
(1991) 01 KL CK 0058

In the High Court Of Kerala

Case No : O.P. No"s. 5852 and 10463 of 1990

M.T. Suresh Babu and another

APPELLANT

Vs

Secy. Board of Revenue (Excise) and others

RESPONDENT

Date of Decision : 31-01-1991

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1991) 1 KLJ 469

Hon'ble Judges : V.S. Malimath, C.J;T.L Viswanatha Iyer, J

Bench : Division Bench

Advocate : P.K. Balasubramanyan, S.V. Balakrishna Iyer and K.V. Kuriakose, for the Appellant; K.R.B. Kaimal Govt. Pleader and M.C. Sen, for the Respondent

Judgement

Malimath, C.J.—These two writ petitions have been referred to the Division Bench by Justice Sreedharan on the ground that he finds it difficult to agree with the view taken by Justice Thomas in the decision reported in Premhumar v. Commissioner of Excise (1989 (2) KLT 200). The petitioners in these two writ petitions have invoking the jurisdiction of this Court under Article 226 of the Constitution of India challenged the grant of licence for the foreign liquor retail shop in respect of Shop No. 186/90-91 for the period from" 1-3-1990 to 31-3-1991, in favour of respondent No: 4. This licensed premises is Door No. 7/594 in Oyitti Road, Calicut. The petitioners who are citizens residing in the locality contend that the grant of licence in favour of the 4th respondent to conduct the Foreign Liquor Retail Shop in the said premises namely, Door No. 7/594 is illegal on the ground that the same is located within the prohibited distance of 400 metres from temples, churches and mosques, prescribed by rule 6 (2) (a) (ii) of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974, hereinafter referred to as the Rules. With a view to establish their case that the licensed premises is located within the prohibited distance of 400 metres from temples and mosques, a Commissioner was got appointed in these proceedings, who, after visiting the place and taking the measurements submitted a report to the effect that there are temples and mosques within a distance varying from

215 to 230 metres from the licensed premises. There is no dispute about the correctness of the report made by the Commissioner. We have therefore to proceed on the basis that the licensed premises is located within 400 metres from the temples and mosques. The stand taken by the petitioners is that the grant of licence to the 4th respondent is clearly opposed to rule 6 (2) (a) (ii) of the Rules. The 4th respondent, however, submits that the grant of licence in his favour is justified relying upon the second proviso to rule 6 (2) (a) of the Rules which permits location and licensing of premises of toddy shop, arrack shop, its allowed sub-shops and foreign liquor retail shops within the prohibited distance of 400 meters, if a toddy shop, arrack shop or foreign liquor retail shop was located and licensed in the said premises during the Abkari year 1988 - 89. It is their case that during the Abkari year 1988 - 89, one Sri Vinod had obtained foreign liquor retail licence and was conducting the foreign liquor retail shop in the premises bearing door No. 7/587, corresponding to the new number 7/597. As the premises in respect of which licence has been granted and the shop located by the 4th respondent is the premises bearing Door No. 7/594, realising that the licensed shop of Sri. Vinod during the Abkari year 1987-88 was located in the premises bearing Door No. 7/597, the stand taken is that the distance between the two premises is only 7 metres and the landlord being the same, we must draw the inference that the place in respect of which licence has been granted in favour of the 4th respondent Sri Rarichan for the Abkari Year 1990-91 must be regarded as the same place. If the 4th respondent is right in his contention, it is maintained that the grant of licence in favour of the 4th respondent in respect of the premises located within a distance of 400 metres from temples and mosques would be justified, having regard to the second proviso to rule 6 (2) (a) of the rules. In support of this stand, the 4th respondent has relied upon the decision of the learned single Judge in Premkumar's case (1989(2) KLT 200). The view taken by the learned single Judge in the said decision is that if the previous building was situated within the vicinity of the present building and the distance between the two is relatively trivial, the two buildings can reasonably be held to remain; in the same place for practical purposes. In other words, the view taken by the learned single Judge in Premkumar's case is that there is no need for the application of the second proviso to rule 6 (2) (a) for the two premises to be identical. We are called upon to examine the correctness of this view taken by the learned single Judge.

2. The general conditions applicable to the toddy, arrack and foreign liquor retail shops are prescribed in rule 6 of Chapter V of the Rules. For the sake of convenience, we will extract the relevant portion of the rule as follows:

2 (a) No toddy, arrack or foreign liquor shop, other than a toddy or arrack sub-shop, shall be located outside the limits notified in the Gazette under rule 4, but with the previous sanction of Assistant Excise Commissioner it may be removed from one place to another within such limits. But no toddy, arrack or foreign liquor retail shop shall be located in, or removed to, a place.....

(i).....

(ii) Within 400 metres from an Educational institution, temple, Church, Mosque or Burial ground.

(i).....

Provided that the Board of Revenue may for sufficient reasons to be recorded and subject to such conditions as it may deem necessary to impose order to remove from any place any toddy shop, or arrack shop or its allowed sub shops or any retail foreign liquor shop or wholesale shop to a place outside the limits specified in sub-clause (i) subclause (ii) or" sub-clause (iii) of clause (a).

Provided further that the toddy shop, arrack shop and Foreign Liquor Retail Shop shall be permitted to be located and licensed in such places where they were located and licensed in the Abkari year 1988-89 as a toddy shop or its sub-shop, an arrack shop or its sub-shop, or a foreign liquor retail shop respectively.

It is clear from this statutory provision that no foreign liquor retail shop can be licensed to be located at a place within 400 metres from the educational institution, temple church or mosque or burial ground. But the second proviso, which is in the nature of an exception to this rule of prohibition, permits location and licensing of a foreign liquor retail shop at a place within 400 metres from educational institutions, churches, temples, and mosques, if that is a place where foreign liquor retail shop was located and licensed during the Abkari year 1988-89. The object of the proviso clearly is to the effect that if during the year 1988-89 foreign liquor retail shop was located and licensed at a place within 400 metres of the temples and mosques in respect of the very same place of business, the prohibition contained in rule 6 (2) will not be attracted. The Licensing Authority would have the discretion to grant licence in respect of the very same place for the subsequent year also, where a foreign liquor retail shop was conducted during the abkari year 1988-89. What clearly emerges on a bare reading of rule 6 (2) (a) (ii) and the second proviso thereto is that there should be identity in regard to the place. The expression "place" has been defined in section 3 (21) of the Abkari Act, 1977, to include also a house, building, shop, tent, booth, raft, vehicle and vessel. Obviously it is an inclusive, definition and not an exhaustive one. The expression "place" has therefore to be given proper meaning, having regard to the context in which it occurs. Though the expression "place" is capable of being given an expanded or restricted meaning, we have to ascertain if there is any guidance available in the statutory provision to understand the meaning assigned to the word "place" which occurs in rule 6 (2) (a) In our opinion, there is clear guidance in this behalf in the second proviso Wherein it is stated that the toddy shop, arrack shop, and its allowed sub-shops and foreign liquor retail shops shall be permitted to be located and licensed in such places where they were located and licensed in the Abkari year 1988-89. It is not "any place" that is contemplated in the second proviso, but a place where it was located and licensed in the Abkari year 1988-89 as a foreign liquor retail

shop. Hence the expression "place" has necessarily to be understood as a place where was located and licensed a foreign liquor retail shop in the Abkari year 1988-89. We have therefore no hesitation in holding that the expression "place", occurring in rule 6 (2) (a) (ii) and the second proviso has been given a restricted meaning to mean a place where was located and licensed a foreign liquor retail shop during the Abkari year 1988-89. Thus it becomes clear that there should be identity in respect of the place in respect of which licence is sought and the place where a foreign liquor retail shop was located and licensed in the Abkari year 1988-89. If the two premises are not identical, the second proviso will not be attracted. In every case where the second proviso to rule 6 (2) (a) (ii) is sought to be taken advantage of, it has to be established that the place in respect of which licence is sought for locating foreign liquor retail shop is the Very same place where was located and licensed a foreign liquor retail shop in the Abkari year 1988-89. The same principle holds good in respect of toddy shop, its sub-shop, arrack shop, and its sub-shop which are also governed by the same provision. In that view of the matter, we find it difficult to subscribe to the view taken by the learned single Judge in Premkumar's case that if the previous building was situated within the vicinity of the present building and the distance between the two buildings is relatively trivial, the two buildings can reasonably be held to remain in the same place for practical purpose. There is also a mistake in assuming that what came up for consideration in the said decision is the second proviso to rule 6 (2) (b) of the Rules. The second proviso is not to rule 6 (2) (b) but to rule 6 (2) (a) of the Rules. What is added by the amendment to the Rules which came into force on 1-4-1989 is clause (b) at the end of rule 6 (2) (a) and immediately above rule 6 (3), without any proviso to the newly added clause (b). In the light of the interpretation which we have given to the second proviso to rule 6 (2) (a) of the Rules, we shall now examine the facts of this case. The place in respect of which licence has now been granted in favour of the 4th respondent is in respect of a place bearing Door No. 7/594. It is not the case of the 4th respondent that foreign liquor retail shop was located and licensed in the Abkari year 1988-89 in respect of premises bearing Door No. 7/594. Admittedly, during that year foreign liquor retail shop was located and licensed in respect of Door No. 7/597. The distance between the two is 7 metres. As there is no identity between the two premises, the second proviso to rule 6 (2) (a) is not attracted. As the premises bearing Door No 7/594 is admittedly located within the prohibited distance of 400 metres from temples or mosques, the grant of licence in respect of the said premises in favour of the 4th respondent is clearly opposed to rule 6 (2) (a) of the Rules, Though the grant of licence in favour of the 4th respondent is clearly illegal, having regard to the fact that the remaining period of the licence is only a couple of months, and also having regard to the fact that the parties were entitled to regulate their conduct in the light of the judgment of the learned single Judge, we are inclined not to interfere with the grant of licence in favour of the 4th respondent for the present abkari year. This does not entitle the licensing authority to continue transgression of the statutory provision now that the position of law has been clarified by us in

this judgment.

For the reasons stated above, we decline to interfere and dismiss these two writ petitions. No costs