IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

WP(C).No. 13570 of 2010 (U)

PETITIONER:

P.K.BALAN, S/O KUMARAN, POZHEKADAVIL HOUSE,
KANJANI ROAD, AYYANTHOLE P.O., THRISSUR DISTRICT.

BY ADV. SRI.T.A.SHAJI

RESPONDENTS:

1. THE DEPUTY EXCISE COMMISSIONER, THRISSUR.

2. THE EXCISE COMMISSIONER,
COMMISSIONERATE OF EXCISE,
THIRUVANANTHAPURAM.

3. STATE OF KERALA, REPRESENTED BY THE
PRINCIPAL SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT, THIRUVANANTHAPURAM.

ADDL.R4 IMPLEADED

4. THE DEPUTY TAHSILDAR (RR), THRISSUR.

Impleaded as per order dated 14.09.2010 in IA 12417/2010.

ADDL. R5 & R6 IMPLEADED

5. THE TAHSILDAR (RR), KODUNGALLUR.

6. THE DISTRICT COLLECTOR, THRISSUR.

Impleaded as per order dated 10.12.2015 in IA 16813/2011

BY GOVERNMENT PLEADER SRI.BOBBY JOHN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 10-12-2015 ALONG WITH WPC. 13571/2010 AND WPC. 13955/2010, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 13570/2010

PETITIONER'S EXHIBITS:

EXT. P1 TRUE COPY OF THE INTERIM ORDER DATED 9.10.2009 OF THE HON'BLE SUPREME COURT

EXT. P2 TRUE COPY OF THE ORDER DATED 27.11.2009 IN CIVIL APPEAL NO. 7844/2009 OF THE HON'BLE SUPREME COURT

EXT. P3 TRUE COPY OF THE COMMON JUDGMENT DATED 5.3.2009 OF THE HON'BLE SUPREME COURT

EXT. P4 TRUE COPY OF THE STATEMENT CONTAINING THE DETAILS OF REMITTANCE ISSUED BY THE CIRCLE INSPECTOR OF EXCISE, VADAKKANCHERRY

EXT. P5 TRUE COPY OF THE CERTIFICATE DATED 12.1.1999 ISSUED BY THE CIRCLE INSPECTOR OF EXCISE, VADAKKANCHERRY

EXT. P6 TRUE COPY OF THE PETITION DATED 5.1.2010 BEFORE THE SECOND RESPONDENT

EXT. P7 TRUE COPY OF THE STATEMENT OF ACCOUNT FURNISHED BY THE PETITIONER

EXT. P8 TRUE COPY OF THE JUDGMENT DATED 19.1.2010 IN WPC 1814/2010 OF THIS HON'BLE COURT

EXT. P9 TRUE COPY OF THE ORDER NO.R6-1393/1998 DATED 9.4.2010 ISSUED BY THE FIRST RESPONDENT

EXT. P10 TRUE COPY OF THE ORDER NO.XM2-17007/ DATED 25.3.2010 OF THE EXCISE COMMISSIONER

EXT. P11 TRUE COPY OF THE ORDER NO.R6-2544/ DATED 12.01.2010 ISSUED BY THE THIRD RESPONDENT

EXT. P12 TRUE COPY OF THE DEMAND NOTICE DATED 2.5.2010 ALONG WITH THE NOTICE BEFORE ATTACHMENT

RESPONDENT'S EXHIBITS:

EXT. R1(a) TRUE COPY OF THE LETTER NO.22907/A1/08/TD DATED 16.03.2010

EXT. R1(b) TRUE COPY OF THE DEMAND COLLECTION BALANCE STATEMENT

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)Nos.13570, 13571 & 13955 of 2010

Dated this the 10th day of December, 2015

COMMON JUDGMENT

In all the three writ petitions, similarly situated petitioners, being the erstwhile licencees to vend toddy, have raised identical questions of law and fact involving the same set of respondents. That apart, all the petitioners have already had Exhibit P2 inter parte order from the Hon'ble Supreme Court on all the issues that have been raised in these writ petitions.

2. In the interpretation of Exhibit P2 order of the Hon'ble Supreme Court, certain difficulties have cropped up; those difficulties seem to have led the authorities to pass Exhibits P9 and P10 orders. Assailing them, the petitioners have, once again, approached this Court.

3. The interpretative difficulty is in the following context: Earlier another batch of licencees, more or less,

under similar circumstances, took the issue to the Apex Court and invited Exhibit P3 judgment (**V.K.Ashokan v. Assistant Excise Commissioner**[1]). Soon thereafter when the petitioners knocked its doors, the Apex Court rendered Exhibit P2 order following Exhibit P3 judgment. For the implementation of Exhibit P2 order, the authorities have, thus, been required to read Exhibit P3 judgment as part of Exhibit P2 order. In that process, a further dispute has arisen.

4. Given the fact that all the writ petitions have raised similar questions of fact and law, this Court has proposed to dispose of all the three writ petitions through a common judgment. The facts as pleaded in W.P.(C) No.13570/2010 have been taken as the basis for the discussion of the matter.

5. The petitioner was the licencee to vend toddy during the abkari year 1997-98. Though the authorities held the auction for three years, i.e., 1997 to 2000, and had a permanent agreement executed for the entire three-year

1 2009 (5) SCJ 783

period, they however granted the licence only for one year.

6. As can be seen from the record, in the first year itself the petitioner committed default, as a result of which the department did not renew his licence. At any rate, since the initial contract was for three years, the Government, owing to the petitioner's default, demanded the kist amount for the entire period of three years from the petitioner.

7. Similar to the petitioners, many other licencees in and around the said period of 1997, as has already been adverted to above, faced the same problem. Most of them have taken recourse to judicial remedies. A batch of licencees had its cases taken to the Hon'ble Supreme Court: The result is Exhibit P3 judgment.

8. A perusal of Exhibit P3 judgment reveals that the Apex Court has interdicted the action of the Excise Department in demanding the kist amount for the entire period of three years. Their Lordships have further observed that in the peculiar facts and circumstances of the

case, the Government ought not to have taken recourse to Rule 6(28) of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 ('the Rules'). Later, when the petitioners herein followed suit, the Hon'ble Supreme Court rendered Exhibit P2 order holding that the facts of the petitioner's case are also similar to those in Exhibit P3 judgment.

9. At any rate, while complying with Exhibit P2 order of the Hon'ble Supreme Court, though the department has agreed to confine the demand for kist to one year, it has, however, refused to exempt the petitioner from the operation of Rule 6(28) of the Rules. Accordingly, the authorities have passed Exhibit P10, which is assailed in the present writ petitions. Exhibit P9 order, containing the consequential computation, has also been challenged.

10. Sri.T.A.Shaji, the learned Senior Counsel for the petitioners, has submitted that the issue concerning both the aspects—confining the kist to one year and also the non-application of Rule 6(28) of the Rules—stands squarely

covered by Exhibit P2 order, which is to be read in conjunction with Exhibit P3 judgment.

11. The learned Senior Counsel has submitted that the singular defence on the part of the respondents is that Exhibit P3 judgment has no application to the facts of the present case. In elaboration, he has submitted that the respondents believe that all the petitioners in Exhibit P3 judgment had their licences cancelled because they had been facing criminal cases. As is evident from page 789 (SCJ) of the judgment, one of the parties to the judgment, contends the learned Senior Counsel, had his licence cancelled owing to the default committed by him.

12. The learned Senior Counsel has specifically contended that as can be seen on page 791 (SCJ) of the judgment, the Hon'ble Supreme Court has also taken into account the impact of Rules 6(28) and 6(30) of the Rules on the dispute that fell for consideration.

13. Eventually, the learned Senior Counsel has submitted that the respondent authorities are estopped from applying Rule 6(28) to the petitioners. According to the learned Senior Counsel, even going by the literal interpretation of Rule 6(28), the question of forfeiture does not arise; at best, it could be a case of adjustment. The learned counsel has also drawn my attention to Exhibit P11 order issued by the department to hammer home his contention that Exhibit P3 judgment involving other licencees had been implemented, and the benefit was extended to all persons concerned who include even the defaulters, apart from the licencees facing criminal cases.

14. Mr.Bobby John Pulickaparambil, the learned Government Pleader, to his credit, has made very elaborate submissions having meticulously researched on the issue. It is heartening to note the learned Government Pleader's dedicated, spirited efforts to present the case and defend the interests of the Government. The points he urged are as

follows:

(a) In the present cases, licences were cancelled for non-payment of the monthly kist. Consequently, the security deposits were forfeited as per the mandate of Rule 28 of the Rules, which declares that 'the whole of the deposit if any made at the commencement of the lease shall be liable to forfeiture'.

(b) To cover the liability of the licencee, the Government cannot allow any adjustment of the security deposit. The Apex Court's Exhibit P3 decision is, therefore, not applicable to the facts of the present case.

(c) The Apex Court has clearly held that Rules 6(30) and Rule 6(28) operate in two different fields; consequences emanating from Rule 6(28) have no impact on cases where licences were terminated under Rule 6(30).

(d) Rule 26 of the Rules says that no remission or abatement of the rentals shall be claimed by the licencee on any account whatsoever. Rule 39 says that the licencee should be bound by all the Rules, which have been passed under the Abkari Act. To repel the petitioners' plea that the Government is entitled only for the actual loss suffered, the learned Government Pleader has placed reliance on **C.M. Joseph v. State of Kerala**[2].

(e) It is settled law as per **Bharati Telecom Ltd. v. Commissioner of Customs**[3] that those who are seeking the benefits of Amnesty Schemes, exemption, etc., should comply with the conditions specified therein strictly.

(f) Rule 25 of the Rules mandates that any remittance towards the liability of the defaulter shall be first adjusted towards interest, as has been held in **Assistant Commissioner v. ACC Limited**[4].

(g) As per the ratio of **Mary v. State of Kerala**[5], the doctrine of fairness cannot be made applicable to the commercial contracts between the State and the licencee to

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2 ((2001) 10 SCC 578).
3 (2001) 10 SCC 18)).
4 Unreported Judgment, dt.03.07.2014 in W.A. No.1807/2013
5 (2014) 14 SCC 272

vend liquor. According to the learned Government Pleader, the Amnesty Scheme is applicable only in respect of 'arrears due at the time of the Scheme'.

(h) The Revenue Recovery Proceedings initiated before the sale of property by the defaulters are still sustainable against any claim of an alleged bona fide purchaser. Any subsequent transaction, therefore, will be subject only to the said liability, which is a 'crown debt'.

15. Heard the learned Senior Counsel for the petitioners and the learned Government Pleader, apart from perusing the record.

16. It is the specific contention of the learned Government Pleader that Exhibit P2 order differs in its scope and content from Exhibit P3 judgment. First, there is no quarrel concerning the proposition that Government should demand the kist arrears from the petitioners only for one year. To that extent, neither of the parties to the lis has any grievance. What remains to be seen is whether in

Exhibit P2 order, Rule 6(28) of the Rules—if at all it applies —finds any exemption.

17. In this context, the learned Government Pleader has submitted that even in Exhibit P3, it has been specifically observed by the Hon'ble Supreme Court that non-application of Rule 6(28) is under the peculiar facts and circumstances of the case. As such, it is apposite for us to examine the true import of Exhibit P2 order, which, being cryptic, reads as follows:

> “Leave granted.
> These appeals have been filed against the impugned common order of the High Court of Kerala at Ernakulam dated 12th September, 2007.
> The facts have been set out in the impugned order and hence we are not repeating the same here.
>
> In our opinion. The facts of the case are covered by a judgment of this Court rendered in Civil Appeal No.1541 of 2009 dated March 05, 2009, titled V. K. Ashokan vs. Assistant Commissioner & Others. In paragraph 36 of the said judgment, it has been stated that if the licence is granted for one year, then there cannot be a recovery of rent for three years.
>
> Following the said judgment, these appeals are allowed and the impugned order of the High Court is set aside and it is directed that recovery of rent will be only for one year and not for three years. No costs. (emphasis added)

18. A perusal of the above-extracted order makes it manifestly clear that their Lordships have opined that the facts of the case are covered by its earlier judgment, i.e. Exhibit P3. In my respectful observation, evidently, their Lordships are of the opinion that there are no distinguishing features between the cases of the petitioners on one hand and those in Exhibit P3 judgment. Further, it has been explicitly recorded that 'following Exhibit P3 judgment, the petitioners' appeals have also been allowed'.

19. Once the Apex Court has held that the facts are identical, and the latter case has been disposed of following the former one, it is incumbent upon this Court to apply in its entirety the judgment followed by the Hon'ble Supreme Court.

20. Differently stated, had there been a judgment rendered following the ratio of another judgment as a matter of precedent, this Court would have had the leverage to cull out and examine the ratio. So that the Court could

have appreciated the rival contentions and seen whether any distinguishing facts had disentitled either of the parties to the benefit of the decision under reference. Here is the case where the Hon'ble Supreme Court has avoided the whole discussion on the premise that the case is identical to the one decided previously. Ipso facto, the entire reasoning of the previous judgment is to be read as if it is the part of the case on hand.

21. Viewing the issue compendiously, I may observe that in Exhibit P2 order any ratiocination has been obviated in the light of the fact that their Lordships have deemed it appropriate to dispose of the case by following, rather than relying on, the previous judgment. It is ineluctable on my part to conclude thus because their Lordships have recorded that the facts are identical. Essentially, as a matter of established practice, I must read the dictum of Exhibit P3 judgment as if it is part of Exhibit P2 order.

22. The learned Government Pleader has laid much emphasis on the fact that Rule 6(28) of the Rules mandates that once there is a default, the forfeiture clause automatically springs into action and the authorities have been left with no other option in its application. The learned Senior Counsel for the petitioners has, however, contended that paragraph 36 of Exhibit P3 squarely answers the said contention of the learned Government Pleader. Before adverting to paragraph 36 of Exhibit P3 judgment, it may be appropriate to examine the contours of Rule 6(28) of the Rules, which reads as follows:

> "6(28). Whenever the licensee fails to pay the kist, tree-tax, duty etc. due from him for any month together with, the interest due under sub-rule (25) on or before the 25th day of the month, the Assistant Excise Commissioner subject to confirmation by the Board of Revenue may cancel the licence and order a resale at the risk of the licensee or direct the management of the business of the contract by departmental agency or otherwise dispose of the same. All losses on account of such cancellation and resale or Departmental management or other disposal of the privilege shall be borne by the defaulting licensee, but he shall have no right to the fain, if any, which accrues. Disposal otherwise than by resale shall be

> liable to forfeiture. The Departmental Management fee collected from a shop while it was under Departmental management due to default of payment of security, kist, etc. shall be liable to forfeiture at the discretion of the Excise Commissioner. The Assistant Excise Commissioner may, however, allow sales to continue or make such other arrangements as he deems fit pending resale or other disposal of the privilege. Any sum due from a licensee on account of kist, tree-tax or otherwise may be recovered from his deposit, if any made by him at the commencement of the lease or corrected under the Revenue Recovery Act. If any adjustment is made from the deposit the licensee shall be bound to replace the sum adjusted from his deposit within fifteen days of receipt of notice from the excise Officer in charge of the Division in which his shop is situated. Interest on account of loss by resale shall be calculated from the date of confirmation of the resale of the shop.
>
> [Provided that the Assistant Excise Commissioner concerned may before confirmation of cancellation by the Board of Revenue, restore the licence cancelled by him subject to confirmation by the Board of Revenue, if the defaulter pays up the amount defaulted by him before the expiry of one month from the date of such cancellation.]”

23. Interpreting the above provision, the Hon'ble Supreme Court in paragraph 36 of Exhibit P3 judgment has held as follows:

“36. We may now consider the applicability of Rule 6 (28) of the Rules (without going into the individual cases).

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We may for the purpose of further discussions take into consideration the fact involved in Civil Appeal arising out of Special Leave Petition (Civil) No.25467/2005. The bid for toddy shop Nos.109 to 222 for a period of 1997-2000 given by the appellant was Rs.15,10,00,000/-. A security of Rs.1,51,00,000/- has been furnished. Appellant started carrying on business on and from 1.4.1997. They paid tax for first-half of the year 1997-98. They had allegedly defaulted in payment of the kist for the month from July 1997 onwards which was due on 1.10.1997 as per Rules, Raid, as noticed hereinbefore, was conducted on 19.7.19997.-

Indisputably, the officers of the Excise Department of the State of Kerala sealed the shop due to which the appellants could not carry out any business from July till October. Apart from the fact that they were required to pay the kist for a period of six months and not for a period of two and a half years, the demand of Rs.11,10,23,687/- made on them cannot be said to be legal and valid. Appellant had inter alia contended that the auction amount for one year being Rs.5,03,33,333/- out which they had already deposited Rs.3,20,00,020/- being an amount for more than the rental for a period of seven months, there was no default. Indisputably, the said amount of Rs.3,20,00,020/- included the amount of security. But in the event, the license was to be cancelled with effect from 19.7.1997, the said amount was available to the State Government for compensating itself towards the damage suffered by it.” (emphasis supplied)

24. It is pertinent to observe that the facts taken up for discussion in the above paragraph pertain to a case that has default as the cause, rather than registration of a criminal case, for the cancellation of licence—contrary to what has been contended by the learned Government Pleader. Having emphatically observed that the security amount is available for the Government to compensate any damage it suffered, the Apex Court has observed in paragraph 38 of Exhibit P3 judgment that the Government has made no statement how and in what manner the State suffered any loss.

25. True, the Hon'ble Supreme Court has, in paragraph 41 of the judgment, observed that in the peculiar facts and circumstances of the case, the Court is of the opinion that 'it was not a case where even Rule 6(28) could have also been resorted to'. Very pertinent is the fact that there is a specific observation that the facts in both the cases are the same. That accepted, we are further required

to treat the case on hand as having the same peculiar facts and circumstances as have been present in the cases that led to Exhibit P3 judgment.

26. To sum up, I may observe that certain persons have invited Exhibit P3 judgment from the Apex Court and got the necessary relief from the respondent Department. When the petitioners in this batch approached, they had their cases disposed of by the Apex Court through Exhibit P2 order, in which it is observed that the facts are similar to the cases in Exhibit P3 judgment. In fact, the Apex Court rendered an order following Exhibit P3 judgment. As a natural corollary, the petitioners are entitiled to have the same benefits from the respondent Department as have been extended to the persons in Exhibit P3 judgment. The respondent authorities want to distinguish both the cases—rather they want this Court to distinguish them.

27. Had the respondents felt that there had been any difference in the fact situation, they ought to have,

especially in the light of the observation in Exhibit P2 order, sought the necessary clarification from the Hon'ble Supreme Court. They did not. Once the Apex Court has observed that the facts in both the cases are the same and the latter case has been disposed of based on the former, I do not think there is any interpretative leverage, as a matter judicial propriety, left with this Court.

28. Despite being appreciative of the diligent efforts made by the learned Government Pleader, this Court is of the opinion that various issues raised and authorities relied on by him need not be referred to, much less discussed. This Court, as has already been indicated above, deems it appropriate—indeed necessary—to follow the dictum of Exhibit P3 judgment and direct the respondents to treat the petitioners herein on a par with the petitioners in Exhibit P3 judgment.

In the facts and circumstances, this Court allows the writ petitions setting aside Exhibit P10 order as well as the consequential Exhibit P9 order to the extent of not adjusting the security amount as against the liability. As a natural corollary, the respondent authorities shall give the benefit of adjusting the security amount to the petitioners, as has been done in the case of the petitioners in Exhibit P3 judgment. No order as to costs.

Dama Seshadri Naidu, Judge

tkv

'C.R.'