

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

WP(C).No. 36844 of 2015 (E)

PETITIONER:

SAJ HOLDINGS (P)LTD., NEDUMBASSERY,
ERNAKULAM DISTRICT REPRESENTED BY
THE MANAGING DIRECTOR SAJAN VARGHESE.

BY ADVS.SRI.GEORGE POONTHOTTAM
SMT.NISHA GEORGE

RESPONDENTS:

1. STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.
2. THE COMMISSIONER OF EXCISE,
COMMISSIONERATE OF EXCISE,
THIRUVANANTHAPURAM - 695 001.
3. THE DEPUTY COMMISSIONER OF EXCISE,
DIVISIONAL OFFICE, ERNAKULAM, KOCHI - 682 011.

BY SR.GOVERNMENT PLEADER SRI.JOSEPH GEORGE

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
22-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 36844 of 2015 (E)

PETITIONER'S' EXHIBITS:

EXT.P1: TRUE COPY OF THE LICENSE NO.FL-3 NO.E174/11-12 ISSUED BY THE EXCISE COMMISSIONER ON 22/09/2011.

EXT.P2: TRUE COPY OF THE COMMUNICATION NO.12-HRACC(46)/2015 DATED 16/11/2015.

EXT.P3:TRUE COPY OF THE G.O.(MS) NO. 1139/2014/TD DATED 22/08/2014.

EXT.P4: TRUE COPY OF THE G.O.(P) NO. 211/2014/TD DATED 30/12/2014.

EXT.P5: TRUE COPY OF THE FL-11 LICENSE NO.133/2015-16 DATED 04/04/2015.

EXT.P6: TRUE COPY OF THE G.O.(P) NO. 141/2014/TD DATED 27/08/2014.

EXT.P7: TRUE COPYOF THE APPLICATION DATED 25/11/2015 GIVEN TO THE DEPUTY EXCISE COMMISSIONER, DIVISIONAL OFFICE, ERNAKULAM.

RESPONDENT'S EXHIBITS: NIL.

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.36844 of 2015 E

Dated this the 22nd day of December, 2015

JUDGMENT

The petitioner, a company engaged in the hospitality industry, initially having a three-star classification, had an FL-3 licence up to 31.03.2015. In the light of the change in policy, the Government on 27.08.2014 amended the Foreign Liquor Rules making, inter alia, five-star classification mandatory for any establishment to have an FL-3 licence.

2. At any rate, all those hotels which enjoyed FL-3 licence until the change of policy were given the benefit of having an FL-11 licence without any break, albeit on their request. The petitioner does have an FL-11 licence.

3. In the course of time, the petitioner having upgraded his establishment into a five-star hotel has sought an FL-3 licence. When the authorities have not acted on its

Exhibit P7 application for the grant of an FL-3 licence, the petitioner has filed the present writ petition.

4. Sri.George Poonthottam, the learned counsel for the petitioner, has submitted that the petitioner initially had an FL-3 licence, as by then even a three-star hotel could have it. It was denied further renewal of the said licence only on account of the change in Government policy rather than any shortcomings on the petitioner's part. In elaboration, the learned counsel has submitted that the very Rules have provided for a legal fiction—a deeming provision—as can be seen from Exhibit P4 notification, through which the Government amended Rule 13 of the Foreign Liquor Rules ('the Rules' for brevity) by inserting sub-rule 11(B).

5. The learned Government Pleader, on the other hand, in tune with the statement filed by the third respondent, has contended that as per the proviso to Rule 13(3) of the Rules, the licence of any bar hotel that remains

defunct for more than six months either during the period of validity of the licence or after its expiry shall not be renewed. By the same reckoning, according to the learned Government Pleader, an FL-3 licence not renewed or defunct for more than six months cannot be renewed.

6. The learned Government Pleader has, thus, contended that the petitioner's FL-3 licence was 'defunct' for more than eight months from 01.04.2015. Hence the petitioner's FL-3 licence, contends the learned counsel, cannot be renewed as per the Rules. He has brought to my notice that sub-rules 11(B)(i) to 11(B)(v) of the Rules were amended through G.O.(P) No.211/2014/TD dated 30.12.2014. The amendment was in the context of issuing FL-11 licences to those hotels included in the list of 418 hotels mentioned in a case then pending before the Hon'ble Supreme Court.

7. The learned Government Pleader has submitted that the licences granted under the amended sub-rule,

especially in compliance with the judicial directives, shall not be treated as a renewal of FL-3 licences. He has further contended that the FL-3 licence granted to the petitioner earlier shall be deemed to be an FL-11 licence as a matter of legal fiction. It cannot, reiterates the learned Government Pleader, be treated as a continuation of an FL-3 licence or renewal of the FL-3 licence held by the petitioner.

8. In the alternative, the learned Government Pleader has submitted that the FL-3 licence held by all of the licencees, including the petitioner, became defunct from 31.03.2014 or 31.03.2015, as the case may be. At present, there is no provision, according to the learned Government Pleader, to issue an FL-3 licence in continuation of the previous one expired on or before 31.03.2015. Summing up his submission, the learned Government Pleader has asserted that the petitioner's present application cannot be considered for renewal of an FL-3 licence, for renewal

contemplates continuation, which is absent.

9. Heard the learned Counsel for the petitioner and the learned Government Pleader for the respondents, apart from perusing the record.

10. Indeed, sub-rule 11(B) of the amended Rule 13 reads as follows:

“Notwithstanding anything contained in sub-rule (11), a licence in Form FL-11 shall be issued by the Deputy Commissioner of Excise to hotel where an FL-3 licence granted was in force as on 31st March 2014, on request by the licensee. The licence under this sub-rule shall be issued subject to the following conditions: -

(a) the licensee shall not treat the licence granted under this sub-rule as a renewal of FL-3 licence in his name. The FL-3 licence granted to him earlier shall be deemed to be an FL-11 licence for the purpose of the issuance of licence under this sub-rule and the licence issued under this sub-rule shall be deemed to be renewal of the same.”

11. In Exhibit P5 licence, conditions attached to Form FL-11 also mandate that the licensee shall not treat the licence granted under the sub-rule as renewal of FL-3 licence in his name. On the other hand, the FL-3 licence granted to him earlier shall be deemed to be an FL-11

licence for the purpose of issuance of licence under the sub-rule. Be that as it may, here is a legal fiction on the converse.

12. At any rate, the principal contention of the respondents is that FL-3 licence granted earlier came to an end owing to the Government's changed policy. The subsequent FL-11 licence granted to the FL-3 licencees cannot be treated as a renewal of the previous licence. Indisputably, Rule 13(3) of the Rules specifies that if a licence of any bar hotel remains defunct for more than six months either during the validity of the licence or after its expiry, it shall not be renewed.

13. In my considered view, the issue of a licence remaining defunct should be at the instance of the very licencee. In the present instance, the supervening statutory developments have stultified the efforts of all the FL-3 licencees to have the licence renewed. It cannot be treated

as a break. On the other hand, a break should be attributable to the conduct of the licensee who did not choose to renew the licence despite the provision or possibility for the renewal. Once the statute makes it impossible for a licensee to have his licence renewed, treating the resulting hiatus as a break amounts to compelling the licensee to perform the impossible and penalising him for his putative failure. Law, after all, does not compel a person to do the impossible.

14. In the present instance, all along, in terms of the then prevailing policy, the petitioner had an FL-3 licence. Later he could not have it renewed only because of the change in the Government policy. In that policy, the Government did impose a condition that the establishment must have a five-star classification to have the benefit of FL-3 licence extended. In due course, the petitioner has complied with the condition and sought the renewal of the

licence.

15. If it is not a renewal, it is at least a resumption. We cannot be oblivious to the fact that the petitioner in the interim continued with an FL-11 licence. I am further constrained to observe that though the legal fiction is on the converse, it hardly makes any difference whether an FL-3 licence is deemed to have been an FL-11 or vice-versa. Either way, the petitioner has continued to hold a licence. Viewed from another perspective, the legal fiction as has been espoused by the respondents obliterates FL-3 licence, as if it had never been given. For as per the amended sub-rule, all along the FL-3 licence is deemed to be an FL-11 licence. In such an event, the issue of cessation of the licence has no relevance.

16. In the facts and circumstances, the objections on the part of the respondent authorities cannot be countenanced and are accordingly rejected. As a

consequence, the respondents are directed to grant the licence to the petitioner provided he meets the other statutory criteria.

With the above observation, the writ petition stands disposed of.

Dama Seshadri Naidu, Judge

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