

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

WP(C).No. 11030 of 2013 (C)  
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PETITIONER:

JACOB MATHEW, AGED 56, S/O.JACOB, KAVUNKAL  
HOUSE, VELLOOR P.O., PAMPADY, KOTTAYAM DIST.  
REP. BY HIS POWER OF ATTORNEY HOLDER  
SRI.SHIBU.K., AGED 39, S/O.KUNJU PILLAI (LATE),  
KIZHAKKEDATH HOUSE, VADAKKADATHUCAVE P.O.,  
ADOOR, PAPTHANAMTHITTA DISTRICT.

BY ADVS.SRI.M.G.KARTHIKEYAN  
SRI.NIREESH MATHEW

RESPONDENTS:

1. THE EXCISE COMMISSIONER,  
COMMISSIONERATE OF EXCISE,  
THIRUVANANTHAPURAM-695 001.
2. THE DEPUTY COMMISSIONER OF EXCISE,  
KOTTAYAM.
3. THE CIRCLE INSPECTOR OF EXCISE,  
KOTTAYAM.
4. STATE OF KERALA REPRESENTED BY SECRETARY,  
TAXES (A) DEPARTMENT, GOVT. SECRETARIAT,  
THIRUVANANTHAPURAM-695 001.

BY GOVERNMENT PLEADER SRI.G.GOPAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON  
22-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**APPENDIX IN WP(C).No. 11030 of 2013 (C)**

**PETITIONER'S EXHIBITS:**

EXHIBIT P1: PHOTOCOPY OF THE DRAFT PARTNERSHIP DEED DATED NIL.

EXHIBIT P2: PHOTOCOPY OF THE APPLICATION DATED 17.10.2011  
SUBMITTED BEFORE THE 1ST RESPONDENT

EXHIBIT P3: PHOCOPY OF THE JUDGMENT DATED 31.10.2012 IN WPC.  
NO.25456/2012 PASSED BY THIS HON'BLE COURT

EXHIBIT P4: PHOTOCOPY OF THE ORDER NO.XC7-7630/11 DATED 12.3.2013  
PASSED BY THE 1ST RESPONDENT

EXHIBIT P5: PHOTOCOPY OF THE ORDER NO.XC6-18473/11 DATED 3.9.2011  
PASSED BY THE 1ST RESPONDENT

EXHIBIT P6: PHOTOCOPY OF THE ORDER NO.XC7-9998/09/R.DIS. DATED  
31.3.2012 PASSED BY THE 1ST RESPONDENT

EXHIBIT P7: PHOTOCOPY OF THE ORDER NO.XC6-19501/12 D.DIS. DATED  
27.7.2012 PASSED BY THE 1ST RESPONDENT

EXHIBIT P8: PHOTOCOPY OF THE CERTIFICATE DATED 18.6.2012 ISSUED BY  
THE DIRECTOR, DEPARTMENT OF TOURISM.

EXHIBIT P9: PHOTOCOPY OF THE ORDER NO.XC6-18473/11 DATED 3.9.2011  
PASSED BY THE EXCISE COMMISSIONER

**RESPONDENT'S EXHIBITS:**

ANNEXURE R1(a) TRUE COPY OF THE SRO NO.258/2012 DATED 18.04.2012

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

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W.P.(C)No.11030 of 2013 C  
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Dated this the 22<sup>nd</sup> day of December, 2015

### **JUDGMENT**

The petitioner, a proprietor, obtained an FL-3 licence for his two-star classified restaurant; later, in the light of the changed Government policy, he got an FL-11 licence.

2. In 2011 the petitioner was said to have applied—though not pleaded in the writ petition but is evident from the counter affidavit—for the change of licensee's name. It was rejected as impermissible. Subsequently, in the light of the amendment effected to Rule 19 of the Foreign Liquor Rules in 2009, the petitioner once again submitted Exhibit P2 application to have the proprietary concern converted into a partnership firm comprising the Proprietor, as one of the partners, and two others. The petitioner, along with the application, has submitted Exhibit P1 draft partnership deed for approval and sanction by the Commissioner of Excise.

3. Initially, the Deputy Commissioner of Excise, having processed the application, forwarded it for further action to the Commissioner of Excise, who, however, through Exhibit P4 rejected the petitioner's claim. Aggrieved, the petitioner has filed the present writ petition.

4. Sri.M.G.Karthikeyan, the learned counsel for the petitioner, has strenuously contended that the reason assigned by the Commissioner of Excise in rejecting the petitioner's application is very strange, apart from being totally unsustainable. In elaboration of his submissions, the learned counsel has submitted that the amended proviso to clause (iv) of Rule 19 of the Foreign Liquor Rules ('the Rules for brevity) amply provides for both constitution and re-constitution of the partnership firm. According to him, it is a case of a partnership firm in the place of a proprietary concern.

5. The learned counsel has also contended that Rule 19 is the only statutory provision that imposes restrictions on the right of a licensee to sell, transfer, or sub-rent without

the previous sanction of the Commissioner of Excise. He has contended that Rule 19 being a restrictive provision is required to be construed strictly.

6. In elaboration, the learned counsel has submitted that in the course of time, the authorities may have dispensed with the requirement of granting FL-3 licences to establishments other than five star hotels; however, the explanation or clarification provided through the note is that the hotels include classified hotels, such other hotels, or restaurants having classification certificates issued by the Government concerned. The 'note' still holds the field. Eventually, he has submitted that Exhibit P4 is perverse and cannot be sustained.

7. The learned Government Pleader, on his part, has submitted that the petitioner has submitted applications on 15.11.2011 and 24.07.2012 requesting sanction to constitute a partnership by inducting two persons (Sri.K.Shibu and Smt.K.K.Valsala) as partners of the firm. He has further submitted that classified/approved restaurant got chances of

constitution/re-constitution by virtue of S.R.O.No.1060/2009 dated 15.12.2009.

8. In elaboration, the learned Government Pleader has submitted that by a proviso added to the S.R.O., classified/approved restaurants have been treated on a par with hotels holding two-star classification certificate issued by the Ministry of Tourism, Government of India. It is for the purpose of constitution/re-constitution as per Rule 19(iv) of the Rules.

9. But, at any rate, the learned Government has submitted that the second proviso to Rule 19(iv) of the Rules has undergone drastic changes as per the amendment carried out through SRO No.258/2012 dated 18.04.2012. According to him, as a result of the said amendment, the “note” appended to the second proviso has virtually lost its significance. In other words, the issue of star-classification has lost its relevance.

10. Heard the learned counsel for the petitioner and the learned Government Pleader, apart from perusing the

record.

11. To confess my inability, I must make it clear that I could not, despite my best efforts, comprehend the true import of Exhibit P4. In paragraph 3 of the impugned order, the first respondent has observed that there is no Rule available in the statute book conferring any power on him to grant 'the privilege of two star classified hotels to classified/ approved hotels of the Government of Kerala'. The reason he assigns for the said lack of power is that the note added in SRO No.1060/2009 dated 15.12.2009 remains unsupported by any legal provision in the Rules.

12. The first respondent has further voiced his concern that the note now left on the statute book after the amendment to the substantive provision is only a 'hanging note'. In essence, the first respondent has concluded that the note is left unattached or stranded as a result of the amendment of the second proviso to Rule 19 of the Rules.

13. In the first place, to have a comprehensive view of what is sought to be conveyed by the first respondent, it

pays to extract the relevant paragraphs containing the 'reasoning'. The impugned order to the extent relevant reads as follows:

“His application is examined in detail. The classified/ approved restaurant got chances of constitution/re-constitution by virtue of SRO No.1060/2009 dated 15.12.2009. By the said proviso, classified/approved restaurants are treated in par with hotels holding two star classification certificate issued by the Ministry of Tourism, Government of India for the purpose of constitution/ reconstitution as per Rule 19(iv) of the Foreign Liquor Rules has underwent drastic changes by the amendment carried out vide SRO No.258/2012 dated 18.4.2012, as a result of which “note” appeared to the 2nd proviso has virtually lost its significance.

There is no rule available in the Statute Book conferring power on the Excise Commissioner to grant the privilege of a 2 star classified hotels to classified/ approved hotels of the Government of Kerala, since the 'NOTE' so added in SRO 1060/09 dated 15.12.2009 remain unsupported by any legal provision contained in the Foreign Liquor Rules. The 'NOTE' so incorporated by the above SRO is only a hanging note taking power from the 2nd proviso to rule 19 of the Foreign Liquor Rules. The 'NOTE' so added cannot stand without the 2nd proviso, which has undergone change by the amendment vide SRO No.258/2012 dated 18.04.2012. The NOTE as of now stands mismatched to the 2nd proviso to rule 19 of Foreign Liquor Rules.”

14. Analysing the initial paragraph, I will try to paraphrase it shorn of officialese: The classified/approved restaurants initially had the facility of getting constituted/ reconstituted by virtue of SRO No.1060/2009 dated

15.12.2009. Indeed, because of the proviso added to the said Rule, classified or approved restaurants were treated on a par with hotels holding two-star classification. The classification is, of course, based on the certificate issued by the Ministry of Tourism, Government of India. Rule 19(iv) of the Rules on 18.04.2012, however, suffered an amendment and underwent drastic changes, as is evident from SRO No. 258/2012. The result is that the “note” appended to the second proviso has now lost its relevance or significance.

15. According to the first respondent, as I understand, the 'note' could make sense only in the context of the unamended Rule 19(iv). The amendment in SRO No. 258/2102 dated 18.04.2012, removed the substratum or the base of the 'note'.

16. Now, I may examine the above extracted second paragraph. According to the first respondent, in the light of the amendment, there is no rule available in the Statute Book conferring power on him, the Excise Commissioner, to grant the privilege of a two-star classified hotel on the

classified/approved restaurants. Because the 'note' initially added through SRO No.1060/09 dated 15.12.2009 remains unsupported by any legal provision in the Rules.

17. In other words, the justification for the 'note' was available in the unamended Rule; now the substituted proviso to the Rule makes the 'note' redundant—leaves it 'hanging', as has been graphically expressed by the first respondent.

18. The first respondent supplies justification to his conclusion by observing that the 'note' cannot stand without the original second proviso, which, in fact, stood totally altered through the amendment: SRO No.258/2012, dated 18.04.2012. The note 'as of now stands mismatched' with the newly incorporated second proviso to Rule 19 of the Rules.

19. Now, we may examine the statutory position, especially in the light of the amendment, but without the gloss sought to be put by the first respondent through Exhibit P4 impugned order. Thus examined, Rule 19,

evidently, mandates that under no circumstances shall any licence obtained under the notification in reference be sold, transferred, or sub-let without the previous sanction of the Excise Commissioner. Indeed, the rest of the provision delineates the manner in which the sanction has to be obtained.

20. Rule 19(iv) of the Rules stipulates that change of name of licensee may be allowed on payment of a certain amount. Sub-rule (v) deals with the change of the licensee's name, reconstitution of the firm, etc., in the eventuality of his or her death.

21. Rule 19 has two provisos appended to it: The first one mandates that the change shall be allowed only if the incumbent in whose name the licence is to be granted is eligible for obtaining a licence under these Rules. The second proviso, the *raison d'être* for our present disposition, originally read thus:

“Provided further that, constitution/reconstitution of partnership deed/Director Board of a Company will be allowed only if the hotel is having two star classification

certificate issued by Ministry of Tourism, Government of India.”

22. The said proviso had a note appended to it. The note being clarificatory is to the effect that 'Hotel' includes classified restaurants and such other hotels or restaurants having classification certificates issued by the concerned Government departments on the strength of which FL-3 licences have been granted.

23. On 18.04.2012, the second proviso underwent a change: It was amended through G.O.(P)No.72/2012/TD.

The amended proviso reads as follows:

“Provided further that the constitution/re-constitution of a partnership or Director Board of a company of a hotel which does not have two star classification will be allowed on payment of Rs.2,00,000/- (Rupees two lakhs) for each partner/director opted out of the partnership or Director Board of the company and on payment of Rs.20,00,000/- (Rupees twenty lakhs) for each partner/director inducted into the partnership or Director Board of the company, as the case may be.”

24. When the second proviso in its two versions—pre- and post-amendment—is examined, it emerges that prior to 18.04.2012, a hotel was required to have two-star

classification; now, the pre-requisite has been dispensed with. Instead of insisting on the criterion of classification, the executive has felt it desirable to allow the change in name, constitution, re-constitution, etc., on payment of certain fee or charges; the change in the statutory position makes economic sense. That apart, I do not see any further change having been brought about by way of amendment.

25. Now, we may examine the 'note'. By way of a legal fiction, a restaurant has been equated with a hotel. Thus, whatever applied to a hotel should apply to a restaurant. The bone of contention, however, seems to be this: the pre-requisite of having two-star classification as regards the hotels stands removed, but the note still insists that the restaurants ought to have the classification certificate issued by the Government departments concerned.

26. Presumably, this is the mismatch perceived by the first respondent. And this perception has led to his self-abnegation: denuding himself of the statutory power.

27. In the first place, the legal fiction in the 'note' has equated a restaurant with a hotel. Nothing more, nothing less. Now, the pre-condition of star status for a hotel to be eligible for the change of name, transfer of licence, re-constitution, etc., stands removed. Therefore, we are required to synchronise the amended proviso with the unamended—the hanging note, so to say.

28. Pre-amendment, both the hotel and restaurant had been put on the same pedestal. The requirement of the classification or star-status was a statutory requirement in both cases. As has already been observed, concerning the hotels, the requirement of star-classification was removed. Since the 'note', post-amendment, still remains on the statute book equating both the hotel and the restaurant, the same privilege or advantage, in my view, as is available to a hotel should be available to a restaurant, too.

29. If we were to conclude that the benefit of transfer, re-constitution, etc., would apply or extend only to the hotels, to the exclusion of the restaurants, it would, in

my considered view, amount to a hostile discrimination letting the provision fall foul of Article 14 of the Constitution. So, essentially, to save the provision from the constitutional vice, we are required to read it down—read down we shall.

30. The consequential issue that presents itself for further resolution is whether the pre-condition, as is evident from the 'note', that the restaurants should have the classification certification from the department concerned should sound a discordant note, thus rendering the restaurants out of tune with the protective second proviso? In other words, has the 'note' outlived its utility and rendered itself redundant—otiose?

31. The learned counsel for the petitioner has submitted that as the hotel is not required to have a star-classification, so should the restaurant be. He has, however, submitted that the restaurant has the necessary star-classification. It, therefore, in the present instance, obviates the need of reading down the proviso in absolute terms to

mean that the hotel and the restaurant stand on an even keel, and whatever applies to the hotel should apply to the restaurant as well.

32. As a result, I am of the opinion, the mere relaxation in the standards of hotels to be eligible for the benefits under Rule 19 does not render the restaurants alien to the provision. The 'note' still stands appended to the amended provision and is very much relevant, too.

33. At any rate, I do not intend to pronounce on the need and necessity of a restaurant having the classification over and above what a hotel should have. It is academic in the present fact situation, for the petitioner's restaurant, however, has the necessary classification. Thus, taking the 'note' as a whole intact and unchanged, I hold that the petitioner is eminently entitled to the benefit under Rule 19 (iv) of the Rules.

34. In the facts and circumstances, this Court declares Exhibit P4 to be unsustainable and accordingly sets it aside. Consequentially, the Court directs the

respondent officials to process further the petitioner's application and pass necessary orders keeping in view the clarification issued in this judgment.

The writ petition is accordingly allowed. No order as to costs.

Dama Seshadri Naidu, Judge

tkv

**'C.R.'**