

Sasi vs Shobana

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Court : Kerala Orders

Decided On : Apr-11-2023

Judge : Honourable Mr. Justice Amit Rawal, Honourable Mrs. Justice C.S. Sudha

Appeal No. : WA/705/2023

Appellant : SASI

Respondent : Shobana

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL & THE
HONOURABLE MRS. JUSTICE C.S. SUDHA TUESDAY, THE 11TH
DAY OF APRIL 2023 / 21ST CHAITHRA, 1945 WA NO. 630 OF 2023
AGAINST THE JUDGMENT DATED 14.03.2023 IN WP(C) 659/2023 OF
HIGH COURT OF KERALA APPELLANT/RESPONDENT NO.5: SASI
AGED 51 YEARS S/O. VELAYUDHAN MULLOLLI HOUSE, POTTA
VILLAGE, POTTA P.O, CHALAKKUDY TALUK, THRISSUR DISTRICT.
PIN - 680722 BY ADVS. ARUN CHANDRAN THOMAS
J.ANAKKALLUNKAL ANJALY T.A
RESPONDENTS/PETITIONER/RESPONDENTS:

1 SHOBANA AGED 58 YEARS W/O. SURESH BABU (LATE), KALLOZHI VATTATHODI HOUSE, PARUTHIPRA DESOM, SHORNUR VILLAGE, OTTAPALAM TALUK, PALAKKAD DISTRICT., PIN - 679121
2 THE EXCISE COMMISSIONER COMMISSIONERATE OF EXCISE, EXCISE HEAD QUARTERS, NANDAVANAM, THIRUVANANTHAPURAM, PIN-695 033. 3 THE DEPUTY COMMISSIONER OF EXCISE EXCISE DIVISION OFFICE, CIVIL STATION, AYYANTHOLE, THRISSUR. PIN - 680003 4 THE CIRCLE INSPECTOR OF EXCISE EXCISE CIRCLE OFFICE, CHALIPPADAM, WADAKKANCHERRY, THRISSUR DISTRICT, PIN - 680623 5 THE DISTRICT COLLECTOR COLLECTORATE P.O, AYYANTHOLE, THRISSUR., PIN -680003 BY ADV NIREESH MATHEW

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 11.04.2023, ALONG WITH WA.705/2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL & THE HONOURABLE MRS. JUSTICE C.S. SUDHA TUESDAY, THE 11TH DAY OF APRIL 2023 / 21ST CHAITHRA, 1945 WA NO. 705 OF 2023 AGAINST THE JUDGMENT DATED 14.03.2023 IN WP(C) 1270/2020 OF HIGH COURT OF KERALA APPELLANT/NON-PARTIES: SASI, AGED 51 YEARS S/O., VELAYUDHAN MULLOLLI HOUSE, POTTA VILLAGE, POTTA P.O, CHALAKKUDY TALUK, THRISSUR DISTRICT, PIN - 680722 BY ADVS. ARUN CHANDRAN THOMAS J.ANAKKALLUNKAL ANJALY T.A RESPONDENTS/PETITIONER:

1 SHOBANA W/O. SURESH BABU (LATE), KALLOZHI VATTATHODI HOUSE, PARUTHIPRA DESOM, SHORNUR VILLAGE, OTTAPALAM TALUK, PALAKKAD DISTRICT. PIN - 679121 2 THE STATE OF KERALA REPRESENTED BY ITS SECRETARY, TAXES (A) DEPARTMENT, GOVERNMENT SECRETARIAT,

THIRUVANANTHAPURAM, PIN -695001 3 THE EXCISE
COMMISSIONER, COMMISSIONERATE OF EXCISE,
THIRUVANANTHAPURAM, PIN - 695033 4 THE DEPUTY
COMMISSIONER OF EXCISE, THRISSUR, PIN - 680001 5 THE
EXCISE INSPECTOR EXCISE RANGE OFFICE,WADAKKANCHERRY,
THRISSUR DISTRICT, PIN - 680582 BY ADV NIREESH MATHEW

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
11.04.2023, ALONG WITH WA.630/2023, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING: AMIT RAWAL & C.S.SUDHA, JJ.

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===== Dated this the
11th day of April, 2023

JUDGMENT

Amit Rawal, J.

The learned Single Judge vide judgment dated 14/03/2023 allowed the writ petition preferred by the respondent No.1, Shobana seeking allotment of toddy shop on the basis of privilege/ preference certificate and closed the other writ petition bearing no.1270/2020 wherein cancellation of the privilege/ preference certificate dated 27/11/2019 and the licence dated passed in Crl.M.C.No.1834/2022, the petitioner was granted the preference certificate on 06/01/2023, Ext.P2 in Writ Petition(C) No.659/2023. In this view of the matter, counsel representing the appellant submitted that no cause of action would survive in pursuing writ appeal bearing No.705/2023 arising out of Writ Petition(C) No.1270/2020, which has been closed and seeks leave of this Court for withdrawal of the same. Ordered accordingly.

2. Writ appeal No.630/23 arises on account of impugned

judgment rendered in Writ Petition(C). No.659/2023. The appeal has been

filed on behalf of an appellant, who was arrayed as respondent No.1 in the writ petition preferred by a successful allottee of a toddy shop in the draw of lot held on 07/01/2023. We would be referring to the appellant as respondent in the writ petition and the respondent no.1 in the writ appeal as writ petitioner.

3. During the year 2016-17, Suresh Babu K.G., husband of

the writ petitioner-Shobana was the original licensee of the toddy shops in Group No.X of Wadakkancherry range. The said toddy shops in the groups, on account of his death, were closed on 18/11/2016. On demise, the privilege and licenses issued in his favour was transferred in favour of the writ petitioner, Shobana as per the order dated 18/01/2017 and since then, the writ petitioner continued to be the licensee of the toddy shops in the groups, aforementioned, for the year 2019-20, on the basis of the renewal of privilege and license up to 31/03/2020.

4. On 16/07/2019 at 12.00 noon, Preventive Officer of

Excise Range on inspection had taken the sample bearing no.53/2016-17 of Kumarappan of the above group and was sent for chemical analysis. As per the chemical analysis certificate dated 01/10/2019 the percentage by v/v of ethyl alcohol was detected as 8.12% greater than the permissible limit as prescribed under Rule 9(2) of the Kerala Abkari Shops (Disposal) Rules,

2002. On the basis of the aforementioned report, a criminal case bearing

No.51/2019 under Section 56(b) and 57 (a) of the Abkari Act I of 1077 was registered against the Manager, one Sadanandan as well as the writ petitioner Shobana. The permissible limit as per the aforementioned

provisions was required to be up to 8.1% v/v. As a result thereof, vide order

dated 27/11/2019 the preference certificate issued in favour of the writ petitioner was cancelled and as a consequential action, license was also cancelled vide order dated 08/01/2020.

5. The aforementioned orders were assailed by the

petitioner in the Writ Petition bearing No.1270/2020 as Annexures-P4 and P6 respectively. This Court vide order dated 17/01/2020, granted the interim order as prayed for. In the meantime, writ petitioner submitted an application for obtaining the preferential certificate, in view of the interim

order and the same was rejected vide order dated 15/03/2020, (Ext.P11

attached along with the I.A.No.2 of 2020). This Court vide order dated

order dated 15/03/2020, Ext.P11 in W.P.(C)No.1270/2020. It was made

clear that the allotment of toddy shops pursuant to the auctions for the year 2021 to 2023 would be subject to the result of the writ petition.

6. In pursuance to the interim order dated 17/01/2020 in

W.P.(C)No.1270/2020, the writ petitioner was allowed to conduct the toddy shops in group No.X in Wadakkancherry Excise Range in Thrissur Division without taking into account the registration of the case as a disqualification, which continued till 31/03/2020. For the period commencing from to one Baiju through lucky draw. But for the personal reasons, it was not renewed. For the purpose of inviting the bid, a notification was published inviting applications for allotment of the toddy shops which was conducted on 07/01/2023.

7. In the meantime, the writ petitioner preferred

Crl.M.C.No.1834/2022 seeking quashing of the criminal case registered as crime No.51/2019 of Wadakkancherry Excise Range, registered as C.C.No.2040/2021 pending before the Judicial First Class Magistrate. This Court, in Crl.M.C. No.1834/2022 vide order dated 21/03/2020 issued directions to the Excise Officers, who were arrayed as respondents 3 and 4 to permit the petitioner herein and the writ petitioner herein to participate in the allotment process without taking

into account the pendency of the crime no.51/2019 against them. The writ petitioner in pursuance of the aforementioned order, submitted an application to the concerned department for issuance of the preference certificate. The said officer without seeking the vacation of the order and apprising the court with regard to the Rules of the Kerala Abkari Shops (Disposal) Rules, 2002, on 06/01/2023, granted a certificate in favour of the petitioner. Despite having been granted a certificate, the Criminal Court vide order dated 14/03/2023 stayed the further proceedings in C.C.No.2040/2021 pending before the Judicial First Class Magistrate in Cr.No.51/2019 and further ordered that the registration of the crime under Section 57(a) and 56(b) of the Abkari Act and the pendency of Criminal proceedings shall not be taken as a ground for denying the preferences available to Shobana, writ petitioner in the auctions conducted as per Rule 5(1)(a) of the Kerala Abkari Shops (Disposal) Rules,

2002. In this view of the matter, writ petitioner preferred writ petition

No.659/2023 equipped with the order of the criminal court and as well as the preferential certificates as Exts.P1 and P2 and sought the indulgence of this Court for quashing sale of the toddy shops in group No.X conducted by the Collector, with a further declaration that the petitioner be allotted toddy shops in pursuance to the provisions of Rule 5(1) of Rules 2002. Both 5th respondents that is the successful allottee and the Excise Commissioner filed a counter statement besides taking up the objections of maintainability of the writ petition, it was averred that the certificate of preference was issued under the misconception nor did petitioner participate in the auction held on

8. Learned Single Judge on the basis of the provisions of

Rule 5(1)(a) and Rule 5(2) closed the W.P.(C).No.1270/2020 but allowed the W.P.(C).No.659/2023 by granting declaration in favour of the writ petitioner to obtain the allotment of toddy shop in group X of Wadakkancherry Excise Range as per the preference certificate dated the privilege granted to the 5th respondent, that is, the appellant herein, in the draw of lots would stand cancelled and competent authorities were directed to reconsider the matter on the strength of preference certificate dated

9. Learned counsel appearing on behalf of the appellant

submitted that the learned Single Judge did not notice the provisions of Rule 5(4) and 5(7) of Kerala Abkari Shops (Disposal) Rules, 2002 as the writ petitioner-respondent herein, did not participate in the auction nor had deposited any entrance fee except was issued a clearance certificate dated proceedings have been stayed by the High Court. The provisions of the aforementioned Rules have to be applied strictly for intended allottees, the holders of preferential certificates. Direction of the learned Single Judge would be total farcical and putting the clock back.

10. On the other hand, Mr.Karthikeyan M.G, the learned

counsel appearing on behalf of the writ petitioner submitted that a preference certificate holder as per the provisions of the Rules aforementioned, is not required to participate in the lucky draw as there is separate procedure for such holders. Preference has to be given to a holder of a certificate. He is barred to compete in ordinary draw of lot until and unless there is another preference holder. The reply of the Excise Department did not disclose whether there was any other preference holder except the writ petitioner, thus the order of the learned single Judge is wholly justiciable and do not require any re-consideration and urged this Court for dismissal of the Writ Appeal.

11. We have heard the learned counsel for the respective

parties. For appreciating contentions and as well as the order of the Single Bench allowing the Writ Petition (C). No. 659/2023 in favour of the writ petitioner, it would be axiomatic to extract the various provisions of Rules 5 of the Rules 2002:-

5. The Grant of privilege of vending Toddy shall be subject to the following conditions, namely.- [(1)(a) While giving privilege, preference shall be given to those licencees who had conducted toddy shops during the [year [2019-20], provided no Abkari case is registered against him other than under section 56 of the Abkari Act. [The licencees who have conducted the shops during the year

[2019-20] and whose licences cancelled due to registration of Abkari cases and subsequently exonerated by the Court [x x x].] [Provided that shops which functioned till 2006-07 and which are sought to be relocated within 50 metres radius of the previous site, for carrying out repair to the building etc. shall be deemed as functional during [2013-14.] [Provided that preference to an applicant in the sale of Toddy shops shall be limited to [one group] [range] of Toddy Shops in the whole of the State.]

[Provided further that no person shall be allowed to purchase more than two groups of toddy shops; Provided also that persons above eighty years of age as on the date of sale shall not be eligible for the purchase of toddy shop.] [(b) The privilege in sub-rule (1)(a) above shall be confined to the group [range] of shops in which his shop falls.] [(2) The Circle Inspector of Excise shall certify the eligibility of preference as required in sub-rule (1)]

(4) Any [applicant] who intends to avail the privilege of vending toddy in any shops as may be notified in sub-rule

(1) of rule 4 shall be present in the place/room where the

sale is conducted. Each intending purchaser, shall pay a sum of Rs. 200 as entrance fee to the "[Deputy Commissioner of Excise] of the Division concerned before the time of sale and shall obtain a receipt thereof from that officer. The entrance fee thus paid shall not be refund. He/She shall bring an identity card in Form I appended to these rules containing his/her recent photograph and his/her signature duly attested by a Revenue Officer not below the rank of a Village Officer of the area where he/she permanently resides. The entrance fee receipt and identity card shall also serve as hall ticket for the admission of the intending purchasers into the sale room No [applicant] will be allowed to purchase the privilege as an agent for another.

(7) [When the sale for each group/ range

commences, the officer conducting the sale shall announce the name of the group/ range, the number and name of toddy shop to be sold, the annual rental fixed for the group/ range and the rental for three years and shall invite

applications for taking up the privilege from the intending purchasers]. The [applicant] desirous of purchasing the privilege shall thereon submit application in writing (before the officer) conducting the sale requesting for the grant of privilege. The application shall be in form 11 appended to these rules and shall bear necessary court fee stamps of the value prescribed by law. The application shall be accompanied by a Bank Draft drawn in favour of the [Deputy Commissioner of Excise] concerned for a amount equal to the annual rental fixed for the [group] [range]. In addition the applicant[shall furnish a bank guarantee or bank draft in favour of the [Deputy Commissioner of Excise] of the Division concerned or solvency by way of deposits in Treasury Savings Account, pledged in the name of [Deputy Commissioner of Excise] of the Division concerned] equivalent to the wages and other benefits to the workers of the [group] [range] payable for one month, which shall fixed by the Toddy Workers Welfare Fund Board. The application shall also be accompanied by the following documents namely:

- (i) Entrance fee receipt
- (ii) Identity card,
- (iii) Certificate to the effect that the applicant is not a

defaulter of Abkari arrears, Sales Tax arrears or any other arrears due to the Kerala Toddy Workers Welfare Fund or the Kerala Abkari Workers Welfare Fund or that he has remitted before the date of sale of shops 50% of the arrears pending as on the date of sale notification, obtained from the Circle Inspector of Excise, Sales Tax Officer or the Authority of the said Welfare Fund Board.

(iv) Certificate to the effect that the applicant, has no

liability towards the Kerala Abkari Welfare Fund and the Toddy Workers Welfare Fund as on 31st December of the preceding years, obtained from the Welfare Fund Inspector concerned. "[v) A declaration disclosing the source of fund, which is being utilized by him for the purchase of the toddy shops.

(vi) An attested copy of the Ration Card issued by the State Civil Supplies Department in which the name of the applicant is enlisted.

(vii) Income Certificate of the applicant issued by the Revenue Authority not below the rank of Village Officer]

(8) The Officer conducting the sale shall verify each application so received and if he is satisfied on consideration of the factors contained in the application and the documents attached thereto and the stipulations contained in these rules that:

(a) there is no objection for the grant of privilege, he may select the applicant or applicants of such applications as the case may be eligible for purchasing the privilege:

(b) there is objection for the grant of privilege he may reject such application or applications stating the reasons publicly.

12. On perusal of Rule 5(1)(a), it is evident that preference

shall be given to those licensees who had conducted toddy shops during the year 2019-20. It is not in dispute that the writ petitioner-respondent in the writ appeal had conducted the toddy shop for the period aforementioned. But the aforementioned provisions cannot be read in isolation as there is a proviso which unambiguously envisage that the said preference will be only given in case there is no abkari case is registered against him other than Section 56 of the Abkari Act and whose licenses have been cancelled due to registration of abkari cases and subsequently exonerated by the court. It is a matter of record and facts noticed above that CrI.M.C.No.1834/2022 for quashing of Cr.No.51/2019 is pending and there is no exoneration. Direction of stay of further proceedings do not amount to

exoneration.

Order passed by the Criminal Court dated 21/03/2022 is extracted herein

below: There shall be a direction to respondents 3 and 4 to permit the petitioner to participate in the allotment process without taking into account pendency of Crime No.51/2019 against them.

13. However, the petitioner in Crl.M.C.No.1834/2022 did

not disclose the order dated 15/03/2020, Ext.P11 annexed with W.P. (C).No.1270/2020 along with I.A.No.2/2020 whereby request for issuance of preference certificate was rejected and there was no challenge to that. Exact order reads as follows: Date-15.03.2020 From Circle Inspector of Excise Wadakkancherry To Smt.Shobhana W/o. Late Suresh babu Kallozhi vattathodi House Paruthipra desam Shornur Village Ottapalam Taluk. Sir, Sub: Abkari - request to grant Preference Certificate for toddy shops in Group No.X of Wadakkanchery Range for 2020-21 -Rejected - reg. Ref: Your application dated 11.03.2020. Kind attention is invited to the subject cited. WP(C) Exhibit.P4 and P6 orders and directing the respondents to permit the petitioner to conduct the toddy shops in Group No.X of Wadakkanchery Range without holding into account the registration of Ext.P2 case as a disqualification, pending disposal

of the Writ petition and The Hon'ble Court passed an interim order

as prayed by you on 17.01.2020. Accordingly the respondents allowed you to run the toddy shops till license period. It is clear from the Abkari policy for the year 2020-21 and from Rule 5(1)(a) of Kerala Abkari Shops Disposal Rules 2002, preference shall be given to those licensees who had conducted toddy shops during 2019-20 and no Abkari case is registered against him/her other than under Section 56 of the Abkari Act of

1077. In this case an Abkari case viz.CR.No.51/2019 u/s 57(a) of

Abkari act is registered against you and the case is still pending. In the above circumstances the application for preferential certificate to run the toddy shops in Group No.X of Wadakkanchery Range for 2020/21 is hereby rejected.

14. But on the strength of interim order dated

18.03.2022 passed in Crl.M.C.No.1834/2022 submitted application for issuance of preference certificate. It appears that the petitioner has been playing hide and seek from the court and rather had been indulging in forum shopping for obtaining preference certificate through any means. The direction of the Criminal Court in our view with all due respect could not have been issued in a proceeding seeking quashing of the crime case as it was in the domain of the writ court, for, matter was already pending adjudication in this Court through W.P.(C).No.1270/2020. Not only this, the Ext.P11 order dated 15/03/2020 was also attempted to be stayed. But single bench of this Court vide order dated 18/03/2020 did not grant interim order. The order reads as follows: Heard. While I am not inclined to grant the interim

order as prayed for, it is made clear that the allotment of toddy shops

pursuant to the auction for the years 2021 to 2023 shall be subject to the result of the writ petition.

15. Even the aforementioned order was also not disclosed to

the criminal court of this court and it was made to believe the assertions made in the petition were correct and true. Perhaps in such eventuality thought it fit for granting permission to participate. The order of the criminal court of this court do not convey any directions to the authority to issue preferential certificate. There was no bar for the petitioner to participate as an ordinary contender instead of preference holder. But for the reason best known, an application was submitted to the authorities for issuance of preference certificate armed with the order dated 21/03/2022. Excise people under misconception issued the preference certificate dated certificate has not been challenged and by also taking into consideration the

provisions Rule 5(1)(a) and 5(2) allowed the writ petition, but failed to notice the provisions of sub-rule (4) and (7) of Rule 5. On perusal of the Rules extracted above, it is clear that the participant even if, it is a preference holder is required to deposit the fees and shall be issued an identity card. There is no pleading in the writ petition either in W.P. (C).No.1270/2020 or W.P.(C).No.659/2023 that the petitioner had deposited the amount or was issued identity card except for bald pleading, was not permitted by the Collector. There is no proof of submission of application in Form II with regard to participation in the bid conducted on 07/01/2023. Such bald allegations were emphatically denied in the counter filed by the respondents, but for the reasons best known, were not rebutted either any rejoinder or reply. It is the settled law that, if the pleadings are not emphatically denied, they are deemed to be admitted. All this factors in our considered opinion and view have not been pondered by the learned Single Judge. For the reasons stated above, we thus set aside the order passed by the learned Single Judge and allow the Writ Appeal. Sd/- AMIT RAWAL, JUDGE Sd/- C.S.SUDHA, JUDGE Jms/11.04 APPENDIX OF WA 630/2023 PETITIONER ANNEXURES Annexure -1 A TRUE COPY OF THE PROCEEDINGS IN WRIT PETITION (CIVIL) NO. 1270/2020 IS PRODUCED HEREWITH AND MARKED AS ANNEXURE - 1 Annexure - 2 A TRUE COPY OF THE INTERIM ORDER DATED 14.03.2023 IN CRL.M.C NO. 1834 IN 2022 IS PRODUCED HEREWITH AND MARKED AS ANNEXURE - 2