(2010) 01 KL CK 0040

In the High Court Of Kerala

Case No : W.A. No. 2260 of 2009

Joshi APPELLANT

Vs

Benny Kurian RESPONDENT

Date of Decision : 18-01-2010

Acts Referred:
Kerala Abkari Shops Disposal Rules, 2002 — Rule 7(2), 7(3)

Citation : (2010) 1 KLT 711 : (2011) 6 RCR(Civil) 1301

Hon'ble Judges : V.K.Mohanan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : C.C. Thomas, M.G. Karthikeyan and Nireesh Mathew, for the Appellant; K.J. Josemon, Mathew Skaria and T.K. Vipindas, Government Pleader, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—Writ Appeal is filed by respondents 4 to 6 in the W.P.C. who were joint licensees of TS 37 in Group VII of Kaduthuruthy Excise Range, challenging the judgment of the learned Single Judge holding that appellants are not entitled to retain the toddy shop licence and carry on business in the building to which they have shifted under Ext. P2 orders of the Deputy Commissioner of Excise which is confirmed by the Excise Commissioner vide Ext.P 10, We have heard senior counsel Sri. C.C. Thomas appearing for the appellants-licensees, counsel appearing for respondents 1 to 3, who are the petitioners in the W.P.C, and Government Pleader appearing for the departmental authorities.

2. Admittedly, toddy shop No. 37 was in existence in the area Madhuraveli, where it is presently located for the last over 50 years. During the financial year 2008-09, toddy shop was located in a building which was required for it''s owner for construction of a house for his son. Therefore the building owner refused to issue consent letter to the appellants for renewal of licence for the financial year 2009-2010. However, on account of election, the licence period for the 2008-09 was extended from 31st March 2009 to 30th June, 2009. In between the

appellants took another building on lease and applied for shifting of the toddy shop in terms of Rule 7(3) of the Kerala Abkari Shops Disposal Rules, 2002, hereinafter called the "Rules". The Excise authorities noticed that the premises where the toddy shop was licensed for the last several years were within the prohibited distance from Church, Mosque and burial ground and the toddy shop was continuously granted renewal of licence only because of the second proviso to Rule 7(2) which permits shifting to a building which is also within the prohibited distance from Church, School and burial ground. The location of the toddy shop in the shifted premises is farther away from the School and Church, but is nearer to burial ground. Shifting was permitted by the Excise Authorities because second proviso to Rule 7(2) provides for grant of exemption from distance rule to existing shops for renewal of licence in the same place. When shifting approved by the Excise Commissioner was challenged in W.P.C. before this Court, the learned Single Judge relying on a Division Bench decision of this Court in Sreenivasan v. Asst. Excise Commissioner 2002 (1) KLT 542 held that shifting approved is in violation of Division Bench judgment and therefore he vacated the orders. Ext.R2(a) Circular issued by the Government was also declared illegal. However, senior counsel appearing for the appellants contended that shifting is governed by second proviso introduced to Rule 7(2) of the Rules and so much so the earlier Division Bench judgment which applies to period prior to introduction of the rule has no application. We agree with this contention because second proviso to Rule 7(2) provides for an exemption to the main rule which provides that toddy shop should not be located within the distance specified therein from Church, Mosque, burial ground, etc. Exemption takes into account situation where unobjectionable buildings are not available in a place for a toddy shop to be run or for existing toddy shops to get licence renewed. Admittedly, appellants'' toddy shop was functioning within the prohibited distance even after the introduction of the distance rule under Rule 7(2) because of the exemption granted under government orders. We find that after the second proviso was introduced the earlier government orders stand recognised by statutory rule and so much so, the government orders on exemption revive and apply for renewal of licences and for approval of shifting of existing toddy shops. Prior to the shifting, the toddy shop was stated to be nearer to the School and Church and after shifting it''s distance from Church and School was increased even though it is now closer to the burial ground. Even though Government Pleader and counsel for the appellants submitted that the allegation of respondents 1 to 3 is that shifting has reduced the distance between the toddy shop and the burial ground is incorrect, we do not think the same has any significance because while considering shifting application of a toddy shop already located within the prohibited distance from a School and Church on the one side and burial ground on the other, we feel shifting to a place farther away from the Church and School should be desired even if such shifting leads to further nearness to the burial ground. This is because burial ground is not always active and is generally a quiet place without any habitation or occupation by anybody. Burial takes place very seldom and the same takes only very little time.

Therefore while considering shifting application, the authorities should always keep in mind that the shifting should not be to a place nearer to a School, Church, Temple, Mosque or the like or even the housing colonies of SC or ST. In other words, our view is that among objectionable sites referred to in Rule 7(2) the burial ground should enjoy least importance while considering shifting application. In this case, Excise authorities have filed an additional affidavit stating that after shifting toddy shop has not gone nearer to the burial ground on which we do not want to adjudicate because of the view expressed by us that even if it has gone nearer to the burial ground the same does not disentitle the appellants for getting licence renewed in the new premises. We therefore allow the Writ Appeal by reversing the judgment of the learned single Judge and by upholding Ext.P2 and P10 orders issued by Excise authorities.

3. Counsel for respondents 1 to 3 submitted that respondents 1 to 3 will be able to locate a building which will be in conformity with Rule 7(2) that is beyond the distance from objectionable sites for the appellants to carry on business. We feel appellants should co-operate with respondents 1 to 3 to re-locate the toddy shop to the new premises to avoid nuisance to public places of worship, burial ground, etc and if the appellants are able to locate any new building as stated above, then the ''Excise authorities should without any delay grant further shifting of the toddy shop to the new premises.

