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(2007) 12 MAD CK 0281

In the Madras High Court

Case No : Writ Petition No. 22337 of 2007 and M.P. No. 1 of 2007

R. Rajangam — APPELLANT

Vs

The Commissioner of Prohibition and Excise Chepauk — RESPONDENT

Date of Decision : 06-12-2007

Acts Referred:
Contract Act, 1872 — Section 13
Madras Prohibition Act, 1937 — Section 4
Tamil Nadu Liquor (Licence and Permit) Rules, 1981 — Rule 19, 19A, 19B, 21

Citation : (2007) 12 MAD CK 0281

Hon'ble Judges : S. Manikumar, J

Bench : Single Bench

Advocate : G. Ethirajulu, for the Appellant; A. Arumugam, Additional Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

S. Manikumar, J.—The petitioner, has sought a Writ of Certiorarified Mandamus to quash the order of the respondent dated 08.06.2007 and consequently, direct him to renew FL3 Licence No. 21/2000-2001, for the excise year 2007-08 and to run a bar in "Gowri Tourist Home (P) Ltd" Kanavaipatti Road, Batalagundu Town, Nilakottai Taluk, Dindigul District and for further orders.

2. The petitioner has submitted that Gowri Tourist Home Pvt. Ltd., situated in Kanavaipatti Road, Batalagundu Town, Nilakottai Taluk, Dindigul District, comprised in Survey No. 412/A3, belonged to one Subburayalu and his wife Rajarathinammal. They have entered into a lease agreement with the petitioner to run the above said Hotel and given their consent to the petitioner to obtain proper licence from the Excise Department to run a Bar. The monthly rent was fixed at Rs. 500/-and an advance of Rs. 50,000/- was paid by the petitioner. The lease period was for seven years, commencing from 20.03.2000 and ending with 19.03.2007. One of the conditions of the lease agreement is that after the expiry of the lease period, the tenant (the petitioner) should handover possession to the

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landlord, on receipt of the advance amount from the landlord.

3. The petitioner has submitted that pursuant to the lease, he applied for FL3 licence to possess and sell liquor to foreign tourists and others who stay in the hotel. By order dated 08.09.2000, the respondent has granted FL3 licence to the petitioner for the excise year 2000-01 and it was renewed periodically. During the excise year 2004-05, the landlord enhanced the monthly rent from Rs. 500/- to Rs. 5,000/- per month and insisted the petitioner to pay Rs. 3,50,000/- towards additional advance amount. Despite payment of rent and additional advance amount, the landlord attempted to vacate the petitioner from the Hotel without due process of law and therefore, the petitioner has filed a Civil Suit in O.S.No. 105 of 2005 on the file of the Sub Court, Dindigul, against the landlord and obtained an order of injunction in I.A.No. 180 of 2005 dated 28.04.2005 and the same is extended from time to time.

4. The petitioner has further submitted that he made an application for renewal of FL3 licence for the excise year 2006-07 and remitted the entire privilege amount of Rs. 1,00,000/-. In the normal course, excise year expires on 31st March of every year and the petitioner was under bona fide impression that the licence would be extended upto the said date. Whereas, to his shock, by order dated 17.10.2006, the respondent renewed the licence only upto 28.02.2007, with a condition that the renewal of FL3 licence for the remaining period between 01.03.2007 and 31.03.2007 would be considered only after production of a fresh lease agreement extending the lease period beyond 19.03.2007.

5. The petitioner has further submitted that though he has made an application to renew the licence upto to the date of expiry of the excise year, i.e., on 31.03.2007, no orders were passed and therefore, he was constrained to file W.P.No. 1643 of 2007. Pending disposal of the Writ Petition, the respondent has renewed the licence upto 19.03.2007, i.e., the date of expiry of lease, instead of 31.03.2007. Aggrieved by the order restricting the licence upto 19.03.2007, the petitioner has filed another W.P.No. 8871 of 2007, contending inter alia that as per the terms of the lease agreement, the petitioner was entitled to run a bar upto 31.03.2007. By order dated 20.03.2007, this Court in M.P. No. 1 of 2007 in W.P.No. 8871 of 2007, directed the Commissioner of Prohibition and Excise, Chennai, the respondent herein, to consider the application of the petitioner and renew FL3 licence for the period 2006-07, as per the terms of the lease agreement forthwith. Pursuant to the orders of this Court, the respondent by his order dated 22.03.2007, extended the licence upto 31.03.2007.

6. The petitioner has further submitted that for the Excise year 2007-08, he submitted an application, dated 08.03.2007 for renewal of licence with necessary privilege amount. But the respondent has rejected the application, stating that unless the petitioner has produced an identical order like W.P.No. 8871 of 2007, the renewal of FL3 licence would not be granted and under such circumstances, the petitioner has was again forced to file W.P.No. 11295 of 2007 for a Mandamus directing the respondent to renew the licence for the Excise year

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2007-08. This Court by order dated 12.04.2007, directed the respondent to pass final orders on the renewal application. Pursuant to the directions of the Collector, Dindigul District, the petitioner attended an enquiry on 21.05.2007 and gave a statement. But the landlord has deliberately failed to appear in the enquiry. Despite the absence of the landlord, the respondent, by order dated 08.06.2007, rejected the renewal application of the petitioner without referring to the contentions raised therein and failed to consider the earlier order of this Court, which interpreted the relevant covenant contained in the lease agreement. The petitioner has further submitted that the hotel is being run by him only because of the fact that it has got the facility of an attached bar and till the landlord returns the advance amount of Rs. 4,00,000/- as stipulated in the lease agreement, the petitioner is entitled to continue to be in possession as a contractual tenant and entitled for renewal of licence for the Excise year 2007-08.

7. The respondent in his counter affidavit has submitted that for the Excise year 2007-08, the petitioner has made an application, dated 08.03.2007 for renewal of FL3 licence and the same was forwarded to the District Collector, Dindigul for detailed enquiry. After inspection of petitioner''s premises, the District Collector, Dindigul has found that the lease deed of the licencee has expired on 19.03.2007 and in the absence of lease deed for the period 31.03.2007 and the Collector, Dindigul did not recommend for renewal of FL3 licence. On receipt of the report, the licencee as well as the landlord were requested to appear for personal hearing before the Commissioner of Prohibition and Excise on 21.05.2007, in order to afford an opportunity of being heard. Though the petitioner appeared before the respondent, the owner of the hotel did not appear for personal hearing, despite two opportunities given to him in the personal hearing, the petitioner has failed to produce the lease agreement for the excise year 2007-08 and therefore, by order dated 08.06.2007, the request for renewal of FL3 licence was rejected.

8. The respondent has further submitted that the suit in O.S.No. 105 of 2005 on the file of the Sub Court, Dindigul is between the landlord and the petitioner and the injunction granted in favour of the petitioner is not binding on the Department. The respondent has further submitted that the refund of advance amount by the landlord to the petitioner is a matter between them and the department has nothing to do with the same. The respondent has further submitted that since the petitioner has failed to produce any fresh lease agreement from 01.04.2007 to 31.03.2008, he is not entitled to renewal of licence for the Excise year 2007-08 and therefore, the impugned order does not suffer from any illegality.

9. Mr. G. Ethirajulu, learned Counsel for the petitioner submitted that the agreement between the landlord and the petitioner is for the purpose of running a hotel attached with a bar for a period of seven years, between 20.03.2000 and 19.03.2007, on a monthly rent of Rs. 500/- and that the landlord had given consent to the petitioner to run a bar or IMFL shop, for the above said period and

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received an advance amount of Rs. 50,000/-. He further submitted that as per the recital in the lease agreement dated 20.03.2000, on completion of seven years as on 19.03.2007, the landlord has to repay the advance amount and taken back possession and since the landlord has failed to refund the advance amount and allowed the petitioner to continue in possession of the premises, it amounts an implied consent for running the hotel with bar.

10. Learned Counsel for the petitioner further submitted that when the respondent declined to grant licence beyond 19.03.2007, on the premise of expiry of lease agreement, this Court, interpreting the lease condition, by order dated 20.03.2007 in W.P.No. 8871 of 2007, directed the respondent to consider the factual issue of non-compliance of the restricted covenant of making payment of advance amount and take back possession from the lessee and directed renewal of licence for the period 2006-07 forthwith. According to him, the respondent having implemented the directions of this Court and extended the licence upto 31.03.2007, cannot take a different stand for the subsequent period and deny the renewal of licence.

11. Learned Counsel for the petitioner further submitted that the respondent ought to have considered that in view of non-fulfilment of the condition of the landlord, the petitioner is a contractual tenant, holding over the premises, beyond 19.03.2007, and therefore, the respondent ought to have renewed the FL3 licence for the Excise year 2007-08. He further submitted that when the Commissioner of Prohibition and Excise, Chennai, summoned the parties for an enquiry into the objections raised by the landlord for renewal of licence, the petitioner appeared before him and gave a statement on 21.05.2007, whereas, the owner of the building has failed to appear for personal hearing, despite the opportunity given to him. According to the counsel, when the landlord himself has not shown any interest before the Licensing Authority, it could be inferred that he has no objection for running the bar and therefore, the respondent has erred in rejecting the renewal. He further submitted that when the respondent had relied on the report of the District Collector, Dindigul, for rejecting the renewal of licence, the same ought to have been furnished to the petitioner, so as to enable him to make his objections, and failure to do so, amounts to violation of the Principles of natural justice.

12. Referring to the recital in the lease agreement, learned Counsel for the petitioner submitted that as the intention of the lessor is to continue and maintain the landlord and tenant relationship till the advance amount is refunded, there is an implied consent for running the bar and hotel. Placing reliance on the decision in Neyveli Lignite Corporation Ltd. v. Hotel Radha (Pvt.) Ltd. reported in 2007 (2) CTC 164 , he submitted that implied consent can be inferred from the conduct of the parties, where renewal is periodically granted. Relying on the decision in P.S. Ranakrishna Reddy Vs. M.K. Bhagyalakshmi and Another, , learned Counsel for the petitioner submitted that while interpreting a deed, the document has to be read in its entirety and the intention of the parties,

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must be gathered from the document itself.

13. Per contra, Mr. A. Arumugam, learned Additional Government Pleader submitted that as per the Tamil Nadu Liquor (Licence and Permit) Rules 1981, licence to run a bar is granted only after ascertaining the written consent from the owner of the building, for which, the applicant has to produce necessary lease deed for processing his application. He further submitted that as the petitioner has failed to produce the extension of lease agreement, the District Collector of Dindigul did not recommend for grant of licence and considering the fact that the landlord had objected to the renewal, the licence was not extended beyond 31.03.2007, for the excise year 2007-08.

Heard Mr. G. Ethirajulu, learned Counsel fat the petitioner and Mr. A. Arumugam, learned Additional Government Pleader for the respondents.

14. Before going into the issue of entitlement of the petitioner for renewal of licence, it is relevant to extract the covenant in the lease agreement, dated 20.03.2000, executed between the petitioner and the owner of the building.

15. From the recitals in the lease agreement, it is evident that the owner of the building had agreed to let out Gowri Tourist Home (Boarding and Lodging) Private Limited for a period of seven years from 20.03.2000 and during the period, provisional tax, property tax and other taxes have to be paid by the tenant. The landlord would extend his full co-operation to the tenant to obtain permission from the Government/ Departments for lawful business and further consented for setting up a bar in the hotel premises till the completion of seven years period from the date of lease.

16. The Supreme Court in catena of decisions, in State of Bombay v. R.M.D. Chamarbaugwala reported in 1995 (1) SCR 305 , Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, , State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., , State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another, , Ashok Lanka and Another Vs. Rishi Dixit and Others, and other similar decisions held that the State while exercising its power of parting with the privilege to deal with liquor, as a positive obligation, should strictly confirm to the public interest and ensure public health, welfare and safety.

17. In Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, , the Supreme Court explained the doctrine of "Res extra Commercium", at Paragraph 60 as follows:

The right to practise any profession or to carry on any occupation trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injuries to health, safety and welfare of the general public, i.e.,

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res extra commercium, (outside commerce). There cannot be business in crime.

18. In Ashok Lanka v. Rishi Dixit reported in 2006 (9) SCC 90 the Supreme Court, while dealing with the standard of scrutiny of application for grant of licence, at Paragraph 25, held as follows:

25. The Act and the Rules deal only with control and regulations. There is no provision which gives any discretion to the authorities concerned to relax the provisions of the Rules. The Rules in this behalf again must be framed upon taking into consideration of all relevant factors. The State in making the rules and formulating the policy decisions must be guided by public interest. In such matters, the State has a positive obligation to ensure that any activity contemplated, strictly conforms to the requirements of public good and is not otherwise derogative of public health. The State parts with its exclusive privilege on certain statutory conditions such as payment of excise fee, when it lays down criteria for selection of persons who would become qualified for grant of licence under the Act, not only the eligibility criteria therefore should be laid down, but having regard to its past experience as to how and in what manner, the licencees find means and methods to circumvent the said provisions, all endeavors should be made to plug ail loopholes. The State has an extremely solemn obligation to fulfil in that behalf. All information supplied by the applicants for licences, thus, must undergo and satisfy the "strict scrutiny test". The State should not treat its right of parting with its privilege only as a means of earning more and more revenue. It may certainly earn revenue but upon fulfillment of its notion of public health and welfare when the matter comes to retention of the exclusive privilege and/or parting therewith either in whole or in part.

19. While dealing with a case as to whether the landlord has given any consent to create sub tenancy, in P. John Chandy and Company (P) Ltd. Vs. John P. Thomas, , the Supreme Court, after extracting the observations made in Bell v. Alfred Franks and Barlett Co. Ltd. reported in 1980 (1) A.E.R. 356, further added that the observations made in the above reported judgment, though no doubt made in reference to a particular provision, yet they throw some light on the question of implied consent that there has to be something more than mere inaction or lack of initiation on the part of the landlord.

20. In P. John Chandy''s case, the suit property was rented out to the appellant company on the basis of an oral lease, by original landlord (grandfather of respondent) in 1949. The appellant created sub-leases and allowed the tenants from time to time. The landlord served a notice in 1981 to terminate the sub lease, but the tenant had failed to comply with the notice. The respondent/ landlord filed eviction petition on the ground that the appellant-company had transferred his rights by creating sub leases in favour of other persons without his consent. The Rent Controller, accepted the contentions of the landlord that there was no consent to create sub tenancy. But the appellate authority has reversed the decision of the Rent Controller and recorded the finding to the effect that,

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in the absence of any evidence either oral and documentary, the terms of tenancy have to be gathered from the long course of conduct of the parties even since commencement of the tenancy in 1949.

The revision filed by the landlord was allowed holding that the tenant had failed to establish the case in terms of lease that they were entitled to sub lease the accommodation and mere inaction or failure on the part of the landlord to initiate any action in the matter would not amount to conferment of right on the tenant. The Supreme Court, accepting the contentions of the landlord, held that the consent has to be with positive action on the part of the landlord so that the tenant can be said to have had the authority to sub-lease his lease rights. Mere silence may not be enough.

21. "Consent" as defined u/s 13 of the Contract Act is as follows:

Two or more persons are said to consent with they agree upon the same thing in the same sense.

22. "Consent" as per OxFord Dictionary means that "to acquiescence" or "to agree". To understand the difference between acquiescence and consent, the observations of their Lord ship Shaw, L.J., in Bell v. Alfred Franks and Barlett Co. Ltd. reported in 1980 (1) A.E.R. 356, would be relevant for the purpose of deciding this case as to whether the landlord had expressed any consent or not.

What is meant by acquiescence? It may involve no more than a merely passive attitude, doing nothing at all. It requires as an essential factor that there was knowledge of what was acquiesced in. In this case it is not in controversy that there was such knowledge on the part of the plaintiff''s predecessor in title that the garage was used in the way in which it was.

If acquiescence is something passive in the face of knowledge, what does "consent" mean? In the context of the contract implicit in the subsection, the only practical and sensible distinction that can be drawn is that if acquiescence can arise out of passive failure to do anything, consent must involve a positive demonstrative act, something of an affirmative kind. It is not to be implied, because the resort to implication betokens an absence of express affirmation. The only sense in which there can be implied consent is where a consent is demonstrated, not by language but by some positive act other than words which amounts to an affirmation of what is being done and goes beyond mere acquiescence in it.

23. In The Neyveli Lignite Corporation Ltd. v. Hotel Radha (Pvt.) Ltd., reported in 2007(2) CTC 164, the Division Bench, taking into consideration the expression "Public Interest", and Rule 19(A)(b) of the Tamil Nadu Liquor (Licence and Permit) Rules, held that the licence could be granted only on the consent or No Objection Certificate from the land owner and upheld the orders of the Commissioner of Prohibition and Excise or the Government, as the case may be, returning the application filed by the licencee for want of consent from the owner

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of the land. On facts of that case, when the licence was granted in the year 1984, since there was no objection from the appellant and the licence being periodically renewed for 14 years till the orders of the Commissioner of Prohibition and Excise in 1999, the Division Bench held that there was an implied consent given by the owner of the land for running a bar and for renewal of licence. However, the Division Bench made it clear that in future, if the land belonging to the appellant therein is to be used either for retail vending or for running a bar for IMFL, the Government shall not issue licence, unless No Objection Certificate is produced or consent is obtained from the appellant-Corporation.

24. The main thrust of petitioner''s argument is on the basis of the recital in the lease agreement and the interpretation of the said covenant by this Court in M.P. No. 1 of 1997 in W.P.No. 8871 of 2007, dated 20.03.2007, to the effect that the restricted covenant of making payment of the advance amount and taking back possession from the lessee would amount to implied consent for renewal of licence and together, intention of the parties, the document has to be in entirety, so as to ascertain the purpose of lease. In this context, the Supreme Court in P.S. Ranakrishna Reddy Vs. M.K. Bhagyalakshmi and Another, , considered as to whether the parties to the agreement is entitled to sell the property or it is only an agreement of lease. While adjudicating the dispute, the Supreme Court at Paragraph 14, held as follows:

A document, as is well known, must be read in its entirety. The intention of the parties, it is equally well settled, must be gathered from the document itself. All parts of the deed must be read in their entirety so as to ascertain the nature thereof.

25. While considering M.P. No. 1 of 2007 in W.P.No. 8871 of 2007, this Court has passed the following orders:

This restriction on the part of the respondent is uncalled for because the other covenant contained in the lease deed says that the lessor has to pay back certain amount and take possession of the property on 19.03.2007. In default on the part of the lessor, the lessee, the petitioner herein can continue in possession. In view of covenant contained therein, the restriction upto 19.03.2007 on the fact that the lessor has not complied with the restricted covenant of making payment and taking back possession from the lessee, the petitioner herein, the respondent Commissioner is directed to consider the above said factual issue and renew Form FL3 licence or the period of 2006-07 as per the terms of the lease agreement forthwith on production of the copy of this Order.

The department has implicitly followed the above interim orders, granting licence upto 31.03.2007 and when the Writ Petition came up for final hearing, the same has dismissed as infructuous.

26. Rule 19 of the Tamil Nadu Liquor (Licence and Permit) Rules, 1981, (hereinafter referred to as "the Rules") sets out certain requirements to be

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satisfied before FL3 licence is issued and the procedure to be followed in dealing with the applications for grant of privilege is also provided. As per Rule 19(A)(b), the licencing authority while considering the applications for grant of FL3 licence to run a bar, should always take into account that public interest shall not suffer by the grant of the licence applied for and that the privilege is not likely to be misused. As per Rule 19(B)(1)(iv), in addition to the above, the licencing authority, after due enquiry, shall satisfy himself as to whether the site and building selected are suitable. The application for renewal of licence is dealt with in Rule 21 of the Rules and as per the Rules, the lease holder desires to renew the licence shall make an application in the prescribed form (the same as for the original grant of the licence) atleast one month before the date of expiry of the licence. The application, should reach the licencing authority directly.

27. Form F.A1.3-A is the prescribed application for possession of liquor by hotels run by the Tamil Nadu Tourism Development Corporation for supply to the persons belonging to other states and foreigners holding liquor permits and who actually stay in the hotel for a minimum period of three hours. As per Column 3 of the above form, an applicant has to furnish the address of the premises, in which, the hotel is situated with the description of the rooms assigned for (1) storage of liquor and (2) serving of liquor (permit room) (boundaries of both to be furnished). Licence is granted for possession and sale of liquor.

28. A owner of the building might agree for leasing out his premises for running a hotel, but may not agree for possession and sale of liquor. As possession and sale of liquor in a place without necessary licence is punishable u/s 4 of the Tamil Nadu Prohibition Act, no landlord would allow an illegal activity of possession and sale of liquor in his building without his consent and therefore, to avoid criminal liability under the provisions of the Prohibition Act and other penal laws, consent of the landlord is mandatory for grant of licence to deal with liquor. The licence holder desires to renew the licence, shall satisfy all the conditions which are required for obtaining a fresh licence. A conjoint reading of the Tamil Nadu Liquor Vending licence, 1981 and the prescribed forms mentioned above, would clearly mandate that the owner of the building, should agree for possession and sale of liquor within the licenced room or private rooms meant for stay.

29. It is mandate of the State to see that the applicant seeking licence to trade in liquor, a business in crime, confirms to the requirements and satisfy itself "the strict scrutiny test". Reading of the document in entirety demonstrates that what was leased out to the petitioner was a hotel, viz., Gowri Tourist Home (P) Ltd, and the landlord has assured that he would extend his full co-operation to the tenant for all his lawful activities permitted by the Government and also given consent to set up a bar or IMFL shop till the expiry of the lease period, i.e., 19.03.2007. On expiry of the lease period, the landlord has to repay the amount and take back possession. From the recitals, the intention appears to be to permit the tenant to run the IMFL shop/bar, till the expiry of the lease and beyond the period, there is no express consent. Whereas, his intention is to take

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back possession of the property. Assuming that there is a continuation of tenancy due to non-payment of advance amount after the expiry of the lease period that by itself would not create any right to obtain licence, when the consent is conspicuously absent from the landlord either in the form of agreement or in writing. It is evident from the lease agreement that the landlord has not expressed in unequivocal terms that the tenant can continue to run the bar even beyond 19.03.2007 or until possession is taken back from him.

30. Pleadings disclose that FL3 licence to possess and sell liquor in the hotel was granted, pursuant to the lease agreement dated 20.03.2000 and it was periodically renewed till 19.03.2007 and there was no objection from the land owner. The conduct of the landlord coupled with the restricted covenant certainly gives an inference that there was an implied consent for the grant of licence as well as its renewal till the expiry of the lease period, 19.03.2007. Therefore, when there was a positive act of not objecting to the renewal of licence during the period of lease, it could be reasonably inferred that there is an element of implied consent. But in the case on hand, when the landlord has made a specific objection for renewal of licence, then there cannot be any inference of implied consent, just because he has failed to return the advance amount and take back possession, or for that matter failed to appear for the enquiry. Mere inaction or lack of initiation on the part of the landlord will not partake the character of implied consent, when there is an objection for renewal.

31. In Uttaranchal Road Transport Corpn. and Others Vs. Mansaram Nainwal, , the Supreme Court at Paragraph 13 explained the nature and scope of precedent. The Court held as follows:

A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a judge while giving judgment that constitutes a precedent The only thing in a judge''s decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of fact is the inference which the judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what is actually decides.

32. With great respect to the learned Judge, the views expressed by him in the Miscellaneous Petition do not have any binding precedent, in view of the law laid down by the Supreme Court in Uttaranchal Road Transport Corporation v. Mansaram Nainwal''s case and therefore, I am of the considered view that the petitioner has failed to discharge the burden of proving that there is a consent for renewal of FL3 licence.

33. In the absence of any mandatory requirement of consent, the petitioner is

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not entitled to the relief sought in the Writ Petition and the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

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