

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

WP(C).No. 24328 of 2008 (U)

PETITIONER :

U. THILAKAN, MANAGING PARTNER,
M.K.R ENTERPRISES, A.V.S ROAD, KOTTAKKAL – 676 503.

BY ADVS.SRI.N.NAGARESH
SRI.M.RAJEEV
SRI.T.V.VINU

RESPONDENTS :

1. STATE OF KERALA,
REPRESENTED BY SECRETARY, TAXES DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.
2. COMMISSIONER OF EXCISE, KERALA
COMMISSIONERATE OF EXCISE, THIRUVANANTHAPURAM.
3. ASSISTANT EXCISE COMMISSIONER,
MALAPPURAM.

R1 TO R3 BY GOVERNMENT PLEADER SRI.V.K.RAFEEQ

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :-

- EXT.P1 : COPY OF THE TEMPORARY INJUNCTION ORDER DTD.22.5.2003 IN C.M.A.No.5/2002 OF THE SUB-COURT, TIRUR.
- EXT.P2 : COPY OF THE INTERIM ORDER DTD.6.1.2004 IN W.P.(C) No.40953/2003 OF THIS COURT.
- EXT.P3 : COPY OF THE JUDGMENT IN W.P.(C)No.40953/2003 DTD.5.4.2004 OF THIS COURT.
- EXT.P4 : COPY OF THE INTERIM ORDER DTD.27.4.2004 IN W.P.(C) No.13037/2004 OF THIS COURT.
- EXT.P5 : COPY OF THE JUDGMENT IN W.P.(C)No.13037/2004 OF THIS COURT DTD.25.5.2004.
- EXT.P6 : COPY OF THE JUDGMENT IN O.S.No.42/2002 DTD.16.6.2004 OF THE MUNSIFF COURT, PARAPPANANGADI.
- EXT.P7 : COPY OF THE JUDGMENT IN A.S.No.80/2004 DTD.18.8.2004 OF THE SUB COURT, TIRUR.
- EXT.P8 : COPY OF THE REPRESENTATION DTD.20.11.2004 SUBMITTED TO THE 1ST RESPONDENT.
- EXT.P9 : COPY OF THE ORDER NO.XC6-2408/05 DTD.30.3.2005 OF THE COMMISSIONER.
- EXT.P10 : COPY OF THE JUDGMENT IN W.P.(C)No.19156/2005 DTD.13.10.2005 OF THIS COURT.
- EXT.P11 : COPY OF THE LETTER XC6-21023/05 DTD.2.1.2006 OF THE 2ND RESPONDENT.
- EXT.P12 : COPY OF THE ORDER No.XC1-21023/05 DTD.30.10.2006 OF THE 2ND RESPONDENT.
- EXT.P13 : COPY OF THE REPRESENTATION DTD.9.1.2007 SUBMITTED TO THE 1ST RESPONDENT.
- EXT.P14 : COPY OF THE LETTER No.776/A2/07/TD DTD.25.1.2008 OF THE 1ST RESPONDENT.
- EXT.P15 : COPY OF THE G.O.(Rt)No.154/1994/TD DTD.21.3.1994 OF THE 1ST RESPONDENT.

RESPONDENTS' EXHIBITS :- NIL.

True copy

P.A to Judge

ANIL K.NARENDRA, J.

W.P.(C)No.24328 of 2008

Dated this the 12th day of October, 2015

JUDGMENT

The petitioner who was an FL3 licensee running Hotel Peeyush Bar at Kottackal has approached this Court in this writ petition seeking a writ of certiorari to quash Exts.P9, P12 and P14 orders of the respondent and seeking a writ of mandamus commanding the respondents to refund him the proportionate part of the license fee for the period from 18.4.2004 to 27.4.2004 and 28.5.2004 and 18.8.2004, during which he could not conduct business due to Court orders.

2. Going by the averments in the writ petition, the petitioner is the Managing Partner of a firm M/s. M.K.R.Enterprises, which was granted FL3 license for conducting a bar hotel at Kottackal as per order dated 13.6.1989. While the petitioner was conducting the bar hotel, one Kalodi Kuchalankutty filed O.S.No.42/2002 before the Munsiff Court, Parappanangadi alleging that the bar is functioning violating Rule 13(3) of the Foreign Liquor Rules. An interlocutory application was filed before the Munsiff Court seeking an order to

restrain the petitioner from conducting the bar. The aforesaid Interlocutory Application No.331/2002 was dismissed on 27.03.2002. Against the said order of dismissal, the plaintiff filed C.M.A.No.5/2002 before the Sub Court, Tirur. The Sub Court by Ext.P1 order dated 22.5.2003 granted a temporary injunction restraining the petitioner from conducting the bar. Against Ext.P1 order, the petitioner filed CRP No.1230/2003 before this Court. This Court granted a stay of operation of Ext.P1 on 5.6.2003. Thus the bar remained closed from 22.5.2002 to 05.6.2003, though the petitioner had remitted licence fee for the said period.

3. However, CRP No.1230/2003 was finally dismissed on 4.9.2003. The petitioner thereupon filed W.P.(C). No.40953/2003 in which Ext.P2 interim order of stay was granted on 6.1.2004. Later, the said writ petition was dismissed on 5.4.2004 by Ext.P4 judgment finding that the filing of the writ petition after the dismissal of a CRP is an abuse of process of Court and consequently the bar was closed with effect from 17.4.2004. Thereafter, on 12.4.2004, one Thenampulakkal Shahud Hameed filed W.P.(C). No.13037/2004 before this Court seeking an order to close the bar run by the petitioner. This Court by Ext.P4 order dated 27.4.2004 directed to

maintain status quo as on 12.4.2004. Accordingly, the bar hotel was reopened on 28.4.2004. The said writ petition was later dismissed by Ext.P5 judgment dated 25.5.2004. Thereupon, the bar hotel was again closed on 27.5.2004. Later, O.S.No.42/2002 was decreed on 16.6.2004 by Ext.P6 judgment, injuncting the petitioner from running the bar hotel. Aggrieved by Ext.P6, the petitioner filed AS No.80/2004 before the Sub Court, Tirur, which was allowed on 18.8.2004 by Ext.P7 judgment, thereby setting aside Ext.P6 judgment of the Trial Court. Therefore, the petitioner would contend that due to various court orders his bar hotel remained closed for various periods, though he had remitted licence fee for the entire period. On 20.11.2004 the petitioner submitted Ext.P8 application to the 1st respondent seeking remission of licence fee of ₹4,58,630/- for the period from 18.4.2004 to 27.4.2004 (for 10 days) and for the period from 28.5.2004 to 18.8.2004 (for 83 days), when the bar hotel remained closed due to court orders. But the same was rejected by the 3rd respondent by Ext.P9 order dated 30.3.2005. Aggrieved by Ext.P9, the petitioner filed W.P.(C).No.19156 of 2005. This Court by Ext.P10 judgment quashed Ext.P9 order on the ground that it was one passed without hearing the petitioner and directed

the 2nd respondent to pass fresh orders. Thereafter, a personal hearing was conducted on 17.4.2012 and the 2nd respondent forwarded the request made by the petitioner in Ext.P8 to the 1st respondent along with Ext.P11 covering letter dated 2.1.2006. Later, the petitioner received Ext.P12 order of the 2nd respondent rejecting the request made in Ext.P8 for remission of licence fee. Aggrieved by Ext.P12, the petitioner submitted Ext.P13 representation dated 9.1.2007 before the 1st respondent. But the 1st respondent, turned down the said request by order dated 25.1.2008. It is mainly aggrieved by the aforesaid order passed by the 1st respondent the petitioner is before this Court in this writ petition seeking various reliefs. In the Writ Petition the petitioner contended that, while passing Ext.P14 order, the 1st respondent has not considered the law laid down by this Court in **Rajagopalan Nair v. Commissioner of Excise (1989(1) KLT 800)** and **Jayadevan v. Varghese (1999 (1) KLJ 87)**. The petitioner would also rely on Ext.P15 Government Order in which the licensee concerned has been granted proportionate remission under similar circumstances.

4. A counter affidavit has been filed on behalf of the respondents supporting the reasoning of the 1st respondent in

Ext.P14 and contending that the petitioner is not entitled for remission of licence fee for the period in question and as such there is absolutely no illegality in Ext.P14 order. The respondents would contend that, in Exts.P12 and P14, respondents 1 and 2 have considered in detail the application made by the petitioner for remission of licence fee and found that no refund as sought for could be granted under the relevant rules. Relying on Rule 14 of the Kerala Foreign Liquor Rules, 1953 the respondents would contend that, even when licence is being granted for limited a period during the course of financial year the full annual fee will have to be remitted. Therefore, according to the respondents, no remission/refund can be granted on the ground that the shop had remain closed for the fraction of a financial year.

5. I heard the arguments of the learned counsel for the petitioner and also the learned Government Pleader appearing for the respondents.

6. The issue raised in this writ petition is squarely covered in favour of the petitioner by the judgment of the Apex Court in **Chitra Vs. State of Kerala and others (ILR 2015 (4) Kerala 1)**. The Apex Court held that, a licensee is entitled to seek remission in

payment of licence fee, if the licensee was precluded from transacting business on the strength of licence because of factors and reasons extraneous to the licence and/or if the licence is granted only for a portion of the financial year, on the direction of this Court.

Paragraph 5 of the judgment reads thus:-

“**5.** We are in agreement with the learned senior counsel for the Appellant that the legal principle to the effect that no person can be prejudiced because of an act of a Court is apposite and relevant in the present case. We say this keeping in perspective the position that although the Appellant had applied for the FL-3 licence which would ordinarily run the course of one financial year, due to interim orders passed by the Courts, the Appellant could only utilize it for a fraction of that period. We hasten to clarify that the Appellant's application was not made in the duration of that year and was thus initially not for a fraction of the financial year. This Court has already held in **R.Vijaykumar v. Commissioner of Excise (1993 (4) SCALE 386)**, in the circumstances prevailing in that case, that the Department could not interfere with the utilization of the FL-3 licence, provided that the licensee complied with all other conditions as well as “payment of annual rental proportionately”. It is therefore clear that Rule 14 would not impede or inhibit the charging of annual proportionate fee so long as no failure is placed on the licensee or it is blameworthy itself. We must be quick to

clarify that in the event that a party applies for a period which is obviously not effective for the entire financial year, such as applying for a licence mid-way that financial year, the full fee for that year may be claimable or chargeable and, therefore, would have to be paid. In other words, had the Appellant applied for the licence even with the knowledge that because of external factors such as a pre-existing injunction order etc., she would not have been able to exploit it for the entire year, she may not have been liable to pay the licence fee for the entire year. This is not the factual matrix which obtains in the case at hand; the licence could only be granted for the period from 21.12.1999 to 31.3.2000, i.e. till the close of that financial year, owing to unforeseeable circumstances beyond the ken and control of the parties before us. We have already made a mention of the Division Bench Judgment delivered in **Jayadevan v. Varghese (1999 (1) KLJ 87)** which in turn was referred to in another Division Bench Judgment in **Rajagopalan Nair v. Assistant Commissioner of Excise (1989 (1) KLT 800)**, wherein the Division Bench directed that the licensee was entitled to remission of payment of kisht because of being disabled to conduct its business on account of the interim orders passed by the Court. We affirm the conclusions arrived at in these decisions. We hold that a party is entitled to seek a remission in the payment of licence fee if it is precluded from transacting business on the strength of that licence because of factors and reasons extraneous to it and/or if it is granted the licence on the direction of a Court for only a

portion of the financial year.”

7. In view of the judgment of the Apex Court in Chitra's case (supra) this writ petition is disposed of setting aside Exts.P9, P12 and P14 orders and directing the 1st respondent to re-consider the issue in the light of the law laid down by the Apex Court in Chitra's case (supra) and grant applicable remission to the petitioner for the period during which he was precluded from running bar hotel on the strength of the licence because of factors extraneous to the licensee, namely, due to court orders.

8. A reasoned decision in this regard shall be taken as expeditiously as possible, at any rate, within a period of three months from the date of receipt of a certified copy of this judgment, with notice to the petitioner and after affording him a reasonable opportunity of being heard.

The writ petition is disposed of as above.

Sd/-

ANIL K.NARENDRAN, JUDGE

jv/skj

True copy

P.A to Judge