

(1999) 11 KAR CK 0049
In the Karnataka High Court
Case No : Writ Petition No. 40111 of 1999

Geetha

APPELLANT

Vs

State of Karnataka and others

RESPONDENT

Date of Decision : 16-11-1999

Acts Referred:

Karnataka Excise Act, 1965 — Section 15, 26, 29, 29 (1)
Karnataka Excise Licences (General Conditions) Rules, 1967 — Rule 17, 17A, 17B

Citation : (2000) ILR (Kar) 909 : (2000) 2 KarLJ 383

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : Sri N.Y. Guruprakash, for the Appellant; Sri K.M. Shivagogiswamy, Government Pleader, for the Respondent

Judgement

1. The petitioner obtained a CL-9 licence dated 30-6-1999 for the excise year 1999-2000 (valid till 30-6-2000) for running a Bar and Restaurant at premises No. 3-2-79 and 3-2-42/1, near Gandhi Circle, Shorapur.
2. The second respondent issued a Circular dated 23-8-1999 informing all the Deputy Commissioners of Excise that this Court in the case of Mahabala Uggappa Adappa v Excise Commissioner and Others, had directed the Excise Commissioner to take immediate steps to cancel the excise licences where the businesses were not carried by the licensees themselves but by some other person on the basis of a "lease agreement or power of attorney or the like", and therefore the Deputy Commissioners of Excise should initiate action in respect of all retail licensees as per the said order of this Court and report compliance within 30-9-1999.
3. In pursuance of it, the third respondent issued a show-cause notice dated 28-9-1999 to the petitioner calling upon the petitioner to show cause why the CL-9 licence granted to her should not be cancelled as she had granted a power of attorney to one Raj Kumar to run the business. The notice also stated that running the business by granting a power attorney was illegal and that this Court

by order dated 10-6-1999 in Mahabala's case, supra, had directed cancellation of such licences. Petitioner filed detailed objections dated 12-10-1999 stating that earlier, the licence stood in the name of her mother Gomibai who died on 11-4-1997; and at that time she had given a power of attorney to her brother Raj Kumar Indnani to get the CL-9 licence transferred from the name of her mother Gomibai to her name and to run the said Bar and Restaurant; that she was running the business and had not transferred it to anyone else; that as she was not keeping good health, her brother had done everything and had even got the current licence for 1999-2000; and that subsequently, she had cancelled the power of attorney granted to her brother. She requested that the show-cause notice may be withdrawn as there was no violation of the rules and as she had also cancelled the power of attorney given to her brother.

4. The third respondent considered the objections filed by the petitioner and passed the impugned order dated 15-10-1999 (Annexure-H) cancelling the CL-9 licence granted to the petitioner on the following reasoning: (i) The general power of attorney dated 10-4-1997 does not mention that Raj Kumar was petitioner's brother; (ii) that petitioner has stated in the power of attorney that she was granting the power of attorney as she was a resident of Sholapur in Maharashtra and she was not able to run the business personally at Shorapur in Karnataka; (iii) that the said general power of attorney authorised the attorney holder to carry on the business and also to lease the business to others; and (iv) that the cancellation of the general power of attorney in favour of Raj Kumar on 12-10-1999 was only to avoid the consequences of proposed cancellation. In short, the third respondent has concluded that there is violation of the terms of licence on account of the business being carried on by the licence (petitioner) not personally, but through her power of attorney Holder Raj Kumar. Feeling aggrieved, petitioner has filed this petition and sought quashing of Annexure-H, dated 15-10-1999 passed by the third respondent.

5. The question that arise for consideration is whether granting a power of attorney by a licensee to run the licenced business, "per se" violates the provisions of the Karnataka Excise Act, 1965 or the Rules thereunder and whether this Court, in Mahabala's case, supra, directed cancellation of licences in all cases where the business is managed by a power of attorney holder of the licensee.

6. Section 15 of the Karnataka Excise Act, 1965 ["the Act" for short] prohibits sale of intoxicants except under the authority and subject to the terms and conditions of a licence granted in that behalf. Section 26 of the Act provides that every licence granted under the Act shall be granted on payment of such fees, for such period, and subject to such restrictions and on such conditions, as may be prescribed. Section 29 of the Act deals with cancellation or suspension of licences. Clauses (a) to (e) of Section 29(1) enumerate the circumstances in which the authority granting any licence under the Act may cancel or suspend it. Clauses (b) and (c) which are relevant are extracted below:

(b) in the event of any breach by the holder thereof, or by any of his servants or by anyone acting on his behalf with his express or implied permission, of any of the terms and conditions thereof; or

(c) if the holder thereof or any of his servants or any one acting on his behalf with his express or implied permission, is convicted of any offence under the Act; or

(emphasis supplied)

7. The Karnataka Excise (Sale of Indian and Foreign Liquors) Rules 1968 ("SIFL Rules" for short) deals with grant of licences for vending of Indian liquor and/or foreign liquor. Sub-rule (9) of Rule 3 described CL-9 licence as a licence for Refreshment Room (Bar) for sale of Indian liquor/foreign liquor combined with the supply of meals or eatables. Rule - provides for application for licence and Rule 5 provides for grant of licence, after inquiry. The conditions subject to which a CL-9 licence is granted, inter alia, provides that the licensee shall be bound by the provisions of the Karnataka Excise Act, 1965 and any general or special rules prescribed or which may, from time to time, be prescribed thereunder. It also reiterates that the licence may be suspended or cancelled in accordance with the provisions of Section 29 of the Act and that licensee or his employee shall be liable for prosecution for breach of any of the conditions of the licence, under the provisions of the Act or the rules and orders thereunder. The other conditions relate to strength of liquor to be served, liability to produce invoices and testing of samples, and maintenance and submission of accounts. It also restricts the sale of liquor only to persons supplied with meals or refreshment prepared and served for consumption in the premises and prescribes the opening and closing hours.

8. Rule 17 of the Karnataka Excise Licences (General Conditions) Rules, 1967 ("General Conditions Rules" for short) provides that the right of retail vend of liquor (governed by CL-2 licence) shall not be transferred by the licensee except with the previous permission of the Deputy Commissioner. Rule 17-A provides that in the event of death of the licensee during the currency of the licence, the Deputy Commissioner may, on an application by the legal heirs of the deceased with the previous sanction of the Excise Commissioner, transfer the licence in their favour. Rule 17-B provides for transfer of licences. It provides that in regard to licences issued for sale of Indian liquor or foreign liquor or both, in Form No. CL-1 or CL-2 or CL-7 or CL-9 under the Karnataka Excise (Sale of Indian and Foreign Liquors) Rules, 1968, the Deputy Commissioner may on an application by the licensee and subject to payment of transfer fee equivalent to the annual licence fee specified and with the prior approval of the Excise Commissioner, transfer such licence in favour of any person named by such licence, if such person is eligible for grant of a licence.

9. A conspectus of the above provisions, that is Sections 15 and 29 of the Excise Act, Rules 17-A and 17-B of the General Conditions Rules and Rules 3(9), 4 and

5 of SIFL Rules, discloses the following position regarding CL-9 licences:

- (i) A CL-9 licence is not transferable, except with the permission of the licensing authority, and subject to payment of prescribed transfer fee.
- (ii) On the death of a licensee, the licensing authority may transfer the licence to a legal heir/heirs of the licensee.
- (iii) A licensee is not entitled to lease out or sublet or transfer the CL-9 licence, otherwise than in accordance with Rule 17-B of General Conditions Rules.
- (iv) A licensee is not required to run or manage the business personally, but may run the business through an authorised agent or servant.

10. The State has the exclusive privilege and right of manufacturing and selling intoxicating liquor. Grant of a CL-9 licence is a privilege or permission granted by the State to the licensee to sell liquor in the manner prescribed in the licence. Parting with the possession and control of the business covered by the CL-9 licence would amount to transfer of such privilege and licence and such an act without the permission of the licensing authority, will be illegal and violative of the terms of licence. But, if the licensee retains possession and control, but only authorises a servant or an Agent to manage the business on his behalf, there is no illegality or infringement of the conditions of licence. In fact clauses (b) and (c) of sub-section (1) of Section 29 contemplate the business of a licensee being run by any agent or servant with the express or implied permission or authority of the licensee.

11. A transfer of licence may be either by way of a transfer simpliciter (that is transfer of the licence alone) or a transfer implied in, or consequential upon: (a) the transfer of the business of Bar and Restaurant covered by the CL-9 licence, by way of sale or mortgage with possession; or (b) the licensee parting with the possession and control of the business, by way of lease, sub-lease or an agreement of transfer and/or a power of attorney coupled with interest.

12. At this stage, it is necessary to refer to the difference between general powers of attorney [simpliciter] on the one hand and powers of attorney coupled with interest or irrevocable powers of attorney on the other.

12.1 A general power of attorney is executed as a matter of convenience. By executing such a power of attorney, the executant [principal] provides for management of his affairs/business/properties, by the agent. A power of attorney is normally executed when the executant is not personally able to attend to his affairs/business due to absence or due to incapacity or other preoccupation. The acts of the agent are binding on the principal. In spite of the absence of the principal (executant) granting the power of attorney, the possession and control of the affairs/business remain with the principal. A general power of attorney granted to an agent to manage the business of the principal does not create any right, title or interest in the asset or business which is the subject-matter of the power of attorney, in favour of the attorney holder.

Power of attorney is revocable at the will and pleasure of the principal. In short, under a general power of attorney simpliciter [either general or special], there is a mere authority to act, unaccompanied by any interest of the agent in the subject-matter of the power of attorney. A common example of such power of attorney is what is granted by a member of family to another family, member to run/manage the business/affairs of the grantor.

12.2 On the other hand, a power of attorney executed in pursuance of, or in furtherance of an agreement of sale, transfer lease etc., stand on a different footing. Where the authority is given to an agent for effectuating any security or to protect or secure any interest of the agent, then the power of attorney is irrevocable during the subsistence of such security or interest. An agency coupled with interest or an Irrevocable power of attorney for consideration, may amount to an equitable assignment of the rights under the contract, by the Grantor Executants in favour of the holder of the attorney. But, mere use of the term "irrevocable" in regard to a power of attorney does not make it "irrevocable" unless the assignment of interest in the subject-matter to the agent is anterior to, or simultaneous with the creation of power in the agent/attorney. The term, "Irrevocable" need not necessarily mean permanent. It only means that the power of attorney is not revocable at the will or pleasure of the principal or during the subsistence of interest in favour of the agent, but is "revocable" only in the manner contemplated under the agreement between the parties which led to the execution of the power of attorney, or is not revocable without the consent of the agent. The creation of interest in the agent or receipt of any consideration (either past, present or agreed to be received in future) by the principal from the agent should be disclosed in the power of attorney, to make it "irrevocable". In a power of attorney coupled with interest, the power to do the act is accompanied by, or is in pursuance of, a right or interest of the agent in the subject-matter on which the power is to be exercised.

13. I may refer to the following common examples of powers of attorney coupled with interest or powers of attorney for consideration at this stage:

(a) Where a power of attorney is executed by the owner of a property in favour of a person who agrees to purchase such property. The owner enters into an agreement of sale with the purchaser and receives full or part consideration for the sale and delivers possession of the subject-matter of the sale in part-performance and executes a power of attorney authorising the agent to effectively enjoy or use the property or even to sell the property. The non-completion of sale and execution of a power of attorney pending sale, may be due to several reasons, that is non-receipt of a part of the consideration or non-receipt of legal clearances required for a conveyance or even to postpone or avoid payment of stamp duty/taxes/fees related to a conveyance,

(b) Where a power of attorney is executed by the holder of a licence, to run his business, in pursuance of sale/transfer of the business by him, a person running licensed business may sell the business as a running concern or may let out the

business or grant permission to run the business for a specified period for consideration. Either on account of the prohibition regarding transfer of licence, or on account of absence of provision for transfer of licence or to avoid payment of fee for transfer, a power of attorney may be executed by the owner of a business or holder of a licence, in favour of the transferee/lessee (that is, person permitted to run the business by the owner) enabling him to run the business.

14. In Mahabala's case, *supra*, the holder of CL-9 licence, appears to have granted a lease of the Hotel without transferring the licence to the petitioner therein. The lessee sought a licence in his own name by way of renewal. The Deputy Commissioner of Excise directed that the licence be granted in favour of the original licensee, by way of renewal. There were several litigations. The writ petition was filed by the lessee of the Hotel challenging the vacation of interim stay of an order permitting the licence holder to shift the business to another premises. While dismissing the writ petition, this Court observed thus:

"..... If a person is not capable of running the business himself or through his staff, he should not ordinarily be entitled for any licence. Subletting or subleasing of premises where a business is carried on is also not permitted. In cases where it is found that on the basis of some agreement the business is being carried without permission of the Commissioner, it was appropriate that even the licence granted to the person who has permitted to delegate his power to somebody else should have been cancelled. No person can carry on business of vending the liquor without a proper licence and if vending of the liquor is permitted, under such arrangement or agreement it would frustrate the very object of having the control over the licensee or to make him even in some cases criminally liable. The petitioner has no locus standi to challenge the order of the Deputy Commissioner for transfer of the place of business and the petition is therefore liable to be dismissed.

It may also be observed that the Excise Commissioner should take immediate steps in cases like the present one where the business is not being carried on by the licensee but by some other person on the basis of lease agreement or the power of attorney or the like, then the proper step should be to cancel the licence itself. A copy of the order be sent to the Excise Commissioner, for taking proper steps after making the enquiry. Compliance report be sent within three months from the date of receipt of copy of this order".

The effect of the direction in Mahabala's case, *supra*, is that if someone, other than the licence holder, is running the business (Bar and Restaurant) in his own right, in pursuance of any lease, agreement, arrangement, power of attorney, then steps should be taken to cancel the CL-9 licence. The decision does not direct that wherever a general power of attorney is executed, the licence should be cancelled. It is no doubt true that this Court has made a passing observation that "if a person is not capable of running the business himself or through his staff should not ordinarily be entitled for any licence". These words refer to the stage of granting or renewing a licence and apparently intended to discourage

persons obtaining licences in the other's names. But the observation is not intended to prohibit a licensee from giving a power of attorney to a brother, son, relation or friend to manage the business. A person running a business through a power of attorney holder, in law runs the business "himself. When companies and firms can apply and obtain licences and run the business through their authorised agents or employees, there is nothing per se objectionable about a person giving a general power of attorney to his family member or friend, or an employee, to run a Bar and Restaurant. A company or firm or individual may own a chain of Restaurants all over the country or State and may grant a power of attorney to an agent/employee to look after the day-to-day management and to apply for licence every year. Mere execution of a power of attorney by the licensee to a family member or employee or friend, cannot lead to suspension or cancellation of the licence or refusal to grant or renew the licence.

15. There is no fundamental right to carry on trade or business in liquor. The State has the power to effectively regulate the various activities relating to intoxicants. As observed by the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, :

"The wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants on such terms of general application as the State deems expedient".

In *M/s. Jagadale and Sons, Bangalore and Vs. State of Karnataka and Others*, etc., , a Division Bench of this Court observed:

"The business in liquor is not per se lawful except when carried on under licence or permit and thus no right inheres in any individual to carry on trade in noxious or dangerous drugs. The moment the licence expires, cancelled or withdrawn, the right or privilege gets extinguished".

Having regard to the nature of licence and the obligations attached to a licence, under the Excise Act and Rules, it is open to the Licensing Authority to consider whether a person who applies for a licence through an attorney Holder or who proposes to run the business by executing a power of attorney is a bona fide applicant. Having regard to the decision in *Mahabala's case*, supra, it is open to the Licensing Authority to consider at the time of grant of licence as to whether the application is merely a camouflage for someone else running the business.

16. Thus, only if it is established that the possession and control of the licensed business has been transferred to someone else, or that the licensee has not retained any control over the licensed business, or where there is a transfer of licence without permission, the licence will be liable to be cancelled. On the other hand, if the licensee continues to have control of the licensed business, but runs the business through a servant or an authorised agent, (that is attorney holder) then there is no violation of the terms and conditions of licence, irrespective of whether the licensee lives in the city/place where the business premises is situated. The question of cancellation of the licence will not arise, in such a case.

17. Coming to the facts of this case, it is seen that there is no finding that the licensee [petitioner] has parted with the possession of the licensed premises or the control of the business to anyone else, in particular to Raj Kumar, the power of attorney holder. Nor has the licence been transferred by the petitioner to anyone else. The power of attorney was granted to a family member, even prior to the date of the licence being transferred from the name of the petitioner's mother to the petitioner. The petitioner obtained transfer of the licence from the name of her mother to her name by making an application through the said power of attorney holder, Raj Kumar. Grant of a power of attorney by a licensee to a family member, to manage the affairs or business of the licensee, cannot be considered as parting with the possession or transferring the control or transferring the licence to someone else. The third respondent has completely overlooked this aspect of the matter and has misconstrued the observations of this Court in Mahabala's case, *supra*.

18. Hence, the petition is allowed. Annexure-H, dated 15-10-1999 passed by the third respondent is quashed. Consequently, the petitioner will be entitled to continue her business. She will also be entitled to claim appropriate refund of licence fee in regard to the period during which she has been wrongfully prevented from carrying on the business by the impugned order. This order will not, however, come in the way of the Department taking any action in future, in accordance with law, if it is found that the petitioner has unauthorisedly transferred the licence or transferred the possession and control of the licenced business to anyone else.