

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 26TH DAY OF MARCH 2015/5TH CHAITHRA, 1937

RP.No.163 of 2015 IN OP(C).2746/2014

AGAINST THE JUDGMENT IN OP(C) 2746/2014 of HIGH COURT OF KERALA
DATED 21.01.2015

REVIEW PETITIONER/PETITIONER:

CHATHAN MADHAVI, AGED 82 YEARS,
W/O.LATE T.K.NARAYANAN, TAZHE KOTTENTAVIDA
NUT STREET.P.O, VATAKARA AMSOM DESOM, VATAKARA,
KOZHIKODE, PIN-673 513.

BY ADV. SRI.G.S.RAGHUNATH

RESPONDENTS/RESPONDENTS:

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1. M/S. DARSANA VASTHRALAYAM,
A REGISTERED PARTNERSHIP FIRM BUSINESS AT STALL NO.5
OLD BUS STAND BUILDING, VATAKARA-1,
REPRESENTED BY ITS MANAGING PARTNER T.K.RAJEEVAN,
AGED 44 YEARS, S/O.T.K.NARAYANAN,
RESIDING AT "MADHAVAM", PALOLIPALAM,
VATAKARA, KOZHIKODE, PIN-673 513.
 2. T.K.CHANDRAN, AGED 82 YEARS,
S/O.T.K.NARAYANAN, TAZHE KOTTENTAVIDA, NUT STREET.P.O
VATAKARA AMSOM DESOM, VATAKARA, KOZHIKODE
PIN-673 513.

BY ADVS.SRI.R.PARTHASARATHY
SRI.B. KRISHNAN.

THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON
26-03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.BHAVADASAN, J.

**Review Petition No.163 OF 2015 IN
Original Petition (Civil) No.2746 OF 2014**

Dated this the 26th day of March, 2015.

O R D E R

This is a review petition seeking to have the order dated 21.01.2015 in O.P.(C) No.2746/2014 reviewed on the ground that real issue involved in the case had not been considered by this Court and that certain facts referred to before this Court are not correct and true.

2. The grievance voiced by the petitioner in the original petition was that she was sought to be ousted from the business though she was a partner and that is not permissible. The trial court found that the licence for Stall No.5 of Municipality stood in the name of the review petitioner before this Court and also that attempt of the plaintiff before the trial court was to oust one of the partners from the business which is not permissible in law and therefore the trial court declined to grant the relief sought for by the petitioner. Applications filed by both the plaintiff and

defendants for interim reliefs were dismissed. Both carried the matter in appeal as C.M.A.Nos.5 and 6 of 2014 before the lower appellate court. The lower appellate court while allowing C.M.A No.5/2014 ordered as follows:

- "1) That the respondents/defendants are hereby restrained by a temporary prohibitory injunction from obstructing the petitioner/plaintiff from carrying out its business from stall No.5 (petition schedule room) till the disposal of the suit.
- 2) Since the key of the shop room is presently in the custody of the respondents/defendants, they are directed to give it back to the plaintiff through court within 10 days from today.
- 3) That the order of injunction will come into force as and when the key is handed over by the respondents/defendants.
- 4) That the petitioner/plaintiff shall file weekly statement of accounts regarding the business conducted in the stall No.5 on every Monday before the lower court, with copy to the respondents/defendants".

C.M.A.No.6/2014 was dismissed. It was the said orders that were challenged before this Court.

3. Before this Court, the main contention taken was that the plaintiff in the suit could not seek to exclude the 1st defendant who is admittedly a partner of the firm from participating in the business of the firm. It was contended that at any rate there was materials to show that the petitioner before this Court was in possession of the premises and if that be so, she is entitled to continue the possession. It was also contended that the interim relief granted by the court below exceeds the prayer in the suit and that vitiates the order of the lower appellate court.

4. The respondents before this Court, on the other hand, contended that the lower appellate court had correctly appreciated the facts and by way of interim measure made certain arrangements to see that the business is carried on. Learned counsel went on to point out that no grounds are made out interfere with the order of the court below.

5. On the basis of the contention raised before this Court, this Court formed the opinion that at the relevant time none of the parties had licence to run the business as such. However, this Court found that the plaintiff in the suit had challenged the

order of the local authority granting licence for the premises in appeal before the Tribunal which was dismissed. Against that order an original petition as W.P.(C) No.26217/2014 was preferred before this Court and it is pending consideration. While considering the Interlocutory Application in the said original petition, this Court had observed that the respondents will not interfere with the right of the petitioner to carry on business.

6. This Court, in O.P.(C) No.2746/2014, having found that both the courts below had come to the conclusion that at least till 19.05.2014 other partners of the firm were actively carrying on business and the 1st defendant in the suit was only a passive partner, after appreciating the available materials, came to the conclusion that the interim arrangement made by the lower appellate court was just and reasonable. But by way of abundant caution this Court imposed a condition that share due to the 1st defendant shall be deposited in court once in 15 days after accounting for the business carried on in the premises. A commission was also directed to be taken out to take the inventory of the articles in the premises.

7. Sri.G.S.Raghunath, learned counsel appearing for the review petitioner, contended that unfortunately for the review petitioner before this Court, true facts were not brought to the notice of this Court and that resulted in the order under review being passed contrary to the state of affairs that existed at the relevant time. Relying on the decisions in **Moran Mar Basselios Catholicos & Another** vs. **The Most Rev. Mar Poulose Athanasius & Others** (1954 KLT 385) and **Alias** vs. **Abraham** (2004 (2) KLT 1044), it was contended by the learned counsel that when court omits to determine real issue involved in the case, a review is maintainable. The case on hand satisfies the above requirement and therefore, it is contended that this Court may review its order.

8. Learned counsel also pointed out that the observation of this Court that during the life time of Narayanan, a partnership firm was formed is incorrect and it is contrary to the available records. Reliance was placed on Annexure A1 which is marked as Ext.B15 in the suit whereby late Narayanan had made it clear that consequent on his death, right over the business and

premises will devolve only on his wife Madhavi. It is contended by the learned counsel that this document is not disputed by the respondents before this Court. If that be so, according to the learned counsel, the so called partnership firm which is alleged to have been formed in 1997 cannot be true. It is further contended that consequent on the death of Narayanan, petitioner was conducting the business and as she was advanced in age, she was taken the aid of her children. They managed to obtain signatures of the petitioner and manipulated documents creating a partnership firm initially showing the petitioner as one of the partners. Later she is shown to have retired from the partnership firm and clandestinely a partnership firm was reconstituted consisting of new partners.

9. According to the learned counsel for the petitioner, the story of the partnership firm having been formed during the life time of Narayanan is a concocted one to see that the 1st defendant is deprived of her rights. When the review petitioner before this Court came to know that her sons had managed to obtain licence from the Municipality in their name regarding Stall

No.5, she preferred a complaint before the Municipality and the Municipality after enquiry passed Ext.B12 order wherein it was confirmed that the licensee of the premises is none other than the review petitioner herself. That is not taken objection to so far. If that be so, according to the learned counsel, it is not conceivable that the plaintiff in the suit would have been in possession of the premises and conducting the business as claimed by them. It is also contended by the learned counsel that the suit is not properly instituted. These aspects were not brought to the notice of this Court and that resulted in the order under review being passed by this Court.

10. Sri.B.Krishnan, learned counsel appearing for the respondents, contended that he was taken by surprise by the contentions raised by the review petitioner which have no relations with the contentions earlier raised before this Court and also the arguments addressed before this Court. Referring to the orders of the lower appellate court and this Court, learned counsel pointed out that this Court was mainly guided by certain findings of fact by the courts below. Attention was drawn to the

fact that Ext.B12 order was passed by the Municipality long after licence was issued in favour of the respondents and it was without notice to them that the said order was passed. It is also pointed out that the same was challenged before the Tribunal and as the order of the Tribunal went against them, the same is challenged in W.P.(C) No.26217/2014 before this Court which is still pending. Learned counsel went on to point out that the order was dictated in the open court in the presence of the counsel on both sides and it is too late in the day for the petitioner to contend that true facts were not brought to the notice of this Court. Altogether a new case is now being put forward contrary to what was contended before this Court on earlier occasion and that cannot be appreciated. It is therefore contended that the review petition is without merits and it is only to be dismissed.

11. At the initial stage itself, it will have to be noticed that the counsel who has filed the review petition is not the counsel who had argued the original petition. As rightly pointed out by the learned counsel for the respondents, after hearing the counsel on both sides, this Court dictated the order in the open

court in the presence of counsel on both sides and no objection was taken to the narration of facts made by this Court in its order.

12. One need not dispute the proposition that a review may be possible under the conditions made mention of in the decisions relied on by the learned counsel for the petitioner in the review petition. But the question is whether such a plea can be countenanced in the present review petition. The entire plea in the review petition is totally inconsistent with what was contended before this Court at the time of hearing of the original petition namely, O.P.(C) No.2746/2014. There was no contention before this Court that the review petitioner before this Court was unduly influenced or that she was compelled to sign on papers and that using those papers, false partnership firm was created by the respondents before this Court.

13. It is true that review petitioner has produced Annexure I in the review petition wherein it is seen that late Narayanan had stated that consequent on his death, his business will devolve on his wife who is the petitioner in the review petition and

O.P.(C) No.2746/2014. However, the argument before this Court at the time of earlier hearing proceeded on the basis that even during the life time of Narayanan there was a partnership firm in which Madhavi, the petitioner before this Court was also a partner. It was also contended before this Court that her signature was clandestinely obtained and it was made use of to create a partnership firm. As would be seen from a reading of the order of this Court, it is clear that the argument proceeded on the basis that the review petitioner before this Court was a partner of the firm and if that be so, she could not be excluded from participating in the business. There was never a contention that the respondents before this Court had no interest of their own in the business and that at best they were only looking after the business for and on behalf of the review petitioner. This Court had also occasion to observe that both the courts below had come to a prima facie conclusion that at least till 19.05.2014 the respondents in the review petition were conducting business in the premises. It was taking note of the various facts and circumstances of the case as placed before this Court that this

Court was inclined to agree with the view taken by the lower appellate court regarding the conduct of business. It also needs to be mentioned that at the relevant time this Court was persuaded to take the said view as per the interim order then prevailing in W.P.(C) No.26217/2014 wherein it was directed that the petitioner in the said petition shall not be prevented from carrying on business in the premises. The petitioner in that writ petition is none other than the respondent in the review petition. It is true that the said order has been subsequently modified by the order dated 06.03.2015 whereby this Court has left open the question as to who is entitled to carry on business in the premises to be decided in the suit.

14. To the above extent, the basis on which this Court was inclined to accept the finding of the lower appellate court may not be available now. But that by itself is not sufficient to interfere with the order under review. The question as to the consequence of Ext.B12 order in favour of the review petitioner before this Court especially when it is contended by the respondents that it was passed without notice to them and behind their back, is a

matter to be decided at the time of trial of the suit. This Court was guided by the fact that instead of keeping the premises closed and also to prevent the scuffle for the business being continued, it will be only appropriate to accept the proposal mooted by the court below to ensure that interest of all the persons are safeguarded. It is because of that reason that this Court made some modification in the order of the court below. As rightly pointed out by the learned counsel for the respondents, a case entirely different from the one contended before this Court at the time of hearing of O.P.(C) No.2746/2014 is sought to be raised in the review petition. This Court feels that such a course cannot be permitted especially when at the time when the order was dictated in the open court no objection had been taken to the narration of any of the facts stated by this Court in its order. Further, this Court had not finally decided rights of parties concerned and only ensured that the business is carried on without prejudice to the rights of the parties. Of course, petitioner has a case that she is the sole person who is entitled to carry on business and the respondents have no interest in the

business. As rightly noticed by the courts below, these are all matters to be determined at the time of trial of the suit.

15. It is not in dispute that licence is required for conduct of business. The licence now relied on by the petitioner is only for the purpose of occupation of Stall No.5 and there is nothing to show that any of the parties have got licence to carry on business in the premises. It is also not in dispute that such a licence is absolutely necessary. Whatever that be, it was taking note of the above facts and circumstances that this Court had passed the order under review.

For the above reasons, this Court finds no grounds to review the earlier order.

This review petition is without merits and it is accordingly dismissed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A. to Judge.