



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF JANUARY, 2023

BEFORE

THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ

WRIT PETITION NO.31185 OF 2018 (EXCISE)

BETWEEN:

COHIBA CLUB

...PETITIONER

(BY SRI.S. VENKATESHWARAN., ADVOCATE)

AND:

1. THE DEPUTY COMMISSIONER
BENGALURU URBAN DISTRICT,
BENGALURU-560 009.
2. THE DEPUTY COMMISSIONER OF EXCISE
BENGALURU URBAN DISTRICT (EAST)
BENGALURU-560 038.
3. THE EXCISE COMMISSIONER
IN KARNATAKA,
2ND FLOOR, TTMC, A BLOCK,
BMTc BUILDING,
SHANTINAGAR,
BENGALURU-560 027.

...RESPONDENTS

(BY SMT. JYOTHI BHAT, HCGP)

Digitally
signed by
POORNIMA
SHIVANNA
Location:
HIGH
COURT OF
KARNATAKA



THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE A WRIT OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT, ORDER OR DIRECTION QUASHING THE IMPUGNED ORDER AS PER ANNEXURE-F DATED 28.6.2018 PASSED BY THE KARNATAKA APPELLATE TRIBUNAL, BENGALURU IN APPEAL NO.173/2016 AND CONSEQUENTLY THAT OF THE 1ST RESPONDENT DATED 13.8.2009 AS PER ANNEXURE-A IN NO.EXE 02 IML 2009-10 AND THAT OF THE 3RD RESPONDENT DATED 6.1.2011 IN APPEAL NO.ECS 73/APP 2009 AS PER ANNEXURE-B AND ETC.

THIS WRIT PETITION, COMING ON FOR PRELIMINARY HEARING IN 'B' GROUP, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

1. The petitioner is before this Court seeking for the following reliefs:
 - a) *Issue a writ of certiorari or any other appropriate writ, order or direction quashing the impugned order as per Annexure-F dated 28-6-2018 passed by the Karnataka Appellate Tribunal, Bengaluru in Appeal No.173/2016 and consequently that of the 1st respondent dated 13.8.2009 as per Annexure-A in No.EXE 02 IML 2009-10 and that of the 3rd respondent dated 6.1.2011 in Appeal No. ECS 73/APP 2009 as per Annexure-B*
 - b) *Issue a writ of mandamus directing the respondent No.1 to renew the license in form CL-9 in favour of the petitioner for the Excise Year 2018-19.*
 - c) *Issue any other appropriate writ, order or direction deemed fit to be granted under the facts and circumstances of the case including a direction for cost.*



2. The petitioner 'Cohiba Club', a registered partnership firm engaged in the business of running Bar and Restaurant having CL-9 licence. 1st respondent- Deputy Commissioner vide order dated 13.08.2009 cancelled the licence of the petitioner and it is aggrieved by the same that the petitioner is before this Court.
3. Sri.S.Venkateshwaran, learned counsel for the petitioner, would submit that:
 - 3.1. there is no violation as alleged of either Rule 17(b) of the Karnataka Excise Licences (General Conditions) Rules, 1967 (for short, 'Rules') or Section 29 of the Karnataka Excise Act, 1965 (for short, 'Act'). Therefore, the powers under Section 29 of the Act could not be exercised by 1st respondent to cancel the valid excise licence in the name of the petitioner.



3.2. that there being a dispute between the partners, the said partners have made use of the 1st respondent so as to cause multiple notices to the petitioner within a short period of time and thereafter cancelled the licence, which action on the part of the 1st respondent is a malafide action and is not in terms of Section 29 of the Act. The petitioner has filed an application for a review of the judgment, but the said review application came to be rejected. It was for the 1st respondent to consider the matter in the right perspective inasmuch as in the review petition, it was specifically pleaded that there is no change in the name of the partnership firm. The name of the firm continues to be Cohiba club. The mere change of partners would not amount to a transfer of license so long the name of the licensee continues to be the same.



3.3. even if at all there is a deemed transfer which has occurred, then at the most respondent authority should have called upon the petitioner to make payment of the transfer fee and/or penalty thereon instead of cancelling the same under Section 29 of the Act. He submits that Section 29 of the Act would be applicable only as regards the violation specifically mentioned in the licence which was granted and the transfer of licence not being a ground mentioned in the licence, Section 29 could not have been invoked.

4. Smt.Jyothi Bhat, learned HCGP would submit that:

4.1. in the case of ***M/S.SHANKAR WINES AND THE COMMISSIONER OF EXCISE IN KARNATAKA AND ANOTHER¹*** this court has held that in cases relating to partnership firm, in the event of partners retiring and new partners entering,

¹ W.P.No.30590/2014 c/w W.P.No.56657.2014 dated 22.08.2017



requiring the reconstitution of the partnership firm. If there is a change to the extent of 50% or more in the constitution of the partnership, there is a deemed transfer of licence which would have occurred, requiring the licensee to make payment of necessary transfer fee. In this regard she relies upon para 12, 13 and 20 thereof, which reads as under:-

12. *It is to be seen first that when such a change in the constitution of partnership firm would effectively result in change in the control and management of the partnership firm, who is the Excise Licensee in question. If an outright sale of business takes place and entire new set of partners takes over the business, then there is no difficulty in applying Rule 17-B to such a case and for transfer of Excise Licence in the name of the new partnership firm, even though, it has continued to carry on the business in old and existing name and style of the partnership firm. But, the difficulty may arise where the change in the constitution of partnership firm takes place in a phased or staggered manner. Therefore, a thumb rule of 50% or more of the change of the share in the profits and losses of the partnership firm is considered to be appropriate and the said thumb rule of 50% change in the existing partnership firm composition was found to be acceptable to both the sides, the petitioners as well as the Excise Department, also.*

13. *The said rule of 50% or more of change in composition would operate in the following in the manner:-*

*Suppose, the Excise Licensee is in the partnership firm ie., M/s. ABCD, Bangalore with four partners namely A, B, C, D each having 25% of shares in the partnership firm and the Excise Licence is held during the current year July 2017 to June 2018. On **31.12.2017**, partner with 25% share retires and a new partner 'X' is*



introduced in the partnership firm giving 'X' 25% of share. Since in the said illustrative case, the partnership firm of M/s.ABCD does not lose 50% or more of its effective control and 'X' is introduced in the firm with only 25% of share, this will not attract the transfer fee and the new partnership firm M/s.ABCX can be given the same Licence upon a transfer being recorded under Rule 17-B of Rules, 1967, without payment of transfer fees.

20. In case, the partnership firm who holds the licence does not inform the fact of change in the constitution of partnership firm within a reasonable period, say within a period of one month from the change in constitution of partnership firm, the concerned Excise Authorities may even proceed to initiate action against the Licencee of the partnership firm to impose suitable penalty and even take action for cancellation of the Licence itself.

4.2. She submits that initially licence was issued in the name of Sri.P.Lava Kumar and Sri.E.Ranjith Kuruvilla, who retired from the partnership and in their place Smt.Thirtha Kumar Swamy and Sri.Mohith Kumar Swamy entered as partners and subsequently Smt.Kapila Saigal had been inducted into the partnership with an understanding that the Smt.Thirtha Kumar Swamy and Sri.Mohit Kumar Swamy would be retiring from the partnership. The issue came to the notice of the Excise Department only



upon a complaint being filed by Smt.Kapila Saigal that Smt.Thirtha Kumar Swamy and Sri.Mohit Kumar Swamy were seeking to cheat Smt.Kapila Saigal by not complying with the terms of the agreement entered into between them. In that background, she submits that this aspect not having been brought to the notice of the Excise Department and no transfer fee having been paid after seeking for permission to transfer would attract the provision of Section 29 of the Act and as such, the authorities have exercised the powers in cancelling the licence on account of default committed by the petitioner.

5. Sri.Venkateshwaran, learned counsel for the petitioner in rejoinder arguments submits that there are discretionary powers vested with the Deputy Commissioner to either suspend the licence, cancel the licence or levy penalty. In the present case, the



Deputy Commissioner ought to have exercised that discretionary instead of cancelling the licence.

6. Heard Sri.S.Venkateshwaran, learned counsel for the petitioner and Smt.Jyothi Bhat, learned HCGP and perused papers.
7. It is not in dispute that when the licence was issued, the partners were Sri.P.Lava Kumar and Sri.E.Ranjith Kuruvilla. Subsequent thereto, these two partners have apparently exited from the partnership and in their place, it is Smt.Thirtha Kumar Swamy and Sri.Mohit Kumar Swamy who have become partners. Thus, the entire constitution of the firm has got changed, in essence, the partners who have applied for and obtained the licence are no longer the partners and in their place, there are new partners. This aspect gets further complicated when Smt.Thirtha Kumar Swamy and Sri.Mohit Kumar Swamy entered into an agreement with Smt.Kapila



Saigal to induct Smt.Kapila Saigal into partnership at the initial stage and thereafter to induct such representative of Smt.Kapila Saigal as she intended to with an understanding that Smt.Thirtha Kumar Swamy and Sri.Mohit Kumar Swamy would be retiring from the partnership. By applying the ratio laid down by this Court in **M/S.Shankar Wines** case supra, it is clear that even there is a 50% change in the constitution of the partnership, then the same would amount to a transfer. In the present case, at the first instance, both the partners having exited, and two new partners being inducted, there is a 100% change in the partnership firm. At the second stage, even the inducted partners wanted to induct a new partner which according to Sri.Venkateshwaran, learned counsel for the petitioner has not been given effect to though a reconstituted partnership deed has been executed.



8. I am of the considered opinion that once a reconstituted partnership deed has been executed it would amount to a change in the constitution of the partnership and the same comes within the mischief as enumerated in **M/S.Shankar Wines** case supra and as such it would fall foul of Rule 17B of the Rules entitling the 1st respondent-Deputy Commissioner to exercise powers under Section 29 of the Act.

9. Section 29 of the Act reads as under:

Power to cancel or suspend licence, etc

(1) Subject to such restrictions as the State Government may prescribe, the authority granting any licence or permit under this [1] [shall cancel it],-

(a) if any duty or fee payable by the holder thereof is not duly paid; or

(b) in the event of any breach by the holder thereof, or by any of his servants or by any one acting on his behalf with his express or implied permission, of any of the terms and conditions thereof ; or

(c) if the holder thereof or any of his servants or any one acting on his behalf with his express or implied permission, is convicted of any offence under this Act; or

(d) if the holder thereof is convicted of any cognizable and non-bailable offence or of any offence under the Dangerous Drugs Act, 1930, or under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, or under the Trade and Merchandise Marks Act, 1958, or under section 481, 482, 483, 484, 485, 486, 487, 488 or 489 of the Indian Penal Code or of any offence punishable under section 112 or 114 of the Customs Act, 1962; or



(e) if the conditions of the licence or permit provide for such cancellation or suspension at will.

[Provided that in case of contravention of provisions of sub-section (1) of section 36 except clauses (c), (g) and (h), the authority granting the licence or permit shall have discretion to cancel or suspend a licence or permit:

Provided further that a licence or permit shall not be cancelled or suspended without giving an opportunity of being heard to the licensee or the holder of permit, as the case may be.]

(2) Where a licence or permit held by any person is cancelled under [3] [xxx] sub-section (1) the authority aforesaid may cancel any other licence or permit granted to such person under this Act or under the Opium Act, 1978.

(3) The holder shall not be entitled to any compensation for its cancellation or suspension nor to the refund of any fee paid or deposit made in respect thereof.

10. It is clear from the perusal of the said Section that if any duty or fee payable by the holder is not duly paid, then, the powers under Section 29 of the Act could be used. It is clear from Sub-Clause (a) of Sub-Section (1) of Section 29 of the Act that if there is any breach of any terms then also the powers under Section 29 of the Act could be exercised.
11. In the present case, when the initial partners exited and Smt.Thirtha Kumar Swamy and Sri.Mohit Kumar



Swamy were inducted as partners, there being a transfer, there was a transfer fee, which was required to be paid, which has not been paid, therefore, entitling the 1st respondent to exercise powers in terms of Sub-Clause (a) of Sub-Section (1) of Section 29 of the Act.

12. The transfer having occurred and not having brought to the notice of the Deputy Commissioner, there being a breach of the licence, 1st respondent would be entitled to exercise his powers of Sub-Clause (a) of Sub-Section (1) of Section 29 of the Act.

13. In view of the above, I am of the considered opinion that the submission made by learned Counsel for the petitioner that Section 29 of the Act would not be applicable would have to be rejected.

14. One another submission of Sri.Venkateshwaran, learned counsel for the petitioner is that discretionary powers ought to have been exercised in



terms of levy of penalty or fine on the petitioner and continuation of the licence. When the petitioner have kept quite for such a long length of time suppressing the transfers, which have occurred, I am of the considered opinion that no such discretion was required to be exercised in favour of the petitioner. As such, I do not find any infirmity in the order passed by the 1st respondent - Deputy Commissioner.

15. In view thereof, the Writ Petition stands dismissed.

**Sd/-
JUDGE**

PRS
List No.: 1 Sl No.: 104