

STATE OF KERALA & ORS.

v.

M/S. PALAKKAD HERITAGE HOTELS

(Civil Appeal No. 5204 of 2017)

APRIL 13, 2017

[DIPAK MISRA AND A. M. KHANWILKAR, JJ.]

Foreign Liquor Rules, 1974:

Application for grant of Beer/Wine Bar FL-11 Licence – For its hotel which was 70 meters from the nearest objectionable institution – Excise Commissioner recommended grant of sanction for the Licence as per the Rules – While the said recommendation was pending consideration, Liquor Rules amended on 18th April, 2012 prescribing the minimum distance from objectionable institution as 200 meters – In view of the amendment of the Rules, the application was rejected – Writ petition by the applicant challenging the decision as also the amendment of the Rules – Allowed by Single Judge of High Court holding that since the order sanctioning the grant of licence was prior to amendment, application could not have been rejected on the basis of the amended Rules – In writ appeal as well as in Review, order of Single Judge was affirmed – On appeal, held: Since the final decision as to grant of the Licence was taken after the Rule was amended, the application was required to be considered keeping in view the amended provision – Matter remanded to the Single Judge of High Court to decide afresh on other issues.

Partly allowing the appeal, the Court

HELD: 1.1 The processing of the application for grant of licence commences from the date of application. The final decision on the proposal is required to be taken by the State Government. The date on which a formal, final decision is taken by the competent authority, alone, would be the relevant date. The recommendation made by the subordinate authority, even if significant for taking a formal decision by the competent authority, will be of no avail. [Para 11][248-F-G]

A 1.2 In the present case, the Single Judge of High Court has assumed the date on which recommendation was made by the Excise Commissioner i.e. 28th March, 2012, as the relevant date. That assumption is untenable. For, that was not the date on which the final decision was taken by the competent authority. Whereas, before a final decision could be taken by the competent authority on the application submitted by the Respondent, the Foreign Liquor Rules were amended on 18th April, 2012. The application submitted by the Respondent for grant of licence, unquestionably, must be treated as pending and under consideration on this date. [Para 12][248-II; 249-A-B]

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C 1.3 The application for grant of FL-11 licence submitted by the Respondent was required to be considered by the competent authority keeping in mind the amended provisions which came into force w.e.f. 18th April, 2012. That is precisely what has been done by the Excise Commissioner, as can be discerned from his speaking order dated 5th June, 2012, for invoking the restriction of distance of 200 metres from the objectionable site. [Para 13][249-C-D]

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E 2. Since the Single Judge of the High Court proceeded to decide the writ petition filed by the Respondent merely by referring to the pronouncement of the Division Bench of the same High Court in the case of **Kallada Hotels and Resorts*, coupled with the fact that the Respondent had asked for a wider relief to declare the amendment of 18th April, 2012 as *void* to the extent it has introduced the restriction of distance of 200 meters from objectionable institutions for getting FL-11 licence, it would be appropriate to relegate the parties before the Single Judge to decide the writ petition afresh, keeping in mind the settled legal position. [Para 14][249-E-F]

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G **Kallada Hotels and Resorts vs. State of Kerala 2012* (2) KLT 167; *State of Kerala and Ors. v. M.P. Shiju 2014* (2) KHC 343 (DB); *The Kerala Bar Hotels Association & Anr. V. State of Kerala & Ors.* [2015] SCR 256 : AIR 2016 SC 163 – referred to.

H *State of Kerala & Anr. v. B.6 Holidays Resorts Pvt. Ltd.* [2010] 3 SCR 1 : 2010 (5) SCC 186 – distinguished.

Case Law Reference

2012(2) KLT 167 referred to Para 4

2014 (2) KIIC 343 (DB) referred to Para 6

[2015] SCR 256 referred to Para 7

[2010] 3 SCR 1 distinguished Para 10

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5204 of 2017.

From the Judgment and Order dated 12.08.2014 of the High Court of Kerala at Ernakulam in W. A. No. 950 of 2014.

G. Prakash, Jishnu M. L., Mrs. Priyanka Prakash, Mrs. Beena Prakash, Manu Srinath, Advs., for the Appellant.

Romy Chacko, Shubham Singh, Varun Mudgal, S. C. Jaidwal, Advs., for the Respondents.

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J. 1. The Respondent constructed a hotel which has been classified as Heritage (Basic) Category for five years (w.e.f. 1st March, 2012 till 28th February, 2017). The Respondent submitted an application for grant of a Beer/Wine Bar FL-11 Licence under the Foreign Liquor Rules. That application was processed by the Deputy Commissioner of Excise, Palakkad. On the basis of the report submitted by the said authority, the Excise Commissioner of Thiruvananthapuram forwarded his recommendation to the Secretary to Government Taxes Department, Government of Kerala, vide a letter dated 28th March, 2012. The Excise Commissioner duly recommended grant of sanction for FL-11 License to the Respondent as per the rules. While the said recommendation was pending consideration before the State Government, the Foreign Liquor Rules came to be amended on 18th April, 2012. The amendment inter alia prescribes the minimum distance of 200 metres from an objectionable institution. The report submitted by the Deputy Commissioner of Excise records the distance between the gate of the hotel of the Respondent and the nearest objectionable institution (being Sree Bhagwati Ayappa Temple, Karuvannurthara) as 70 metres only. Consequent to the amendment to the Foreign Liquor Rules, the Government vide letter No. 8028/A2/2012/

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A TD dated 26th April, 2012, called upon the Excise Commissioner, Thiruvananthapuram to examine the proposal of the Respondent. The Excise Commissioner, by a speaking order passed on 5th June, 2012, came to the conclusion that the application submitted by the Respondent deserved to be rejected and directed it to be returned to the Deputy Commissioner of Excise, Palakkad.

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2. For answering the controversy at hand, we deem it apposite to reproduce the said communication in its entirety:

*“PROCEEDINGS OF THE EXCISE COMMISSIONER,
KERALA*

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*THIRUVANANTHAPURAM
(Present: Sri. A. Ajith Kumar IAS)*

Sub:- Excise- Abkari-Application for FL-11 licence to Palkkad Heritage Hotels, Koduvayoor, Palakkad rejected –orders issued.

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Read:- (1) Govt. Letter No. 8028/A2/2012/TD dated 26/04/2012

(2) Letter No. CZ3-577/12 dated 19.03.2012 of the Joint Excise Commissioner, Central Zone, Ernakulam.

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(3) Letter No. P-6-1611/12 dated 16/03/12 & 21/03/2012 of Deputy Commissioner of Excise, Palakkad.

(4) Application dated 01/03/2012 of Sri. M.J. Thomas

(5) GO (Ms) No. 107/11/TD dated 17/08/11

(6) GO (P) No. 72/2012/TD dated 18/04/12

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ORDER NO. XC6-7476/12/K. Dis Dated 05.06.2012

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The Joint Excise Commissioner, Central Zone, Ernakulam has forwarded, vide letter read as 1st above, an application submitted by Sri. M. J. Thomas, Managing Partner, M/s Palakkad Heritage Hotels, Eroor P.O. Ernakulam requesting sanction for FL-11 licence in his name to the Palakkad Heritage Hotels, Koduvayoor, Palakkad having a valid heritage basic category classification certificate vide order No. 27/HRACC (08)/2011 dated 09.03.2012 of the Member Secretary (HRACC) Ministry of Tourism, Government of India,

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Chennai. The hotel is situated in Re. Sy. No. 673/8-1 Koduvayoor Village in Chittur Taluk bearing door No. XI/324 of Koduvayoor Grama Panchayat in Palakkad District. A

The Deputy Commisisoner of Excise, Palakkad has reported that the nearest objectionable institution is the Sree Bhagavathy Ayyappa Temple, Karuvannurthara which is 70 meters away from the gate of the hotel. B

Before the amendment made vide Government order read as 6th above, as per rule 13 (3) of Forensic Liquor Rules, there was a restriction that no FL-3 licence shall be issued to hotels which are located within 200 meters from objectionable site (educational institution, temple, church, mosque or burial ground, schedule caste/schedule tribe colony) but those hotels other than in the private sector having four, five star, five star deluxe classification will be exempted from the distance restrictions in the interest of promotion of tourism and also in the case of hotels in private sector of above categories and hotels having heritage, heritage grand and heritage classic classification is issued by Ministry of Tourism, Government of India, the distance limit was only 50 meters from objectionable site. Vide Government order read as 6th above, the said rule is modified by deleting the exemption of distance restrictions in the case of hotels in private sector of above categories, thereby at present the distance limit to those hotels in private sector of above categories, thereby at present the distance limit of those hotels in private sector of all categories from the objectionable site is 200 meters. C D E

In the above circumstances and as reported by the Joint Excise Commissioner, Central Zone, Executive and Deputy Commissioner of Excise, Palakkad and since the nearest objectionable institution viz. the Sree Bhagavathy Ayyappa Temple, Kanvannurthara is located only 70 metres away from the gate of the hotel the application read as 4th above is hereby rejected and returned to the Deputy Commissioner of Excise, Palakkad. F G

Sd/-
Excise Commissioner"

A 3. Against this decision, the Respondent filed a writ petition before the High Court of Kerala, being Writ Petition (C) No. 14220 of 2012 for the following reliefs:

B *"i) call for the records leading to Ext. P7 and quash the same by issuing a writ of certiorari or other appropriate writ, order or direction;*

ii) declare that petitioner is entitled to get an FL-11 licence as per Ext. P-2 application.

C *iii) Declare that Ext. P6 amendment to the extent it introduce distance of 200 meters from objectionable institutions for getting FL-11 license is discriminatory and without any basis;*

D *iv) Declare that if the hotels located within 200 meters from objectionable institutions are permitted to conduct the licenses, the petitioner is also entitled to get license as per Ext. P2 application;*

E *v) Issue a writ of mandamus or other appropriate writ, order or direction commanding the respondent 1 to 5 to issue an FL-11 license under Rule 13 (11) of the Foreign Liquor Rules, beer/wine parlour license, vide Ext. P-2 application on the basis of the rule/law prevailed on the date of Ext. P-5 (28.3.2012);*

F *vi) Issue a writ of mandamus or other appropriate writ, order or direction commanding the respondents 1 to 5 not to renew FL-3 and FL-11 licenses, which are conducting within 200 meters from the objectionable institutions, if the petitioner is denied FL-11 license; and*

vii) Grant such other and further relief as this Hon'ble Court may deem fit and proper in the interest of justice."

G 4. The learned Single Judge of the High Court vide Judgment dated 4th February, 2014, allowed the said writ petition on the finding that the Excise Commissioner had issued an order in favour of the Respondent (writ petitioner) on 28th March, 2012, sanctioning FL-11 licence. The Single Judge then placed reliance on the decision of the Division Bench of the same High Court in the case of *Kullada Hotels*

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*and Resorts vs. State of Kerala*¹, wherein it was held that the law to be applied for consideration of the application submitted by the Respondent for grant of licence must be as on the date on which the Excise Commissioner made recommendation for grant of licence to the Respondent, as was in force on that date. The appellant herein had pointed out to the learned Single Judge that the said decision was challenged before this Court by the Government and the same was pending. The learned Single Judge, however, rejected that contention as follows:

"6. However, admittedly, as per the decisions of this Court, which stand now, when the Excise Commissioner recommends the application for grant of licence on the basis of a Rule in force on that date, subsequent amendment should not be relied on to assail the same. Viewed in that profile, the petitioner is entitled to get the relief as sought for in this writ petition.

Therefore, the writ petition is allowed.

Ext. P7 is quashed and respondents 1 to 5 are directed to issue FL-11 licence to the petitioner under Rule 13(11) of the Foreign Liquor Rules, beer/wine parlour licence vide Ext. P2 application on the basis of rule/law prevailed on the date of Ext. P5, i.e., 28.03.2012.

This exercise shall be completed within a period of three months from today."

5. Against this decision, the appellant filed a Writ Appeal being No.950 of 2014 before the Division Bench of the High Court. The same has been dismissed on 12th August, 2014, in the following terms:

"1. Heard the learned Senior Government Pleader and the learned counsel appearing for the respondent/writ petitioner.

2. The impugned judgment has been rendered by a learned Single Judge relying on the decision of a Division Bench in Kallada Hotels and Resorts v. State of Kerala [2012(2) KLT 167]. That decision notwithstanding, the fact of the matter remains that even as per the later bench decision in State of Kerala and Others v. M. P. Shiju [2014(2) KHC 343 (DB)], the respondent/writ petitioner is entitled to succeed, in view

¹ 2012(2) KLT 167

A *of the fact that the law has been succinctly stated to the effect*
that the eligibility has to be considered applying the law as
on the date of consideration of the matter by the Excise
Commissioner. This being, pointedly, the legal issue involved
 B *in this writ appeal, the question raised has, necessarily, to be*
answered against the State. This appeal, therefore, fails.
In the result, this writ appeal is dismissed. No costs."

C 6. The later decision adverted to by the Division Bench in the
 case of **M.P. Shiju** (supra), was challenged by the State Government
 before this Court by way of SLP(C) No.25780 of 2014. The same was
 disposed of on 22nd July, 2016 in the following terms:

"ORDER

Learned counsel for the parties are agreed that this petition
has become infructuous in view of the position rendered to
 D *this Court in Civil Appeal No. 4157 of 2015, titled as The*
Kerala bar Hotels Association & Anr. V. State of Kerala &
Ors. decided on 29.12.2015.
The special leave petition is accordingly disposed of as
infructuous."

E 7. Since the said relied upon decision in **M P Shiju's** case has
 been affirmed by this Court, even this appeal must follow the same suit.
 However, the said SLP has been disposed of by this court on the basis of
 concession made by the counsel for the parties - that it had become
 infructuous in view of the judgment of this Court in the case of *The*
*Kerala Bar Hotels Association & Anr. V. State of Kerala & Ors*².

F 8. On a bare perusal of the decision in the **Kerala Bar Hotels**
Association (supra), it is seen that the question examined by this Court
 was whether the policy to ban the consumption of alcohol in public or
 exception carved out to the policy in favour of Five Star Hotels violates
 the rights of the Hotels of Four Star and below classification under
 G Articles 14 and 19. The other decision considered by the High Court for
 allowing the writ petition filed by the Respondent is the case of **Kallada**
Hotels & Resorts (supra). The correctness of the decision of the
 Division Bench of the High Court was not in issue before this Court in
 the case of **Kerala Bar Hotels Association** (supra).

² AIR 2016 SC 163

9. Indeed, the decision of the Division Bench in **Kallada Hotels & Resorts** (supra) has been affirmed by this Court by dismissal of SLP(C) No.18392 of 2012 on 20th June, 2012 in the following terms: A

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Heard Mr. Ramesh Babu M.R., learned counsel for the petitioners. B

In the facts and circumstances of the case, we are not inclined to interfere with the impugned judgment.

The Special Leave Petition is, accordingly, dismissed. Question of law is kept open.” C

Even the review petition filed by the State against the said decision, being Review Petition(C) No.1409 of 2012, came to be dismissed on 14th August, 2012.

10. What is relevant to note is that, in the case of **Kallada Hotels & Resorts** (supra), the Division Bench of the High Court had adverted to the decision of this Court in the case of **State of Kerala & Anr. v. B.6 Holidays Resorts Pvt. Ltd.**³, wherein it has been held that an application for grant of liquor licence has to be considered with reference to the rules/law prevailing or in force on the date of consideration of application by the Excise Authorities and not with reference to the law as on the date of the application. After noticing the decision of this Court, the Division Bench on the facts of the case before it allowed the Writ Appeal. It will be useful to advert to the relevant portion of the Division Bench decision: D

“4. Going by the judgment of the Hon’ble Supreme Court the law applicable is the law that is in force when the Excise authorities at various levels consider an application for FL3 licence, as is evidenced by the records produced in this case, the application submitted before the Excise Commissioner goes for enquiry to the Deputy Commissioner who make his recommendations which in turn is endorsed by the Joint Commissioner of Excise. Thereafter the application goes to Government and with the permission of the Government the Excise Commissioner issues E F G

³ 2010 (5) SCC 186

A *the licence. In this case the initial denial of licence to the*
appellant was on account of the mistake about the distance
from the temple which was wrongly reported as within the
prohibited distance. It is seen that within one month of
issuance of the first report namely Ext. P6 dated 25/08/2011
B *the Joint Excise Commissioner corrected the mistake on 22/*
09/2011 vide Ext. P9 recommending appellant's case for
issuance of licence. If Ext. P6 was issued with correct distance
without committing a mistake and at least if the correct report
namely Ext. P9 dated 22/09/2011 was acted upon in time the
appellant would have got licence even before the new policy
C *was introduced. Respondent has not brought to the notice of*
this Court any other objection against entitlement of the
appellant for licence. We feel appellant cannot be declined
licence on account of the mistake committed by the Excise
authorities in Ext. P6 report. In any case since by 22/09/
D *2011, correct report was submitted vide Ext. P9 we feel the*
amended rule which came into force on 09/12/2011 cannot
be applied to appellant. So much so, we hold that appellant
is entitled to have their application finally considered and
disposed of by the Government and Excise Commissioner with
reference to Rule 13 (3) as it stood prior to the amendment
E *introduced to it with effect from 09/12/2011. Accordingly the*
Writ Appeal is allowed vacating the observation of the learned
Single Judge in this regard and with a direction to the
respondent to consider and pass orders on appellant's
application at the earliest."

F 11. In our view, the question as to what date should be reckoned
as the date of consideration of licence has not been squarely dealt with
in this decision. Indubitably, the processing of the application for grant
of licence commences from the date of application. The final decision
on the proposal is required to be taken by the State Government. The
date on which a formal, final decision is taken by the competent authority,
G alone, would be the relevant date. The recommendation made by the
subordinate authority, even if significant for taking a formal decision by
the competent authority, will be of no avail.

12. In the present case, the learned Single Judge has assumed the

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date on which recommendation was made by the Excise Commissioner i.e. 28th March, 2012, as the relevant date. That assumption is untenable. For, that was not the date on which the final decision was taken by the competent authority. Whereas, before a final decision could be taken by the competent authority on the application submitted by the Respondent, the Foreign Liquor Rules were amended on 18th April, 2012. The application submitted by the Respondent for grant of licence, unquestionably, must be treated as pending and under consideration on this date.

13. A priori, no fault can be found with the State Authority for calling upon the Excise Commissioner to examine the proposal and submit his fresh recommendation keeping in mind the amended provisions of the Foreign Liquor Rules. In other words, the application for grant of FL-11 licence submitted by the Respondent was required to be considered by the competent authority keeping in mind the amended provisions which came into force w.e.f. 18th April, 2012. That is precisely what has been done by the Excise Commissioner, as can be discerned from his speaking order dated 5th June, 2012, for invoking the restriction of distance of 200 metres from the objectionable site.

14. Since the learned Single Judge of the High Court proceeded to decide the writ petition filed by the Respondent merely by referring to the pronouncement of the Division Bench of the same High Court in the case of **Kallada Hotels and Resorts** (supra), coupled with the fact that the Respondent had asked for a wider relief to declare the amendment of 18th April, 2012 as void to the extent it has introduced the restriction of distance of 200 meters from objectionable institutions for getting FL-11 licence, we deem it appropriate to relegate the parties before the learned Single Judge to decide the writ petition afresh, keeping in mind the settled legal position.

15. Accordingly, we set aside the impugned judgment of the Division Bench dated 12th August, 2014 in Writ Appeal No.950 of 2014 as also the judgment of the Single Judge in Writ Petition (c) No.14220 of 2012 dated 4th February, 2014. Further, we remand the Writ Petition(C) No.14220 of 2012 and restore it to the file of the Single Judge of the High Court of Kerala for being decided afresh on other issues in accordance with law.

A 16. The appeal is partly allowed in the above terms with no order as to costs.

Kallpana K. Tripathy

Appeal partly allowed.