

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

WP(C).No. 18118 of 2015 (L)

PETITIONER : -

ABAAM HOTEL,
(A UNIT OF CHINAR HOMES PVT LTD NO.30/1156B, C & D,
KANIYAMPUZHA ROAD, VYTILA P.O,
ERNAKULAM, KERALA, PIN 682 019,
REPRESENTED BY ITS MANAGING DIRECTOR - SRI V.SLALAN.

BY ADVS.SRI.T.A.SHAJI (SR.)
SMT.K.P.SHEEBA
SMT.NAMITHAJYOTHISH
SRI.V.VINCENT DIDACOSE
SRI.DARSAN SOMANATH

RESPONDENTS : -

1. STATE OF KERALA,
REPRESENTED BY THE PRINCIPAL SECRETARY TO THE GOVERNMENT,
TAXES (G) DEPARTMENT, GOVT. SECRETARIAT,
THIRUVANANTHAPURAM PIN 695 001.
2. THE EXCISE COMMISSIONER, KERALA,
THIRUVANANTHAPURAM, PIN - 695 001.
3. THE DEPUTY EXCISE COMMISSIONER,
ERNAKULAM, COCHIN 18.
4. THE CORPORATION OF COCHIN,
ERNAKULAM, REPRESENTED BY ITS SECRETARY,
COCHIN 11.

R4 BY ADV.SRI.PRAVEEN K.JOY,SC,COCHIN CORPORATION
BY SRI.P.K.SOYUZ,SC,COCHIN CORPORATION
BY Sr. GOVERNMENT PLEADER SRI. K.C. VINCENT

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
19-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 18118 of 2015 (L)

APPENDIX

PETITIONER'S EXHIBITS : -

EXHIBIT P1 : TRUE COPY OF THE STAR CLASSIFICATION CERTIFICATE DATED
NIL ISSUED BY THE HRACC TO THE HOTEL EFFECTIVE FROM
18-06-2014 TO 17-06-2019.

EXHIBIT P2 : TRUE COPY OF THE APPLICATION DATED 10-09-2014 FILED BY
THE PETITIONER BEFORE THE 4TH RESPONDENT FOR NOC.

EXHIBIT P3 : TRUE COPY OF THE COMMUNICATION DATED 01-11-2014 ISSUED
BY THE HEALTH OFFICER OF THE 4TH RESPONDENT ALONG WITH
ITS ENGLISH VERSION.

EXHIBIT P4 : TRUE COPY OF THE APPLICATION DATED 29-12-2014 FILED BY
THE PETITIONER ON 21.02.2015 BEFORE THE 2ND RESPONDENT
FOR FL-11 LICENSE.

EXHIBIT P5 : TRUE COPY OF THE REQUEST DATED 10-03-2015 FILED BY THE
PETITIONER BEFORE THE 4TH RESPONDENT ,ALONG WITH ITS
ENGLISH VERSION.

EXHIBIT P6 : TRUE COPY OF THE APPLICATION DATED 09-01-2015 FILED BY THE
PETITIONER BEFORE THE 4TH RESPONDENT.

EXHIBIT P7 : TRUE COPY OF THE SANITATION CERTIFICATE DATED 24-11-2014
ISSUED BY THE CORPORATION FOR BEING PRODUCED BEFORE
HRACC.

RESPONDENTS' EXHIBITS: - NIL.

// TRUE COPY //

P.A. TO JUDGE

DMR/-

C.R.

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 18118 of 2015

Dated this the 19th day of August, 2015

JUDGMENT

The petitioner, a unit of a Private Limited Company, is running a Three Star Hotel. In the course of time, with a view to establishing a Beer and Wine Parlour, the petitioner has desired to obtain an FL-11 licence from the Excise Department. Since one of the stipulations for obtaining the said licence is to have a 'No Objection Certificate' (NOC) from the fourth respondent, the petitioner submitted Exhibit P2 application before the fourth respondent on 10.09.2014. That apart, the petitioner is also said to have submitted Exhibit P6 application to the same authority for the grant of a 'hygiene and sanitation certificate' for the Hotel.

2. For considering the applications submitted for the purpose of obtaining any licence or permission the time limit is thirty days as per Section 447 (6) of the Kerala Municipality Act ('the Act' for brevity). The respondent authorities have, however, not taken within the stipulated

time any decision on the applications made by the petitioner; on the other hand, they issued to the petitioner Exhibit P3 notice on 01.11.2014, informing that the 'No Objection Certificate' could not be granted to it. It was beyond the stipulated time.

3. After Exhibit P3 notice, there is, nevertheless, no further correspondence, much less rejection concerning Exhibit P6 application for sanitation certificate. Under these circumstances, the petitioner has approached this Court assailing Exhibit P3, apart from seeking a declaration that the NOC is deemed to have been granted in terms of Section 447(6) of the Act.

4. Mr. T. A. Shaji, the learned Senior Counsel for the petitioner, has submitted that sub-section (6) of Section 447 has incorporated the deeming provision and that since thirty days has elapsed from the date of petitioner's making an application, the advantage of the said deeming provision has to be applied with full vigour in petitioner's favour. The learned counsel has also pointed out that though sub-sections (6) to (8) of Section 447 had been deleted through Act No.14 of 1999 with effect from 24.03.1999, they

were, later, again reintroduced in the statute book with effect from 09.07.2013, through Ordinance No.39/2013. He has also submitted that the ordinance has been replaced later by Kerala Municipality (second amendment) Act, 2014.

5. Summing up his submissions the learned Senior Counsel has submitted that in terms of the deeming provision in Section 447 (6) of the Act, both the certificates — the NOC and the Sanitation Certificate—are, as a matter of legal fiction, given to the petitioner. According to him, the requirement of the petitioner to produce those certificates before the excise authorities stands dispensed with.

6. *Per contra*, the learned Standing Counsel for the Corporation has strenuously opposed the claim of the petitioner as regards the deeming provision. Adverting to the merits of the matter, the learned Standing Counsel would contend that the petitioner had not fulfilled any of the norms prescribed for obtaining the NOC.

7. The learned Government Pleader, on his part, has submitted that sub-section (3) of Section 447 deals with the granting of licence or permission for conducting dangerous or offensive trade within the municipal limits. According to

him, the time limit of thirty days prescribed is only concerning the dangerous and offensive trades, but not all other trades. In expatiation of his submissions, the learned Government Pleader would contend that Schedule I appended to the Kerala Municipalities Dangerous and Offensive Trade Licensing Rules, 2011 does not include Beer and Wine under any category of the dangerous and offensive trades. Referring to Item 154 in Schedule I, the learned Government Pleader would contend that it only enumerated spirit, toddy and foreign liquor, but not beer or wine.

8. The learned Senior Counsel in reply has, however, countered the submissions of the learned Government Pleader that the Beer and Wine have not been included under dangerous and offensive trades. According to him, foreign liquor includes Beer and Wine as well.

9. Heard Mr. T. A. Shaji, the learned Senior Counsel for the petitioner, Mr. Praveen K. Joy, the learned Standing Counsel for the respondent Municipality, and Mr. K.C. Vincent, the learned Government Pleader, apart from the perusing the records.

10. It is not in dispute that Section 447 (3) of the Act prescribes a time limit of thirty days for the authorities to consider any application filed to obtain any licence to use a place for conducting a dangerous or offensive trade. Indeed, the authority has the power to refuse the licence or permission in the interest of the public, within the stipulated time, however.

11. The contention of the learned Government Pleader that Beer and Wine are not included in the dangerous and offensive trade cannot be countenanced. The fact remains that foreign liquor very well includes them, as can be seen from Section 3 (12) and (13) of the Abkari Act. As a corollary, the further contention of the learned Government Pleader that no time limit is fixed concerning other trades is also required to be rejected, and is accordingly rejected.

12. Once it is accepted that a time frame has been fixed for considering an application under Section 447 (3) of the Act, it is further incumbent for me to examine the scope of sub-section 6 of Section 447, which reads as follows:

“(6). If the order on an application for any licence or permission is not communicated to the applicant within thirty days after the receipt of the application by the Secretary or within such longer period, as may be

prescribed in any class of cases the application shall be deemed to have been allowed for the period required in the application, subject to the Act, rules and bye-laws and all conditions which would have been ordinary imposed."

13. Indisputably, the above extracted provision stood omitted through Act 14 of 1999 with effect from 24.03.1999. Later, the legislature has, however, reincorporated it with effect from 09.07.2013 through Kerala Municipalities (second amendment) Act, 2014. As such, I am to hold that sub-section (6) of Section 447 has been in force and its impact and the consequences flowing therefrom are to be applied to the petitioner's application. It is, indeed, not in dispute that the petitioner's application was not considered within thirty days.

14. A deeming provision being a facet of legal fiction, it is required to be given full effect so as to subserve the statutory mandate. The Courts have often held that the deeming provision or the legal fiction has the impact of rendering things real and tangible, though, in fact, they are not. In that context, the deeming provision has the impact as if the petitioner had been granted licence. Once the said proposition is accepted, there cannot be any hindrance against the petitioner's approaching the excise authorities,

as if he had those certificates, which it would have been otherwise compelled to produce before the licencing authorities.

15. Black's Law Dictionary defines legal fiction as an assumption that something is true even though it may be untrue, made especially in judicial reasoning to alter how a legal rule operates; specifically a device by which a legal rule or institution is diverted from its original purpose to accomplish some other object indirectly. It is also termed fiction of law or *fictio juris*. The law lexicon further quotes from Morris R. Cohen's *Law and the Social Order* (1933) to the following effect:

"Legal fiction is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasures. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion."

16. Writers on jurisprudence have regarded fiction as a remedial institution like equity and not as a unit in legislative law-making because the employment of legal fictions in legislative enactments is of recent origin. That positive laws of many countries now make extensive use of legal fictions is well known. Fictions in legislative enactments or legislative

fictions, if they may be called, are growing in scope and importance, since they serve not only the immediate formulation of legislation. (vide P.178, Vepa P. Sarathi, V K Varadachari's *Legal Fictions*, EBC, 2012).

17. The learned author has further observed that legislatures employ fictions 1) to extend the scope and reach of a rule; 2) as a terminological device; 3) to secure economy of speech and didactics; and 4) to enact provisions *ex majori cautela* [out of an abundance of caution] to render certain that which might be regarded as uncertain.

18. As Lon L. Fuller has observed, 'the influence of the fiction extends to every department of the jurist's activities.' Bentham has detested the 'pestilential breath of Fiction', whereas Backstone has felt that legal fictions are highly beneficial and useful. According to Fuller a fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.¹ Legal fictions, indeed, are not allowed to work an injury, and *ipso facto* they are required to be construed strictly.

¹ P.9 of Legal Fiction by Lon L. Fuller (Stanford University Press)

19. In *Manish Trivedi v. State of Rajasthan*² the Hon'ble Supreme Court has held that a deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction.

20. In fact, this Court in *Rajesh Ramachandran v. Corporation of Trivandrum*³ dealing with an identical issue, having placed reliance on *Gajraj Singh v. State Transport Appellate Tribunal*⁴, has observed that legal fiction is one which is not an actual reality but which the law recognises and the court accepts as a reality. Therefore, in a case of legal fiction, the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise should not obtain is deemed to obtain under the circumstances.

² (2014) 14 SCC 420

³ 2008 (3) KLT 419

⁴ (1997) 1 SCC 650

21. Further, this Court in *Rajesh Ramachandran* (supra) has examined the very same provision that has fallen for consideration in the present writ petition—Section 447 (6) of the Act. It has, thus, observed that though there is no licence in favour of the petitioner therein, in terms of Section 447 (6) of the Act, law still assumes that a licence exists in favour of the petitioner. This court is bound to give full effect to the statutory provisions and the petitioner should be given the benefit of the provision.

22. At any rate, it is to be further observed that though in terms of the deeming provision, the NOC and Sanitation Certificate are declared to have been given, for all practical purposes, in the petitioner's favour, the authorities, nevertheless, are not powerless to re-examine the issue in the course of time whether the petitioner has violated any statutory provision while the deemed NOC or licence has been in force. In such an event, after putting the petitioner on notice, the Municipal authorities can further determine the issue.

In the above facts and circumstances, it is declared that the petitioner has the NOC, as well as the sanitation

certificate, for the purpose of establishing a Beer and Wine Parlour. Consequently, the first and second respondents are directed to consider petitioner's application for Beer and Wine parlour licence treating as if the petitioner had the NOC and the sanitation certificate from the fourth respondent. No order as to costs.

**DAMA SESHADRI NAIDU
JUDGE**

DMR/-