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 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

WA.No. 2272 of 2015 () IN WP(C).30282/2015

AGAINST THE JUDGMENT IN WP(C) 30282/2015 of HIGH COURT OF KERALA DATED 09-10-2015.

APPELLANT/4TH RESPONDENT:

GEORGE JOSEPH
S/O.JOSEPH, PARTNER, NAVARANG TOURIST HOTEL
KANHANGAD, RESIDING AT KOICKAL HOUSE
CHERPUNGAL P.O. PALA, KOTTAYAM DISTRICT -686 145.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.S.M.PRASANTH
SRI.G.RENJITH
SMT.ASHA BABU

RESPONDENTS/PETITIONER & RESPONDENTS 1 TO 3:
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1. M/S. NAVARANG TOURIST HOTEL,
KANHANGAD - 671 315
REPRESENTED BY ITS MANAGING PARTNER JACOB JOSEPH
AGED 63 YEARS, S/O.JOSEPH.

2. THE EXCISE COMMISSIONER
COMMISSIONERATE OF EXCISE
THIRUVANANTHAPURAM - 695 033.

3. THE DEPUTY COMMISSIONER OF EXCISE
KASARAGOD - 673 001.

4. STATE OF KERALA
REPRESENTED BY THE SECRETARY,TAXES (A) DEPARTMENT
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM - 695 001.

R1 BY ADVS. SRI.M.G.KARTHIKEYAN
SRI.NIREESH MATHEW
SRI.C.C.THOMAS (SR.)
R2 TO R4 BY GOVERNMENT PLEADER SRI.RINNY STEPHEN CHAMAPARAMBIL

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 19-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

smv

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

W.A. No.2272 of 2015
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Dated this the 19th day of October, 2015

JUDGMENT

Surendra Mohan,J.

The petitioner, 4th respondent in W.P.(C) No.30282 of 2015 has filed this appeal against the judgment of the learned Single Judge allowing the same. The Writ Petition was filed by the 1st respondent herein challenging Ext.P8 order of the 2nd respondent. As per Ext.P8 order, an earlier order Ext.P5 passed by the very same respondent was re-called and the renewal of Foreign Liquor (FL-11) licence issued provisionally was cancelled. As per the judgment of the learned Single Judge, Ext.P8 has been set aside and Ext.P5 has been restored.

2. The brief facts necessary for the purpose of deciding the case are the following:

3. The 1st respondent is a partnership firm that is conducting a hotel. Originally it was a bar attached hotel having an FL-3 licence to conduct the bar. With the change of the policy of the Government, the 1st respondent became disentitled to be

issued with an FL-3 licence. However, the firm was entitled to be issued with an FL-11 (Beer & Wine parlour) licence. The 4th respondent was the Managing Partner of the firm. Admittedly, the licence was being issued to the partnership firm, though in the name of the Managing Partner. It appears that, there are disputes among the partners. According to the 1st respondent, the partners had met and adopted a resolution as evidenced by Ext.P2, removing the 4th respondent from his capacity as the Managing Partner and appointing a new Managing Partner. It was also resolved that a fresh licence be obtained by the new Managing Partner in the name of the partnership firm. Pursuant to Ext.P2, Ext.P3 was submitted to the Excise Commissioner seeking a change of the nominee of the firm for issue of the FL-11 licence. When no orders were passed on the said application, the 1st respondent had approached this Court by filing W.P.(C) No.13720 of 2015. The same was disposed of by Ext.P4 judgment directing the Excise Commissioner to consider the same and take a decision thereon “after affording an opportunity of hearing to the petitioner and the former Managing Director”. The Excise Commissioner had pursuant to the above direction of this Court, heard all the parties including the appellant herein and had passed Ext.P5 order. It is mentioned in Ext.P5 that, the appellant was also heard and that he had submitted his written statement in the matter.

4. In the meanwhile, it appears that the appellant herein had preferred Writ Appeal No.1206 of 2015 against Ext.P4 judgment of this Court. As per the judgment dated 11.06.2015, the Division Bench directed the Excise Commissioner to hear the appellant herein also before taking any decision on Ext.P3 application submitted by the 1st respondent. Since Ext.P5 was passed before the direction of the Division Bench, it appears that the matter was again heard by the Excise Commissioner. Thereafter, Ext.P8 order was passed. As per Ext.P8, the Excise Commissioner has found that by Ext.P5, the licence had been renewed only provisionally, subject to the decision to be taken by the Excise Commissioner on the application for the re-constitution of the partnership. But no application was seen submitted for the re-constitution of the firm. For the above reason, the FL-11 licence provisionally granted to the 1st respondent was revoked. It was Ext.P8 order that was under challenge before the learned Single Judge in O.P. No.3028 of

2015 as already noticed above.

5. It was contended before the learned Single Judge that, by effecting a change of the Managing Partner of the firm no reconstitution thereof had taken place. Since the FL-11 licence was already issued in favour of the partnership firm, the change in the identity of the Managing Partner would not amount to reconstitution of the firm. The appellant herein also continued to be a partner thereof. The partnership deed, Ext.P7 provides that the partnership itself was terminable at will and that death of a partner or adjudication of a partner as insolvent would not result in dissolution of the firm. Since no reconstitution of the firm has taken place, it was contended that the impugned order, Ext.P8 of the Excise Commissioner requires interference at the hands of this Court.

6. The contentions of the learned counsel for the 1st respondent were opposed by the appellant. It was contended that, Rule 19 of the Foreign Liquor Rules requires reconstitution of a partnership to be permitted by the Excise Commissioner and the stipulated fee to be paid for change of Managing Partner of a firm. Since both these eventualities have not taken place in the present case, the Excise Commissioner was justified in passing

Ext.P8 order.

7. The learned Single Judge considered the contentions of the respective parties and found that there was no reconstitution of the partnership firm as contended by the appellant, by a change in the identity of the Managing Partner thereof. The partnership firm had been dissolved for many years. It was initially being issued with an FL-3 licence and later on with the FL-11 licence. The firm has huge liabilities. It is not in the interests of any one that the business is disrupted. On the contrary, it is in the interests of all concerned that the business is permitted to be continued. Therefore Ext.P8 has been set aside and Ext.P5 has been restored. The appellant challenges the said findings in this appeal.

8. According to the learned Senior Counsel Sri. K. Ramkumar, the requirements of Rule 19 of the Foreign Liquor Rules is mandatory and cannot be bypassed by any authority. Any reconstitution of the partnership firm could be done only with the permission of the Excise Commissioner. In the present case, the appellant has been removed and a new Managing Partner has been chosen. The said change amounts to reconstitution which could have been effected only with the

permission of the Excise Commissioner. The provision also stipulates the payment of a fee for any such reconstitution but no such payment has been made in the present case. Therefore, according to the learned counsel, the judgment appealed against, requires interference by us. When the appellant asserts that there has been reconstitution, the same is disputed by the 1st respondent. The dispute can be properly resolved only by the jurisdictional Civil Court. However, the learned Single Judge has found that there is no re-constitution of the partnership firm. The said finding in exercise of the jurisdiction available under Article 226 of the Constitution is unsustainable, it is contended.

9. The learned Senior Counsel Sri.C.C.Thomas who appears for the 1st respondent contends per contra that, change of the Managing Partner does not amount to reconstitution of partnership firm. The counsel relies on the dictum laid down by a Division Bench of this Court in support of his contention. The firm has been in operation for the past many years. All along, licences were being issued in the name of the Managing Partner nominated by the firm. There has only been a change in the identity of the Managing Partner. The appellant continues to be a partner of the firm. It is in his interests also that the firm

continues to do business, for he is entitled to 30% share of the profits. The firm has huge liabilities for the recovery of which, it has also been threatened with Revenue Recovery action. The above being the position, it is pointed out that, the judgment of the learned Single Judge is fully justified and does not call for any interference in appeal.

10. We have heard the learned Government Pleader also.

11. It is not in dispute that, what has been effected is only a change in the identity of the Managing Partner. The above is evidenced by Ext.P2 resolution. The licence was being issued in the name of the 1st respondent, as evident from Ext.P1 which is a copy of the licence that was valid till 31.03.2014. Ext.P3 is the application that was submitted by the 1st respondent requesting for a change in the name of the nominee of the firm and for allowing renewal of FL-11 licence of the firm in the name of the new Managing Parter. It was Ext.P3 that was directed to be considered by Ext.P4 judgment of this Court. Ext.P5 is the order passed pursuant to Ext.P4. Ext.P5 shows that, the appellant was also heard and that he had filed his written statement also. As per Ext.P5, what was ordered, was to provisionally renew the FL-11 licence to the partnership firm for the year 2015-2016 in the

name of the new Managing Partner. It has been stated in the order that, the order was purely provisional and subject to the final decision to be taken by the competent authority adjudicating the civil disputes among the partners and would also be subject to the decision of the Excise Commissioner on the application to be filed by the firm for reconstitution and transfer of licence under Section 19 of the Foreign Liquor Rules. Therefore, Ext.P5 was only a provisional order. It is not in dispute that, the disputes between the partners have not become the subject matter of any legal proceedings before a Civil Court of competent jurisdiction. The above being the position, therefore, there is no justification for having revoked the licence granted pursuant to Ext.P5 by the issue of Ext.P8.

12. A perusal of Ext.P8 shows that Ext.P5 has been revoked only for the reason that no application for reconstitution of the partnership had been submitted. In the above context, the dictum laid down by the Division Bench of this Court in **State of Kerala & others v. Panammottil Investments and others** [2010(1) KHC 353] is relevant. In the said case, the question was whether the change in the identity of the person who was representing the partnership firm would amount to a

reconstitution of the partnership firm and whether the amounts stipulated by Rule 19 of the Foreign Liquor Rules was required to be paid. The above issue has been considered in paragraph 10 of the said decision as follows:

> "In this case, the appellant submits, there is no change in the partners, constituting the partnership firm, which is an FL-3 licence. Hitherto, the partnership was being represented by Mr.Mathew Philip, Managing Partner. Now, Mr. Sunoj Kurian is also nominated as a joint Managing Partner to represent the licensee. That means, hereafter, there will be two joint Managing Partner to represent the licensee. The same is also treated as reconstitution of the partnership by the Commissioner and the amounts payable under sub-rules (iii) and (iv) of Rule 19 of the Foreign Liquor Rules, have been demanded. It is submitted that the payment as demanded, has been made, subject to the result of the Writ Appeal. The learned Senior Counsel for the appellant submitted that there is no change in the constitution of the partnership. The same partners continue even now. But, instead of one partner, two partners are authorised to manage the affairs of the partnership firm. The same cannot be described as a reconstitution. Even going by the deeming provision under sub-rule (ii) of Rule 19 of the Rules, it is submitted the direction to pay the amount under Rule 19(iii), is unsustainable. The

> learned Senior Counsel also submitted that there is no change of name of the licensee. The name of the licensee continues to be M/s.Panamootil investments, Kadavanthra, Kochi – 20. So, the demand made for payment of the amount under sub-rule (iv) of Rule 19 is also unjustified, it is submitted."

13. In view of the above, we do not find any infirmity in the reasoning of the learned Single Judge holding that Ext.P8 was unjustified and setting aside the same. Ext.P5 has also been consequently restored. We find the conclusions of the learned Single Judge to be fully justified in the facts and circumstances of the present case.

The appeal fails and it is accordingly dismissed.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.A. To Judge

smv
20.10.2015