IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 20TH DAY OF JULY 2015/29TH ASHADHA, 1937

WP(C).No. 30533 of 2005 (I)

PETITIONER(S):

REJIMOL THOMAS, AGED 40 YEARS,
D/O. P.J. THOMAS, AMAL GARDENS, AMALGIRI P.O.
KOTTAYAM.

BY ADV. SRI.M.J.THOMAS

RESPONDENT(S):

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1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO LOCAL SELF
GOVERNMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. DEPUTY DIRECTOR OF PANCHAYATS,
KOTTAYAM.

3. ARPOOKARA GRAMA PANCHAYAT,
VILLOONNI, KOTTAYAM, REPRSENTED BY THE SECRETARY.

4. SECRETARY,
ARPOOKARA GRAMA PANCHAYAT, VILLOONNI, KOTTAYAM.

R3,4 BY ADV. SRI.M.V.BOSE
R1 & 2 BY ADV. SR GOVERNMENT PLEADER SRI.RAMAPRASAD UNNI

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/6/2015 THE COURT ON 20/07/2015 DELIVERED THE FOLLOWING:

WPC NO.30533/2005

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF THE NOTICE DATED 19.7.2005.

EXT.P2: TRUE COPY OF THE RECEIPT DATED 25.7.2005 ISSUED BY THE 4TH RESPONDENT.

//True Copy//

PS to Judge

Rp

A.M. SHAFFIQUE, J.

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W.P (C) No. 30533 of 2005

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Dated this, the day of July, 2015

J U D G M E N T

This writ petition is filed seeking for a direction to respondents 3 and 4, the Arpookara Grama Panchayat and its Secretary, to refund to the petitioner an amount of ₹2,30,230/- with interest or to adjust the said amount towards the future monthly licence fee and for other consequential reliefs. Petitioner also seeks to strike down Rule 23 of the Taxation and Appeal Rules on the ground that the same is unconscionable and unconstitutional, and a declaration that the Panchayat is not entitled to recover penal interest at the rate of 24% at compound interest.

2. Short facts involved in the writ petition would disclose that petitioner, being the successful bidder in an auction, obtained the right to use building No.1/802 for business purpose, on a monthly licence fee of ₹71,500/- for a period from 1/1/2003 to 31/12/2007. An agreement was executed on 31/12/2003. Petitioner had deposited an amount ₹2,14,500/- as security

deposit. According to her, she had made several improvements in the building and started conducting a medical shop. Petitioner was unable to pay monthly licence fee promptly, which came in arrears. According to the petitioner, without any notice, the 4th respondent seized and attached the medicines kept in the medical shop and an inventory was prepared. The shop was sealed and it was kept closed. Notice was issued demanding an amount of ₹11,15,150/- as arrear of licence fee which included penal interest of ₹15,150/. Further, petitioner was called upon to remit ₹2,30,230/- towards attachment expenses, which is 20% of the demand made. She remitted the entire amount and took back possession of the premises. Petitioner contends that the demand for attachment fee and penal interest is illegal. In the said set of facts, the petitioner had sought for the reliefs as aforesaid.

3. Though the learned counsel appearing for the respondents submits that counter affidavit has been filed, it is not seen on record. At any rate, argument note was filed *inter alia* contending that the levy of attachment charges and penal interest is in accordance with law and therefore, petitioner is not entitled to seek refund of the same. The challenge against the

validity of Rule 23 is totally unsustainable and the writ petition is liable to be dismissed.

4. Learned counsel for the petitioner at the time of argument submits that the only relief sought for is to seek refund of ₹2,30,230/- which had been collected as attachment fee.

5. The learned counsel for Panchayat submits that the attachment fee is collected in terms of Rule 23 of the Kerala Panchayat Raj (Taxation, Levy and Appeal) Rules, 1996 (hereinafter referred to as 1996 Rules). She relied upon the terms of agreement dated 31/12/2003 executed between the parties by which there was clear stipulation that the licence fee shall be paid every month in advance and late payment carries interest at the rate of 24% per annum. Further reference is made to Clause 11 which indicates that, the licensor has the absolute right to recover the dues, if any, from the licensee as if it were a tax due to the Panchayat. This, according to the learned counsel, permits the Panchayat to recover the amount as if it is a tax and therefore the provisions of the 1996 Rules, squarely apply. It is also pointed out that the judgments relied upon by the learned counsel for the petitioner in ***Thalavoor Grama Panchayat v. Salim*** (2004 (3)

KLT 835) and ***Peravoor Grama Panchayat v. Rafi*** (2004 (2) KLT 1115) have been overruled by the Division Bench in ***Pudunagaram Grama Panchayat v. A.Saleem & another*** (2005(4) KLT 415). It is argued that the amount due to the Panchayat even though it does not come within the category of arrears of cess, rate, surcharge, tax or fees, can be recovered in the manner provided in the 1996 Rules for collection of taxes and therefore, the recovery of penal interest as well as attachment charges are justified.

6. Having heard the learned counsel appearing on either side, the question to be considered is whether imposition of an amount of ₹230,230/- as attachment charges under the circumstances is justified or not.

Rule 23 of 1996 Rules reads as under:

> *"**23. Levy of fees on distraint**-(1) There shall be levied fees on distraints made under these rules according to the value of the property distrained and the rates specified below:*

The Sum distrained for	*Fees*
(1)	*(2)*
	Rs. Ps.
Upto rupees 10	*2 00*
Above rupees 10 and upto rupees 25	*5 00*

Above rupees 25 and upto rupees 50 10 00

Above rupees 50 and upto rupees 100 20 00

Above rupees 100, 2.00 rupees each for every 10 rupees

(2) The above rates shall include all expenses to keep the property distrained.

(3) The fees levied under this rule shall not include the cost of maintenance of any livestock distrained."

It is not in dispute that this fee can be levied on distraint according to the value of property distrained. If the value of the property is above ₹100, 2 rupees each for every 10 rupees is the distraint fee, that is 20% of the value of goods. It cannot be disputed that the above mentioned rules have been framed in exercise of power conferred under Sections 210 and 241 of the Kerala Panchayat Raj Act, 1994 (hereinafter referred to as the Act). The tax is not defined under the Rules whereas Chapter XIX of the Act, relates to finance and taxation. Section 200 relates to levy of various types of taxes which includes property tax, profession tax, advertisement tax, entertainment tax, service tax etc,. Section 203 relates to levy of property tax on all buildings and land appurtenant to it. Section 204 relates to profession tax. Chapter XIX therefore contains various statutory provisions which enables the Panchayat to recover various form of taxes, cess etc., and Section 210 indicates that any arrear of cess, rate, surcharge or tax imposed or fees levied under the Act shall be recovered as an arrear of public revenue under the law relating to recovery of arrears of public revenue for the time being in force. Proviso to Section 210 indicates that the Secretary of the Village Panchayat may directly recover by distraint, under his warrant, and sale of movable properties of the defaulter subject to rules as may be prescribed. Section 210 reads as under;

> *"**210. Recovery of arrears of tax, cess etc** - Any arrear of cess, rate, surcharge or tax imposed or fees levied under this Act shall be recoverable as an arrear of public revenue under the law relating to the recovery of arrears of public revenue for the time being in force:*
>
> *Provided that the Secretary of a Village Panchayat may directly recover by distraint, under his warrant, and sale of movable properties of the defaulter subject to such rules as may be prescribed:*
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> *Provided further that, it for any reason the distraint or a sufficient distraint of a defaulter's property is impracticable, the Secretary may prosecute the defaulter before a Magistrate".*

7. It cannot be disputed that the Panchayat is entitled to dispose of the property vested with it in accordance with statutory provisions. Though at the time when the licence was granted, the

Rules were not framed under the 1994 Act, presently, it is covered by the Kerala Panchayat Raj (Acquisition and Disposal of Property) Rules, 2005 (hereinafter referred to as 'the 2005 Rules'), which came into force on 14.3.2005. Rule 7 relates to the grant of Panchayat's own property for rent, lease or licence. Specific provisions are made under sub rules (7) to (11) when there is default on the part of licensee to pay the licence fee, which reads as under;

> *"(7) If any licensee defaults the remittance of licence fee beyond the period for which the amount deposited in accordance with the provisions of the licence, the Secretary shall, by notice in writing, demand the defaulter to remit the amount due along with interest or fine provided for in the agreement, within 7 days from the issuance of such notice and in the case of default, he shall make to close the premises temporarily at once and evict the possessor or possessors from there with or without the assistance of the police.*
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> *(8) Even if such premises are closed under sub-rule (7) the licensee shall continue as the user and possessor of that premises and shall be responsible for the safety of the properties present there. Provided that he shall not open such premises by force or shall re-enter there.*
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> *(9) When a premises is caused to be closed by the Secretary under sub-rule (7), he shall direct the*

licensee to remit the amount due within the period that may be specified in the notice.

(10) If the licensee remits the amount demanded under sub-rule(9), the Secretary shall handover possession of the premises to him immediately and if he defaults the payment of that amount, the Secretary shall cancel the licence at once and the order of cancellation of the licence shall be communicated to him and where it is not possible to communicate to him personally that order, it shall be published in the premises closed under sub-rule(7) and it shall be deemed to be sufficient notice.

(11) Where a licence has been cancelled by the Secretary under sub-rule (10) he shall after giving advance notice to the licensee and public notice dispose of the properties found in the premises by auction or otherwise on the date notified and the income received from it shall be set off towards the amount due from the licensee and other expenses and charges connected with the sale and the balance, if any, shall be returned to the licensee. If the income received from such sale is not sufficient to set off completely the amount to be realised from the licensee and other charges and expenses connected with the sale; the balance amount shall be realised from the licensee as arrear of tax due to the Panchayat."

Therefore, sub rule (7) contemplates closure of the premises of the licensee, on account of a default committed by him in payment of licence fee. From sub rule (8), it could be seen that even if it is closed under sub rule (7), the licensee shall continue as the user and possessor, but, he shall not be entitled to re-enter the same or open the premises by force. Sub rule (9) permits the Secretary to direct the licensee to remit the amount due within a specified period as stated in the notice. Sub rule (10) indicates that, if the licensee remits the amount, the Secretary has to hand over possession of the premises to him immediately and in the case of default, the Secretary shall cancel the licence at once. Sub rule (11) indicates the manner in which the amount is to be recovered, which apparently includes distraint and sale of property.

8. Now coming back to the 1996 Rules, Rule 14 enables the Secretary to serve a notice on the defaulter demanding the payment of tax. If the amount demanded is not paid or sufficient cause is not shown within the specified period, Rule 15 permits the Secretary to recover the tax by distraint under warrant and sale of property. Rule 18 is the procedure to be followed for seizure of property. Rule 18 reads as under;

*"**18. Procedure for seizure of property** - The*

officer conferred with the duty to execute a warrant shall, before making the distraint, demand the remittance of the tax due and the warrant fee. If the tax and fee are remitted no distraint shall be made, but where the tax or fee is not remitted, the officer shall,-

(a) seize the movable property of the defaulter as he may think necessary;

(b) make an inventory of the property seized in the presence of two witnesses; and

(c) give to the person in possession of the property seized, at the time of the seizure, a copy of the inventory and sale notice in Form No.2 appended to these rules;

Provided that a period of seven days shall be allowed for remitting the amount due and redeeming the property seized."

9. Ext.P1 is a notice issued under Rule 18 of the 1996 Rules. In Ext.P1, the demand is for an amount of ₹11,51,150/- along with attachment fee of ₹23,0230/-. The schedule to Ext.P1 indicates that the property seized has been separately shown. Petitioner was called upon to remit the amount of ₹11,51,150/- along with penal interest, warrant fees, attachment fees, etc., on or before 26/7/2005. Petitioner paid the amount demanded within the 7 days' period as prescribed in the notice. Rule 18 only permits the officer to demand the tax due and the warrant fee.

Distraint is made only if the amount is not paid in terms of Rule 18. In such an event also, the defaulter gets an opportunity to pay the amount and redeem the property seized.

10. In the present case, it is stated that an amount of ₹2,30,230/- was recovered as attachment fee. Learned counsel for the Panchayat submits that the same is distraint fee. Can such a fee be levied when the payment of arrears of licence fee is paid within 7 days of closure of the shop, is the question.

11. After the 2005 Rules have come into force, the Secretary or the authorised Officer will have to follow the said Rules for recovery of the licence fee. Sub rule (9) specifically provides that when a premises is closed under sub rule (7), the licensee shall be directed to remit the licence fee within a specified period. If he remits the amount demanded, the Secretary shall hand over possession back to the licensee or else licence will be cancelled and steps shall be taken under sub rule (11), by which the properties found in the premises will be sold by auction and the sale proceeds will be adjusted towards all amounts due, including charges connected with the sale.

12. The 2005 Rules had come into force on 14/3/2005. It is

therefore apparent that ***Saleem's case*** (supra) was not decided with reference to the 2005 Rules. That was a case in which a transaction under Section 74 of the Kerala Panchayats Act, 1960 for realisation of arrears of bid amount was considered. The Division Bench referred to Rule 22 of the Kerala Panchayats (Public and Private Markets) Rules, 1964 and also a notification dated 7/11/1962 (SRO No.319/62) and observed that in the light of such statutory provisions and the Residuary Rules of 1962, it is open for the Panchayat to recover the amount under the Taxation and Appeal Rules.

13. Presently we are concerned with a clear statutory provision under the 2005 Rules, since the recovery has been effected after the coming into force of the 2005 Rules, especially sub rules (7) to (11) of Rule 7 of the 2005 Rules. Viewed in that manner, invocation of Rule 18 of the 1996 Rules, was not justified. Even assuming for the sake of argument that the said provision could be invoked, it can only be done at a stage when sub rule (11) of Rule 7 of the 2005 Rules is invoked. Such a situation had not arisen in the case. The statutory provisions clearly indicate that the shop of a licensee can be closed by the Secretary if there

is non payment of licence fee and if the amount is not paid within the specified period in terms of Rule 7(9), the licence can be cancelled and steps may be taken for selling the properties inside the shop room. If the sale proceeds are not enough to satisfy the amount due to the Panchayat, along with other charges, the balance amount can be recovered as if it is an arrears of tax. Therefore, 1996 Rules can be invoked only at a stage when proceedings are initiated as per Rule 7(11) of the 2005 Rules.

14. It is therefore clear that if there is arrears of licence fee payable on account of non payment, right of the Panchayat is to initially close down the said shop and call upon the licensee to remit the dues within a specified time. As already stated, in the present case, though Rule 18 of the 1996 Rules has been invoked, Ext.P1 notice has to be treated as one under Rule 7(9). But, once the payment has been effected within the specified time, no other charges can be levied. In the said circumstances, I am of the view that the levy of attachment fee or distraint fee was not warranted in terms of the Rules and at the stage when the shop room had been closed. It might be true that the Secretary had invoked Rule 18 of the 1996 Rules, but then, there was no situation warranting

invocation of such a power when specific provisions have been made under the 2005 Rules. Viewed in that manner, the claim for attachment fee was unjustified and unwarranted.

15. In the result, this writ petition is allowed as follows:-

Respondents 2 and 3 are directed to refund to the petitioner an amount of ₹2,30,230/- (Rupees Two lakhs thirty thousand and two hundred and thirty only) within a period of one month from the date of receipt of a copy of this judgment, failing which, it will carry interest @9% per annum from the date of the judgment or in the alternative, if the licence is in force, the aforesaid amount shall be adjusted towards future licence fee, for which the 3rd respondent shall issue necessary intimation to the petitioner within the period aforesaid.

Sd/-

A.M. SHAFFIQUE, JUDGE

Rp

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PS to Judge