

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI**

THURSDAY, THE 12TH DAY OF FEBRUARY 2015/23RD MAGHA, 1936

WA.No. 19 of 2014 () IN WP(C).5818/2013

**AGAINST THE ORDER/JUDGMENT IN WP(C) 5818/2013 of HIGH COURT OF KERALA
DATED 04-12-2013**

APPELLANT(S)/PETITIONER:

**M/S.PTS HOTELS INDIA PVT LTD
(HOTEL COPPER FOLIA), PUTHIYARA
KOZHIKODE DISTRICT-673004
REPRESENTED BY ITS MANAGING DIRECTOR
P.T.SREENIVASAN, AGED 53 YEARS, S/O.MADHAVAN.**

**BY ADVS.SRI.N.M.MADHU
SRI.M.C.ASHI
SMT.C.S.RAJANI**

RESPONDENT(S)/RESPONDENTS:

- 1. STATE OF KERALA
REPRESENTED BY SECRETARY, TAXES(A) DEPARTMENT
GOVT. SECRETARIAT, THIRUVANANTHAPURAM-695001.**
- 2. THE EXCISE COMMISSIONER,
COMMISSIONERATE OF EXCISE
THIRUVANANTHAPURAM-695001.**
- 3. THE DEPUTY COMMISSIONER OF EXCISE,
KOZHIKODE-673020.**
- 4. THE CIRCLE INSPECTOR OF EXCISE,
KOZHIKODE-673020.**
- 5. THE CORPORATION OF KOZHIKODE,
REPRESENTED BY ITS SECRETARY, KOZHIKODE-673020.**

**R5 BY SRI.K.D.BABU, SC,
BY SPL.GOVERNMENT PLEADER SRI.TOM K.THOMAS**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 12-02-2015, ALONG
WITH WPC. 34066/2014, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

WA NO.19/14

APPENDIX

APPELLANT'S EXHIBITS

ANNEXURE A: PHOTOCOPY OF THE ORDINANCE NO.33/2013
ISSUED BY THE GOVT.NO.9239/leg.CI/2012/LAW DATED
26.4.2013.

//True Copy//

PA to Judge

Rp

ANTONY DOMINIC & A.V.RAMAKRISHNA PILLAI, JJ.

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&

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Dated this the 12th day of February, 2015

J U D G M E N T

Antony Dominic, J.

The parties and issues in these cases being common, these were heard together and are disposed of by this common judgment.

2. The appellant in WA No.19/14 initially filed WP(C) No.5818/13 stating that he had established a four star hotel and wanted to obtain FL-11 licence under the Foreign Liquor Rules to open a beer and wine parlour. It was at that stage by Ordinance 64/2012, Section 447 of the Kerala Municipality Act was amended introducing sub sections 7 to 10, which *inter alia* provided that notwithstanding the provisions of the Abkari Act or any other law for the time being in force, no person shall, without previous permission in writing of a Municipality and except than in accordance with the conditions specified in the permission, establish an Abkari shop within a municipal area. "Abkari shop" was defined as toddy shop or a foreign liquor shop or a foreign liquor retail shop or an establishment having FL-9 licence or a bar hotel, under the Abkari

Act and the rules made thereunder. It was the contention of the appellant that a beer and wine parlour is not an abkari shop as defined in the explanation to sub section 10 introduced by Ordinance 64/2012 and that therefore his application was liable to be considered without insisting on a permission of the Municipality. Learned single Judge by the judgment under appeal, rejected this contention and it is against this judgment, WA No.19/14 is filed.

3. During the pendency of the writ appeal, Ordinance 9/2012 was replaced by Kerala Municipality (Amendment) Act, 2014 and it was challenging the vires of the said legislation, WP (C) No.34066/14 was filed.

4. We heard the learned counsel for the appellant/petitioner, learned Government Pleader appearing for the official respondents and the learned standing counsel appearing for the Municipality.

5. Sections 447(7) to (10) and the explanation introduced by Act 8 of 2014 reads thus;

“447 (7): Notwithstanding anything contained in the Abkari Act, 1077 (1 of 1007) or in any other law for the time being in force, no person shall, without previous permission in writing of the Municipality and otherwise than in accordance with the conditions specified in the permission, establish an Abkari shop within a municipal area;

(8) While granting permission to establish an Abkari shop near an educational institution or place of worship, the distance limit prescribed in the Abkari Act for the time being in force or the rules framed thereunder shall be complied with and the Municipality shall not grant permission to establish an Abkari shop within the said distance limit.

(9) A Municipality shall be competent, in consideration of public peace or morality or on the grounds of convenience or nuisance to order shifting from one place to another or closing of an Abkari shop within a period not exceeding fifteen days, as may be directed in this behalf.

(10) Notwithstanding anything contained in this section, the provisions of sub-sections (7) to (9) shall not be applicable to any Abkari shop

existing on the 25th day of November, 2012, the date of commencement of the Kerala Municipality (Second Amendment) Ordinance, 2012 (64 of 2012), or, subject to all existing legal provisions for re-establishing the toddy shops existing on the said date, in the area within the boundaries allotted for establishing them.

Explanation;- "Abkari shop" means a toddy shop or a foreign liquor shop or a foreign liquor retail shop or an establishment having FL-9 licence or a bar hotel, under the Abkari Act, 1077 and the rules made thereunder."

6. Reading of the above provisions show that notwithstanding the provisions of the other enactments, on the introduction of Act 8 of 2014, no person shall, without previous permission in writing of the Municipality and otherwise than in accordance with the conditions specified in the permission, establish an abkari shop, within a municipal area. Sub section 447(8) provides that while granting permission to establish an Abkari shop near an educational institution or place of worship,

the distance limit prescribed in the Abkari Act for the time being in force or the rules framed thereunder shall be complied with and the Municipality shall not grant permission to establish an Abkari shop within the said distance limit. Section 447(9) enables the Municipality to shift abkari shop from one place to another or closing of an Abkari shop in consideration of public peace or morality or on the grounds of convenience or nuisance. As per sub section (10), sub sections (7) to (9) are made inapplicable to any Abkari shop existing on 25th of November, 2012, the date of commencement of Ordinance 64 of 2012.

7. These provisions are challenged by the learned counsel for the appellant/petitioner on two grounds. The first ground raised is violation of Article 14 of the Constitution of India and the second ground raised is one of legislative competence. According to the learned counsel, Section 447(10) excludes from the purview of sub sections (7) to (9) Abkari shops existing on 25th of November, 2012 and that therefore, the shops which come into existence subsequent to 25th of November 2012 are treated in a

discriminatory manner. Therefore, he says that the provisions introduced by Ordinance 64 of 2012 and Act 8 of 2014 are discriminatory and are hit by the provisions of Article 14 of the Constitution of India.

8. Having considered the submissions made, we are unable to accept the said contention. Reading of the provisions contained in the impugned act would show that the legislature has deliberately chosen to treat separately abkari shops existing on 25th of November, 2012 and the abkari shops which came into existence after 25th of November, 2012. If that be so, the shops existing prior to 25th of November, 2012 and which came into existence after the said judgment are treated as belonging to two different classes. It is the settled legal position that Article 14 has application only among those who belong to one class or category and to those belonging to different classes or categories, Article 14 cannot have any application. It is evident from Section 447 (10) that abkari shops which exist as on 25th of November, 2012 and those which came into existence thereafter are treated as

belonging to separate classes. If that be so, Article 14 has no place and the contention now raised by the counsel for the appellant/petitioner is only to be rejected and we do.

9. Counsel then contended that in view of the provisions contained in Article 243-W and the XIIth Schedule to the Constitution of India, provisions introduced by the impugned ordinance and the Act are ultra vires the constitutional provisions. Article 243-W provides that subject to the provisions of the Constitution, Legislation of a State may, by law, endow the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

- “(i) the preparation of plans for economic development and social justice;*
- (ii) the performance of functions and the implementation of schemes as may be*

entrusted to them including those in relation to the matters listed in the Twelfth Schedule.”

10. Reading of clause (ii) clearly shows that the legislature has used the word 'include' in clause (ii) to Article 243-W. This, therefore, means that 18 items included in the XIIth Schedule to the Constitution are not exhaustive and therefore it is open to the legislature to confer on Municipalities such other powers and authority as may be necessary to enable them to function as institutions of self-government. This therefore means that the second contention raised by the learned counsel for the appellant/petitioner also cannot be accepted. We do not find any substance in the challenge against the constitutional validity of Ordinance 64 of 2012 replaced by Act 8 of 2014.

11. However, we are informed that during the pendency of these proceedings, appellant/petitioner had made an application to the Calicut Corporation for a permission as contemplated under Section 447 of the Kerala Municipality Act and that the same has been rejected by order dated 12/8/13. This order is not under

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challenge before us and we also have not examined the validity thereof.

In such circumstances, while we confirm the judgment of the learned single Judge and dismiss the writ appeal and the writ petition, we clarify that this judgment will not stand in the way of the appellant/petitioner to challenge the said order issued by the Calicut Corporation.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
A.V.RAMAKRISHNA PILLAI
JUDGE

Rp