

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving the Order	Date of Pronouncing the Order
27.10.2017	.11.2017

CORAM

The Hon'ble Mr.Justice T.S.Sivagnanam

W.P.No. 20715 of 2011

and

M.P.No.1 of 2011

R.Arumugam
Licensee,
M/s.Breeze Bar,
Karaikal, Ward E, Block No.1,
T.S.No.6/1, Thirunallar Main Road,
Karaikal.

... Petitioner

Vs.

1.The Excise Commissioner,
Department of Excise,
Government of Puducherry,
Puducherry.

2.The Deputy Commissioner (Excise),
Office of Deputy Commissioner (Excise)
Government of Puducherry,
Karaikal.

3.Sri Sithi Kaliyamman Alayam,
Rep. by its Joint Secretary,
R.Murugavel,
No.1, Usman Colony,
Thirunallar Main Road,
Patchchoore, Karaikal.

सत्यमेव जयते

... Respondents

Prayer:-

Writ Petition filed under Article 226 of the Constitution of India to writ of Certiorari to issue a Writ of Certiorarified to call for the records on the file of the second respondent in Ref.9212/DCE/C2/2011-2012, dated 26.08.2011 and quash the same.

For Petitioner

:

Mr.G.K.Ilanthirayan for
Ms. Sai, Bharath & Ilan

For Respondents 1 & 2

:

Mr.J.Kumaran
Government Advocate

For Respondent 3

: Mr.R.Natarajan

O R D E R

Heard Mr.G. K. Ilanthirayan, the learned counsel appearing for M/s.Sai Bharath and Ilan, the learned counsel for the petitioner and Mr.J.Kumaran, the learned Government Advocate for the respondents 1 and 2 and Mr.R.Natarajan, the learned counsel for the third respondent.

2. The petitioner was granted a licence, in Form FL-2 to establish a Liquor Shop with Bar attached. Initially, the Shop and the Bar were located in a rented premises. After the petitioner's spouse purchased a property, in T.S.No.61/1, Tirunallar Road, Karaikal, they put up a construction to run the Liquor Shop and Bar in the said premises.

3. The petitioner applied for the transfer of the licence to their own premises, which was granted, and an order to the said effect was passed by the second respondent on 11.07.2009. The third respondent, who is the Secretary of a Temple situated opposite to the petitioner's new premises challenged the said order, by filing a Writ Petition in W.P.No.15240 of 2009. The said Writ Petition was dismissed, by order dated 17.08.2009. On Appeal, in Writ Appeal No.1432 of 2009, the Hon'ble Division Bench, by judgment, dated 06.11.2009, disposed the Appeal, and permitted the appellant (third respondent herein) to prefer an Appeal to the first respondent against the order, dated 11.07.2009 passed by the second respondent, granting permission to the petitioner to shift the Shop and Bar to the new premises. The Appeal filed by the third respondent was dismissed by the first respondent, by order, dated 07.07.2010. The third respondent, challenged the said order, by filing a Writ Petition No.25471 of 2010, which was partly allowed, by order, dated 18.02.2011, and the second respondent was directed to conduct a fresh enquiry into the matter.

4. On a perusal of the said order, dated 18.02.2011, made in W.P.No.25471 of 2010, it is seen that the Court made very strong observations against the second respondent, and the manner, in which he had granted the permission to shift the shop vide his order, dated 11.07.2009. In the meantime, the petitioner herein filed a Writ Appeal in W.A.No.1135 of 2011, against the order passed in W.P.No.25471 of 2010, dated 18.02.2011. However, the said Writ Appeal was dismissed by judgment, dated 24.11.2011. Even prior to that, the second respondent, after conducting a spot inspection, passed an order, dated 26.08.2011, rejecting permission to shift the shop and the petitioner was granted 30 days time to relocate the shop, failing which, the license will be suspended. This order, dated

26.08.2011 is impugned in this Writ Petition.

5. The petitioner's contention is that, the Temple was constructed in the year 2005, and it is a small Temple, put up by the third respondent, by encroaching into the poramboke land, and the Temple was constructed with an ulterior purpose, as the third respondent's house is situated adjacent to the Temple, and there is no road access to his property, and using the Temple, he obtained road access to his property.

6. Further, it is contended that the petitioner's Shop is situated on the opposite side of the road, and beyond the road, there is a small water channel, and beyond that, is the Temple and that would not in any way remain as an obstacle for locating the Shop. It is submitted that, before passing the order, dated 11.07.2009, the second respondent inspected the premises, called for objections, and after having found that there are no objections raised, granted permission. Therefore, the impugned order is required to be interfered with.

7. Further, it is contended that, the Pondicherry Excise Rules, 1970 (hereinafter, referred to as 'the Rules') has been amended during 2014, and in terms of amended Rule 113, the distance restrictions of 50 meters/100 meters from place of worship or Educational Institutions will not apply to areas designated as commercial or industrial by the Town Planning Authorities, and the area is a commercial area, and as per amended Rule 113, there can be no objection to locate the Shop and Bar in the present location.

8. The third respondent's contention is that, prior to passing the order, dated 11.07.2009, there were several objections raised by the public, which were all ignored by the second respondent, and arbitrarily the order was passed, and when the W.P.No.25471 of 2010 was heard, the original files were called for, and the Court found that the objections filed by the public of the area have not at all been taken into consideration and numerous representations have been sent and no material was placed to show that the area was a commercial area. In such background, the Court remanded the matter for fresh consideration. Upon remand, the second respondent has inspected the premises and assigned reasons, while passing the impugned order, as required under Rule 163 of the said Rules. The reasons being perfect and valid, the order does not call for any interference.

9. Mr.Natarajan, the learned counsel for the third respondent relied on the following reported decisions of this Court in support of his case:-

I) (2009) WLR 844 in the case of (Headmistress & Correspondent Jayaranai High School, Puducherry Vs. Union Territory of Puducherry and others).

ii) (2015) (1) CWC 9 in the case of (V.K.A. Velusamy Vs. The District Collector, Erode and others)

and

iii) (2016) (1) CTC 104 in the case of (R.Gopinath Vs. The District Collector, Virudhunager and others)

10. Mr. J. Kumaran, the learned Government Advocate referred to the counter affidavit and submitted that, in obedience to the direction issued by the Court, in its order, dated 18.02.2011, in W.P.No.25471 of 2010, the impugned order has been issued to relocate the Shop to some other to locate alternate site.

11. By way of reply, Mr. G. K. Ilanthirayan, the learned counsel for the petitioner contended that, at present, Temple is a huge structure, and on the date, when it was established, viz., in 2005, the Temple was a small Private Temple, and that cannot be a reason to direct the petitioner to shift the Shop to an alternate site.

12. After elaborately hearing the learned counsels appearing for the parties and carefully perusing the materials placed on record, this Court is fully convinced that the impugned order, dated 26.08.2011 is just and proper, and requires to be affirmed by this Court. This conclusion is supported by the following reasons:-

i) The contention of the petitioner that before passing the order, granting permission to shift the shop, vide order dated 11.07.2009, objections were called for by the second respondent, but no objections were received, and therefore, orders were passed. This contention is factually incorrect, as the Court, while deciding W.P.No.25471 of 2010, had called for the files, examined the same, and found that there were number of representations on behalf of the third respondent's Temple, including representation submitted to Excellency, the Lieutenant Governor of Union Territory, Excise Commissioner, Chief Secretary and the first respondent ignored all the objections and passed the order, which was held to be not sustainable. Therefore, at the first instance, the order granting permission to shift itself is an illegal order, as it has been passed

without considering the objections. Therefore, no right can accrue to the petitioner, by virtue of on such an illegal order.

ii) The reliance placed on the amended Rule 113 by the learned counsel for the petitioner is thoroughly misconceived. The rule, which would be relevant is the Rule, which was in force on the date when the petitioner sought permission for shifting the Shop, viz., 2009. If the unamended Rule 113 is enforced, the petitioner shop is clearly within the prohibited distance. The Rules do not make a distinction between a Public Temple and Private Temple. Rule uses the words "'Place on Worship'". The petitioner has substantiated that the Hindu Religious Department has sanctioned a sum of Rs.7,05,000/- during 2011 for carrying out renovation works in the third respondent/Temple.

iii) Thus, the fact that the third respondent/Temple is a place of worship cannot be denied. The contention that there is a small water channel and the Temple is situated beyond the water channel is hardly a defence for the petitioner, as there is a direct access from the road to the Temple, as could be clearly seen from the photographs produced by the petitioner as well as the third respondent. Therefore, after the Writ Petition filed by the third respondent was partly allowed, by an order dated 18.02.2011 and the matter was remanded to the second respondent, it appears that an IAS Officer, in charge of the Deputy Commissioner, had inspected the place and conducted an enquiry and has assigned reasons as to why the petitioner's Shop should be relocated. The five reasons assigned in the impugned order are as follows:

"(a) The premises of the liquor shop is located at a distance of (20) metres from the temple.

(b) Regular poojas are being performed by the temple authorities.

(c) Special occasions like full moon day are celebrated in a grand manner.

(d) Female devotees regularly visit the temple.

(e) The nearby area is developing into a residential agglomeration."

iv) Rule 163 of the said Rules deals with shifting of the Shop. Under the said Rule, the Licensing Authority may, either on the application of the licensee, or otherwise, and for

reasons to be recorded in writing, direct shifting of the shop from one place to another and a licensee shall not be entitled to any compensation on account of such shifting. Hence, if the Authorities find that, for some reason, the Shop cannot be located in a particular location, they can order for shifting. Equally, the licensee can also seek for shifting. When an application is filed by the licensee for shifting, a duty is cast on the Licensing Authority to examine as to whether such Application for shifting satisfies the statutory rules. Unfortunately, the Officer, who was holding the post of Deputy Commissioner during 2009, failed to discharge his statutory duty, and passed an arbitrary order, dated 11.07.2009 (granting permission to run the shop) which was rightly interfered by this Court, at the instance of the third respondent, by directing a fresh enquiry to be conducted. The new incumbent, who took over as Deputy Commissioner (Excise) has made a personal visit, and gave five reasons for rejecting the petitioner's request for shifting. There is no mala fides alleged against the Officials.

v) The correctness of the distance mentioned in the impugned order is not disputed. Certain defences have been raised by the petitioner, which are to be outrightly rejected as moonshine defences. The photographs produced by the petitioner as well as the third respondent shows a very dismal picture, where, devotees who are coming to the Temple have to virtually walk across the petitioner's Bar and Shop. There are photographs, showing a gang of persons standing in front of the petitioner's shop surrounded by policemen. Copies of First Information Reports registered on account of nuisance created by the petitioner's Shop has been filed as a compilation. There is nothing more to add to the reasons assigned by the second respondent, in the impugned order under the Pondicherry Excise Rules. It was submitted that the distance Rule is only for a Shop, which has been granted license, in Form FL-2, where vending or consumption is permitted. The license, in Form FL-1, permits only vending and prohibits consumption.

vi) In the case of Jayarani High School (supra), the contention was that, the Rule 113 of Distance Rules has no application to the licence in Form FL-1. This contention was rejected by the Hon'ble Division Bench, and it was held that, 'when objections are raised, it has to be considered by the Licencing Authority, and, it cannot be stated that, since Rule 113 does not apply to FL-I license, their objections will not be considered. In fact, the Hon'ble Division Bench pointed out that, there is no justifiable or acceptable reason as to why the Distance Rule be restricted only to FL-2 license and not for FL-I licence, where retail vending is permitted. This decision fortifies the case of the third respondent.

vii) In the cases of i) V.K.A.Velusamy and ii) R.Gopinath (supra) some what an identical situation arose for consideration and the Courts have held that when the people have right to oppose establishment of Liquor Shop, objections raised by them should be considered, and they need not wait till the damages is done or nuisance is created.

viii) As pointed out earlier, the second respondent, in the impugned order has given reasons (quoted above) for rejecting the Application for shifting, which is found to be just and proper. Unfortunately, the subsequent incumbent, who had become the Deputy Commissioner, appears to have taken contrary stands in the counter affidavit filed by him on 05.10.2016. This cannot be ignored as an inadvertent mistake, but, there is a suspicion that looms large, that such inconsistent averments are presumably to support the stand of the petitioner. This is sufficient to reject the counter affidavit in toto, and in particular, the averments set out in para No.4. However, in para Nos.7 and 8, the second respondent has accepted that the place, where, the Shop is presently located, is an objectionable place. The petitioner would state that, about 300 meters from his Shop, there is another FL-2 licensee, viz., M/s.New Land Hotel Pvt. Ltd., and the same has not been questioned/objected to. The second respondent has explained in his counter affidavit that, it is a Star Category Hotel, and it does not infringe the Distance Rules and different norms have been laid for issue of such Bar licence.

13. For all the above reasons, I find no error in the impugned order, and accordingly, the Writ Petition fails and it is dismissed. The petitioner is granted 30 days' time from the date of receipt of a copy of this order to shift and relocate the shop to a different location, failing which, the second respondent shall suspend the license of the petitioner, till the shop is shifted to the new location, as ordered in the impugned order. No costs. Consequently, connected Miscellaneous Petition is closed.

s/d-

Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

msm

To

1.The Excise Commissioner,
Department of Excise,
Government of Puducherry,
Puducherry.

2.The Deputy Commissioner (Excise),
Office of Deputy Commissioner (Excise)
Government of Puducherry,
Karaikal.

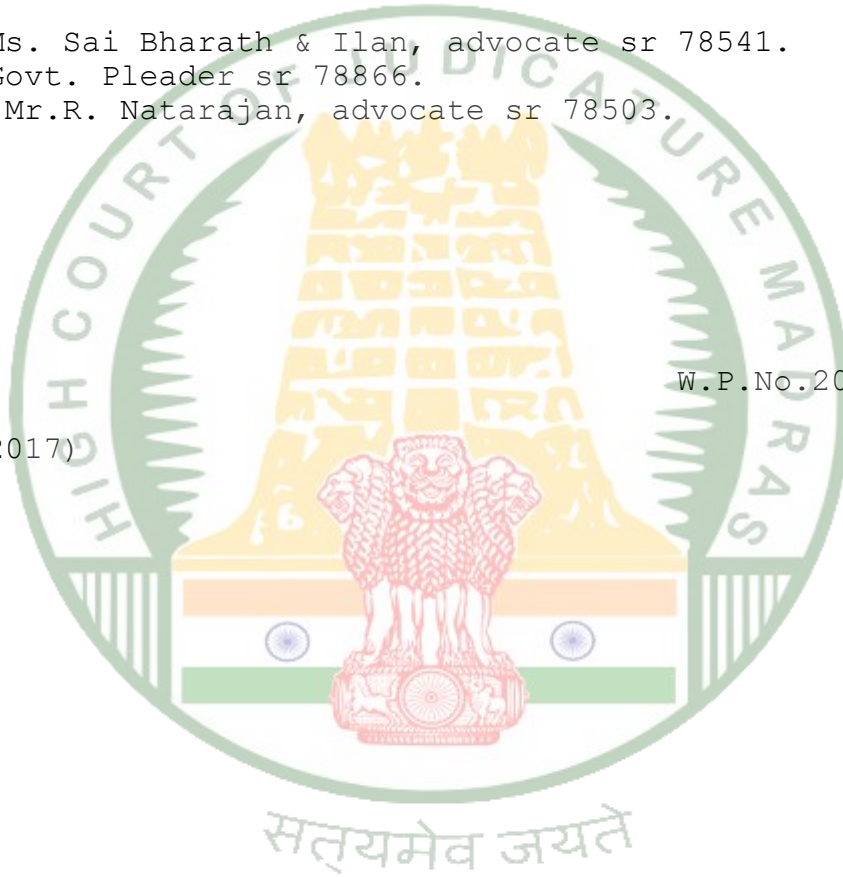
+1 cC to Ms. Sai Bharath & Ilan, advocate sr 78541.

+1 CC to Govt. Pleader sr 78866.

+2 cCs to Mr.R. Natarajan, advocate sr 78503.

W.P.No.20715 of 2011

SP(10/11/2017)



WEB COPY