. According to Rule 25(9) license fee payable by IL-24 licensee shall be at the rates as shown in the schedule appended to the Rules. Rule 26A and 30 give effect to the mandate of Section 29. Rule 26A(1)(b) mandates licensee to execute a counter-part agreement in Form IL 28 and IL 28A as the case may be. Rule 30(3) is also to the same effect. Clause (iv) of Form IL-28A (counter-part agreement) commits licensee to pay enhanced license fee. It is mandatory to enter into counter-part agreement.

9.1 Rule 25 (9) reads as under:

Rule 25 : License fees:

(9): The annual license fee for the licenses in Form IL 24, Form IL- 24B and Form IL 24- G referred to in Rule 23 shall be amended, from time to time, at the rates as shown in the schedule appended to these rules. The annual license fee for a lease years shall be paid before the commencement of the lease year to which it relates in one lump sum or in three equal instalments or in a manner as notified from time to time. Where the license is issued before the 31st May of the lease year, the first instalment i.e., 1st of the annual license fees shall be paid into the Government Treasury through a challan before the issue of license, together with a Bank Guarantee of a Scheduled Bank situated in Andhra Pradesh in Form IL 30 or Fixed Deposit Receipt/National Savings Certificate for an amount equal to 1st of the annual license fee. The Bank Guarantees shall be valid for a period of 7 months. The 2nd and 3rd instalment of the annual license fee of 1st each shall be remitted into Government Treasury on or before 1st July and 1st October of the lease year respectively in such case, the Fixed Deposit Receipt or Bank Guarantee or National Savings Certificate proportionate to that amount shall be returned to the licensee otherwise such deposits or Bank guarantee shall be adjusted against the instalments of the license fee due on 1st July and 1st October respectively:

Provided that in respect of the licenses granted other than occasional or special licenses during the month in a lease year, the license fee shall be proportionately collected from first of the month in which the license is granted. For example, if the license is granted in the month of May, the license fee payable shall be for eleven months of the annual license fee of that year;

Provided further that if the licenses are granted in June, July, August on and September of the lease year, the applicants for licenses have to pay 50 % of the license fee before the issue of licenses together with a Bank Guarantee; Fixed

Deposit Receipt/National Savings Certificate for a like amount valid for a period of 7 months and the remaining 50 % of the license fee has to be remitted into Government Treasury on or before first October of the lease year and if the licenses are granted in October, November, December, January, February and March of the lease year, the applicants for licenses have to pay the license fee in one lump sum before the issue of license.

9.2 The relevant entry in schedule reads as under:

" The Schedule appended to Rules forms part of the Rules and contains the rates of license fee payable for each of the licenses granted under the Rules. In this Judgment, the controversy is about fee for the license in IL-24. Therefore, the relevant entry providing for license fee may be referred to.

Sl.No.

Category of License

License Fee

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Sl. Nos. 1 to 7 are omitted in this Order

IL.24 Retail license for the sale of all kinds of Indian Liquor, Foreign Liquor and/or Beer not to be consumed on the premises (Off License)

(a) Rs. 3,00,000/- (Rupees Three lakhs only) per year in places where the population of the Revenue village and its hamlets/Municipality/Municipal Corporation does not exceed 10,000;

(b) Rs. 4.50,000/- (Rupees Four lakhs Fifty thousand and only) per year in places where the population of the Revenue village and its hamlets/Municipality/Municipal Corporation is above 10,000 but does not exceed 50,000;

(c) Rs. 8,25,000/- (Rupees Eight lakhs twenty five thousand and only) per year in places where the population of the revenue village and its hamlets/Municipality/Municipal Corporation is above 50,000 but does not exceed 3,00,000;

(d) Rs. 10,35,000/- (Rupees ten lakhs thirty five thousand and only) per year in places where the population of the Revenue village and its hamlets/Municipality/Municipal Corporation is above 3,00,000 but does not exceed 7,00,000; and

(e) Rs. 12,30,000/- (Rupees twelve lakhs thirty thousand and only) per year in places where the population of the Revenue village and its hamlets/Municipality/Municipal Corporation is above 7,00,000/-;

Provided that the license fee in respect of retail shops situated within a belt of 5 Kms from the periphery of Municipal Corporation shall also be at the rate of fee of retail shops situated within the limits of such Corporation;

Provided further that the license fee in respect of retail shop situated within a

belt of 2 Kms from the periphery of Municipalities, notified areas and village/Town/City with population of 25,000 and above, shall also be at the rate of license fee of retail shops situated within the limits of such Municipalities, Notified areas and villages ;

Provided also that where a retail shop falls within the belt area of a Corporation as well as a Municipality, Notified area and village/town/city with a population of 25,000 and above, the license fee payable shall be the fee applicable to the Retail shop situated in the belt area of the Corporation

Sl.Nos. 9 to 14 are omitted in this Order.

Explanation:- In respect of licenses granted for a less period in a lease year, the license fee shall be chargeable proportionately as defined in Rule 3(fff)

10. No person can indulge in sale of liquor unless he is granted license. License can be granted subject to such restriction and condition and for such period and on payment of such fee as prescribed. IL-24 is one of the categories of sale (liquor retail outlet). Rule 25 of the rules mandates payment of annual license fee for each of the licenses granted as prescribed in schedule appended to the Rules. In column 3 against entry 8 of the schedule, five different slabs of license fee is prescribed depending on the population of the habitat where the IL-24 shop is sought to be located. However, by placing three provisos in column 3, exceptions are carved out for payment of license fee based on population. Irrespective of the population of the locality where IL-24 shop is established, if such location falls within 2 KMs radius of a Municipality or within 5 KMs radius of a Municipal Corporation, the licensee has to pay the license fee as applicable to such Municipality or Municipal Corporation as the case may be. Insofar as these petitioners are concerned, the first proviso is relevant.

11. A careful reading of Rule 25 along with Entry 8 of the Schedule, the legislative intent is manifest. The rule making authority fixes 5 slabs of license fee based on the population of habitations but makes exception from this general principle in three provisos, dealing with three different contingencies. The first proviso implies that irrespective of the habitation where IL-24 shop is located, even in rural village, if such location falls within 5km radius, belt area, of the adjoining Municipal Corporation, the licensee has to pay same license fee as applicable to the town area IL-24 licensee. Such application is automatic whenever a Corporation is formed.

12. Rule 25 read with schedule introduced legal fiction and revised license fee applies automatically the moment the retail outlet comes within the prescribed belt area of the municipality/municipal corporation. It is well settled that legislature is competent to create legal fiction. A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the Court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving

effect to the fiction [Manish Trivedi v. State of Rajasthan - (2014) 14 SCC 420]. In construing a provision it must not be extended beyond the purpose for which it is created or beyond the language of the section by which it is created. It cannot be extended by importing another fiction [Superintendent of West Bengal v. Sadan K. Bormal - (2004) 6 SCC 59]. Legal fiction has to be given full effect but it cannot be extended to the purpose not specifically provided in the statute. It must receive strict construction, especially when it creates a penal provision [Commission of Customs (Port) v. J.K. Corporation ? (2007) 9 SCC 401].

13. It is not a case of upward revision of license fee. The IL-24 shops of petitioners, due to the geographical location, come within the radius of 5km of newly formed Municipal Corporations and thereby move into higher slab already determined. No new obligations are created by virtue of any decision taken by the excise authority, but he only gives effect to the legal fiction created by the first proviso in column 3 against entry 8 in the schedule appended to the Rules, 1970. There is no dispute that the shops of petitioners are falling within the 5 KMs belt area of the respective municipal corporations and, therefore, first proviso in column 3 is attracted.

14. The prescription of different slabs based on the population of the area in which retail outlet is established has direct proportion to the volume of business a licensee can generate. According to the assessment of the Government, a retail outlet located nearer to the urban agglomeration generates more business as compared to normal rural outlet. Thus, same license fee as applicable to urban area is stipulated while granting privilege to shops located within the belt area of urban agglomeration. Such classification has reasonable nexus to the object sought to be achieved. The prescription of same license fee as applicable to IL-24 shop within the town is intended to protect the licensee of the town and is also in recognition of the fact that due to close proximity to town, as per the assessment of the excise authorities, would generate same business. Thus, demand to pay same license fee to such of the licensees whose shops are located within the 5 KMs belt area of the respective Municipal Corporations is in tune with the policy as deducible from Rule 25 and the Schedule. It is intended to serve larger public interest.

15. The competence of the authority of the State to demand payment of difference in license fee on account of subsequent change of status of the location where IL-24 licensed shop is established has fallen for consideration in Sri Rama Wines through Rama Rao and others v. Excise Superintendent, Adilabad 1997 (5) ALT 788 (DB) and in Meka Nageswara Rao v. Deputy Commissioner of Excise, Guntur and Another 1998 (3) ALD 159 (DB).

15.1 In Sri Rama Wines, licenses of FL-17 and FL-24 were granted under Rules, 1970 valid for a period of five years commencing from 1.10.1987. Licensees paid license fee as fixed at the time of granting licenses determined on the basis of population in Kagaznagar Municipality. With effect from 20.01.1989, Government included Sirpur area in Kagaznagar Municipality. As a consequence to such

inclusion, the population of Kagaznagar Municipality has gone up and thereby Kagaznagar has moved into higher slab of license fee. Demand notice dated 17.09.1989 was issued by the competent authority calling upon the petitioners to pay differential amount of license fee. The same was challenged before this Court. It was contended that when the licenses were granted, the population as existing as on 01.10.1987 was taken as a basis and once license was granted in the said manner, merely because there is increase in population cannot be the ground to demand higher license fee and conditions of license cannot be altered to disadvantage of the petitioners during the subsistence of the license. Division Bench observed that:

"6. As is evident from the counter-part agreement and not disputed by the learned counsel for the petitioners, the petitioners executed the counter-part agreement in Form FL 28, to pay the enhanced license fee that may be levied by the respondent from time to time. The license fees was fixed initially on the basis of population of Kagaznagar municipality. As per Rule 25 of the Rules, the rates at which license fees was payable are directly proportional to the increase in the population, i.e. density of the population. It is, therefore, logical to enhance the license fees when the population has been increased in Kagaznagar Municipality in 1989.

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Further as required under Section 29 of the Act and in accordance with Rule 30 of the Rules, the petitioners had executed a counter-part agreement unconditionally undertaking to pay any enhanced license fees. Having thus given an undertaking, the petitioners are estopped from questioning the liability under the said undertaking. The petitioners are therefore liable to pay the enhanced license fees as demanded by the respondent.

7....The license, though was granted under Section 28 of the Act, is subject to certain conditions as prescribed in the Rules. It is true that conditions of license do not contain any such liability to pay any enhanced license fees. But the conditions do not place any embargo on the authorities to collect the same. When such is the situation and when the authorities have been clothed with the power to require the applicant to give an undertaking for such payment, it cannot be said that the undertaking is contrary to the letter and spirit of the license or Section 28 of the Act. The counter-part agreement is a statutory one and an undertaking has been given as prescribed in Clause (iv) of Form FL 28 under Rule 30. It is not far to seek the reason for requiring the licensee to give such an undertaking. The population of a place varies due to the lapse of time and also for the reason of merger of another area into the concerned village/town/municipality. Many other situations also can be visualized. These situations cannot be anticipated on the date of grant of license. Since the license fees was payable depending upon the density of the population, the Act gives the power to the authorities to require the licensee to pay the enhanced license fee as and when levied, even during the currency of the period of license. This power having

been given by the Act itself, it cannot be said that it runs counter to the license granted under the Act. The counter-part undertaking has to be treated as one of the conditions of license. The undertaking is also in consonance and tenor of the license."

15.2 In Meka Nageswara Rao, petitioner was granted license for a period of five years in Angalakuduru village commencing from 14.10.1987. Even before the completion of five years license period, petitioner stopped the sales w.e.f. 30.09.1990. During the subsistence of license, on account of inclusion of Sultanabad in Tenali Municipality, Angalakuduru village fell within 1 KM limits from the periphery of Tenali Municipality. Thus, the competent authority issued show cause notice directing petitioner to pay differential license fee for the period from 28.3.1988 to 30.09.1990. This demand for payment of differential license fee was challenged before this court. Referring to the slab system as enumerated to table annexed to Rules and Rule 25 of the Rules and the counter-part agreement entered by the petitioner therein, the Division Bench observed that it is open to the petitioner to challenge the demand for differential license fee. The Court also repelled the contention that demand amounts to revising license fee retrospectively.

16. M/s. Deluxe Bar and others v. The Excise Superintendent and others 1992 (2) ALT 314 has no application to the facts of these cases. In M/s. Deluxe Bar, by the order of Government which was impugned, the schedule appended to the rules was amended, enhancing the license fee for various categories of licenses. While upholding the power of the Government to enhance the license fee, Division Bench held that such enhancement should come into operation only from the date of commencement of the excise year after the amendment was made and it cannot be extended retrospectively to the date of commencement of the license, which was granted after payment of the license fee as demanded for the existing excise year. In the instant case, there is no such enhancement and, therefore, the principle of M/s. Deluxe Bar has no application.

17. At this stage it is also appropriate to note that in exercise of regulatory power, State Government imposed appropriate restrictions on manufacture, storage and sale as well as levy appropriate duty or fee as the case may be. What is levied on the licensee is in the nature of price of privilege conferred on the licensee by the State, which he has to pay while purchasing the trade or business transaction. While granting such privilege, it is permissible for the State to impose appropriate restrictions or prescribe appropriate license fee. Prescription of license fee can vary depending on the location of the shop. A licensee seeking such privilege has to comply with the demand of the State and shall act according to the requirements of the license. The impugned demand has to be seen from said stand point. Thus, when power is conceded to the State to regulate business in intoxicants and to levy appropriate fee as warranted in public interest and the incorporation of 1st proviso in column 3 against entry 8 of the schedule read with rule 25 of the Rules, the consequential demand cannot be

termed as arbitrary or unconstitutional.

18. In *Har Shankar and others etc. v. The Deputy Excise and Taxation Commissioner and others etc.* AIR 1975 SC 1121 (1), on review of earlier Constitution Bench decisions, Supreme Court observed as under:

"53. ??There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants ? its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. "

18.1 Supreme Court also observed, wider power to prohibit absolutely would include the narrower power to permit dealings in intoxicants on such terms of general application as the State deems expedient. Since, rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. Explaining the scope of fee charged by the Government while granting license to vend liquor by retail outlet, Supreme Court observed as under:

"59. ?.. But the ?License fee? or ?Fixed fee? in the instant case does not have to conform to the requirement that it must bear a reasonable relationship with the services rendered to the licensees. The amount charged to the licensees is not a fee properly so-called nor indeed a tax but is in the nature of the price of a privilege, which the purchaser has to pay in any trading or business transaction. "

19. It is also appropriate to notice that all IL-24 licensees have to enter into counter-part agreements. The agreement contains clause where under the licensee agrees to pay the revised license fee. Once, counter-part agreement is signed, the licensee is bound to pay the additional demand made, if there is enhancement of license fee, as and when license fee is enhanced. It is the categorical assertion of the Government Pleaders that petitioners have entered into counter-part agreement. A copy of such agreement entered by one of the petitioners in W.P. No. 9629 of 2005 is circulated during the course of the arguments. Clause-iv of the agreement binds the licensee to pay the enhanced license fee. Thus, even otherwise petitioners cannot refuse to pay the amount demanded having agreed to pay such amount. The contention urged on behalf of the petitioners is contrary to the terms of agreement entered by them. Thus, their contention against demand for payment of differential amount is not valid.

20. In the above analysis, the impugned demand cannot be said as illegal or without power or jurisdiction. We see no illegality in demanding the petitioners to pay the differential amount of license fee by applying the license fee payable by the IL-24 licensee located within the town of the concerned Municipal Corporation consequent to formation of Municipal Corporations in the place of existing Municipalities as the retail shops of petitioners were coming within the 5 KMs belt area of the Kadapa, Karimnagar, Eluru and Nellore Municipal Corporations

respectively.

21. The writ appeals are allowed. The order under appeal is set aside. If the petitioners have not deposited the differential amount, they shall deposit the same within the period of eight weeks from the date of receipt of copy of this order. On failure to deposit the amount due, it is open to the competent authority to take appropriate coercive steps as warranted by law to recover the amounts due to the State.

22. Miscellaneous petitions if any pending shall stand closed. No costs.