

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 10TH DAY OF SEPTEMBER 2015/19TH BHADRA, 1937

WP(C).No. 30079 of 2014 (H)

PETITIONER:

P.AJAIKUMAR, S/O.LATE KANDANKUTTY,
MANAGING PARTNER, M/S.KANDANKUTTY
AND SONS-HOTEL SEA QUEEN, KOZHIKODE,
RESIDING AT 13/B, ELLYZEN COURT,
ARABIND GHOSH ROAD, KOZHIKODE.

BY ADVS.SRI.THOMAS ABRAHAM
SMT.MERCIAMMA MATHEW
SRI.V.RENJITH KUMAR
SRI.ASWIN.P.JOHN

RESPONDENTS:

1. STATE OF KERALA REP. BY THE SECRETARY,
DEPARTMENT OF EXCISE, SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.
2. SECRETARY, TAXES DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM - 695 001.
3. THE COMMISSIONER OF EXCISE,
KERALA STATE, TRIVANDRUM - 695 001.

BY GOVERNMENT PLEADER SRI.G.GOPAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 30079 of 2014 (H)

PETITIONER'S EXHIBITS:

EXHIBIT P1. THE TREU COPY OF THE APPLICATION DATED 26.02.2014 TO THE 3RD RESPONDENT AUTHORITY.

EXHIBIT P2. THE TRUE COPY OF THE ORDER NO.XC1-8161/2014/D.DIS DATED 30.05.2014 ISSUED BY THE 3RD RESPONDENT.

EXHIBIT P3. THE TRUE COPY OF THE COMMON ORDER OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ADDITIONAL BENCH, KOZHIKODE IN T.A.NOS.12/2012 AND 13/2012 AS WELL AS THE CROSS OBJECTION NOS.1/2012 AND 2/2012.

EXHIBIT P4. THE TRUE COPY OF THE JUDGMENT DATED 25.02.2014 IN W.P. (C)NO.5585 OF 2014.

EXHIBIT P4(a). THE TRUE COPY OF THE JUDGMENT DATED 30.09.2014 IN W.P.(C)NO.25424 OF 2014.

EXHIBIT P4(B). THE TRUE COPY OF THE JUDGMENT DATED 07.10.2014 IN W.P.(C)NO.25562 OF 2014.

EXHIBIT P5. THE TRUE COPY OF THE DETAILS OF THE EXISTING LOAN ACCOUNTS IN KERALA, FINANCIAL CORPORATION AS ON 11.11.2014 ISSUED TO THE PETITIONER.

EXHIBIT P6. THE TRUE COPY OF THE REPRESENTATION DATED 18.08.2014 SUBMITTED BY THE PETITIONER.

EXHIBIT P7. THE TRUE COPY OF LETTER NO.060429716/1045/2014 DATED 10.10.2014.

RESPONDENT'S EXHIBITS: NIL.

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.30079 of 2014 H

Dated this the 10th day of September, 2015

JUDGMENT

Facts in Brief:

This writ petition calls into question the need for clearing the abakri arrears, including any arrears of tax, as a pre-condition to having a partnership re-constituted for the purpose of carrying on the abkari business.

2. The facts in brief are that the petitioner is a Managing Partner of a firm called M/s.Kandankutty and Sons. The firm, initially comprising the father and three sons, has carried on hospitality business having hotels in different parts of the State. Initially, it had an FL-3 licence but later has come to possess an FL-11 licence to have Beer and Wine Parlours in its hotels, in the light of the change in the abkari policy of the State.

3. While the partnership comprised the father and three sons was contuing, the father died on 21.09.2006; thereafter, the three sons continued their business. Though the remaining partners applied to the abkari authorities for re-constitution of the firm in the face of death of one of the partners, i.e., the father, the authorities, however, through an order dated 28.04.2010, rejected their request. The rejection was on the premise that there were dues of abkari revenue from the firm or the partners, as the case may be. That order was not challenged.

4. In the course of time, one of the remaining three partners died. At that juncture, since it is a closely held family firm, one of the sons of the deceased partner, on his attaining majority, desired to be a partner as a 'successor' to the deceased partner. Accordingly, the petitioner, the Managing Partner, filed Exhibit P1 application on 26.02.2014 seeking re-constitution of the firm. The third respondent, nevertheless, rejected Exhibit P1 application

through Exhibit P2 order essentially holding that the firm could not be permitted to re-constitute itself on account of its abkari-revenue dues to the Government. Aggrieved, the petitioner has filed the present writ petition.

Summary of Submissions:

Petitioner's:

5. Sri.Thomas Abraham, the learned counsel for the petitioner, in the above factual background, has strenuously contended that, in terms of Section 3(1) of the Abkari Act ('the Act' for brevity), abkari revenue does not include any arrears of sales tax. He has further drawn my attention to Rule 13C of the Foreign Liquor Rules ('the Rules' for brevity) to contend that once the case of the petitioner does not fall within the mischief of Section 3(1) the Act, the embargo imposed under Rule 13C has no application.

6. The learned counsel has further submitted that the tax in most cases is erroneously assessed and imposed, but invariably either the Statutory Tribunal or the Appellate

Courts, including this Court, would be reversing the assessment, as can be seen from Exhibits P3 and P4. In other words, it is the specific contention of the learned counsel for the petitioner that unless there are an established or admitted arrears of revenue, be it tax or otherwise, the statutory embargo under Rule 13C does not apply.

7. The learned counsel has made elaborate references to various provisions of the Kerala Value Added Tax Act, 2003 ('the VAT Act' for brevity). To begin with, the learned counsel has laid emphasis on lexical provisions of Section 2(xix) of the said enactment to hammer home his contention concerning the definition of foreign liquor. The learned counsel has further referred to Sections 18A, 27, 28 and 29 of the said enactment. He would persistently contend that once there is a specific enactment dealing with sales tax, the generic provisions of the Abkari Act or the Rules made thereunder would not have the impact of

nullifying the statutory provisions under the said enactment.

8. According to the learned counsel, under the VAT Act there is no restriction on the legal representatives continuing the business. The learned counsel has further submitted that rejection of the earlier application through an order dated 28.04.2010 would not come in the way of the petitioner's maintaining Exhibit P1 application for re-constitution.

9. In elaboration, the learned counsel has submitted that earlier when the father had died, since all the three sons were already in the partnership firm, they continued the business not only as the partners but also as the legal representatives of the deceased partner. In the present instance, since one of the partners died, it is incumbent that his legal representatives, contends the learned counsel, be brought on record so that they could continue the business. The learned counsel in this regard has relied on Section

18A of the VAT Act to contend that there is a specific positive provision that the legal representatives of the deceased partner should be allowed to carry on the business. The learned counsel has eventually contended that the provisions of the VAT Act bind the third respondent as well.

10. In sum and substance, the contention of the learned counsel for the petitioner is that since no specific embargo has been imposed under the VAT Act, the third respondent ought not to have rejected Exhibit P1 on the premise that the petitioner has not complied with the mandate under Rule 13C of the Rules.

Respondents':

11. Per contra, the learned Government Pleader has submitted that Section 3(1) of the Act is very specific in its scope so as to include any tax as an element of abkari revenue. He has further submitted that the third respondent even in 2010 rejected the petitioner's

application for the same reason, but the petitioner did not assail it. According to him, it acts as res judicata in so far as the petitioner's fresh claim for re-constitution of the firm is concerned. The learned Government Pleader has also drawn my attention to the specific embargo imposed under Rule 13C that unless the partners, with joint and several liability, clear all the statutory dues and submit the sales tax clearance certificate from the department concerned, they cannot insist on having the partnership re-constituted.

12. Heard the learned counsel for the petitioner and the learned Government Pleader for the respondents, apart from perusing the record.

Issue:

13. As has been adverted to at the outset, the singular issue that calls for adjudication is whether the petitioner is entitled to have the partnership firm re-constituted without producing the sales tax clearance certificate from the department concerned.

Discussion:**The Statutory Setting:**

14. It is appropriate to adjudicate the issue confining to the impugned order, which, being cryptic, reads as follows:

“An earlier application for reconstitution of partnership deed of the Hotel submitted by Sri.P.Ajayakuymar by deleting the name of the deceased Kandakutty from the partnership had been rejected vide order read 1st above, since sales tax clearance certificate in respect of the deceased Kandankutty has not been produced.

The applicant has submitted the present application read 2nd above with the same request without presenting the sales tax clearance certificate in respect of the deceased Kandankutty and the firm.

As per Rule 13C of the FL Rules, in the case of Partnership each partner shall individually and collectively be responsible for the whole amount due to Government. The rule further says that no reconstitution of the partnership will be allowed if any of the partners is an Abkari defaulter.

Section 3(1) of the Abkari Act defines the term 'Abkari revenue'. It means revenue derived or derivable from any duty, fee, tax, fine or confiscation imposed or order under the provisions of the Act or of any other law for the time being in force relating to liquor or intoxicating drugs. In the light of the above provisions, the arrears due towards sales tax can be considered as 'Abkari Revenue' and therefore the partners of the firm are Abkari defaulters.”

15. A perusal of the above order makes it clear that the third respondent rejected the petitioner's claim for re-constitution of the partnership firm on the ground that the firm has failed to produce the sales tax clearance certificate. The authority has referred to Section 3(1) of the Act and concluded that the sales tax due from the partners should be treated as the abkari revenue due from the firm. As a corollary, the authority has held that the petitioner's claim for re-constitution falls within the mischief of Rule 13C of the Rules.

16. It is essential to examine the scope of Rule 13C of the Rules under which the third respondent rejected the petitioner's claim for reconstitution. Rule 13C reads as follows:

“In the case of partnership each partner shall individually and collectively be responsible for the whole amount due to Government. No partnership will be granted with a licence under these Rule if any of the partners are abkari defaulters or offenders under the Abkari Act 1 of 1077 or the Narcotic/Drugs and Psychotropic Substances Act, 1985 (Central Act 61 of 1985). No reconstitution of the partnership will be allowed if any of the partners is an

abkari defaulter or an offender under the Abkari Act 1 of 1077 or the Narcotics and Psychotropic Substances Act, 1985 or is disqualified under any of the provisions of these Rules.”

(emphasis supplied)

17. As can be seen from the above extract, it is clear that in the case of a partnership, each partner shall individually and collectively be responsible for any amounts due to the Government. It has been specifically mandated that no re-constitution of the partnership will be allowed if any of the partners is an abkari defaulter or an offender under the Abkari Act. Now the question boils down to whether the firm or any of the partners, since the firm is a compendious reference to all the individual partners, owe any abkari dues to the Government.

18. It is not in dispute that even prior to 2010 the partners, including the deceased partners, owed sales tax dues to the Government. For that precise reason, the petitioner's first application was rejected in 2010. In the present instance, too, the position has not improved and the

partners still are indebted to the Government.

19. Since heavy emphasis has been laid on what is meant by abkari revenue, it is further relevant to elaborate on the definition clause of Section 3(1), which, defining abkari revenue, reads as follows:

“Abkari Revenue:- “Abkari Revenue” means revenue derived or derivable from any duty, fee, tax, fine or confiscation, imposed or order under the provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs.”

(emphasis supplied)

20. As could be seen, the definition is exhaustive as it employs the legislative device of “means”. The revenue derived or derivable from any duty, fee, tax, fine or confiscation, imposed or order under the provisions of the Abkari Act or of any other law for the time being in force relating to liquor or intoxicating drugs should be treated as abkari revenue. As regards the definition of abkari revenue, the learned counsel for the petitioner has a two-fold objection: that the term 'tax' is not specifically explicit to include sales tax; that the law relating to tax should be

concerning the liquor or intoxicating drugs, exclusively.

VAT Act, 2003:

21. Indeed, it is the contention of the learned counsel that VAT Act, 2003, cannot be termed as an exclusive enactment dealing with liquor or intoxicating drugs or the tax therefrom. Attractive as the said submission may be, it does not pass, in my view, the judicial muster. In the first place, once the term tax has been employed in a generic manner, it takes into the fold every nuance or facet of it. It is, therefore, beyond dispute that 'sales tax' is one species of the tax, the genus.

22. It is facetious to contend that the enactment concerning tax should be exclusively confined to liquor or intoxicating drugs. I am afraid, it is inconceivable to have legislation with myriad manifestations; there cannot be hermetically sealed legislations. It is, indeed, chimerical to expect to have legislation confined exclusively to a singular field of activity notwithstanding the fact that it deals with a

homogenous subject but cutting across various fields of human endeavour. We cannot have many acts of evidence: one applying for marriage, one applying for succession, one applying for the contract, one applying for theft, one applying for murder and yet one applying for treason. Similarly, nor can we expect to have acts of partnership, confining to partnership in each field of commerce.

23. Wherever there is commerce, there is sale—it may be patent or latent; it may be tangible or intangible. Once a direct tax is legislatively applied, it is applied across the board, notwithstanding the variation of the product or service.

24. It is, thus, indisputable that any tax due towards the sale of liquor or any other intoxicating substance is also covered under the VAT Act. A person becomes a defaulter if he fails to pay the revenue due to the Government. The revenue can be any duty, fee, tax, fine or confiscation, imposed under any other law in force. A person becomes an

abkari defaulter if he defaults in paying the revenue relating to abkari. The tax on the sale of liquor being the revenue due to the Government, the petitioner is, ineluctably, an abkari defaulter. No re-constitution of the partnership will be allowed if any of the partners is an abkari defaulter.

25. As has been contended by the learned counsel for the petitioner, Section 2(xix), in fact, clearly defines what is meant by foreign liquor. Thus, I am of the opinion that any sales tax arrears would fall within the scope of abkari revenue and thereby form part of the embargo imposed under Rule 13C of the Rules.

26. Now, we may as well examine certain provisions in the VAT Act that have been relied on by the learned counsel for the petitioner. Section 18A of the VAT Act deals with special provisions for registration and continuance of business by the legal representatives of the deceased dealer. The very provision begins with a non-obstante

clause to the effect that notwithstanding anything contained in Section 11 of the Act. In fact, Section 11 deals with input tax credit.

27. It is axiomatic to observe that when there are two enactments covering two different fields with an incidental overlapping, there cannot be any presumption that one is repugnant to the other, and that the former should give way to the latter, in temporal terms. In other words, the canon of construction that a special enactment takes precedence over a general enactment—well entrenched, though—is not of universal application, much less with invariable implications.

Constraints of Construction:

28. It cannot, however, be concluded that under all circumstances the talisman of harmonious construction is to be invoked and the repugnancy as has been constitutionally consecrated under Article 254 of the Constitution is to be abandoned or wished away. As far as possible, without

doing violence to the language employed in the statute, our endeavour is to reconcile the jarring notes in the statutory Symphony, for most of the times what is is is not what it is. Sometimes, the provisions of the same enactments or the provisions in two different enactments may have the fortification of the non-obstante clauses. More often than not, there can be an enactment legislatively dealing with an issue in general and another, in particular. Yet, the courts have consistently held that there is no automatic presumption that one conflicts with another and the generic shall give way to the specific.

29. In the present instance, the petitioner wants us to believe that Rule 13C of the Rules is irreconcilably in conflict with Section 18A of the VAT Act. In fact, Section 18A of the VAT Act mandates that notwithstanding anything contained in Section 11 of the Act, where any dealer who is the sole proprietor registered under the Act dies and his legal heir continues business, then the legal heir shall

within four months obtain registration. The explanation appended to the section clarifies that the legal heir need not be an individual, it can even be a firm. The fact, however, remains that the person who has died must be an individual; obvious as it is. Without fear of contradiction it can be held that Section 18A of the VAT Act has no application in the present instance, for the dealer is a partnership firm rather than an individual.

30. Section 27 of the VAT Act deals with the assessment of legal representatives. In the present instance, once a person comes in as a partner in a firm, he no longer carries the tag, at least, of being a legal representative. As such, the provision, to my mind, has no application. In so far as Section 28 is concerned, it deals with the liability of the firms to pay sales tax. In fact, as has been the case with Rule 13C, Section 28 of the Act also makes the liability of all the partners of the firm joint and several; beyond that it does not come to the rescue of the

petitioner. Eventually, if we examine Section 29 of the Act, which has also been relied on by the learned counsel for the petitioner, it deals with the dissolution of the firms and discontinuation of the business. I am afraid, neither is the case here. Even otherwise, I am of the considered opinion that the VAT Act and the Abkari Act deal with two entirely different facets of the law. Indeed, the VAT Act, among other things, concerns itself with imposition and realisation of tax, be it the sales tax. On the other hand, the Abkari Act regulates any trade or business in noxious substances such as liquor.

31. If a person is desirous of carrying on any business that does not come in conflict with any of the provisions of the Abkari Act, indeed, there may not be any statutory interdiction on his continuing the business taking recourse to the provisions as have been contained in the VAT Act, a case in point being Section 18A. Once the provisions of the VAT Act, if at all, read in conjunction with

Section 3(1) of the Act and Rule 13C of the Rules, the inevitable conclusion is that unless the person meets the pre-requisites as have been set out in Rule 13C, he cannot take advantage of an enabling provision, if any, of the VAT Act.

The Impact of Earlier Rejection:

32. At this juncture, it may not be out of place to further hold that the very rejection way back in 2010 of the application filed by the petitioner for re-constitution acts as res judicata. Placing reliance on **Livingstone v. Westminster Corporation**¹, **Re Birkenhead Corporation**², **Re 56 Denton Road Twickenham**³, **Society of Medical Officers of Health v. Hope**⁴, and **Burn & Co., Calcutta v. Their Employees**⁵, S.K. Das, J in **Ujjam Bai v. State of UP**⁶ has held that the characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong.

¹ [1904] 2 K.B. 109

² (1952) Ch. 359

³ [1953] Ch.51

⁴ [1959] 2 W.L.R. 377

⁵ (1957) 1 LLJ 226 SC

⁶ AIR 1962 SC 1621 (accessed from MANU/SC/0101/1961)

33. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts *stricto sensu* but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of *res judicata* has been applied to such decisions.

34. It is further observed that although the rule of *res judicata* as enunciated in Section 11 of the Code of Civil Procedure does not in terms apply to quasi-judicial tribunals, its underlying principle which is founded on sound public policy and which is of universal application

must apply.

35. As it emerges from the record, the petitioner earlier applied for re-constitution of the firm soon after the death of his father, but that was rejected by the authorities on 28.04.2010. Now, the petitioner, as the Managing Partner, revived his effort with an added cause that another partner, too, died. For his second attempt to have the firm re-constituted the excuse is that the legal representative of the deceased partner has desired to be a partner.

36. I may add that the difference between the first attempt and the second attempt of the petitioner to have the firm re-constituted is that another partner has died. It has not introduced any material change to hold that the ground on which the earlier rejection was based is no longer available for the authorities.

Conclusion:

37. Firstly, the concept of legal heir succeeding to a partner and his or her getting automatically elevated to the

status of a partner by way of succession is hard to appreciate in the context of the Indian Partnership Act or the Kerala Abkari Act. Simply put, in the wake of the death of certain partners, the remaining partners want the firm to be reconstituted by inducting a new partner. Having already declared that Section 18A of the VAT Act, 2003 has no application, I am of the considered opinion that unless the petitioner or the firm satisfies the mandate under Rule 13C of the Rules, the possibility of re-constitution of the partnership firm is ruled out.

In the facts and circumstances, I find no merit in the writ petition and accordingly I dismiss it. No order as to costs.

Dama Seshadri Naidu, Judge

tkv

'C.R.'