

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

WP(C).No. 35956 of 2010 (T)

PETITIONERS :-

1. M/S.HOTEL KEETHI, THAMPANOOR,
THIRUVANANTHAPURAM-1, REP. BY ITS MANAGING PARTNER,
S.K.SUDHIR, AGED 47 YEARS, S/O.KRISHNANKUTTY.
2. K.KRISHNANKUTTY, AGED 80 YEARS,
S/O.KESAVA PANICKER(LATE), TC-24/817, KRISHNA BHAVAN,
THYCAUD, THIRUVANANTHAPURAM-695014.
3. S.K.SUDHIR, AGED 47 YEARS,
S/O.KRISHNANKUTTY, 8C, ROYAL PALMS,
OPP. XANADU, NEAR WOMEN'S COLLEGE, VAZHUTHACAUD,
THIRUVANANTHAPURAM-695014.

BY ADVS.SRI.C.C.THOMAS (SR.)
SRI.M.G.KARTHIKEYAN
SMT.T.V.NEEMA

RESPONDENTS :-

1. STATE OF KERALA,
REP. BY SECRETARY, TAXES (A) DEPARTMENT,
GOVT. SECRETARIAT, THIRUVANANTHAPURAM - 695 001.
2. THE EXCISE COMMISSIONER,
COMMISSIONERATE OF EXCISE, THIRUVANANTHAPURAM - 695 001.
3. THE DEPUTY COMMISSIONER OF EXCISE,
THIRUVANANTHAPURAM - 695 001.
4. THE CIRCLE INSPECTOR OF EXCISE,
THIRUVANANTHAPURAM - 695 001.

BY SR. GOVERNMENT PLEADER SRI. K.C. VINCENT

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
09-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS:

EXHIBIT P1 : PHOTOCOPY OF THE FL-3 LICENCE No.33/2010-11 - TVPM.

EXHIBIT P2 : COPY OF THE APPLICATION DATED NIL SUBMITTED TO THE
EXCISE COMMISSIONER.

EXHIBIT P3 : COPY OF THE LETTER DATED 07.02.2007 SUBMITTED TO THE
EXCISE COMMISSIONER.

EXHIBIT P4 : COPY OF THE ORDER No. XC7-13615/06 DATED 16.3.2007 PASSED
BY THE EXCISE COMMISSIONER.

EXHIBIT P5 : COPY OF THE PARTNERSHIP DEED DATED 1.4.2007.

EXHIBIT P6: COPY OF THE MINUTES OF THE MEETING OF THE PARTNERS OF
THE 1st PETITIONER FIRM HELD ON 04.06.2010.

EXHIBIT P7 : COPY OF THE LETTER DATED NIL SENT TO THE 2nd RESPONDENT.

EXHIBIT P8 : COPY OF THE LETTER DATED NIL SENT TO THE RESPONDENT.

EXHIBIT P9 : COPY OF THE LETTER/ORDER No. XC7-21592/10 DATED 17.10.2010
PASSED BY THE 2nd RESPONDENT.

RESPONDENTS' EXHIBITS : NIL.

// TRUE COPY //

P.A. TO JUDGE

DMR/-

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 35956 of 2010

Dated this the 09th day of December, 2015

JUDGMENT

The first petitioner is a partnership firm comprising second and third petitioners as its partners, who are also incidentally father and son. To begin with, since 1981 the second petitioner, the father, had been the sole proprietor, having in his name an FL-3 licence till 2007.

2. For the first time, in 2005, owing to his ill health and also advanced age, the second petitioner, then in his mid-70's, wanted to induct the third petitioner, his son, into business thereby converting the proprietary concern into a partnership firm. In that regard, he submitted Exhibit P2 request to the second respondent. Since nothing significant materialized thereafter, once again, he submitted Exhibit P3 request in 2007 in terms of Rule 19 of Foreign Liquor Rules.

3. As can be seen from the record, the second respondent passed Exhibit P4 order on 16.03.2007 granting leave to the second petitioner to convert the business into a partnership firm. As a consequence, the second and third petitioners constituted a partnership through Exhibit P5 deed

dated 01.04.2007.

4. In the course of time, i.e. on 04.06.2010, given the second petitioner's advanced age (his being 80 years old), both the partners passed Exhibit P6 resolution allowing the second petitioner to retire. Consequently, the petitioners submitted Exhibit P7 request to the second respondent to permit the second petitioner to retire from the business so that the first petitioner, the son and sole partner, could carry on the business as a proprietor. Nevertheless, the second respondent passed Exhibit P9 order rejecting the petitioners' request. Assailing the same, the petitioners have filed the present writ petition.

5. The learned counsel for the petitioners has submitted that the second respondent in Exhibit P9 has assigned a very strange reason. According to him, Exhibit P9 amounts to a review of Exhibit P4, which is impermissible. He has further contended that since Exhibit P4 permission was granted on 16.03.2007, the subsequent amendment to Rule 19 on 01.04.2007 has no impact on the partnership constituted by the petitioners.

6. The learned counsel has also submitted that in the light of the changed Government Policy in March 2014, the petitioners have come to have an FL-11 licence from 01.01.2015 onwards. The learned counsel has also submitted that pending the writ petition, the second petitioner died last year leaving behind only the third petitioner to be the sole surviving person in the partnership. According to him, Exhibit P5 deed of partnership explicitly mandates that in the event of the second petitioner's death, the surviving partner should alone have all the rights in the business.

7. The learned counsel, in the alternative, has submitted that, if not by an official directive, even by operation of law now the partnership stood automatically converted into a sole proprietary concern because of the death of the second petitioner. And the third petitioner is its owner. Summing up his submissions, the learned counsel has urged this Court to set aside Exhibit P9, which according to him is illegal and arbitrary.

8. The learned Government with equal vehemence has submitted that though the authority passed Exhibit P4 order on 16.03.2007, the petitioners converted the business into a partnership only on 01.04.2007 by entering into Exhibit P5 partnership. According to him, since Rule 19 suffered an amendment on the same day—01.04.2007—by way of incorporation of a proviso thereto, Exhibit P5 and also the endorsement on Exhibit P1 by the Assistant Commissioner acknowledging the factum of partnership have become *non est*.

9. The learned Government Pleader has also further contended that in the light of the second petitioner's death, the very writ petition has become unsustainable. In addition, he has also submitted that Exhibit P6 resolution has lost its relevance and significance for the same reason: the death of the second petitioner.

10. The learned Government Pleader, in the alternative, has submitted that the respondent authorities have never objected to the conversion of the partnership firm into the proprietary concern; on the contrary, the objection is with

regard to their seeking the conversion without having a two-star classification. Accordingly, the learned Government Pleader has submitted that Exhibit P9 order is unexceptionable and needs no interference.

Issues:

(1) Whether the amendment to Rule 19 on 01.04.2007 will vitiate Exhibit P4 order dated 16.03.2007; and

(2) Notwithstanding Exhibit P4 order, since the partnership came into being only on 01.04.2007, whether the amendment to Rule 19 on the same day would render the whole process of conversion of business to sole proprietary concern from partnership firm *non est*?

Discussion:

11. As both the issues are interconnected, rather framed in the alternative, I propose to address both of them together. The bone of contention is whether the amendment to Rule 19 by way of incorporation of a Proviso on 01.04.2007 will nullify Exhibit P4 order. Of course, the next consequential issue to be determined is whether the execution of partnership deed on 01.04.2007 would mean that the actual partnership came into existence only on that day.

12. A learned Division Bench of this Court in an unreported judgment dated 12.08.2014 in W.A. No.950/2014, referring to an earlier Division Bench judgment in **State of Kerala and Others v. M.P. Shiju**¹, has held that once an official of the department has applied his mind and made the necessary recommendation concerning grant of any licence or facility, the subsequent change in the statutory position should not affect the rights of the applicant. This proposition of law stood repeatedly affirmed by this Court on various other occasions.

13. In the present instance, the second respondent did permit the second petitioner through Exhibit P4, dated 16.03.2007, to convert the sole proprietary concern into a partnership firm. In my considered view, the subsequent execution of Exhibit P5 partnership deed is only a consequential statutory formality complied with by the petitioners. *Ipso facto*, the amendment to Rule 19 on 01.04.2007 will not, definitely, nullify the second respondent's Exhibit P4 order.

¹ 2014 (2) KHC 343 (DB)

14. Indeed, the second petitioner died pending the writ petition. In that context, it is apposite to observe that Exhibit P5 partnership deed expressly records that in the event of the second petitioner's death, the first petitioner, the sole surviving partner, will inherit the entire business to the exclusion of all other persons.

15. Before proceeding further, it is essential to address another issue: whether the writ petition has been abated, so to say, because of the second petitioner's death? Law does not, in my view, compel that all the legal heirs of a deceased person should be brought on record for the continuation of the proceedings. It requires, at best, sufficient representation; in other words, the estate or the interest of the deceased shall be properly represented.

16. In the present instance, the deceased party has been sufficiently represented by his son, the third petitioner. His representing the estate of his deceased father is all the more justified given the fact that Ext.P5 partnership deed, which has not been disputed, records that the third petitioner should succeed to the entire business interest of the deceased

partner, the second petitioner.

17. Thus, since there is an effective representation for the second petitioner by the third petitioner, who is not only the other partner, but also a legal heir and representative, no question of abatement arises.

18. The learned Government Pleader has contended, as has already observed, that the authorities have no objection to the conversion of business, but for the fact that the petitioners' business has no two-star classification. I am afraid, the requirement is a pre-condition from 01.04.2007. By the time, the petitioners had obtained the necessary permission through Exhibit P4 from a competent authority.

19. In the alternative, if we assume that the petitioners had not applied for the change of the status of the business by way of the second petitioner's retirement, the business would have continued in the same manner until his death. Trite to observe that on the death of one of two partners, the very partnership, by operation of law, gets converted into a sole proprietary concern.

20. It is the specific contention of the learned Government Pleader that as partnership deed was executed on 01.04.2007 when the amendment came into effect, Exhibit P4 order and also the endorsement of the official on Exhibit P1 became non est. Specious as the contention may be, we cannot, further, be oblivious to the fact that the authorities in subsequent years continued to renew the licences in the name of the partnership firm. At no point in time have they interdicted the orders earlier passed.

21. At this juncture, the learned Government Pleader has advanced an argument that once an order has become a nullity, it requires no setting aside. Indeed, attractive is the proposition, but I am afraid it fails to pass the judicial muster. There is a subtle difference between an act being void and being voidable. If an order or an official act has no sanctity since inception or, in other words, it suffered any incurable, inherent statutory shortcoming, then alone does the order become stillborn and, therefore, is void *ab initio*.

22. On the other hand, if an order is valid at the time it was passed, but the subsequent, supervening events rob the

order of its sanctity, it needs, in my view, an express declaration that the order passed earlier has been rendered ineffectual in the light of the subsequent developments. In any event, the issue has been addressed only because the learned Government Pleader has raised it as an alternative plea. However, it appears to me that Ext.P4 becoming a nullity has never been contemplated even by the authorities.

23. The fact, thus, remains that in the light of the definitive pronouncement of the learned Division Bench of this Court that the date of order rather than its execution is material to determine the validity, the subsequent change in legal position will not have any vitiating impact.

Under these facts and circumstances, Exhibit P9 order is set aside. At any rate, in the light of the subsequent developments, since the second petitioner has died pending the disposal of the writ petition, even by operation of law, the business stood converted into a sole proprietary concern. As such, in my further considered view, no specific consequential order is required concerning the present status of the third petitioner's business. I, therefore, clarify that the third

petitioner here afterwards shall carry on his business as a sole proprietor and the officials shall recognize him as the sole proprietor of the business. Given the plea raised by the learned Government Pleader, it is entirely open for the respondent authorities to collect any statutory fee or other remittances from the third petitioner if it is legally permissible. No order as to costs.

DAMA SESHADRI NAIDU
JUDGE

DMR/-