

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

WP(C).No. 19121 of 2015 (M)

PETITIONER:

GEORGE JOSEPH, AGED 69 YEARS,
S/O.JOSEPH, MANAGING PARTNER, NAVARANG TOURIST HOTEL,
KANHANGAD, R/A.KOICKAL HOUSE, CHERUPUNMKAL P.O.,
KOTTAYAM DISTRICT.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.S.M.PRASANTH
SRI.C.DINESH
SRI.G.RENJITH

RESPONDENTS:

1. THE COMMISSIONER OF EXCISE,
COMMISSIONERATE OF EXCISE, THIRUVANANTHAPURAM 695 033.
2. SRI ANIL XAVIER,
COMMISSIONER OF EXCISE, COMMISSIONERATE OF EXCISE,
THIRUVANANTHAPURAM 695 033.
3. MR JACOB JOSEPH,
PARTNER, M/S.NAVARANG TOURIST HOTEL, KANHANGAD 671 315.
KASARAGOD DISTRICT.

R3 BY ADV. SRI.M.G.KARTHIKEYAN
R BY SRI. K.C. VINCENT, SR. GOVERNMENT PLEADER
SRI. C.C. THOMAS (SR.)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
09-10-2015, ALONG WITH W.P.(C) NO. 30282/2015, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 19121 of 2015 (M)

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APPENDIX

PETITIONER'S EXHIBITS:

P1:-TRUE COPY OF THE ORDER NO XC1-11214/2015 DT. 09/6/2015.

P2:-TRUE COPY OF THE JUDGMENT DTD 8/5/2015 IN WPC NO 13720/2015.

P3:-TRUE COPY OF THE LETTER DTD 8/6/2015 SUBMITTED BY THE PETITIONER BEFORE THE FIRST RESPONDENT.

RESPONDENTS' EXHIBITS:

EXT.R3(a): PHOTOCOPY OF THE PARTNERSHIP DEED DATED 16.03.2010.

EXT.R3(b): PHOTOCOPY OF THE RESOLUTION DATED 21.04.2015 TAKEN BY FIVE PARTNERS OF THE FIRM.

EXT.R3(c): PHOTOCOPY OF THE REVENUE RECOVERY NOTICE DATED 20.02.2015 ISSUED BY THE KERALA FINANCIAL CORPORATION.

/True Copy/

P.A to Judge.

'CR'

DAMA SESHADRI NAIDU, J.

W.P. (C) Nos. 19121 & 30282 of 2015

Dated this the 9th day of October, 2015.

COMMON JUDGMENT

A partnership firm, having a hotel, was given Ext.P5 provisional FL-11 licence to have a Beer & Wine Parlour. One of the partners, whose claim to be the Managing Partner is contested, filed W.P. (C) No.19121 of 2015 assailing Ext.P5 provisional licence. He obtained an order of status quo. The Commissioner of Excise, pending the said writ petition, in compliance with the direction of this Court in a writ appeal arising out of another writ petition, heard the rival claimants and recalled Ext.P5 provisional licence through Ext.P8.

2. Impugning Ext.P8 order of the Excise Commissioner, the partnership firm, represented by another Managing Partner, filed W.P. (C) No.30282 of 2015 arraying the petitioner in W.P. (C) No.19121 of 2014 as the 4th respondent. Since both the writ petitions raise the same issue involving the same parties on either side, this Court

disposes of both the writ petitions through a common judgement. For the narrative purpose, the facts and the documents from W.P. (C) No.30282 of 2015 are taken as the basis.

3. Briefly stated, as pleaded in W.P.(C) No. 30282 of 2015, the petitioner firm initially had a bar licence beginning from 1986 under Rule 13(3) of the Foreign Liquor Rules ('the Rules' for brevity). Until 2006, the firm was headed by one Mr K. A. George, the managing partner, in whose name ostensibly the licence stood. When the said managing partner took ill in 2006, the firm comprising six partners nominated the 4th respondent, holding 30% share, to be the managing partner. In 2010, as Mr K.A. George, the then managing partner, had died, the remaining partners reconstituted the partnership firm.

4. Under the stewardship of the 4th respondent, the petitioner firm continued to have FL-3 licence until 31.03.2014, when the Government had a change of policy leading to the non-renewal of all FL-3 licences for all establishments other than five star hotels.

5. In the light of the incorporation of sub-Rule 11(b) under Rule

13A of the Rules with effect from 30.12.2014, all hotels which had been denied FL-3 licences were given FL-11 licences to have Beer & Wine Parlours. Taking advantage of the said provision, the petitioner firm as well, through the 4th respondent, applied and obtained Ext.P1 licence on 02.01.2015, with its validity up to 31.03.2015.

6. Once Ext.P1 licence came to an end, the 4th respondent did not show any inclination to have it renewed. In the meanwhile, the Kerala Financial Corporation (KFC) also issued Ext.P7 notice initiating revenue recovery proceedings against the defaulting petitioner firm to recover an amount of Rs.2.46 crores.

7. In the light of the 4th respondent's disinclination to apply for the renewal of the licence, the remaining five partners, having 70% stake, came together and passed Ext.P2 resolution on 21.04.2015 nominating Mr. Jacob Joseph, one of the partners, to be the Managing Partner in the place of the 4th respondent. It seems that through the same resolution the partners authorised the newly nominated Managing Partner to apply for the renewal of the FL-11 licence, which he did through Ext.P3.

8. Soon after submitting the Ext.P3 application, as the record reveals, the petitioner approached this Court questioning what is said to be the delay on the part of the Commissioner of Excise in considering its Ext.P3 application. This Court, in turn, through Ext.P4 judgement directed the Excise Commissioner to take an expeditious decision. Aggrieved, the 4th respondent, not originally being a party to W.P.(C) No. 13720 of 2015, took the matter in appeal in W.A. No. 1206 of 2015; resultantly, a learned Division Bench through its judgment dated 11.06.2015 directed the Excise Commissioner to hear the 4th respondent as well before taking any decision on the petitioner's Ext.P3 application.

9. Chronologically viewed, before the directive in writ appeal could be communicated, the Excise Commissioner issued Ext.P5 proceedings granting an FL-11 licence to the petitioner provisionally, however. Ext.P6 order seems to be consequential in nature as it is an endorsement of the renewal of licence. The petitioner having obtained an FL-11 licence seems to have established a Beer & Wine Parlour. At any rate, the 4th respondent, further aggrieved, filed W.P.(C)

No.19121 of 2015 and obtained an order of status quo on 24.07.2015.

10. As the march of events would indicate, in the light of the direction given by a learned Division Bench of this Court in its judgment dated 11.06.2015 in W.A. No. 1206 of 2015, the Excise Commissioner, albeit after issuing Ext.P5 proceedings, heard all the partners including the 4th respondent, and rendered Ext.P8 order. Under these circumstances, assailing Ext.P8, the partnership firm has filed W.P.(C) No. 30282 of 2015.

11. In the above factual background, Mr. C. C. Thomas, the learned Senior Counsel for the petitioner, has submitted that the Excise Commissioner has taken into account all aspects while issuing Ext.P5 proceedings. According to him, there was no occasion for the said authority to recall his orders by issuing Ext.P8. In elaboration of his submissions, the learned Senior Counsel has submitted that there is neither re-constitution nor any finding from any competent judicial forum, be it a civil court or an arbitrator, concerning the disputes between the two sets of partners: the 4th respondent on one side and the rest of the partners on the other. As such, instead of leaving the

parties to have the dispute resolved by a competent civil court, the Excise Commissioner's recalling his well-considered Ext.P5 order is unwarranted, asserts the learned Senior Counsel.

12. The learned Senior Counsel has laid specific emphasis on the fact that all along the licence had been issued in the name of the partnership firm, and that the 4th respondent for a certain period was only at the helm of the affairs having been nominated as the managing partner. He has also contended that initially the 4th respondent was not inclined to apply for the renewal of the licence; under those circumstances, the rest of the partners have decided to rescue the firm and proceed with the business. In this regard, he has drawn my attention to the fact that owing to the recalcitrant attitude of the 4th respondent, the petitioner firm defaulted in repaying its loan taken from the KFC, which issued Ext.P7 recovery notice.

13. In justification of the action on the part of the rest of the partners, the learned Senior Counsel has laid emphasis on the fact that after the renewal of the licence, provisionally though, the present management has resumed the repayment of loan.

14. To hammer home his contention that the licence has been issued all along in the name of the firm, and that there is no reconstitution to warrant any interference by the Excise Commissioner, the learned Senior counsel has placed reliance on **State of Kerala and others v. M/s. Panamoottil Investments and others**¹ and **Donnie J.M. Philip v. State of Kerala and others**².

15. Per contra, Mr K. Ramkumar, the learned Senior Counsel for the 4th respondent in W.P.(C) No. 30282 of 2015 and petitioner in W.P.(C) No. 19121 of 2015, has strenuously contended that 'admittedly' the licence stood in the name of the 4th respondent as is evident from Ext.P1. Now the rest of the partners have sought it to be transferred or obtained, as the case may be, in some other name, which is, claims the learned Senior Counsel, not only impermissible but also illegal.

16. According to the learned Senior Counsel, any change in the name of the managing partner or the reconstitution of the firm requires compliance with the statutory mandate under Rule 19 of the

¹ 2010 (1) KHC 353

² 2011(2) KHC 684

Rules. Having specifically drawn my attention to the contingencies stated under the said Rule and the remedial steps required to be taken in that regard, the learned Senior Counsel has submitted that the rest of the partners have not taken recourse to any of the steps mandated therein.

17. The learned Senior Counsel has also laid emphasis on the fact that there are disputes among the partners and that any adjudication by this Court involves disputed questions of fact. Unless a competent civil court decides the issue, claims the learned Senior Counsel, there is no occasion for either the officials of the Abkari Department or this Court under Article 226 of the Constitution to enter into the arena of disputed questions of fact.

18. In that regard, the learned Senior Counsel has drawn my attention to the grounds of the writ petition as pleaded by the partnership firm to stress that none of the grounds qualifies for consideration under Article 226 of the Constitution of India.

19. Insofar as the ratio of the decision in **Panamoottil Investmetns** (supra) is concerned, the learned Senior Counsel has

made efforts to distinguish it. He has contended that there was no dispute at all in that case among the partners. The only issue was whether having two managing partners would amount to any reconstitution. In the present instance, there is, contends the learned Senior Counsel, admittedly a dispute among the partners and it needs to be resolved by a competent civil court before the question whether the name of the licensee could be changed unilaterally.

20. Summing up his submissions, the learned Senior Counsel has submitted that both the 4th respondent and the rest of the partners have applied separately before the Excise Commissioner for renewal of the licence, and that it is entirely open to the said authority to hear all the parties concerned and take an objective decision as regards who is entitled to have the licence renewed.

21. Heard the learned Senior Counsel for the petitioner and the learned Senior Counsel for the 4th respondent, apart from perusing the record.

22. The issues to be resolved are as follows:

1. Whether the licence was initially issued in the name of the 4th respondent or the name of the petitioner firm, represented by

the 4th respondent?

2. Whether Ext.P8 can be sustained on the ground that the petitioner has not taken any steps to re-constitute a partnership firm or to have the licence transferred in terms of Rule 19 (4) of the Rules?

Issue No.1:

23. The fulcrum of the submissions made by the learned Senior Counsel for the 4th respondent is that 'admittedly' the licence stood in the name of the 4th respondent. There is no cavil that a cursory reading of Ext.P1 would reveal that the licence was in the name of the 4th respondent, ostensibly. It is meat to extract that portion of Ext.P1, which records the factum of granting licence:

"Deputy Commissioner of Excise, Kasaragod, under the provisions of the Abkari Act, 1077 hereby licence Sri. George Joseph, S/o. Joseph, Managing Partner, Navarang Tourist Hotel & Residency, Kanhangad to vend beer/wine at the premises of the Hotel where the FL-3 licence granted was in force as on 31st March, 2014, Navarang Tourist Hotel & Residency, Kanhangad, Kasaragod District situated as shown in annexure schedule during the period from 2nd January, 2015 to the last day of March, 2015, subject to the following conditions and stipulations to be observed by the licensee."

24. In this regard, the statutory scheme and also the judicial pronouncements having a bearing on the issue are required to be

examined.

25. Rule 13(11) of the Rules deals with granting of a licence to an applicant to have a Beer & Wine Parlour. It reads to the effect that Beer/Wine Parlour licences in Form FL-11 shall be issued by the Commissioner of Excise under the orders of the Government to the hotels, motels, resorts, catering establishments, etc. The fact remains that any of the entities specified in Rule 13 (11), such as hotels, motels, resorts, etc., could be owned either by individuals or any firms or legal entities, such as companies.

26. It needs no reiteration that a partnership firm is not a juristic person. For the authorities to deal with, and to fix answerability on, an entity, it is always essential for the authorities to identify a human agent acting on behalf of the said impersonal entity. It is too well established to be caviled about that a partnership firm is an association of person and is only a compendious reference to all those persons put together. In other words, the firm is not a legal entity different and distinct from its partners. Of course, a firm can be a legal entity by legal fiction as is the case under the Negotiable Instruments Act or by

a statutory mandate, as is the case under the Income Tax Act.

27. Each partner, thus, acts not only in his interest but also in the interest of all other partners as their agent. Thus, the authorities have, I believe, devised the method of convenience to grant licence in the name of a particular person, a human being, evidently while he is acting in the capacity of, say, a managing partner of a firm—the non-juristic entity.

28. Ample light can be thrown on this judicial concept if we examine Rule 19 of the Rules. Rule 19 specifies that under no circumstances shall any licence be sold, transferred or sub-rented without the previous sanction of the Excise Commissioner. Clause (ii) thereof mandates that reconstitution of the partnership firm by addition or deletion of members resulting in a change of ownership shall be deemed to be a transfer of the licence. It is not, in this regard, far to seek that unless there is a check, the partnership becomes a cloak for transfer: new partners join and the old ones go and the partnership remains only in the name. Thus, there will be an unhindered transfer of licence using the cloak of partnership.

29. If the contention of the learned Senior Counsel for the 4th respondent is to be accepted that the licence was issued in the name of the 4th respondent alone, the entire mechanism provided in the Rule 19 becomes otiose. In other words, once it is to be accepted that the licence was given exclusively in the name of the 4th respondent in his individual capacity, the issue of reconstituting the partnership firm and the whole procedural mechanism concerning paying the reconstitution fee, etc., would be, to my mind, contradictory in terms.

30. In my considered view, whoever is the managing partner represents the interest of the rest of the partners and acts on behalf of all of them. Similarly, in the present instance, after the death of the first or founding managing partner, i.e., Mr K.A. George, in 2010 the 4th respondent was nominated to be the managing partner. Not disputed is the fact that he has 30% of the stake, while the other five partners have 70%.

31. The Managing Partner representing the rest of the partners, at best, has the advantage of being *primus inter pares*. That apart, he does not enjoy any privilege to take a decision unilaterally that he,

notwithstanding the intention of other partners having a majority stake, does not go for the renewal of the licence or that he wants to have the licence renewed for himself.

32. As the record bears out, in W.P.(C) No. 19121 of 2015 the 4th respondent has gone on record saying that he had no intention of having the FL-11 licence renewed because the firm had been sustaining loss. At any rate, the learned Senior Counsel for the 4th respondent at Bar has represented that now he, too, has applied for a licence.

33. We may examine the ratio of **Panamoottil Investments** (supra) rendered by a learned Division Bench of this Court. A partnership firm initially having one managing partner had another partner also designated as a managing partner. Thus, instead of one, two managing partners started representing the firm. The Excise Commissioner has treated this as amounting to transfer of licence as well as the reconstitution of the firm.

34. In that factual background, the learned Division Bench has held that the licence has, in fact, been in favour of the partnership

firm. Their Lordships have further held that neither the partnership is reconstituted nor the name of the licensee is changed. So, Sub-rule (iii) of Rule 19 and the main part of Sub-rule (iv) under Rule 19 of the Rules have no application to the facts of the case.

35. I am in respectful agreement with the said ratio that it is the firm that has the licence, and that the managing partner only represents the firm.

Issue No.2:

36. In **Donnie J. M. Philip** (supra), the facts are, more or less, similar to the case on hand. The Excise Commissioner recalled the FL-3 licence on account of the disputes among the partners. In that context, a learned single Judge of this Court has held that if there are disputes among the partners touching upon their rights, they have to be resolved in civil proceedings. Having observed thus, the Court has disapproved the action of the Excise Commissioner in suspending the FL-3 licence till the disputes between the partners are settled.

37. To the credit of the Excise Commissioner, it is to be stated that both Exts.P5 and P8 are very well reasoned and balanced. As a

quasi-judicial authority, the first respondent has conducted himself exemplarily in adjudicating the dispute. At any rate, having issued Ext.P5 proceedings, while status quo order in W.P.(C) No. 19121 of 2015 was in force, there had been no occasion for the Excise Commissioner to recall Ext.P5 by issuing Ext.P8. But I hasten to add that the learned Division Bench of this Court, indeed, has directed the Excise Commissioner to take a decision concerning the renewal of the licence after hearing all the parties concerned, including the 4th respondent.

38. In that context if we examine further, first, Ext.P5 was issued on 24.06.2015, and status quo order in W.P.(C) No. 19121 of 2015 was issued on 24.07.2015. On the other hand, the learned Division Bench of this Court disposed of the writ appeal on 11.06.2015. Evidently, before a copy of the judgment in the writ appeal could be made available to the Excise Commissioner, presumably oblivious of the said direction, he went ahead and issued Ext.P5. Later, after hearing all the parties, he issued Ext.P8.

39. A perusal of Ext.P8 reveals that essentially two grounds have

weighed with the Excise Commissioner to recall Ext.P5: the partners have not filed any application for the reconstitution of the firm, and they have not made any efforts to have the licence transferred in terms of Rule 19(4) of the Rules. The Excise Commissioner has reiterated the fact that Ext.P5 was only provisional. At the same time, there is no occasion for the partnership firm or its partners to have the transfer of licence since it is the partnership firm that has the licence represented by its managing partner. Thus, there is no reconstitution.

40. At this juncture it is pertinent to refer to the repeated assertion of the learned Senior Counsel for the 4th respondent that the dispute among the partners is essentially a question of fact required to be resolved before a civil court. According to him, the rest of the partners, qua the firm, cannot use the public law remedy of judicial review to settle the private disputes. Indeed, the Court totally endorses the contention of the learned Senior Counsel. But the fact of the matter is that the said statement applies with equal vigour on either side.

41. Admitted is the fact that the 4th respondent on one side and

the remaining five partners on the other are at loggerheads. Neither of the rival groups has chosen to approach a civil court or an arbitrator, as the case may be, so far. They have rather chosen to spar with each other in the manner of a shadow boxing using Article 226 of the Constitution. This Court, nevertheless, has no intention of driving them to any litigation, unless they choose to.

42. The petitioner firm has been in the business for many years; first it had an FL-3 licence and later it had an FL-11 licence, till recently. The 4th respondent, as the Managing Partner, at least initially, was willing to apply for the renewal of the licence. As is evident from Ext.P7, the firm has huge liabilities. The Court's endeavour is to see that the business goes on, provided the firm is otherwise eligible, more particularly when partners having 70% stake are in unison.

43. Under these circumstances, I am of the considered opinion that Ext.P8 suffers from an incurable legal infirmity and requires to be set aside and is accordingly set aside. As a result, Ext.P5 stands restored.

44. At any rate, this Court, as a truism, is conscious of the disputes among the partners. The renewal of the licence and the consequential continuation of the business by the rest of the partners should not be to the disadvantage of the 4th respondent. Admittedly, he has 30% stake. If at all the 4th respondent has any grievance that he has been sidelined in the decision-making by the rest of the partners or that the rest of the partners by virtue of their majority have been acting adversely to his interest, he is at liberty to take appropriate legal remedial steps in that regard.

44. As has rightly been contended by the learned Senior Counsel for the 4th respondent, this Court under Article 226 of the Constitution of India cannot be used as a forum for adjudicating the disputed questions of fact, especially concerning a private contract in the nature of partnership.

With the above observations, both the writ petitions stand disposed of. No order as to costs.

sd/- DAMA SESHADRI NAIDU, JUDGE.

