IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

&

HON'BLE SHRI JUSTICE AVANINDRA KUMAR SINGH

ON THE 30th OF MAY, 2023

WRIT PETITION No.12282 of 2023

BETWEEN:-

RATHORE AND MEHTA ASSOCIATED THROUGH ITS PARTNER MR. SURENDRA RATHORE S/O SHRI PREM NARAYAN RATHORE AGED ABOUT 52 YEARS R/O F-1 HIG 3 MUSKAN SARASWATI NAGAR JAWAHAR CHOWK BHOPAL (MADHYA PRADESH)

.....PETITIONER

(BY SHRI SANJAY AGRAWAL – SENIOR ADVOCATE WITH SHRI RAHUL GUPTA - ADVOCATE)

AND

1. **THE STATE OF MADHYA PRADESH THROUGH PRINCIPAL SECRETARY, COMMERCIAL TAX DEPARTMENT, VALLABH BHAWAN BHOPAL (MADHYA PRADESH)**
2. **EXCISE COMMISSIONER GWALIOR MOTI MAHAL GWALIOR (MADHYA PRADESH)**
3. **COLLECTOR (EXCISE) BHOPAL DISTRICT BHOPAL (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI BRAMHADATT SINGH – DEPUTY ADVOCATE GENERAL)

This petition coming on for admission this day, ***JUSTICE GURPAL SINGH AHLUWALIA*** *passed the following:*

ORDER

This Writ Petition under Article 226 of the Constitution of India has been filed against the order dated 26/05/2023 (Annexure-P/7) and 27/05/2023 (Annexure-P/8) passed by the Collector (Excise) Bhopal, by which the license to run the liquor shop awarded to the petitioner has been cancelled and fresh e-tender has been issued.

2. It is the case of the petitioner that the petitioner is a partnership firm constituted under the name and style "Rathore and Mehta Associates". Initially there were three partners namely, Shri Sanjeev Kumar Mehta, Shri Sushil Singh and Shri Surendra Rathore. The petitioner was under obligation to submit the bank guarantee which was done by the petitioner firm. As per the partnership deed, Shri Sanjeev Kumar Mehta had 45% share in profit and loss, Shri Surendra Rathore had 45% share in profit and loss and Shri Sushil Singh had 10% share in profit and loss. It is the case of the petitioner that without the information, knowledge and consent of other partners, Shri Sanjeev Kumar Mehta entered into a memorandum of understanding on 04/05/2023 i.e. subsequent to the submission of the bank guarantee and inducted one more person namely Shri Anand Tripathi as a partner and by the said memorandum of understanding, Shri Sanjeev Kumar Mehta reduced his share in profit and loss to 30% and the remaining 15% share in profit and loss was given to Shri Anand Tripathi. It is submitted that father of Anand Tripathi namely Shri Narayan Tripathi had assured the petitioner that he

would submit the bank guarantee and accordingly, a bank guarantee dated 07/04/2023 (Annexure P/6) was submitted which was purportedly issued by the Union Bank of India, Thana Dara, Kalimpong, Siliguri, West Bengal. It is submitted that it appears that the respondents tried to verify the genuineness of the bank guarantee and ultimately by order dated 26/05/2023, Annexure-P/7, informed the petitioner that the bank guarantee submitted by the petitioner was a fake bank guarantee and accordingly, cancelled the license awarded to the petitioner and also directed for registration of FIR against the partners. It is submitted that on the very next date i.e. on 27/05/2023, Annexure-P/8, impugned e-tender notice has been issued for award of license to run composite liquor shops at Lalghati, District Bhopal.

3. Challenging the impugned order dated 26/05/2023, Annexure-P/7, it is submitted by the counsel for the petitioner that the said order has been issued in utter violation of Section 31(1A) of the M.P. Excise Act, 1915. An opportunity of hearing should have been awarded to the petitioner before cancelling the license. However, the same has not been done and the license has been cancelled by the impugned order. It is further submitted by the counsel for the petitioner that it is clear from the impugned order dated 26/05/2023, Annexure-P/7, an e-mail was received on 26/05/2023 from the concerning bank that bank guarantee submitted by the petitioner has not been issued by the said bank and immediately thereafter on the very same day impugned order dated 26/05/2023 was passed.

4. It is further submitted by the counsel for the petitioner that in fact the petitioner itself has been defrauded by one of the partner Shri Sanjeev

Kumar Mehta. In fact father of Anand Tripathi had assured the petitioner that he would get the bank guarantee prepared. The petitioner was not aware of the fact that father of Shri Anand Tripathi has prepared a forged bank guarantee. It is further submitted that if the respondents have given an opportunity of hearing to the petitioner, then they would have explained each and every aspect of the matter and could have furnished a fresh bank guarantee. To buttress his contention, the counsel for the petitioner has relied upon judgment passed by the Single Bench of this Court in the case of **Gwalior Distilleries Pvt. Ltd. Vs. State of M.P. and others** reported in **2006 (1) M.P.L.J. 498.** It is further submitted that although the order under challenge is an appealable order, but since it has been passed in utter violation of principles of natural justice, therefore availability of alternative remedy can be ignored.

5. *Per contra,* it is submitted by the counsel for the respondents that in fact the petitioner has admitted in the petition that the bank guarantee submitted by the petitioner was a fake bank guarantee. Thus, it is a clear case of fraud played by the petitioner on the respondents. It is further submitted that in compliance of the order dated 26/05/2023, Annexure-P/7, FIR in Crime No.305/2023 has been registered at Police Station Kohefiza, District Bhopal City for offence under Sections 420, 467, 468, 471, 120-B of IPC against the partners namely, Shri Sanjeev Kumar Mehta, Shri Sushil Singh and Shri Surendra Rathore.

6. Heard the learned counsel for the parties.

7. Section 31(1-A) of the M.P. Excise Act reads as under:-

> 31. (1-A) Before making an order cancelling or suspending a licence permit or pass under sub-section (1), the authority

> aforesaid shall record in writing the reasons for the proposed action, furnish to the holder thereof a brief statement of the same and afford him a reasonable opportunity of being heard.

8. From plain reading of this Section, it is clear that before passing an order of cancellation of a license, the competent Authority is under obligation to provide a reasonable opportunity of hearing to the licensee. Admittedly, in the present case no such opportunity has been granted to the petitioner.

9. The Single Bench of this Court in the case of **Gwalior Distilleries (supra)** has held has under:-

> 5. Excise commissioner is authorized to cancel or suspend a license under section 31 of the Excise Act, 1950. However, sub-section (I-A) of section 31 incorporated by Amending Act 23 of 1979 contemplates that before making an order cancelling or suspending a license, permit or pass under sub-section (1), the authority aforesaid shall record in writing the reasons for the proposed action, furnish to the holder thereof, a brief statement of the same and afford him a reasonable opportunity of being heard. In the present case, there is total violation of the aforesaid statutory provision. The order Annexure P/1 has been passed on 29-7-2005 but before passing of the aforesaid order, proposed statement in brief has not been supplied to the petitioner nor has he been afforded the reasonable opportunity of hearing as contemplated in this sub-section before suspending the license. It is therefore, a case where mandatory requirement under the statutory provision has not been followed and the license has been cancelled without following the aforesaid statutory provision. Under such circumstances, question is as to whether,

> petitioner should be relegated to the statutory remedy available to file appeal under section 62(c) of the Excise Act or this Court should entertain in the matter.

10. Now the only question for consideration is as to whether non-grant of opportunity of hearing to the petitioner would vitiate the impugned order dated 26/05/2023 or not?

11. The Single Bench of this Court in the case of **Gwalior Distilleries (supra)** has not considered the aspect that when no prejudice has been caused to the petitioner, then the impugned order cannot be set aside merely on the ground of violation of natural justice.

12. The Supreme Court in the case of **Nirma Industries Limited and another Vs. Securities and Exchange Board of India** reported in **(2013) 8 SCC 20** has held as under:

> **30.** In B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] , having defined the meaning of "civil consequences", this Court reiterated the principle that the Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished to the employee. It is only if the Court or Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. In other words, the Court reiterated that the person challenging the order on the basis that it is causing civil consequences would have to prove the prejudice that has been caused by the non-grant of opportunity of hearing.....
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> **35.** Mr Venugopal has further pointed out that apart from the appellants, even the merchant

bankers did not make a request for a personal hearing. He submitted that grant of an opportunity for a personal hearing cannot be insisted upon in all circumstances. In support of this submission, he relied on the judgment of this Court in Union of India v. Jesus Sales Corpn. [(1996) 4 SCC 69] The submission cannot be brushed aside in view of the observations made by this Court in the aforesaid judgment, which are as under: (SCC pp. 74-75, para 5)

> "5. The High Court has primarily considered the question as to whether denying an opportunity to the appellant to be heard before his prayer to dispense with the deposit of the penalty is rejected, violates and contravenes the principles of natural justice. In that connection, several judgments of this Court have been referred to. It need not be pointed out that under different situations and conditions the requirement of compliance with the principle of natural justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearings have to be afforded to the persons concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the competent authorities who

have been vested with powers to dispose of the same. Such authorities which shall be deemed to be quasi-judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events the quasi-judicial authorities must hear the appellants or the applicants, as the case may be. When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded."

13. The Supreme Court in the case of **Chairman, State Bank of India and another Vs. M.J. James reported in (2022) 2 SCC 301** has held as under:-

> **31.** In State of U.P. v. Sudhir Kumar Singh [State of U.P. v. Sudhir Kumar Singh, (2021) 19 SCC 706 : 2020 SCC OnLine SC 847] referring to the aforesaid cases and several other decisions of this Court, the law was crystallised as under : (SCC para 42)
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> > "42. An analysis of the aforesaid judgments thus reveals:
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> > 42.1. Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.
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> > 42.2. Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.
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> > 42.3. No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or

> admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.
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> 42.4. In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.
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> 42.5. The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

14. The Supreme Court in the case of **Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati and others reported in (2015) 8 SCC 519** has held as under:-

> 20. Natural justice is an expression of English Common Law. Natural justice is not a single theory--it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called "naturalist" approach to the phrase "natural justice" and is related to "moral naturalism". Moral naturalism captures the essence of commonsense morality--that good

and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision-making by judicial and quasi-judicial bodies, has assumed a different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must give (sic an opportunity) to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as "natural justice". The principles of natural justice developed over a period of time and which is still in vogue and valid even today are: (i) rule against bias i.e. nemo debet esse judex in propria sua causa; and (ii) opportunity of being heard to the party concerned i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is the duty to give reasons in support of decision, namely, passing of a "reasoned order".

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38. But that is not the end of the matter. While the law on the principle of audi alteram partem

has progressed in the manner mentioned above, at the same time, the courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post- decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of

principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non- grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of "prejudice". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing.

41. In ECIL [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] , the majority opinion, penned down by Sawant, J., while summing up the discussion and answering the various questions posed, had to say as under qua the prejudice principle: (SCC pp. 756-58, para 30)

> "30. Hence the incidental questions raised above may be answered as follows:
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> (v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or

removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non- furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an 'unnatural expansion of natural justice' which in itself is antithetical to justice."

44. At the same time, it cannot be denied that as far as courts are concerned, they are

empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in ECIL [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] itself in the following words: (SCC p. 758, para 31)

> "31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or

> revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

15. The Supreme Court in the case of **Canara Bank and others v. Debasis Das and others** reported in **(2003) 4 SCC 557** has held as under:-

> 22. What is known as "useless formality theory" has received consideration of this Court in M.C. Mehta v. Union of India [(1999) 6 SCC 237] . It was observed as under: (SCC pp. 245-47, paras 22-23)
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> > "22. Before we go into the final aspects of this contention, we would like to state that cases relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed see Malloch v. Aberdeen Corpn. [(1971) 2 All ER 1278 : (1971) 1 WLR 1578 (HL)] (per Lord Reid and Lord Wilberforce), Glynn v. Keele

University [(1971) 2 All ER 89 : (1971) 1 WLR 487] , Cinnamond v. British Airports Authority [(1980) 2 All ER 368 : (1980) 1 WLR 582 (CA)] and other cases where such a view has been held. The latest addition to this view is R. v. Ealing Magistrates' Court, ex p Fannaran [(1996) 8 Admn LR 351] (Admn LR at p. 358) [see de Smith, Suppl. p. 89 (1998)] where Straughton, L.J. held that there must be 'demonstrable beyond doubt' that the result would have been different. Lord Woolf in Lloyd v. McMahon [(1987) 1 All ER 1118 : 1987 AC 625 : (1987) 2 WLR 821 (CA)] has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in McCarthy v. Grant [1959 NZLR 1014] however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is 'real likelihood -- not certainty -- of prejudice'. On the other hand, Garner's Administrative Law (8th Edn., 1996, pp. 271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from Ridge v. Baldwin [1964 AC 40 : (1963) 2 All ER 66 : (1963) 2 WLR 935 (HL)] , Megarry, J. in John v. Rees [(1969) 2 All ER 274 : 1970 Ch 345 : (1969) 2 WLR 1294] stating that there are always 'open and shut cases' and no absolute rule of proof of prejudice can be laid down. Merits are

not for the court but for the authority to consider. Ackner, J. has said that the 'useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that 'convenience and justice are often not on speaking terms'. More recently, Lord Bingham has deprecated the 'useless formality theory' in R. v. Chief Constable of the Thames Valley Police Forces, ex p Cotton [1990 IRLR 344] by giving six reasons. (See also his article 'Should Public Law Remedies be Discretionary?' 1991 PL, p. 64.) A detailed and emphatic criticism of the 'useless formality theory' has been made much earlier in 'Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL, pp. 27-63) contending that Malloch [(1971) 2 All ER 1278 : (1971) 1 WLR 1578 (HL)] and Glynn [(1971) 2 All ER 89 : (1971) 1 WLR 487] were wrongly decided. Foulkes (Administrative Law, 8th Edn., 1996, p. 323), Craig (Administrative Law, 3rd Edn., p. 596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. de Smith (5th Edn., 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (Administrative Law, 5th Edn., 1994, pp. 526-30) says that while futile writs may not be issued, a distinction has to

be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a 'real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , Rajendra Singh v. State of M.P. [(1996) 5 SCC 460] that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

23. We do not propose to express any opinion on the correctness or otherwise of the 'useless formality' theory and leave the matter for

> decision in an appropriate case, inasmuch as in the case before us, 'admitted and indisputable' facts show that grant of a writ will be in vain as pointed out by Chinnappa Reddy, J."
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> 23. As was observed by this Court we need not go into "useless formality theory" in detail; in view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel for the appellants, unless failure of justice is occasioned or that it would not be in public interest to dismiss a petition on the fact situation of a case, this Court may refuse to exercise the said jurisdiction (see Gadde Venkateswara Rao v. Govt. of A.P. [AIR 1966 SC 828]). It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing. (See Charan Lal Sahu v. Union of India [(1990) 1 SCC 613 : AIR 1990 SC 1480] .)

16. The Supreme Court in the case of **State of U.P. Vs. Dheer Kumar Singh and others reported in (2020) SCC OnLine SC 847** has held has under:-

> 39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness,

> accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason—perhaps because the evidence against the individual is thought to be utterly compelling—it is felt that a fair hearing "would make no difference"—meaning that a hearing would not change the ultimate conclusion reached by the decision- maker—then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corpn. [(1971) 1 LR 1578], who said that: (WLR p. 1595) "… A breach of procedure … cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain." Relying on these comments, Brandon L.J. opined in Cinnamond v. British Airports Authority [(1980) 1 WLR 582] that: (WLR p. 593) "… no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing." In such situations, fair procedures appear to serve no purpose since the "right" result can be secured without according such treatment to the individual.

17. Thus, it is clear that any order cannot be quashed merely on the ground that opportunity of hearing was not given unless and until prejudice is caused to the aggrieved person. However, in a case where law requires grant of opportunity of hearing, then the respondents must make out a very strong case for by passing such statutory provision.

18. The petitioner in the Writ Petition has categorically admitted that the bank guarantee submitted by the petitioner appears to be a fake one. It is nowhere claimed that Bank Guarantee was genuine one. Para 1 (iv)(e) & (f), para 5.7, 5.9, 5.10 and 5.13 of the petition read as under:-

“1(iv)(e): It is pertinent to mention herein that one Shri Anand Tripathi who later on virtually inducted as partner in the firm through memorandum of understanding with Mr. Sanjiv Kumar Mehta had requested his father Shri Narayan Tripathi to get the BGs prepared. The original three partners had no role to play in the preparation of the said BGs. Shri R.P. Singh and Shri Narayan Tripathi then requested the Shri Surendra Rathore to collect the same from New Delhi. Shri Surendra Rathore merely followed the said instructions believing it to be true and genuine in the interest of the firm and got the said BGs collected from Delhi and thereafter submitted the same before the respondent authorities as a guarantee amount in lieu of the said tender condition.

f: The petitioner firm has no role to play in preparation of the said BGs and therefore the entire firm because of an illegal act of one of the partner cannot be subjected to such harsh consequences.

5.7 That, the petitioner firm in order to comply with the tender condition to deposit the security and guarantee amount got prepared a Bank Guarantee for a sum of Rs. 1, 84,00, 000/- (One Crore Eighty Four Lakhs Only) from the Union Bank of India. It is pertinent to mention herein that one Shri Anand Tripathi who was later on virtually inducted as a partner in the firm through memorandum of understanding with Mr. Sanjiv Kumar Mehta had requested his father Shri Narayan Tripathi took assistance of one Shri R.P. Singh to get the BGs prepared. The original three partners had no role to play in the preparation of the said BGs. Shri R.P. Singh and Shri Narayan Tripathi then requested the Shri Surendra Rathore to collect the same from New Delhi. Shri Surendra Rathore merely followed the said instructions believing it to be true and genuine in the interest of the firm and got the said BGs collected

from Delhi and thereafter submitted the same before the respondent authorities as a guarantee amount in lieu of the said tender condition. A copy of letter dated 07.04.2023 regarding Bank Guarantee of the petitioner firm issued by the Union Bank of India is marked and enclosed herewith as **Annexure –P/6.**

5.9 That, it is pertinent to mention herein that the partners of the petitioner firm except Shri Anand Tripathi were completely shocked after going to know about the forged BG which was never issued by the Union Bank of India in favour of the petitioner firm. The petitioner herein most respectfully submits that original three partners were assured by the father of Shri Anand Tripathi that the BGs will be provided with the assistance of one Shri R.P.Singh being completely unknown to the original partners. The petitioner is in possession of assurance given by Shri R.P. Singh and father of Shri Anand Tripathi as electronic evidence in the form of text messages and calls and the same will be produced as and when this Hon'ble Court so directs.

5.10 That, it is further most respectfully submitted that the petitioner firm was never afforded an opportunity of hearing before cancelling of the said tender. The principles of *audi alteram partem* are heart and soul of any proceedings which may result in civil and criminal consequences. In the matter at hand, the respondent authority completely overlooking the said dictum has directly taken an action by cancelling the tender of the petitioner firm. The petitioner would have cured the said defect if provided with a reasonable opportunity to cure the same.

5.13 That, the petitioner most respectfully submits that petitioner firm was acting under fiduciary relationship of the other partner namely Mr. Anand Tripathi and his father Narayan Tripathi and their associate R.P.Singh. <u>The petitioner was always</u>

> under an impression that Mr. Anand Tripathi and his father Narayan Tripathi and their associate R.P. Singh will always work for the betterment of the firm in a legitimate way. The petitioner firm was not aware of said forged BG otherwise would have taken a stern action against the partner and his father. The respondent authority should have given an opportunity to the petitioner and the petitioner would have submitted the fresh BG as required under the license conditions. The petitioner firm has been betrayed by one of its partner by doing an illegitimate act of forging the BG by submitting the same before the respondent authorities. The mistake of one of the partner in doing an illegitimate act would not bound all the other partners of the firm as the same was accepted in recitals by all the partners, and therefore, instead of proceeding for fresh tender, the respondent authorities should have issued notice to the petitioner by affording him an opportunity to cure the said defect within a reasonable period otherwise the right of the petitioners will stand forfeited. Instead of adhering to the said procedure the respondent authority had directly cancelled the petitioners tender and issued a fresh tender which is completely unknown to law. The petitioner is ready to furnish BG immediately with the authorities. Furthermore, the act of the respondent authorities in completely ignoring the principle of *audi alteram partem* is grossly unjustified, irrational and arbitrary and is in violation of Article 14 of the Constitution of India, 1950."

19. Thus, it is clear that petitioner itself has admitted that the bank guarantee in question was a forged document. The only ground raised by the petitioner is had any opportunity being given to the petitioner to explain the circumstances, then it would have satisfied the respondents

that in fact the initial three partners are not responsible and the petitioner would have furnished a fresh bank guarantee. It is the case of the petitioner that father of Shri Anand Tripathi namely, Shri Narayan Tripathi had got the bank guarantee prepared and handed over to Shri Surendra Rathore, one of the partner. Thus, it is clear that the bank guarantee was deposited by the initial three partners of the petitioner firm. So far as the contention of the petitioner that they were not aware of the fact that Narayan Tripathi would prepare a forged bank guarantee is concerned, the same cannot be accepted. In fact the petitioner is trying to project that the fake bank guarantee provided to them by Narayan Tripathi was submitted in a good faith.

20. Section 52 of the IPC reads as under:-

> 52. "Good faith".—Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

21. Thus, anything which has not been done without due care and attention cannot be said to have been done in good faith. Admittedly, Shri Anand Tripathi was not in picture on the day when the fake bank guarantee was submitted with the respondents. Even according to the petitioner Shri Anand Tripathi was inducted as one of the partner by Shri Sanjeev Kumar Mehta on 04/05/2023. Thus, it can be presumed that prior to 04/05/2023 Shri Anand Tripathi was not in picture at all. Then the defence taken by the petitioner that fake bank guarantee was prepared by his father Shri Narayan Tripathi cannot be accepted for the purpose of this Writ Petition. In this Writ Petition, the petitioner is making allegation against his own partners, therefore, it appears to be an

inter se dispute between the partners. If one partner has played fraud on the other partner then the other partners may have remedy under the civil or criminal law against the erring partner but the petitioner cannot run away from its liability on the ground that one of its partner had committed fraud.

22. It is submitted by counsel for the petitioner that since the petitioner was regularly depositing the licence fee, therefore, no economic loss was caused to the respondents/State and, therefore, an opportunity should have been granted to the petitioner to furnish a fresh bank guarantee.

23. Considered the submissions made by counsel for the petitioner.

24. Fraud vitiates all solemn acts. Fraud means an intention to deceive, whether it is from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial.

25. The Supreme Court in the case of **Commissioner of Customs (Preventive) Vs. M/s Aaflout Textiles (I) Private Limited and others** by order dated 16.2.2007 passed in **Civil Appeal No.2447/2007** has held as under :-

> "9. "fraud" means an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases

where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. (See Dr. Vimla v. Delhi Administration (1963 Supp. 2 SCR 585) and Indian Bank v. Satyam Febres (India) Pvt. Ltd. (1996 (5) SCC 550).

10. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See S.P. Changalvaraya Naidu v. Jagannath (1994 (1) SCC 1).

11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See

Ram Chandra Singh v. Savitri Devi and Ors. (2003 (8) SCC 319).

12. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, `wing me into the easy hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The

representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case i.e. Derry and Ors. v. Peek (1886-90) All ER 1 what constitutes "fraud" was described thus: (All ER p. 22 B- C) "fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false". But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in Khawaja v. Secretary of State for Home Deptt. (1983) 1 All ER 765, that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation of statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. "If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or

non-existence of which the power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. "In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain. In public law the duty is not to deceive. (See Shrisht Dhawan (Smt.) v. M/s. Shaw Brothers, (1992 (1) SCC 534).

13. In that case it was observed as follows:

"Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'.

It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was

at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of the fact with knowledge that it was false. In a leading English case Derry v. Peek [(1886-90) ALL ER Rep 1: (1889) 14 AC 337 (HL)] what constitutes fraud was described thus: (All Er p. 22 B-C) `Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false'."

14. This aspect of the matter has been considered by this Court in Roshan Deen v. Preeti Lal (2002 (1) SCC 100) Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education (2003 (8) SCC 311), Ram Chandra Singh's case (supra) and Ashok Leyland Ltd. v. State of T.N. and Another (2004 (3) SCC 1).

15. Suppression of a material document would also amount to a fraud on the court. (see Gowrishankar v. Joshi Amba Shankar Family Trust (1996 (3) SCC 310) and S.P. Chengalvaraya Naidu's case (supra).

16. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav's case (supra).

17. In Lazarus Estate Ltd. v. Beasley (1956) 1 QB 702, Lord Denning observed at pages 712 & 713, "No judgment of a Court, no order of a Minister can be

> allowed to stand if it has been obtained by fraud. Fraud unravels everything." In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. (page 722)
> 18. These aspects were highlighted in the State of Andhra Pradesh and Anr. v. T. Suryachandr Rao (2005 (5) SCALE 621) and Bhaurao Dagdu Paralkar v. State of Maharashtra and Ors. (2005 (7) SCC 605)

26. If the petitioner had failed to submit the bank guarantee then the license would not have been issued in its favour and thus by submitting a forged/ fake bank guarantee, the petitioner successfully obtained a license to run the liquor shop.

27. It is well established principle of law that no order can be allowed to stand if it was obtained by fraud.

28. Under these circumstances, this Court is of the considered opinion that no prejudice was caused to the petitioner for the reason that no opportunity of hearing as envisaged under Section 31(1-A) of the M.P. Excise Act was given to the petitioner.

29. The petition sans merits and it is **dismissed**.

(G.S. AHLUWALIA)
V. JUDGE

(AVANINDRA KUMAR SINGH)
V. JUDGE

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