

(2014) 02 KL CK 0209**High Court Of Kerala****Case No:** Writ Appeal No. 1215 of 2013

State of Kerala

APPELLANT

Vs

M.P. Shiju

RESPONDENT

Date of Decision: Feb. 18, 2014**Citation:** (2014) 2 KHC 343**Hon'ble Judges:** Antony Dominic, J; Anil K. Narendran, J**Bench:** Division Bench**Advocate:** Viju Abraham, (Senior Government Pleader), Advocate for the Appellant; B. Krishna Mani, D. Kesavan Nair, Rahul Venugopal and N.V. Sandhya, Advocate for the Respondent**Judgement**

Antony Dominic, J.

The respondents in WP (C) No. 8170 of 2013, which was a Writ Petition filed by the respondents herein, are the appellants. They are aggrieved by the judgment of the learned Single Judge rendered on 14/06/2013 whereby, Ext. P13 order passed by them rejecting Ext. P4 application submitted by the respondent for a FL3 licence, was quashed and they were also directed to grant the respondent FL3 licence. We heard the learned Government Pleader appearing for the appellants and the learned counsel for the respondent.

2. The essential facts of the case are that the respondent herein submitted an application for FL3 licence on 28/03/2012. That application was rejected by the appellants by their order on 18/10/2012 on the ground that the hotel of the respondent did not have four star classification, which was one of the requirements of Rule 13(3) of the Foreign Liquor Rules for grant of licence. Subsequently, after obtaining the necessary qualifications for a licence, respondent submitted Ext. P4 application dated 08/11/2012 for obtaining FL3 licence. The application was processed at various levels of the Department and by Ext. P25 dated 05/12/2012, the Excise Commissioner made recommendations to the Government for granting licence.

3. Despite all these, final orders on the applications were not passed and complaining of delay in the matter, respondent filed WP (C) No. 3104 of 2013 before this Court. That Writ Petition was disposed of by Ext. P12 judgment where this Court has held as follows:

6. It is not in dispute that Ext. P4 application has been received and is pending consideration of the authorities. The objection put forward is that in view of the appointment of the One Man Commission, the petitioner's application would be considered only after a new Abkari Policy is formulated. However, I notice that the Abkari Policy for the current year has already been finalised and is in place. The One Man Commission has been appointed, for the formulation of a fresh Abkari Policy. It is also pertinent to note that as per Ext. P10, a FL3 licence has been issued to a similar hotel. The application on the basis of which Ext. P10 has been issued was also initially submitted on 14/03/2012 but was rejected as in the case of the petitioner herein. Thereafter, a fresh application was submitted by the petitioners in Ext. P10. It was the said application that was considered and ordered as per Ext. P10. There are no circumstances, justifying a differential treatment to the petitioner. I also take note of the contention of the learned counsel for the petitioner that various other hotels have been granted similar licences, though no other licence has been produced by the petitioner. Since Ext. P4 is pending consideration of the respondents, it is only appropriate that the same is considered expeditiously, without waiting for the report of the One Man Commission.

In view of the above, this Writ Petition is allowed. Respondents 1 and 2 are directed to consider Ext. P4 application for FL-3 licence submitted by the petitioner, in accordance with law and to pass appropriate orders thereon, as expeditiously as possible and at any rate, within a period of three weeks of the date of production of a copy of this judgment.

4. In the purported compliance of the directions in Ext. P12 judgment, Ext. P13 order was passed rejecting Ext. P4 application. In that order Government held thus:

3. As per the Government Order read as 4th paper above, the Government have decided to appoint a One Man Commission to recommend comprehensive changes in the present Abkari Policy, including review of the FL-3 licences already granted. The Government have also taken a conscious policy decision not to grant any more bar licences till such time. Accordingly, Foreign Liquor Rules has also been amended as per the Government Order read as 5th paper above.

4. In the B six case, the Hon'ble Supreme Court allowed the appeal of the State holding that any application for grant of FL-3 licence, should be considered by the licensing authority by applying the law prevailing as on the date of consideration, and not with reference to the law that was applicable on the date of application.

5. In the Kandath Distillery case, the Hon'ble Apex Court held that "State has the power to frame and re-frame, change and re-change, adjust and re-adjust policy,

which cannot be declared as illegal or arbitrary on the ground that the either policy was a better and suited to the prevailing situation.

6. Government have examined the application in detail in view of the Supreme Court orders mentioned above, as there is no provision at present for grant of FL-3 licence in the Foreign Liquor Rules, and the application for grant of FL-3 licence to Hotel Malayattoor Residency, Malayattoor, Kalady, Ernakulam is hereby rejected.

It was challenging Ext. P13 and seeking consequential directions for the grant of licence, the Writ Petition was filed and was allowed by the impugned judgment.

5. The first contention raised by the learned counsel for the appellants was that relying on Rule 13(b) of the Foreign Liquor Rules, the learned Judge held that under the Rule the Excise Commissioner having recommended the grant of licence as per Ext. P25 and as the Excise Commissioner has once taken a decision in the matter, Rules do not contain any provision for the Government to interfere in the said decision making process. This finding, according to the learned Government Pleader, is against the terms of Rule 13(3) of the Rule.

6. Rule 13(3) of the Foreign Liquor Rules state that the licence in this form may be issued by the Excise Commissioner under orders of Government in the interest of promotion of tourism in the State to hotels satisfying the required standards. Therefore, the licence under this form can be issued by the Excise Commissioner only under the orders of the Government and therefore even if a recommendation has been made by the Excise Commissioner, for issuing licence orders thereon are required to be obtained from the Government. In view of this, the finding of the learned Single Judge that there is no provision in the Act or Rules enabling the Government to interfere with the decision making process by the Excise Commissioner cannot be accepted and the same is subject to orders of the Government as provided under Rule 13(3) of the Foreign Liquor Rules. We clarify the legal position as above.

7. Be that as it may, insofar as this case is concerned, the reason stated in Ext. P13 Government Order for rejecting the application of the respondent is that the Government have appointed a One Man Commission to recommend comprehensive changes in the Abkari policy and have also taken a conscious policy decision not to grant any more bar licence till such time. As far as the appointment of the One Man Commission and the decision of the Government to await the report of the commission are concerned, in Ext. P12 judgment, the relevant portion has already been extracted, this Court has already held that such appointment of the One Man Commission cannot be a reason for denying consideration of the application of the respondent. Therefore, the fact that a One Man Commission has been appointed and that its report is awaited is not a reason insofar as the respondent herein is concerned.

8. As far as the policy in decision not to grant any more bar licence till the receipt of the one Commission Report is concerned, the learned Government Pleader pointed out that by Annexure-A3 dated 12/02/2013 a proviso has been added to the Rule 13(3) of the Foreign Liquor Rules, providing that no new licence under this Rule shall be issued. However, the question is whether the said proviso will have any relevance insofar as the respondent herein is concerned. Ext. P8, i.e., a common judgment rendered by this Court in WA No. 470 of 2012 and connected cases. In this judgment, following the judgment in WA No. 469 of 2012, a Division Bench of this Court held thus:

The learned counsel for the appellants/petitioners have relied on a Division Bench judgment of this Court in WA No. 469 of 2012 dated 14/03/2012, wherein this Court held that the law to be applied is the law as on the date on which the Excise Commissioner reconsidered application for grant of licence and when he recommends it based on the Rule in force as on that date, then the subsequent amendment should not be relied on by the Government to deny licence. We also notice that the Special Leave Petition filed by the State against the judgment in WA No. 469 of 2012 has been dismissed by the Hon"ble Supreme Court by order dated 20/06/2012 in Petition for Special Leave to Appeal (Civil) No. 18392/2012, however keeping the question of law open: Between the Government and the Excise Authorities, consideration on merit is done by the Excise Authorities and when the Excise Commissioner recommends with reference to the law as on the date of his order, then the Government cannot decline it merely because they passed amendment subsequent to the order.

(emphasis supplied)

9. Although SLPs have been filed against this judgment and Ext. P9 order has been passed by the Hon"ble Apex Court in those SLPs, the aforesaid findings in Ext. P8 have not been stayed by the Hon"ble Apex Court. A reading of the principles thus laid down by the Division Bench in the judgment in WA No. 470 of 2012 and connected cases would show that between the Government and the Excise Authorities, consideration on merit is done by the Excise Authorities and that when the Excise Commissioner makes his recommendation with reference to the law as on the date of his order, then the Government cannot decline licence to the applicant merely because an amendment has been made to the rules subsequently.

10. Insofar as this case is concerned by Ext. P25 dated 05/12/2012 recommendation of the Excise Commissioner was made. The amendment to the rule by which the proviso relied on by the learned Government Pleader, was effected by Annexure-A3 dated 12/02/2013 and it is on that basis Ext. P13 order has been issued on 15/03/2013 rejecting the application of the respondent. In the light of the principles laid down by the Division Bench in WA No. 470 of 2012 and connected cases, we must necessarily hold that when the Excise Commissioner has made his recommendation by Ext. P25 dated 05/12/2012, the Government could not have

relied on by the amendment brought on by them on 12/02/2013 and consideration of Ext. P4 application has to be on the basis of Ext. P25. Therefore the amendment relied on by the Government in Ext. P13 had no relevance and for that reason Ext. P13 deserves to be quashed. Yet another aspect of the matter which need to be noticed is that in Ext. P12 judgment in WP (C) No. 3104 of 2013, this Court has held that there is no circumstances justifying a treatment to the petitioner which is different from Ext. P10 therein. Ext. P10 in that case was the order issued on 31/01/2013 granting FL3 licence to an applicant. Ext. P12 judgment has become final. If that be so, in view of the binding force of the findings in Ext. P12 judgment, the respondents' case ought to have been treated on a par with the beneficiary of Ext. P10 order. That reason also renders Ext. P13 Government Order untenable and liable to be set aside.

For the aforesaid reasons we fully agree with the learned Single Judge that Ext. P13 order was illegal and therefore uphold the judgment.

The Writ Appeal therefore fails and is dismissed.