IN THE HIGH C0URT 0F JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 12.05.2023
Pronounced on: 19.05.2023

WP(C) 1384/2021 CM 3312/2022

M/S HIGHLANDER BAR AND RESTAURANT …Petitioner(s)

Through: Mr. Pranav Kohli, Sr. Advocate with
Mr. Arun Dev Singh, Advocate.

Vs

UNION OF INDIA AND ORS ...Respondent(s)

Through: Mr. T. M. Shamsi, Dy. SGI for R 1 to 6
Mr. Shahbaz Sikander, Advocate for R 7 & 8

CORAM:
HON'BLE MS JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

J U D G M E N T

"Discretion" means, when it is said that something is to be done within the discretion of the authority, is that something is to be done, according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office, ought to confine himself.

Sharp V. Wakefield (1891) 64 L.T.Rep.180.

1. Discretionary power is not absolute. The executive administrative action is subject to judicial review and there are many checks and balances on the part of the executive with respect to their discretion for making policy decisions. It is not a license to be used in an arbitrary and biased manner according to one's whims and fancies and personal interest, and to quote eminent Jurist, Cook, "Discretion is the signs of understanding to discern between falsity and truth, between right and wrong, between shadow and substance, and not to do things according to an individual's, personal whims, or opinions."
2. The petitioner herein, is aggrieved of the impugned letter No. CB/BB/license/277/380 dated 12.07.2021, issued by respondent No. 8, whereby, the petitioner has been directed to deposit the Trade License Fee of 5,00,000/- (Rupees Five Lakh Only), for Bar and Restaurant under

Section 277(I)(J) of Cantonment Act, 2006. The petitioner is also aggrieved of the impugned Minutes of Meeting held on 19.12.2020, in the Office of Chief Executive Officer, Cantonment Board, Srinagar, whereby it has been decided that 'Bar' shall be placed under the category "Eating Establishments" at point no.7 and that the Bar shall pay the fee @ Rs. 5,00,000/-, Trade license fee, being in contravention to Section 277(4) Cantonment Act, 2006. Petitioner has also been communicated vide letter dated 12.07.2021, that in case he fails to deposit the fee, the action shall be initiated under relevant provisions of Cantonment Act, 2006.

FACTUAL BACKGROUND:

3. It is stated that the petitioner is the partnership firm under the name and style of M/S Highlanders Bar and Restaurant and the petitioner is the Managing partner. The petitioner is engaged in the business of Bar and Restaurant falling in Type B - JKEL - 4. The license bearing No. 83/JKEL-4, has been issued by Excise Department, J&K and has all valid permissions to run and operate the business. The petitioner has deposited the requisite annual fee before the J&K Excise Department which is valid up to 31.03.2022. The petitioner is also registered by the Government of J&K under Shops & Establishments Act, 1966. The petitioner's Bar and Restaurant is situated in the Cantonment area of Srinagar and the said area is governed and regulated in terms of Cantonment Act, 2006. The petitioner has been granted trade licence in terms of section 277 of the Cantonment Act, 2006 vide dated 03.09.2020, for the year 2020-2021. The petitioner commenced the business of running Bar and Restaurant under the name and style of M/S Highlanders Bar and Restaurant at Cantonment area, Srinagar in the year 2005. The Trade License Fee was charged to the tune of Rs.10,000/- (Ten Thousand only), annually, by the Board. Subsequently, the fee was increased from time to time every year, but in the year, 2014, the Cantonment Board passed the resolution bearing No. CBR No. 04 dated 16.04.2014 which is reproduced here under:-

> **Resolution**
>
> Board considered and approved to issue the licence in respect of Highlanders Bar and M/S Sandeep Chattoo Wine Shop henceforth on the yearly basis with the 10% enhancement on

previous licence fee for every year. Following in this regard was also approved in the board meeting.

a. In future these trade licence be treated at par with other trade licenses, since there is no difference with other trades as per section 277 of Cantt Act, 2006.
b. Re-issue of these licence every year should only be brought up for discussion and voting in case there is any violation to Section 277 of Cant. Act, 2006.
c. It should not be linked to existence or non-existence of similar shop/bars in Srinagar, since licence is issued by Excise Dept. of J&K Govt."

4. It is stated that consequent upon the passing of the resolution dated 16.04.2014, the petitioner paid Rs.2, 42, 000/- + 2500 /- = 2, 44, 500 for the year 2015-2016. Thereafter the petitioner has been depositing the fee at the said rate with 10% enhancement every year, as per the resolution in the following tabulated manner:-

S. No.	Financial Year	Amount of Fee with 10% enhancement
1.	2016-17	Rs. 2,68,950/-
2.	2017-18	Rs. 2,95,845/-
3.	2018-19	Rs. 3,25,429/-
4.	2019-20	Rs. 3,57,972/-
5.	2020-2021	Rs. 3,88,743/-
6.	2021-2022	Rs. 4,27,617/- @ 10%
7.	2021-22	But Rs. 5,00,000/- has been charged (impugned Trade Fee levied with 30% hike)

The petitioner moved an application under Right to Information Act, 2005 and sought certain information. Respondents in response to the application of the petitioner furnished their reply on 16.11.2020. It was revealed that respondents have nowhere stipulated the condition of yearly enhancement of fee @ 10%, and all other traders have still been allowed a nominal

annual fees of Rs. 550/- only. The petitioner approached respondents with a communication dated 02.12.2020 and made his protest before the respondents against their discriminatory and arbitrary attitude for charging exorbitant licence fee. The respondents in reply to an appeal under J&K Right to Information Act, 2009 replied as under:-

"(i). Under which provision of Section 277 of C Cantonment Act, 2006 the Cantonment Board is charging Rs. 100000/- as a licence fee with 10% increase every year from the vendor at S. No. J whereas the Cantonment is charging at the rates of Rs. 550/- a licence fee from all other vendors.	The Board is competent to fix any fee deemed fit. In this regard, the President Badamibagh Cantonment Board vide his approval Dated 3/10/2007 considered and approved to grant licence for the year 2007-08 in favour of Highlanders Bar and M/S Sandeep Chattoo subject to condition to deposit of Rs. 100000/- as licence fee. Further the Board vide CBR No. 04 dated 16.04.2014 Considered and approved to issue of licence in respect of Highlanders Bar and M/S Sandeep Chattoo Wine Shop henceforth on the yearly basis with the 10% enhancement on previous licence fee for every year."

It is stated that the petitioner filed a representation dated 17.03.2021, with respect to the imposition of arbitrary, excessive and unjustified Cantonment Licence Fee in clear contravention to Section 277 of the Cantonment Act, 2006. The respondents vide communication dated 30.04.2021 intimated the petitioner that they have relied upon the fee charged by the Government of J&K, (Excise Department) particularly Notification issued vide SO 275 dated 31.08.2020 and furnished the rates thereof and justified their decision of charging Trading/Cantonment Board Fee upon the Bar of the petitioner by the respondents. The respondents vide communication dated 12.07.2021 agreed to renew the trade license of the petitioner but with the condition to deposit Rs. 5,00,000 for a period 2021-2022.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PARTIES

5. The contention raised by the learned senior counsel for the petitioner, Mr. Pranav Kohli is that the impugned communication dated 12.07.2021 and

the impugned decision taken in Board meeting on 19.12.2020, is in clear violation to the section 277 of the Cantonment Board Act, 2006. Section 277 (1) J and 277 (4) of the Cantonment Act, 2006 is reproduced hereunder:-

"Section 277 of the Cantonments Act, 2006

277. Licences required for carrying of certain occupations:-

(1) No person of any of the following classes, namely:-

(j) vendors of spirituous liquor;

(4) **The Board may charge for the grant of licences, under this section such reasonable fees, as it may fix keeping in view the fees levied in this regard in a municipality in the State wherein such cantonment is situated."**

It is stated that the establishment of the petitioner is situated at Srinagar and respondents are liable to fix the reasonable fee, keeping in view the fee levied in a Municipal Corporation of the State where the Cantonment Board is situated, as such, the respondents cannot under law, charge the fee beyond the stipulation contained in section 277(4) of the Act. The reliance placed by the respondents in their communication i.e., SO 275 is irrelevant in the case of the respondents where the respondents have been charging exorbitant fee. The notification relied upon by the respondents is issued by the J&K Government Excise Department and is a part of Excise Policy whereas the respondents are not the part of the Excise policy, therefore, are not competent to levy the rates applicable under Excise Act.

6. The learned senior counsel states, that the Cantonment Board is not competent to surpass the rates, rules and laws governing the field. In terms of the Municipality Act, the municipality is charging only Rs. 30,000/- as annual license fee, which is also evident from the notification issued by Srinagar Municipal Corporation on 18.09.2019.It is also contended that the Trade Fee is in the nature of licence fee and not a tax. There is No *quid pro quo* service or relationship between the petitioner's establishment and the respondents. The respondents do not provide any sought of service/facility etc., to the petitioner for running its establishment. The fee charge has to be commensurate to the source of power under which the same is charged. The authority of the respondents is derived from a legislative enactment

which restricts the amounts/quantum to the municipal license fee in the municipal area. The exorbitant fee charged by the respondent amounts to excessive delegation and without any legislative competence. The petitioner has been paying the exorbitant rates since 2015, but there cannot be any estoppel against law, yet the issue came to limelight when the petitioner moved an RTI application and on perusal of the RTI reply, it came to fore that for all other traders, minimal charges are being levied by the Cantonment Board except establishment of the petitioner.

7. It is further contended that the petitioner is already paying huge amount as annual excise fee and the charging of the Cantonment Board Fee more than reasonable amounts to double taxation which is also impermissible and prohibited in law. The respondents have sought parity with the excise license fee charged by the excise department, which is not the zone of consideration or permissible under section 277 of Cantonment Board Act, 2006.
8. It is also contended that in terms of supplementary agenda i.e., Agenda No.9 for issuance of licence under Section 277 of Cantonment Act, 2006, the matter was placed before the Board vide CBR No. 1 dated 19.12.2020 for consideration to fix reasonable fees for grant of licence under Section 277 and the process to be adopted as per SOP prescribed in terms of Government of India, Ministry of Defence, dated 09.12.2020, but instead of fixing the reasonable fees, the respondents have hiked the fee to such an extent that business of the petitioner is at the verge of extinction. The action of the Board to discriminate between similarly situated individuals and treat them differently is violative of Article 14 and 19(1) (g) of the Constitution. Moreover, there exists no intelligible differentia between other establishments and that of the petitioner with regard to levy of licence fee as a ‘fee’ is charged on account of maintenance of establishment and there is no reason whatsoever which would show that petitioner’s establishment requires a higher amount of expense as compared to other establishments, the excessive fee which is sought to be imposed, has no correlation to the object for which it is being realised. Petitioner has nowhere, pleaded that he is also entitled to be refunded the amount he has already deposited with the respondents since 2015, as excessive licence fee. As such he has no grievance with respect to the amount which has already

been deposited as licence fee with the respondents. Learned senior counsel for the petitioner has also stated that petitioner is not seeking the refund of licence fees already deposited by the petitioner.

9. It is also stated that the petitioner has already filed an application for renewal of his trade license 18.03.2023, for the year 2023-2024, the same is pending before respondents and has not been renewed till date. Petitioner has also placed on record extract from the Special Board Meeting of Cantonment Board held at office of the Cantonment Board, Secunderabad on 21 June 2013, wherein it was considered and resolved that the Trade Licence Fee be charged on par with the adjoining Greater Hyderabad Municipal Corporation, as per section 277(4) of the Cantonment Act, 2006.

10. The learned senior counsel for the petitioner has referred to and relied upon the judgments passed by the Apex Court in (i) Jalkal Vibhag Nagar Nigam and Others v. Pradeshiya Industrial and Investment Corporation and Another reported as 2021 SCC Online SC 960 (ii) Liberty Cinema v. The Commissioner, Corporation of Calcutta reported as AIR 1959 Cal 45.

Learned senior counsel for the petitioner has referred to paragraph Nos. 55 & 57 of the judgment passed in Jalkal Vibhag Nagar Nigam and Others v. Pradeshiya Industrial and Investment Corporation and Another reported as 2021 SCC Online SC 960, which are taken note of as under:-

> 55. The distinction between a tax and fee has substantially been effaced in the development of our constitutional jurisprudence. At one time, it was possible for courts to assume that there is a distinction between a tax and a fee: a tax being in the nature of a compulsory exaction while a fee is for a service rendered. This differentiation, based on the element of a quid pro quo in the case of a fee and its absence in the case of a tax, has gradually, yet steadily, been obliterated to the point where it lacks any practical or constitutional significance. For one thing, the payment of a charge or a fee may not be truly voluntary and the charge may be imposed simply on a class to whom the service is made available. For another, the service may not be provided directly to a person as distinguished from a general service which is provided to the members of a group or class of which that person is a part. Moreover, as the law has progressed, it has come to be recognized that there need not be any exact correlation between the expenditure which is incurred in providing a service and the amount which is realized by the State. The distinction that while a tax is a compulsory exaction, a fee constitutes a voluntary payment for services rendered does not hold good. As in the case of a

tax, so also in the case of a fee, the exaction may not be truly of a voluntary nature. Similarly, the element of a service may not be totally absent in a given case in the context of a provision which imposes a tax.

57. In Southern Pharmaceuticals and Chemicals, Trichur v. State of Kerala24 Justice AP Sen speaking for the Court held:

"24. The distinction between a "tax" and a "fee" is well settled. The question came up for consideration for the first time in this Court in the Commissioner, H.R.E., Madras v. Lakshmindra Thirtha Swamiar of Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005 : 1954 SCJ 335].

25. "Fees" are the amounts paid for a privilege, and are not an obligation, but the payment is voluntary. Fees are distinguished from taxes in that the chief purpose of a tax is to raise funds for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. Thus, fees are nothing but payment for some special privilege granted on service rendered. Taxes and taxation are, therefore, distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes and under particular powers or functions of the Government. It is now increasingly realised that merely because the collections for the services rendered or grant of a privilege or licence, are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure for rendering the service is (1981)4 SCC 391 not by itself decisive. That is because the Constitution did not contemplate it to be an essential element of a fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realised that the element of quid pro quo stricto senso is not always a sine qua non of a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax. We may, in this connection, refer with profit to the observations of Seervai in his Constitutional Law, to the effect: [HM Seervai Constitutional Law of India, 2nd Edn, Vol. 2, p 1252, para 2239]

"It is submitted that as recognised by Mukherjea, J. himself, the fact that the collections are not merged in the consolidated fund, is not conclusive, though that fact may enable a court to say that very important feature of a fee was present. But the attention of the Supreme Court does not appear to have been called to Article 266 which requires that all revenues of the Union of India and the States must go into their respective consolidated funds and all other public moneys must go into the respective public accounts of the Union and the States. It is submitted that if the services rendered are not by a separate body like the Charity Commissioner, but by a government department, the character of the imposition would not change because

> under Article 266 the moneys collected for the services must be credited to the consolidated fund. It may be mentioned that the element of quid pro quo is not necessarily absent in every tax."

Learned senior counsel for the petitioner has referred to Para No. 31 of the judgment passed by the Calcutta High Court in case titled Liberty Cinema v. The Commissioner, Corporation of Calcutta reported as AIR 1959 Cal 45, the relevant portion of the said para is reproduced as thus:-

> 31. ……The increased demand is therefore illegal and must be struck down. If the said imposition is considered to be a tax still it is bad, firstly, because there has been an improper delegation of legislative power and secondly because by reason of an unrestricted power being delegated to a non-legislative body, there has been an infringement of the fundamental rights of the petitioner under Article 19(1)(g) of the Constitution. Section 548(2) of the Act would then be ultra vires and invalid, and the imposition thereunder is not saved by Article 277 of the Constitution. But as the imposition is held to be license-fee it is not necessary to declare Section 548(2) to be invalid. As regards Article 276(2) of the Constitution, it is not necessary for me to decide whether the payment should be confined to Rs. 250/-, in view of the fact that the petitioners are quite willing to pay the amount which they were paying before the increase that has been demanded under the impugned notices. This rule and the other rules which have been heard with it, must consequently be made absolute and the impugned resolution of the Corporation dated 14-8-1958 and the notices served on the petitioners in these oases in so far as they relate to an increase in the license fee payable must be quashed by a Writ of Certiorari and there will be a Writ in the nature of Mandamus directing the respondents not to give effect to the same. But this will be without prejudice to the right of the respondents to realise the license fees at the rate that they were being realised previous to the impugned notices.

11. Per Contra, the learned counsel for the respondent - Cantonment Board states in his reply that that as per the records available with the respondents after floods of 2014, petitioner applied for a renewal of trade license under section 277(1) J of the Cantonment Act, 2006 for the year 2014-2015, to run his bar and restaurant. Accordingly, the matter was placed before respondent and vide CBR No. 4 dated 16.04.2014, respondents considered and approved issuance of licence in favour of the petitioner on yearly basis with the 10% enhancement on the previous licence fee for every year. The decision of the board was conveyed to the petitioner and he was asked to deposit Rs. 2,20,000/- as license fee and Rs. 2500/- Profession Tax per annum. The petitioner vide his application dated 13.03.2015, applied for renewal of licence for the year 2015-2016 and, accordingly, he was asked to deposit Rs.2,42,000/- as licence fee and Rs. 2500/- as profession tax

after enhancement of 10% on the existing licence fee, per annum as per the decision of the Board dated 16.04.2014. The petitioner till 2020-21, got his license renewed after the 10% enhancement every year i.e., Rs. 3,89,743/- as licence fee and Rs. 2500/- as profession tax.

12. It is further contended that in the meanwhile, Directorate General, Defence, Estates, Delhi, Cantt. vide letter No. 76/67/e-Chhawani/C/DE/2020 dated 09.12.2020, standardized the process of issue of trade licence under section 277 of the Cantonment Act, 2006 and ordered to fix reasonable fees as well on the prescribed format of trades (E- Chhawani online management of Cantonment Boards). Accordingly, the matter was placed before the Board vide CBR No. 1 dated 19.12.2020. The respondent Board approved to adopt the overall process mentioned in the letter dated 09.12.2020 and also fixed rates for each trade including rate for Bar and Wine shop @ Rs. 5,00, 000/- as Trade License Fee instead of increase of 10% of annual basis. The petitioner applied online for issuance of trade license for the year 2021-22 for running of bar and restaurant under section 277(1) (J) of Cantonment Act, 2006, vide his application dated 08.03.2021, which was approved by the Board vide CBR No. 01 dated 07.07.2021, subject to the position of trade license fee, amounting to Rs.5,00,000/- as fixed by the Board, and also uploaded on e-Chhawani module. The petitioner failed to deposit the trade fees and as a result he was intimated vide letter dated 12.07.2021 to deposit the trade license fee.
13. It is further contended by the respondents that the trade licence fee is being fixed in accordance with the revenue generated by the traders, owing to the fact that these commodities do not come under essential items. It is also stated that petitioner never agitated with respect to any kind of harassment of fixation of the trading license fee till 2021, and has all along been depositing the fee in accordance with the decision of the respondent board, even on 08.03.2023, petitioner has filed an application on the online portal where in it is clearly reflected that for renewal of the trade license, wherein petitioner is subject to deposit Rs. 5,00,000 /- as such Principle of Estoppel will apply against him.
14. I have heard learned counsels for the parties, have considered the submissions and perused the record.

15. Section 277(4) of the Cantonment Act,2006, clearly states that the Board may charge for the grant of licences, under this section such reasonable fees, as it may fix keeping in view the fees levied it in this regard in a municipality in the state, where in such Cantonment is situated. Hon'ble Apex Court, while dealing with the similar matter, in case titled Madhyamam Broadcasting Limited v. Union of India & Ors. reported as 2023 SCC Online SC 366 has also laid down the same principle. Paragraph No. 49 being relevant is taken note of as under:-

> 49. Reasonableness is a normative concept that is identified by an evaluation of the relevant considerations and balancing them in accordance with their weight. It is value oriented and not purpose oriented. That is why the courts have been more than open in identifying that the action is unreasonable rather than identifying if the action is reasonable. This is also why the courts while assessing the reasonableness of limitations on fundamental rights have adopted a higher standard of scrutiny in the form of proportionality. The link between reasonableness and proportionality and the necessity of using the proportionality standard to test the limitation on fundamental rights has been captured by Justice Jackson in the course of the Canadian Supreme Court's judgment in R v. Oakes:
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> > "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutionally protected right or freedom...Second … the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test."

16. The intent of the legislature is clearly reflected in Section 277(4), wherein, it is categorically mentioned that the Board has to charge and fix fees for the grant of licences only such reasonable fees levied at par with the fees fixed by the municipality in the state where such Cantonment is situated. As per the petitioner municipality is charging licence fees of Rs. 30,000/- annually, but in terms of the Notification issued by Srinagar, Municipal Corporation dated 18.09.2019, Restaurant with sitting of more than 50 persons licence fees fixed is Rs. 2500/- per month and Clubs, Cinema Halls, Pubs, Multiplexes and such other places licence fees is fixed as -4500/- per month, this fact has not been denied by the respondents in their reply.

17. The petitioner has been granted trade license for his Bar and Restaurant under section 277(I) (J) of the Cantonment Act, 2006.The Respondents have placed on record the communication dated 09.12.2020, issued by Government of India, Ministry of Defence, Directorate General, Defence Estates, wherein, in order to provide online services to more than 2,00,000 users, residing in 62 cantonment across the country, a master portal of all the cantonment boards with standardize content is proposed to be developed such as trade license, collect, public grievance and redressal, water and sewerage, property tax, etc. The objectives of the E-chhawani portal, is to provide online services to the citizens, improve the efficiency of the current system, from paper-based, towards paperless, enhance the revenue through transparency, unification of multiple systems on a single platform. In order to give effective implementation of the project a Domain Advisory Committee (DAC) was set up for process, standardization, gathering, business requirements, and exception, handling vide letter dated 27.10.2020. It was decided to implement the recommendations of the DAC and the CEOs were directed to adopt the standard categories, processes and follow the timelines given in the report with the due approval of the cantonment boards. In pursuance to the communication dated 09.12.2020, minute meeting of special board was held on 19.12. 2020.
18. In terms of Agenda No.1E - CHHAWANI, online management of containment boards, Clause- VII, it is stated that revenue section will refer those applications cleared by Engineering and Sanitation Section, relating to trade in Food and Eatable (As per Section 277) to SHO/EHO for comments/NOC.
19. It is also stated that before standardize the process, the board has to fix reasonable fees, as it may fix for grant of licence under section 277 of Cantonment Act, 2006.

Resolution No. 1:

S. No	Category	SI. No.	Sub-Category	UOM	Rate
1	2	3	4	5	6
1	Eating Establishments	1	Sale of Bakery Products/ Confectionary Articles	Flat/Fixed	1000
		2	Sale of Ice Creams/ Kulfi/Ice fruit/Cold Drinks/Aerated	Flat/Fixed	1000

			Water		
		3	Dealers and Vendors Of Fruits & Veg. Juice (Wholesaler/ Retailers/Green Grocer/Fruit Sellers Etc)	Flat/Fixed	1000
		4	Manufacturers of Packaged drinking Water	Flat/Fixed	2000
		5	Manufacturing of Ice cream, ice fruit/ Kulfi, Bakery Products/Cold Drinks/Aerated Water, confectionery Articles/Sugarcane Juice/Namkins/ Savories/Masals/ Jaggery/Coconut Powder/Oil Mill, Dal Mill, Flour Mill Etc.	Flat/Fixed	2000
		6	Cafeteria/Eating Home, Food Court Boarding House/ Tiffin Centres/Mess Catering Service Centre	Flat/Fixed	2000
		7	Bar	Flat/Fixed	500000
		8	Dhaba/Tea house	Flat/Fixed	1000
		9	Manufacturers/Sale Of Sweet/Savories	Flat/Fixed	1000
		10	Restaurants/Hotels	Flat/Fixed	10000
		11	Banqet Halls, Conference Halls/ Function Halls/ Restaurant with Lodging/Service Apartments	Flat/Fixed	10000
		12	Hostels for Working Men/Working Women/Students	Flat/Fixed	2000
		13	Sale/Manufacturing Of Tabacco products /Pan/Pan Masala	Flat/Fixed	1000
		14	Kirana shop/Edible Or Vegetable Oils, Pulses/Tea/Coffee/ Condiments/Masala/ Grains/Tamirind, Dry chillies/Kirana Items/Grocery/Wet Coconut	Flat/Fixed	1000
		15	Sugar/Jaggery	Flat/Fixed	1000
		16	Ration Shop	Flat/Fixed	1000
		17	Sale of Milk/Milk Products (Milk, Cheese, Butter & Ghee)	Flat/Fixed	1000

		18	Manufacturing of Wine/Liquor	Flat/Fixed	100000
		19	Sale of Wine/ Country Liquor/ Toddy/Beer	Flat/Fixed	500000
		20	Sale of Foreign Liquor	Flat/Fixed	500000
		21	Wholesale traders	Flat/Fixed	5000

The table above clearly shows that only Bar and sale of wine/ liquor/country liquor/foreign liquor have been saddled with the immoderate and exorbitant flat/fixed license fees. If the contention of the respondents is to be taken into account that the licence fees is proportionate to the revenue generated by the traders and also based on the nature of business, then the licence fee fixed for restaurants/hotels, banquet, Halls, ration shops, bakery shops, Dhabas, cafeteria, ice cream, parlours etc, is very nominal i.e., from 1000 to 10,000.

20. The contention raised by the senior counsel for the petitioner that respondents have placed reliance on the communication SO 275 which authorizes Excise Department to levy fees on Trade License. The respondents have no authority to levy rates applicable under SO 275. Moreover, the action of the respondents in levying licence fees at par ith SO 275 is not only unfair, arbitrary but also infringes statute It is also stated that fee charged by the respondents is in the shape of Cantonment Board trade fee and is in the nature of licence fee and not a tax. There is a quid pro quo service or relationship between the petitioner's establishment and the respondents.

Hon'ble Supreme Court in case titled Delhi Race Club Ltd vs. Union of India & Ors, has in paragraph No. 17 of the said judgment held as under:-

> 17. Therefore, the pivotal question to be determined is the nature of the impost in the present case. The characteristics of a fee, as distinct from tax, were explained by this Court, as early as in The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt[11] (commonly referred to as the 'Shirur Mutt's Case'). The ratio of this decision has been consistently followed as locus classicus in subsequent decisions dealing with the concept of 'fee' and 'tax'. A Constitution Bench of this Court in Hingir Rampur Coal Co. Ltd. Vs. State of Orissa[12] was faced with the challenge of deciding upon the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, levying

cess on the colliery of the petitioner therein. The Bench explained different features of a ‘tax’, a ‘fee’ and ‘cess’ in the following passage:

“The neat and terse definition of Tax which has been given by Latham, C.J., in Matthews v. Chicory Marketing Board (1938) 60 C.L.R. 263 is often cited as a classic on this subject. “A tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee..” It was further held that, “It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefitting the specified class or area the State as a whole may ultimately and indirectly be benefitted would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy….”.

21. In another decision rendered in case titled Pashupati Castings Ltd. and Ors. v. State of U.P. and Ors Honb’le Supreme Court, reported as MANU/UP/0435/2017 in para 16, has laid down as under:-

16. The submissions of Sri. Kshitij Shailendra and Sri T. A. Khan, learned counsels appearing in the connected matters and who have raised the issue of the licence fee lacking a quid pro quo and being excessive now fall for determination. At the very outset, it becomes relevant to bear in mind that the fee in question is being imposed and collected by the Zila Panchayat for the issuance of a license. A license is issued by a statutory authority to regulate a trade, industry or business. License fee is therefore liable to be viewed as distinct from a “fee for services”. It is in this sense that it is described as a “regulatory fee”. A regulatory fee need

not answer the test of a quid pro quo which is a test which may be relevant while testing the validity of a levy of a "fee for services". A fee for regulation of activity is none the less classifiable as a fee even though no services are rendered. No element of quid pro quo is required for such a fee. This aspect was lucidly explained by the Supreme Court in Delhi Race Club Ltd. Vs. Union of India MANU/SC/0545/2012 : (2012) 8 SCC 680 wherein it was held:

37. It is pertinent to note that in Liberty Cinema (supra), the Court had identified the existence of two distinct kinds of fee and traced its presence to the Constitution itself. It was observed that in our Constitution, fee for licence and fee for services rendered are contemplated as different kinds of levy. The former is not intended to be a fee for services rendered. This is apparent from a bare reading of Articles 110 (2) and 199(2) of the Constitution, where both the expressions are used, indicating thereby that they are not the same. Quoting Shannon Vs. Lower Mainland Dairy Products Board, with approval, it was observed thus:-

"If licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province or for both purposes…It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue."

38. The same principle was reiterated in Secunderabad Hyderabad Hotels Owners' Association case (supra) where the existence of two types of fee and the distinction between them has been highlighted as follows:

9. It is, by now, well settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering specific services, a certain element of quid pro quo must be there between the service rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. Licence fee can also be regulatory when the activities for which a licence is given require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive.

22. The Hon'ble Supreme Court in case titled Assam Medicine Dealers Association and Ors. vs. Guwahati Municipal Corporation and Ors has held that the authority while fixing the fee for regulating the business of Bar & Restaurant, should bear in mind the reasonableness of such fee. An endeavor is required to be made in that direction to ensure that the fee fixed is not excessive. The Hon'ble Apex Court in the said case, in order to elaborate as to what would be excessive, has deliberated upon the

expression ‘excessive’ in paragraph No. 27 of the said judgment. The said paragraph for facility of reference is taken note of hereinbelow:

> 27. The expression ‘excessive’ means beyond any given degree, measure or limit. The very meaning of the expression ‘excessive’ that it is beyond any given degree, measure or limit, by itself is an indication that ‘excessive’ is a relative term which has to be in relation to something, which is in existence and is accepted. The concept of excessive cannot exist on its own without it being compared with something already existing.

23. In a decision rendered by the High Court of Gujarat at Ahmedabad in case titled Outdoor Advertising Owners Association of Ahmedabad and Ors. v. State of Gujarat and Ors, reported as MANU/GJ/0551/2006, has held as under:-

> 09. Reliance was also placed on the decision of the Hon’ble Supreme Court in the case of Vam Organic Chemical Ltd. and Anr. v. State of U.P and Ors. reported in MANU/SC/1076/1997 : [1997]1SCR403, wherein Hon’ble Supreme Court made following observations:
> The High Court has taken the view that in the case of regulatory fees, like the licence fees, existence of quid pro quo is not necessary although the fee imposed must not be, in the circumstances of the case, excessive. The High Court further held that keeping in view the quantum and nature of the work involved in supervising the process of denaturation and the consequent expenses incurred by the State, the fee of 7 paise per litre was reasonable and proper. We see no reason to differ with this view of the High Court.
> On the basis of the said observations, it was sought to be canvassed that the Corporation must show reasonable co-relation between the licence fees being charged as compared to the expenditure which the Corporation is required to incur for regulating the activity.

Therefore, the decision made by the respondents is not made on any rational classification and is without any intelligible differentia. It is palpably arbitrary having no nexus with the object sought to be achieved, as such, is in violation of Article 14 and 19 (1) (g) of the Constitution of India . The respondents have also adopted pick and choose method by adopting their absolute discretion which is not permissible in terms of section 277(4) of the Act.

24. The petitioner is liable to pay licence fee as fixed by the respondents in terms of section 277(4) of the cantonment act, 2006, the claim of the respondents of fixing the licence fee proportionate to the revenue earned by the petitioner and on the basis of the fee in terms of notification, SO275 of the excise department, cannot be taken into account because of the fact that

that firstly, the respondents have no access to the revenue earned by the petitioner and secondly the licence fee charged by the respondents is with respect to the sanitation, hygiene and a licence to run the business etc., in the Cantonment Area of the respondents. It is not the income tax or any other tax which is proposed to be taken on the income earned by the petitioner but, it is a licence fee to be fixed, and the procedure to be followed for fixing licence fees is already specified as reasonable in section 277(4) of the Cantonment Act, 2006. The action of the respondents in fixing excessive licence fee has virtually made Section 277(4) of the Cantonment Act, 2006 as redundant.

25. The contention of the respondent that the petitioner has been depositing licence fee at the same exorbitant rates since 2015, therefore, Principle of Estoppel will govern against him. The petitioner has rightly stated that RTI application was moved by him and on perusal of the RTI reply of the petitioner it was noticed by him that minimal charges as licence fees are being levied by the Cantonment Board from other traders, whereas the establishment of the petitioner has been made to deposit licence fee at excessive, exorbitant and unreasonable rates. Moreover, from last few years, establishment of the petitioner is already depositing a huge excise fee with the Excise department. Therefore, he was left with no option other than to challenge the action and authority of the respondents in enhancing the licence fee to the extent of Rs.5,00,000 /-.

26. Hon'ble Apex Court in case titled Krishna Rai (Dead) v. Banaras Hindu University & Ors reported as 2022 8 SCC 713 has in paragraph No. 23 & 31 while dealing with the Principle of Estoppel held as under:-

> 23. ……It is settled principle that principle of estoppels cannot override the law. The manual duly approved by the Executive Council will prevail over any such principle of estoppel or acquiescence.
>
> 31. Further in the case of Tata Chemicals Ltd. Vs. Commissioner of Customs (preventive), Jamnagar, it has been laid down that there can be no estoppel against law. If the law requires something to be done in a particular manner, then it must be done in that manner, and if it is not done in that manner, then it would have no existence in the eye of the law. Paragraph 18 of the said judgment is reproduced below:
>
> > "18. The Tribunal's judgment has proceeded on the basis that even though the samples were drawn

> contrary to law, the appellants would be estopped because their representative was present when the samples were drawn and they did not object immediately. This is a completely perverse finding both on fact and law. On fact, it has been more than amply proved that no representative of the appellant was, in fact, present at the time the Customs Inspector took the samples. Shri K.M. Jani who was allegedly present not only stated that he did not represent the Clearing Agent of the appellants in that he was not their employee but also stated that he was not present when the samples were taken. In fact, therefore, there was no representative of the appellants when the samples were taken. In law equally the Tribunal ought to have realized that there can be no estoppel against law. If the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of law at all. The Customs Authorities are not absolved from following the law depending upon the acts of a particular assessee. Something that is illegal cannot convert itself into something legal by the act of a third person."

27. Petitioner herein, was though depositing the licence fee since 2015, whatsoever was being fixed by the respondents but in terms of the statutory provisions laid down in terms of section 277(4) of the Cantonment Act, 2006 the fixation of licence fee for the establishment of the petitioner as compared to the licence fee fixed in favour of the similarly circumstanced, eating establishments is not only unreasonable, arbitrary, but also is not sustainable in the eyes of law. Respondents have failed to justify their action of levying excessive fees for the petitioner that too in violation of Section 277 (4) of the Act. The discretionary powers must be exercised within its legal boundaries and must not become ultra vires of the statute. Discretionary power regarding policy-making, is not a licence to be used in an arbitrary and biased manner according to one's whims and fancies and personal interests.

28. In view of the foregoing discussion, the letter No. CB/BB/license/277/380 dated 12.07.2021 issued by respondent No.8, charging exorbitant trade licence fee and the Minutes of Meeting held on 19.12.2020, in the office of Chief Executive Officer, Cantonment Board, Srinagar, whereby, it has been decided under the category "eating establishments" at point No.7, that the bar shall pay the fee @ Rs. 5,00,

000/- being in contravention to Section 277(4) of the Cantonment Act, 2006, are hereby, quashed. However, respondents are granted liberty to fix reasonable trade license fee strictly in terms of section 277(4) of the Cantonment Act, 2006, keeping in view the licence fee charged by the Cantonment Board in other States/UT of the country.

Disposed of.

29. Record be returned to the learned counsel for the respondents.

(MOKSHA KHAJURIA KAZMI)
JUDGE

SRINAGAR
19.05.2023
AAMIR

Whether the judgment is speaking Yes

Whether the judgment is reportable Yes