

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

WA.No. 1944 of 2015 () IN WP(C).6332/2009

AGAINST THE JUDGMENT IN WP(C) 6332/2009 DATED 29-07-2015 OF THIS
COURT

APPELLANTS/PETITIONERS:

1. LUCKA AGED 54 YEARS
S/O. LATE KURIAKOSE, PAZHAYAMADAM HOUSE, VALLAKAM KARA
VAIKOM, KOTTAYAM DISTRICT.

2. SURAJKUMAR
S/O. MANIKANTAN NAIR, LAKSHMI NIVAS, VAIKOM
KOTTAYAM DISTRICT
REPRESENTED BY POWER OF ATTORNEY HOLDER
HIS FATHER SRI. K.G.MANIKANDAN NAIR, LAKSHMI NIVAS
VAIKOM, KOTTAYAM DISTRICT.

BY ADVS.SRI.C.C.THOMAS (SR.)
SRI.M.G.KARTHIKEYAN
SRI.NIREESH MATHEW

RESPONDENTS/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
KOTTAYAM-686001.

4. THE CIRCLE INSPECTOR OF EXCISE
VAIKOM, KOTTAYAM DISTRICT-686141.

5. THE TAHSILDAR
TALUK OFFICE, VAIKOM, KOTTAYAM DISTRICT-686141.

6. THE CATHOLIC SYRIAN BANK LTD.
REPRESENTED BY THE BRANCH MANAGER, VAIKOM BRANCH
KOTTAYAM DISTRICT-686141.

R1 TO 5 BY GOVERNMENT PLEADER
SHRI. BOBBY JOHN PULICKARAMBIL

R6 BY ADV. SRI.R.S.KALKURA

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 28-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JJ

K. SURENDRA MOHAN & SHAJI P. CHALY, JJ.

W.A. NO.1944 OF 2015

Dated this the 28th September, 2015.

JUDGMENT

Surendra Mohan, J.

This appeal is filed challenging the judgment dated 29.7.2015 of the learned Single Judge in WPC 6332/2009. The appellants are Abkari contractors. They along with two others who are no more, had been contractors for the conduct of arrack shops in group No:1, Vaikom Excise Range for the Abkari year 1993-94 (1.4.1993 to 31.3.1994). Due to non-payment of the kist amount the licence was cancelled on 19.8.1993. Thereafter, the shops were conducted under Departmental Management from 11.9.1993 to 31.3.1994. Meanwhile, on 23.12.1993 Rule 13 of the Abkari Shops (Departmental Management) Rules, 1972 (the 'Departmental Rules' for short), was amended to provide that

the Departmental Management amount could be forfeited without any credit for the said amount being given to the Contractor while calculating the loss of the Government

2. Since the licence of the petitioners were cancelled, as per the rules applicable, they were liable to compensate the State for the loss caused due to their default and consequent cancellation of the licence. Therefore, demand notices were issued against them for the amounts claimed by the State as loss. According to the petitioners, the entire amount demanded was not liable to be paid by them for the reason that, they had not been given credit for the amount received by the Government by conducting the shops through Departmental Management. Contending that they were entitled to be given credit for the said amount, they challenged the demand notices issued against them in O.P.8271/1994. It was also contended that the amended Rule 13 of the Kerala Abkari Shops Departmental Management Rules, 1972 was not applicable to them for the

reason that, the contracts that were entered into by them were prior to the amendment. Therefore, according to them, it was the unamended rule that was applicable to them. The writ petition filed by the petitioners as well as other similar writ petitions were considered by a Division Bench of this Court and allowed by Ext.P1 judgment.

3. This Court found that, in so far as the petitioners were concerned they were governed by the unamended Rule 13(3) and therefore, the demand notices issued to them invoking the amended rule was unsustainable. Accordingly, demand notices were set aside, with a direction to recompute the amounts payable by them, in accordance with the rules applicable. The State challenged Ext.P1 judgment before the Supreme Court by filing Special Leave Petitions against the same. The Special Leave Petitions were allowed and converted into Civil Appeals. However, as per Ext.P2 order dated 19.2.2008 the said Civil Appeal Nos: 4976 – 4987 of 2002, were dismissed. Thus, Ext.P1 judgment has become

final.

4. While so, the State introduced an Amnesty Scheme on 26.5.2008 evidenced in the writ petition by Ext.P3 for settlement of Abkari dues payable to the Government. The petitioners wanted to take the benefit of the said scheme. Ext.P4 Demand Collection Balance Statement ('DCB' for short) showed the total amounts due from the petitioners together with interest, to be in excess of 1.69 crores. The Amnesty Scheme provided for waiver of the entire interest. As per Ext.P5 communication the petitioners were informed that they were at liberty to avail the benefits of the Amnesty Scheme provided they paid the principal amount of ₹54,10,910/-. Though the petitioners claimed that they were entitled to be given credit for the amounts collected through Departmental Management they were informed by Ext.P7 that the said amount has been adjusted towards the interest payable by them. The stand of the Department was that, the petitioners were not entitled to get credit for the amount collected

through Departmental Management, for the reason that they did not replenish the security after the defaulted licence fees were adjusted from the security amount. The appellants thereupon filed the present writ petition challenging the stand of the Department and claiming that they were entitled to be given credit for the amount collected by conducting the shops through Departmental Management.

5. According to the petitioners, since this Court had held in Ext.P1 judgment that they were entitled to be given credit for the amount realized through Departmental Management, the said amount was liable to be deducted from the principal amount claimed by the Department. Ext.P1 judgment having become final it was contended that a direction to extend the benefit of the Amnesty Scheme to them was necessary to be issued in the present case. They also claimed credit for an amount of ₹19,74,000/- that the Department had realized through sale of an item of property that belonged to the first appellant, which amount was

available with the first respondent. A further contention regarding the quantum of Excise Duty charged on the arrack lifted by the appellants was also raised.

6. The contentions of the appellants were opposed by the respondents. According to the respondents, the appellants were not entitled to claim credit for the amount realized through Departmental Management for the reason that, they had not replenished the security deposit amount that had been adjusted towards the kist payable by them. According to the State, Ext.P1 judgment would not help the appellants in contending that they were entitled to be given credit for the amount realized through Departmental Management. Rule 13 as it stood prior to the amendment disentitled them from claiming credit for the amounts collected through Departmental Management since they had not replenished the security amount. Therefore, it was contended that writ petition was only to be dismissed.

7. The learned Single Judge considered the contentions

of the respective parties, analysed the scope of the dictum laid down by Ext.P1 judgment and found that, this Court has not in Ext.P1 found in favour of the appellants on their claim that they were entitled to be given credit for the amounts collected through Departmental Management. The learned Single Judge also found that, no adjustment as claimed by the petitioners was liable to be granted as per the unamended Rule 13 of the Departmental Management Rules. However, the learned Single Judge found that the petitioners were entitled to claim adjustment of the amount of ₹19,74,000/- being the sale proceeds of the property of the first appellant, towards the principal amount demanded. The appellants are aggrieved by the said judgment.

8. According to the Senior Counsel Shri. C.C.Thomas who appears for the appellants, the judgment appealed against is unsustainable and liable to be set aside. According to the learned Senior Counsel, Rule 13 of the Departmental Management Rules as it stood prior to the

amendment alone was applicable to the case of the appellants herein. The Departmental Management Rules was amended only on 23.12.1993 whereas, the agreement between the appellants was entered into, much prior to the said date. It has been held by a Division Bench of this Court in Ext.P1 judgment that the amended Rule 13 had no application to the case of the appellants. The amended rule has only prospective effect. In view of the above, it is contended that the respondents are entitled to claim and recover only the actual loss that was caused to them. Ext.P1 had been the subject matter of challenge before the Supreme Court in Special Leave Petitions preferred by the respondents. The Special Leave Petitions having been allowed and Civil Appeal Nos: 4976-4987 having been considered by the Supreme Court and dismissed by Ext.P2 order, Ext.P1 judgment has become final. Ext.P1 judgment having merged with Ext.P2 order of the Supreme Court, it is contended that, the learned Single Judge seriously went wrong in not finding that the

parties were bound by Exts.P1 and P2. The learned Senior Counsel places reliance on the decisions of the Supreme Court to support his contention that merger would take place, even when civil appeals are dismissed by the Supreme Court without assigning any reasons. It is the contention of the learned Senior Counsel that, the appellants are ready and willing to settle the entire dispute and to pay the amounts due to the respondents availing the benefit of the present Amnesty Scheme that is in force up to 30.9.2015. The learned counsel points out that, in similar circumstances another Division Bench of this Court has by Ext.P21 judgment held the petitioners therein entitled to the benefits of the Amnesty Scheme that was in force at that time. The said judgment was also rendered, following Ext.P1 judgment as confirmed by Ext.P2. The above aspects, according to the learned counsel have been missed by the learned Single Judge. For the above reasons, according to the Senior Counsel, this writ appeal is only to be allowed.

9. The learned Govt. Pleader Shri. Bobby John Pulickaparambil on the other hand refutes the contentions of the learned Senior Counsel and contends that this writ appeal is devoid of merits and is only to be dismissed. It is contended that, the specific case pleaded by the first respondent in the counter affidavit filed in the writ petition was that, for non-payment of the kist amount from May 1993 onwards, the security amount deposited by the appellants had been adjusted towards the arrears of kist. Thereafter, a demand had been made to the appellants to replenish the security amount. Since the security amount was not replenished, the licences granted were cancelled on 19.8.1993. Thereafter all the shops in the group were conducted under Departmental Management from 11.9.1993 to 31.3.1994. According to the learned Govt. Pleader, the appellants are not entitled to claim credit for the amount obtained by conducting the shops through Departmental Management, for the reason that they had not replenished the

security amount. According to the learned Govt. Pleader, the writ petition filed by the appellants has been dismissed by the learned Single Judge appreciating the above facts. With respect to the claim of the appellants for the benefit of the Amnesty Scheme, the answer of the Govt. Pleader is that they had not satisfied the requirements necessary for claiming the said benefit. According to the learned Govt. Pleader, the Single Judge has therefore rightly declined relief to the appellants.

10. Heard. The facts are not in dispute. The appellants had been granted licences to conduct the arrack shops in group No:1 of Vaikom Excise Range for the Abkari Year 1993-94. It is not in dispute that, they had furnished 30% of the kist amount as security and that, licences had been duly issued to them to conduct the arrack shops. Thereafter, they had paid the kist up to April 1993. However, payment of the kist was defaulted from May 1993 onwards. Therefore, the kist amount due was adjusted from the security

furnished by the appellants. Though they were directed to replenish the security, they did not do so. Therefore, the licences issued to them were cancelled on 19.8.1993 for non-payment of kist. Thereafter, from 11.9.1993 to 31.3.1994 the shops were conducted under Departmental Management. Ext.P4 copy of the DCB statement shows that a substantial amount had been collected by conducting the shops through Departmental Management. The claim of the appellants is that, they are entitled to be given credit for the amounts so collected by conducting the shops through Departmental Management. They also claim the benefit of the Amnesty Scheme that is in force. According to them, calculated as per the terms of the Amnesty Scheme applicable, the total amount due from them after giving credit for the amount collected through Departmental Management is ₹ 28,21,744/- (Rupees twenty eight lakhs twenty one thousand seven hundred forty four only). They are ready and willing to pay the said amount.

11. Therefore, the question is whether the appellants are entitled to claim the benefit of the amounts collected by the respondents by conducting the Abkari shops through Departmental Management. According to the learned Single Judge the appellants had not replenished the security amount as directed by the respondents. Therefore, even as per the unamended Rule 13 of the Departmental Management Rules, they were not entitled to claim the benefit of the amounts collected through Departmental Management. Before examining whether the approach of the learned Single Judge is correct or not, it is necessary to take into account a few further facts.

12. The appellants had earlier approached this Court along with the other two licencees who are no more, by filing O.P.8271/1994. It is the said writ petition and other connected matters that were disposed of by Ext.P1 judgment. As per memo dated 7.9.2015 the counsel for the appellants has produced copies of the said original petition as well as the

counter affidavit filed by the second respondent for our perusal. The contention of the petitioners and others in O.P.8271/1994 was that, the amended Rule 13 was not applicable to them. Since their case was to be governed by the rule as it stood before the amendment, they were entitled to be given credit for the amount collected by conducting the shops under Departmental Management. A specific prayer for the issue of a direction to the respondents to give credit for the Departmental Management fee collected is also seen to have been made.

13. A counter affidavit filed on behalf of the second respondent shows that the contention taken therein was that, the Departmental Management fees collected due to default in payment of security, kist etc. was liable for forfeiture at the discretion of the Excise Commissioner (para 5 of the counter affidavit). Paragraph 7 of the counter affidavit is reproduced hereunder for convenience of reference:—

Rule 13 of Abkari Shops Departmental

Management Rules 1972 before issuing the amendment in G O (P) No.176/93/TD dated 23.12.1993 read as follows:-
" The amount collected as D M fee may be given credit towards the dues from the original contractor provided he had completed the security and such credit shall be given only up to the date of confirmation of the resale if any. In the case of resale purchasers, the D M fee collected from the date of confirmation of the resale may be given credit towards the dues from the resale purchasers, if he completes the security. The D M fee may be given credit to the original contractor shall be forfeited, if he had not completed the security. Similarly, the D M fee that may be given credit to the resale purchaser shall be forfeiture if he fails to complete the security". This rule was in force till 23.12.1993 and is applicable to the petitioner's case. Since there is no retrospective effect to the amendment. According to the Abkari Shops (Disposal in Auction) Rules 1974 the DM fee has to be given credit only according to the discretion of the Excise Commissioner.

It was in the context of the above pleadings that the writ petitions were considered by this Court in Ext.P1 judgment. It is worth noticing that, none of the parties had a case before this Court at that time that the amount collected through Departmental Management was liable for forfeiture for the

reason that the appellants had not replenished the security amount. This Court considered the contentions of the respective parties and held that, the amendments to Rule 13 had no retrospective operation. The issue has been concluded by this Court in Ext.P1 in the following words:-

Since all the contracts in these original petitions were entered into before amendment of Rule 13, the petitioners are liable to pay only the actual loss suffered by the Government in realisation of rentals and excise duty. Apart from the absence of any clause in the agreement for forfeiture of departmental management fee, while calculating the loss suffered by Government, Rule 13 of the Departmental Management Rules existing at the time of executing the agreement, specifically provided for giving credit to departmental management fee collected unless the contractor fails to compensate security in case of resale. Therefore, balance amount taking into account the amount collected can

be realised while calculating the loss suffered by the Government in view of cancellation of licence. Hence, all the demands are set aside and the Government is directed to pass fresh demands in accordance with the rules and agreements executed with the licencees and rules recovering only the actual loss suffered by the Government taking into account the income received by the Government during the abkari year while it was under departmental management also.

(Emphasis supplied)

The validity of the amended Rule 13 was left open.

14. It is clear from the above passage that, this Court has held in very clear terms that the petitioners therein, including the appellants herein, were liable to pay “only the actual loss suffered by the Government in realisation of rentals and excise duty.” The above finding is binding inter parties. The said finding has also become final, with the dismissal of the civil appeals filed against Ext.P1, by Ext.P2 order of the Supreme Court. Therefore, the respondents are

not entitled to contend that anything in excess of the actual loss suffered by the Government was liable to be recovered from the appellants. Viewed in the above perspective, we do not have any doubt in our minds that the appellants are entitled to claim the benefit of the above direction in respect of the amounts collected, by conducting the shops through Departmental Management.

15. The learned Single Judge has placed reliance on the finding in Ext.P1 that Rule 13 of the Departmental Management Rules existing at the time of executing the agreement of the appellants “specifically provided for giving credit to departmental management fees collected unless the contractor fails to compensate security in case of resale”. According to the learned Single Judge, the appellants not having replenished the security amount despite being directed to do so had forfeited their right to claim the benefit of the amount collected through Departmental Management. Though such a construction is possible when the particular

sentence is viewed in isolation, on a reading of the findings contained in Ext.P1 in the operative portion thereof as a whole, no such conclusion is possible. This is for the reason that, the said observation has been made after finding specifically that the Government was entitled to recover only the actual loss suffered by it. The observation that follows is to the effect that, the balance amounts taking into account the amount collected can be realized while calculating the loss suffered by the Government in view of cancellation of the licence. Therefore, this Court has made it clear that in the cases that were being considered, including that of the appellants herein, there was no question of forfeiture of the amount collected through Departmental Management. It is in view of the above finding that, the Government was directed to issue fresh demands in accordance with the rules and the agreement executed with the licencees “recovering only the actual loss suffered by the government taking into account the income received by the government during the

abkari year while it was under departmental management also.” The above observations leave no doubts in our minds that, this Court has held the licencees including the appellants herein, entitled to the benefit of the amounts collected by conducting the shops through Departmental Management. The above dictum having been confirmed by the Supreme Court in appeal also by Ext.P2 order, the respondents are not entitled to agitate the said contentions again.

16. We notice that, since the Special Leave Petitions filed against Ext.P1 were allowed and the Civil Appeals were dismissed by the Supreme Court, this is a case in which the doctrine of merger applies. In *Kunhayammed and others v. State of Kerala* [(2000)6 SCC 359] the question as to whether the doctrine of merger would apply where a civil appeal is dismissed by the Supreme Court by a non-speaking order was considered. It has been held that, once leave to appeal is granted and the appellate jurisdiction of the Supreme Court

invoked, the order passed in appeal would attract the doctrine of merger, whether the order is of reversal, modification or mere affirmation. In the present case, even though the civil appeals have been dismissed by a non-speaking order, the doctrine of merger applies in view of the above dictum. Anyhow, Ext.P1 is binding inter parties and having become final, it is not open to the respondents to contend that they are entitled to claim forfeiture of the amount collected through conduct of the arrack shops under Departmental Management.

17. The learned Single Judge has, on an interpretation of Rule 13 of the Departmental Management Rules as it stood before the amendment, concluded that the appellants had lost their right to claim the benefit of the amount collected through Departmental Management by not having replenished the security amount, on being directed to do so. The said interpretation of the unamended Rule 13 also is unsustainable. Rule 13 before the amendment read as under:

“Departmental management fee to be given credit

of. The amount collected as departmental management fee may be given credit towards the dues from the original contractor provided he had completed the security and such credit shall be given only up to the date of confirmation of the resale, if any. In the case of resale purchasers, the departmental management fee collected from the date of confirmation of the resale may be given credit towards the dues from the resale purchaser, if he completes the security. The Departmental Management fee that may be given credit to the original contractor shall be forfeited if he had not completed the security. Similarly the departmental management fee that may be given credit to the resale purchaser shall be forfeited if he fails to complete the security.”

The above rule provided that, credit for the Departmental Management fee could be given towards the dues from the original contractor provided he had completed the security. Therefore, what is contemplated by the above provision is deposit of the security amount. It is not in dispute that, the appellants had deposited the required amount as security, before licences were issued to them. Therefore, they are persons who had completed the security. It is provided in

the rule that, such credit shall be given only up to the date of confirmation of the resale if any. This is for the reason that where a resale of the shops is conducted, credit for any Departmental Management fees collected thereafter would have to be given to the person who had purchased the shops upon such resale. The above facility is also conditional upon the said person completing the security. It is clear from the above stipulations that, what is contemplated by the rule is not a situation where a direction to make good the security amount that has been adjusted towards defaulted amount of kist, was not acceded to. Such a situation has not been contemplated by the original Rule 13 extracted above. In the present case, admittedly there has been no resale of the shops licensed to the appellants. Therefore, no rights of a resale purchaser arise for consideration here. In the above view of the matter, the observation of this Court in Ext.P1 has to be understood only as a recognition of the legal position that, the Departmental Management fee

collected would have to be given credit to unless the contractor fails to compensate security in the case of resale. Since there was no resale in the present case, the said question does not arise at all.

18. It is also worth noticing that, as per Ext.P21 judgment dated 24.2.2010 in WPC 31844/2009, a learned Single Judge of this Court has found another Abkari contractor placed in similar circumstances, to be entitled to claim the benefit of the amount collected by conduct of the shops through Departmental Management. We also notice that, accepting the said judgment, as per Ext.P22 proceedings dated 19.7.2010 the petitioner in the said writ petition has been extended the benefits of the Amnesty Scheme that was in force at that time after giving credit to him for the amount collected by way of Departmental Management fees.

For the foregoing reasons, the appellants are entitled to succeed. This writ appeal is accordingly allowed. The judgment of the learned Single Judge dated 29.7.2015 in WPC

6332/2009 is set aside except to the extent to which the appellants have been directed to be given credit for the sale proceeds of the property of the first appellant sold in public auction by adjusting the same towards the principal amount alone. The respondents are directed to extend the benefit of the Amnesty Scheme 2015 that is currently in force to the petitioners after giving credit for the amount collected by conducting the shop under Departmental Management for the period from 11.9.1993 to 31.3.1994.

Sd/-
K. SURENDRA MOHAN
Judge

Sd/-
SHAJI P.CHALY
Judge

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