(1998) 12 KL CK 0015

In the High Court Of Kerala

Case No : W.A.Nos. 1116 of 1997

Jayadevan and Others — APPELLANT

Vs

Board of Revenue (Excise) and Others — RESPONDENT

Date of Decision : 09-12-1998

Acts Referred:

Foreign Liquor Rules — Rule 14

Citation : (1999) 1 KLJ 87

Hon'ble Judges : K. Narayana Kurup, J;A.R. Lakshmanan, J

Bench : Division Bench

Advocate : K. Rama Kumar, M. Ramachandran, P. Ramakrishnan and M.C. John, for the Appellant; A. Sudhi Vasudevan, Bindu Mohandas and Govt.Pleader Alexander Thomas, for the Respondent

Final Decision : Dismissed

Judgement

K. Narayana Kurup, J.—One Varghese who figures as respondent in the Writ Appeals and the original petitions (who will be hereinafter referred to as the licensee for the sake of convenience) was in possession of an F.L.3 licence to run a bar at his hotel "Hotel Seven Hills" at Trichur issued pursuant to Ext. Pl order of the Board of Revenue dated 19-5-1984. The licence is seen renewed only upto March, 1986. Thereafter the licensee could not renew the licence for the period commencing from 1-4-1986 onwards due to financial difficulty. When his financial position improved, he submitted an application for renewal of licence as provided in the proviso to Rule 14-of the Foreign Liquor Rules. However, the Board of Revenue as per order dated 30-12-1996 rejected the said application on the ground that there is no provision in the Foreign Liquor Rules for the renewal of a cancelled licence. Aggrieved thereby, the licensee moved this Court in O.P. No. 8081/97 which was disposed of by judgment dated 16-5-1997 directing renewal of the licence on condition that he pays a sum of RsJ25,000/- each for every year as defunction within a period of two weeks from the date of receipt of a copy of the judgment and on such payment the Board of Revenue shall renew the licence within the said period. The aforesaid direction is impugned in Writ Appeal Nos. 1116/97 and l146/97 at the behest of leave granted appellants who were not parties to the original petition. O.P. No. 10081/97 is filed by an unregistered samithi to call for the records relating to Exts. P13 and P14 proceedings of the Govt. of Kerala and Board of Revenue respectively according sanction for renewal of F.L.3 licence and directing the Asst. Commissioner to renew the F.L.3 licence in favour of the licensee in the existing building on remittance of the additional rental for 11 years (Rs. 25,000/- for each year of defunction) over and above the rental for 1997-98 of Rs. 10 lakhs, and for other reliefs. O.P. No. 10132/97 is another writ petition filed by one P.P. Gopala krishnan as convenor of "Madhya Vilpana Sala Virudha Samithi", Trichur praying for the issuance of a writ of certiorari to quash all proceedings for sanctioning of a licence in favour of the licensee and for a declaration that the Asst. Excise Commissioner has no jurisdiction to grant such licence in favour of the? licensee and for other reliefs.

2. Since common question arises for consideration in the Writ Appeals and the Original Petitions, they are being disposed of by a common judgment treating Writ Appeal No. 1116/97 as the main case so much so, the fate of the rest of the cases will depend upon the outcome of this Writ Appeal.

3. W.A. No. 1116/97:-This appeal at the instance of a person who is not a party to the original petition is directed against the judgment of the learned single Judge in O.P. No. 8081/97 directing the Board of Revenue to renew the F.L.3 licence in favour of the licensee on condition that he pays a sum of Rs. 25,000/- for each year of defunction. The writ appeal is at the instance of a stranger (who was not a party to the writ) after obtaining leave of the court. Pursuant to Ext. Pl order of the Board of Revenue, the licensee was granted Foreign Liquor Licence No. 7/84-85 to run a Bar at his hotel "Hotel Seven Hills", Trichur. After obtaining the licence pursuant to Ext. Pl order of the Board of Revenue, the licensee started functioning the Bar at the said hotel. The licence was renewed upto March, 1986. Since the licensee could not renew the licence for the period commencing from 1-4-1986 for the period 1986-87 due to financial difficulties his licence became defunct on and from 1-4-1986 which was thereafter deposited with the Asst. Excise Commissioner, Trichur. When he attained financial soundness, he submitted an application dated 27-9-1996 for renewal of the licence as provided in proviso to R.14 of the Foreign Liquor Rules. The Board of Revenue as per Ext. P2 rejected the said application on the ground that there is no provision in the Foreign Liquor Rules for the renewal of a cancelled licence. Aggrieved by Ext. P2 letter of the Board of Revenue, the licensee moved this Court in O.P.8081/97 praying interalia for the issuance of a writ of certiorari to quash Ext. P2 and for the issuance of a writ of mandamus directing the respondents to renew the FL-3 licence No. 7/84-85 within a period to be fixed by this Court. A learned Single Judge of this Court disposed of the original petition by impugned judgment dated 16-5-1997 in the following terms:

Petitioner is a licensee of FL-3 licence. It has become defunct and meanwhile the petitioner took steps to revive the licence. That was disallowed by the impugned order. Now the petitioner''s counsel submits that in the case of such defunct licence the Board of Revenue allows revival of such licence on payment of Rs. 25,000/- each for every year in which the shop was not functioning. It is submitted that from 1986 onwards the shop is not functioning. So the petitioner has to pay Rs. 25,000/- each for every year in which the shop was defunct. Counsel for the petitioner points out that similar directions have been given by this Court in O.P. No. 14076/95 on 18th October, 1995 and Ext. P4 is a copy of the judgment.

2. The petitioner is therefore permitted to pay Rs"".25,000/- each for every year of defunction within a period of two weeks from the date of receipt of a copy of this judgment. On such payment the Board of Revenue shall renew the licence within the said period.

The original petition is disposed of as above.

4. In the absence of appeal the aforesaid judgment which is impugned in this writ appeal has attained finality. In compliance with the direction contained in the aforesaid judgment which is impugned in this writ appeal, the Government had passed an order directing renewal of the licence on payment of Rs. 25,000/- for each year of defunction over and above the annual rental for the year of renewal. However, in view of the stay granted by this Court the licence was not renewed for the year 1997-98. The challenge in this writ appeal is directed against the aforesaid judgment of the learned single Judge as already noticed.

5. Heard Mr. K. Ramakumar for the appellant in W.A. 1116/97 and the counsel appearing in the connected writ appeal and original petitions as also the counsel for the licensee.

6. The short question that arises for consideration in this writ appeal is whether a defunct licence can be renewed under the relevant provisions of the Foreign Liquor Rules upon payment of the fee etc. as prescribed under the said Rules? Rule 13 of the Foreign Liquor Rules deals with the various descriptions or kinds of licences that are contemplated under the said rule and the forms in which licences are to be issued to the licensees. Rule 13(3) deals with issue of FL3 Hotel (Restaurant) Licence. Such licence is issued to persons who satisfy the conditions specified in the said sub-rule. Proviso to Rule 13(3) under note 2 deals with renewal of licences of bar hotel. Proviso to Rule 14 specifically deals with renewal of licences granted under Rule 13 enabling the authorities to renew the licence of bar hot?is which did not or do not function on the expiry of the valid licence on payment of an additional rental of Rs. 25,000/- for each year of defunction over and above the annual rental for the year of renewal subject to observance of the other Rules in that regard, the substantive part of Rule 14 dealing with grant of a licence in the course ?f a financial year on payment of full annual rental. Admittedly, the Iicense was in possession of valid F.L.3 licence No. 7/1984-85 which got expired on the close of the financial year viz. 31-3-1986.

Thereafter, the licensee could not renew the licence with effect from 1-4-1986 because of financial problems and the shop remained defunct. Prior to 27-2-1991 a defunct licence was treated as dead for all practical purposes and could not be renewed. But by G.O. (MS) 27/91/TD dt.27-2-1991, the Government introduced an amendment to the Foreign Liquor Rules by which the defunct licence was made renewable under the Rules. No time limit is prescribed for submitting an application for renewal of a defunct licence. Therefore, going by the tenor and phraseology of the proviso to Rule 14, it has to be held that a renewal application in respect of a defunct licence is perfectly maintainable on payment of an additional rental of Rs. 25,000/- for each year of defunction, over and above the annual rental for the year of renewal which is a pointer that renewal of a licence need not necessarily of a valid current licence and that it can also be of a defunct-time expired licence as in the present case. If a renewal application for a defunct licence can be coinsidered only as one for a fresh licence, there is no legal warrant or basis in demanding the additional rental from the applicants for each year of defunction over and above the current rental. In fact, the State has also understood the Rules in the same manner is evident from Ext. P3 proceedings of the Board of Revenue dated 28-11-1996 whereby on the death of the original licensee on 21-10-1991 sanction was accorded for transfer of FL3 licence which was renewed only upto 1987-88 in favour of the wife of the original licensee and further to renew the licence for the current year 1996-97 on remittance of the rental for the current year and the additional rental for the current year and the additional rental for the defunct period. In Ext. P4 common judgment of the learned single Judge of this Court and in subsequent judgments consistent view taken is that a defunct licence can be renewed as provided under the proviso to Rule 14 of the Foreign Liquor Rules. In the absence of appeal, Ext. P4 judgment in the batch cases dealing with the same question has become final. We are further fortified in our view by the recent Division Bench decision of this Court in State of Kerala v. Abdulla Kunhi (1998 (2) KLJ 620) to which one of us (Lakshmanan, J.) was a party in which after adverting to Rules 13 and 14 of the Foreign Liquor Rules, it was held as follows:

A plain reading of the provisions contained in the proviso to R. 13(3) and Rule 14 would clearly indicate that even after the expiry of the period of licence, it can be renewed by the appropriate authorities if that authority is satisfied that the conditions mentioned in the said clause as such have been complied with by the applicant. In the instant case, the respondent is ready and willing to pay the additional rental of Rs. 25,000/- for each year of defunction. As in other cases, it is not a case of transfer. It is only a case of renewal of a defunct licence. Similar licences have been not only transferred but also renewed even for the current year (1998-99). As such, none of the grounds alleged in Ext. P3 order refusing to renew the licence are sustainable in law. Since the licence was granted to the respondent after complying with all the legal formalities and requirements, he is entitled to get renewal of the same after complying with the conditions mentioned in the proviso to Rule 14."

7. No appeal is seen filed against the judgment of the Di vision Bench. In the aforesaid view, the learned Single Judge was perfectly right in issuing the impugned direction to renew the defunct FL-3 licence in favour of the licensee after complying with the conditions in that regard and the same does not call for any interference by this Court, more so, at the instance of a person who is an utter stranger to the proceedings.

8. The licensee has a further case that the State cannot discriminate between the citizens carrying on business in liquor. In support of his contention, Ext. P3 order of the Board of Revenue has been pressed into service where a defunct licence has not only been renewed and transferred in favour of the legal representative of the original licensee but has been shifted to a new premises. Ext. P3 is not under challenge before any forum. If that be so, the licensee is also entitled to a like treatment. In this connection, we may usefully refer to the decision of the Apex Court in Khoday Distilleries Ltd" and others v. State of Karnataka and others, (1995) 1 SCC 574) wherein it has been held that when the State permits trade or business in potable liquor with or without limitation, the citizen has a right to carry on the trade or business subject to the limitation, if any, and the State cannot make a discrimination between the citizens who are qualified to carry on the trade or business, The aforesaid view was echoed by the Division Bench of this Court in the decision noted supra (1998 (2) KLJ 620) wherein adverting to similar facts it was held as follows:

A citizen has no fundamental right to do trade or business in liquor which is extra commercium and hence the trade or business in liquor can be completely prohibited and that the Government can impose limitations and restrictions on the trade or business in potable liquor as beverage. State cannot discriminate between citizens carrying on business in liquor within the region."

In contrast to the decision discussed above, the stand taken by the stranger leave granted appellant as well as by the Board of Revenue as reflected by the counter affidavit filed in O.P. No. 10081/97 is that the licence having been surrendered, it was cancelled by the Board of Revenue as per Order No. XA3-20149/86/L.Dis dated 4-11-1986. We are afraid we cannot accept the above stand now belatedly canvassed on behalf of the State which has been urged for the first time before this Court. Had there been an iota of bonafides in such a contention, it was open for the State to move the learned single Judge to review or clarify the directions issued as per the impugned judgment. Instead, the State has chosen to renew the licence in favour of the Hcensee as directed in the judgment under appeal. There was no appeal against the impugned judgment by the State either. That apart, the State miserabiy failed to convince this Court that there was a valid cancellation of the licence issued in favour of the Hcensee. No material was brought to our notice justifying the arrival of a conclusion that the licence in question was actually cancelled. The files do not disclose that the licence was cancelled. The proceedings cancelling the licence are not produced in spite of being directed to do so. On the contrary, what has been pleaded is that the alleged cancellation proceedings could not be produced as it was destroyed? In this connection, we have to observe that an order of the Board of Revenue which relates to an importam fact is not liable to be destroyed. In the aforesaid view, the case now set up by the State that the cancellation order could not be produced as the same was destroyed cannot be accepted. We are satisfied that the State has miserabiy failed to convince us that there was a valid cancellation of the licence issued in favour of the licensee. On the facts disclosed before us, we hold that the licence on its expiry on 1-4-1986 has become automatically defunct and there cannot be a cancellation of a defunct licence. Cancellation presupposes the existence of a valid licence, absence of the latter renders the proceedings for cancellation as one rendered it a legal vaccum it is not disputed that the licence expired on 31-3-1986 and that being so, no proceedings can be initiated for its cancellation culminating in the so called cancellation order on 4-11-1986 long after the expiry of the licence. Even if it is assumed that there is a cancellation order, such cancellation order cannot be given the imprimatur of this Court after the expiry of the licence, that too without giving the lincensee an opportunity of being heard thereby visiting the licensee with civil consequences in as much as cancellation may operate as a bar to renewal. Accordingly, we hold that there is no cancellation of the licence in question and on the contrary the licence has become defunct on its expiry on 1-4-1986.

9. The appellant had raised a contention that the Hotel in question does not have two star facility. The question as to whether the hotel in question complies with the requirements of two star facility must be presumed to have been considered by the Board of Revenue while passing Ext. R4(c) order directing renewal of defunct licence on payment of the amount referred to therein (vide counter affidavit of the licensee in O.P. 10081/97), If, as a matter of fact, the hotel in question does not possess two star facility, the Board of Revenue would not have passed Ext. R4(c) order. In this context, it is pertinent to note that the licensee is seeking renewal subject to condition that the hotel has two star facilities. It is, therefore, for the Board of Revenue or "the officers of Excise Department to consider this question. At any rate, it is not for the appellant busy body urge this contention before this Court. Therefore, the contention of the appellant that the defunct licence cannot be renewed as it does not possess two star facilities cannot be accepted.

10. Admittedly, the licensee was not in a position to start the Baron the basis of the impugned judgment of the learned single Judge due to the Interim stay granted by this Court in Writ Appeal No. 1116/97. In the event of the defunct licence being directed to be renewed at this stage of the year, the petitioner will be able to run the business during this year only for a period of four months is the grievance projected. The licensee relies on a decision of this Court reported in Rajagopalan Nair v. Asst. Commissioner of Excise (1989 (1) KLT 800 DB) wherein this Court has taken the view that proportionate remission can be granted with regard to the payment of rental during the period in which one is prevented from conducting the business on account of the Interim order passed

by this Court which is subsequently vacated. Going by the said decision we are of the view that it is only just and proper to allow proportionate remission with regard to payment of rental during the period in which the licensee was prevented from conducting the business on account of the interim stay passed by this Court. In the aforesaid decision (1989 (1) KLT 800 DB) it was held as follows:

Facts and circumstances disclosed that it is not on account of any fault of the appellant that he was disabled from conducting the business for almost half an year. He was precluded from conducting the business because of the Interim orders passed by this Court. So far as the State Government and the Revenue Board are concerned, they have consistently made orders permitting the appellant to conduct the business in the very premises itself. The State Government has therefore misdirected itself in declining to grant relief to the appellant."

On the above premise this Court held that the petitioner therein is entitled to remission on payment of kist for not being able to conduct the business on account of the Interim orders passed by this Court. Applying the same analogy we hold that the licensee will be entitled to proportionate remission of rental for the period during which he could not conduct the business on account of the interim stay issued by this Court.

In the result, there will be a direction to respondents 2 to 5 in this Writ Appeal No. 1 116/1997 to renew the defunct licence of the licensee on payment of a sum of Rs. 25,000/- for each year of defunction and the proportionate rental for the year 1998-99. This shall be done as expeditiously as possible, at any rate, within two weeks from today. Accordingly, we confirm the judgment of the learned single Judge and dismiss the writ appeal.

In view of the dismissal of the Writ Appeal No. 1116/97, connected Writ Appeal 1146/97 and O.P. Nos. 10081/97 and 10132/97 are only to be dismissed, which are accordingly dismissed. No costs.