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Court : Kerala

Decided On : Mar-09-2016

Judge : K. Surendra Mohan & The Honourable Smt. Justice P.V. Asha

Appeal No. : WA. No. 2644, 2717 of 2015, IN WP(C) No. 36289 of 2015

Appellant : Ramanan

Respondent : State of Kerala, Represented by its Secretary, Taxes(A)Department and Others

Judgement :

Surendra Mohan, J.

1. Both these Writ Appeals are filed against a common order passed by the learned Single Judge in four Writ Petitions declining to grant the interim relief that was sought for by the petitioners. The appellants are licensees of toddy shops. Their licences have been suspended by the second respondent for the reason that the samples of toddy taken from the shops conducted by them have been found, on Chemical Analysis, to contain either starch or ethyl alcohol in excess of the permissible limit. On the basis of the Chemical Analysis Report, their licences have been suspended. The common contention of both the appellants is that, as per orders on applications submitted by them to the respective Magistrate's

Courts, the `B' Sample taken from their toddy shops have been sent for chemical analysis to a different laboratory since they dispute the correctness of the first report. Therefore, the suspension of their licences should await the report of the second sample.

2. The facts are not in dispute and are briefly summarized as under:- The appellant in W.A.No.2644 of 2015 is the licensee of the toddy shops in Group No.VIII of Karunagappilly Excise Range. A sample of toddy was taken from one of the toddy shops conducted by him, T.S. No.36. On analysis of the sample marked as `A', it was found that the sample showed presence of starch. Therefore, Crime No.177 of 2015 of Karunagappilly range was registered under Section 57(a) of the Abkari Act. The sample marked `B' was produced before the Judicial First Class Magistrate's Court, Sasthamcotta. Thereafter, the second respondent passed an order suspending the licence of the appellant in respect of all the toddy shops in Group No.VIII of Karunagappally Excise Range and directed him to show cause why the licences should not be cancelled. A copy of the said order is produced as exhibit P3 in the Writ Petition. Thereupon, the appellant filed WP(C) No.36289 of 2015 challenging the said proceedings and seeking to quash the same. In the Writ Petition, the appellant also sought for the grant of an interim order of stay of exhibit P3 and a direction to permit him to conduct the toddy shops till the report of chemical analysis of the second sample was obtained. However, the learned Single Judge has declined the interim order against which, the Writ Appeal has been filed.

3. The appellant in W.A.No.2717 of 2015 is the petitioner in W.P.(C) No.36287 of 2015. He is the licensee of all toddy shops in Group No.V of Karthikappilly Excise Range in Alappuzha Division. The Excise party inspected toddy shop No.26, conducted by him and took sample of toddy from the said shop. Upon chemical analysis, it was found that the sample contained 8.23% v/v of Ethyl Alcohol, which is in excess of the permissible limit of 8.1% v/v. Therefore, crime No.172 of 2015 of Karthikappilly Excise Range was registered against him alleging offences punishable under Section 56(b) and Section 57(a) of the Abkari Act. The appellant thereupon approached the Judicial First Class Magistrate's Court-1, Harippad and sought for a chemical analysis of the second sample that was produced in Court.

Accordingly, the same has been sent for chemical analysis. The report is awaited. While so, the second respondent passed an order suspending the licence of the appellant in respect of the toddy shops of Group No.V of Karthikappally Range and directed him to show cause why his licence should not be cancelled. A copy of the said order has been produced as exhibit P3 in the Writ Petition, which was under challenge therein. The appellant had also sought for a stay of exhibit P3 order and a direction to permit him to conduct the toddy shops till the report of the chemical analysis of the second sample was obtained. However, the learned Single Judge has declined the interim order, against which the appellant has filed this Writ Appeal.

4. The contention of the appellants is that, the second respondent has no authority to pass the impugned order suspending the licence of the petitioners solely on the basis of the report of analysis of the 'A' sample. Since the appellants were disputing the correctness of the said chemical analysis, they have already sought for chemical analysis of the 'B' sample. Any action to suspend or cancel the licence of the appellant could be initiated only after obtaining the result of analysis of the second sample also. The learned Single Judge has rejected the above contention holding that, the power to suspend a licence was not dependent on any chemical analysis report.

5. According to Senior Counsel Sri. CC Thomas who appears for the appellants, a learned Single Judge of this Court has by exhibit P5 judgment allowed a Writ Petition filed in similar circumstances and has ordered that all further proceedings would be subject to the orders to be passed by the Magistrate's Court and directed the status quo to be maintained until analysis of the second sample was obtained. Exhibits P6 to P8 interim orders following the dictum in exhibit P5 are also relied upon to contend that, it has been the consistent practice of this Court to interdict all proceedings of the second respondent to suspend or cancel an Abkari licence until report of the 'B' sample was available. Therefore, according to the learned Senior Counsel, there is no justification for the present view of the learned Single Judge. It is contended by the learned Senior Counsel that, the judgment of the Division Bench in WA No.794 of 2015 on which reliance has been placed by the learned Single Judge has not addressed the question that arises for consideration

in these cases. Therefore, the learned Single Judge erred in declining the interim order that was sought for.

6. The learned Senior Counsel further points out that, since the procedure contemplated by Rule 8 of the Abkari Shops Disposal Rules, 2002(Kerala) (herein after referred to as the Disposal Rules for short) contemplates dividing of the sample taken into two, marking them separately as 'A' and 'B' respectively, sending of the A sample for chemical analysis and thereafter producing of 'B' sample before the Jurisdictional Court, whenever a crime is registered, a valuable right is conferred on the licensee to have the second sample subjected to a separate chemical analysis, if he disputes the initial report. Therefore, whether the sample taken was deficient in any manner would become conclusive only after the report of analysis of the B sample was also obtained. Any action of the authorities to suspend or cancel the privilege granted to the licensee could be initiated only after report of analysis of the second sample is also received. According to the learned senior Counsel, suspension or cancellation of the privilege would cause irreparable injury and loss to the licensee, he would even lose his privilege to conduct the shops during the succeeding year. Therefore, any punitive action against him should await the report of analysis of the second sample also, where the licensee has sought for sending the second sample for such analysis. In the present case, since the second sample has already been sent for chemical analysis at the instance of the appellants, it is only appropriate that all further action is stayed until such report is available. The learned counsel placed reliance on the decisions in *Joshy George v. State of Kerala* [2011 (4) KHC 818] and *Rajappan and another v. State of Kerala* [2012(2) KHC 657] to contend that different Single Judges of this Court have quashed criminal proceedings that were initiated in similar circumstances, relying upon the reports of the second sample showing that the earlier reports were wrong. Reliance is placed on other unreported decisions also, all rendered by Single Judges of this Court.

7. The Government Pleader on the other hand seriously opposes the contentions of the learned Senior Counsel. According to the learned Government Pleader, the power of suspending a licence has been conferred on the second respondent by Section 26 of the Abkari Act. The said power is one that is available to the

authorities, to be exercised in accordance with the stipulations contained in the said provision. No restriction other than what has been stipulated by Section 26 could be imported into the said provision to limit the scope or amplitude of the said power. Therefore, an order suspending a licence could be attacked only if any of the limitations on the power, set out in the said provision is shown to have been violated. The power of suspension of a licence has to be exercised independently by the second respondent taking into account all the relevant facts and circumstances of a case. Since the facts and circumstances in each case would vary, no rigid rule regarding the circumstances under which such power could be exercised can be stipulated. According to the learned Government Pleader, the power available to the second respondent to suspend a licence is not confined to situations where presence of objectionable articles are detected in toddy or other liquor stored by the licensee for sale but is available generally in cases where any of the other provisions of the Rules are violated. Even violation of any of the terms of the licence would attract such action. In cases where such action is later on found to have been unwarranted, there is also provision for restoring the licence to the licensee. Reliance is placed on Rules 5(1)(a), and 7(34) of the Disposal Rules. Since in this case, the chemical analysis reports prima facie establish the case charged against the licensees, it is contended that suspension of their licences was fully justified. If ultimately, it is found that there are no grounds to continue the proceedings initiated against them, it is pointed out that, their licences would be restored. However, permitting them to conduct the toddy shops even after finding that they had been selling adulterated toddy would not be in public interest. It could jeopardize public health and could even result in liquor tragedies involving serious consequences. In order to prevent such incidents, it is only appropriate that a licensee who is prima facie found to be indulging in objectionable activities is removed from the scene by suspending his licence. If he is ultimately found to be innocent, there is provision for the restoration of his privilege to him. The course of action adopted by the authorities is in tune with the above rule of prudence, it is contended. It was taking into account the above aspects that the learned Single Judge has declined to grant an interim order in the present case. There are absolutely no grounds to interfere with the same, it is contended. According to the learned Government Pleader, since this Court has held in the

judgment in W.A. No.794 of 2015 that the power to suspend a licence is not dependent upon the obtaining of a chemical analysis report under Rule 8 of the Disposal Rules, the reasoning of the learned Single Judge cannot be found fault with on any count. Therefore, it is contended that these Writ Appeals are only to be dismissed.

8. Heard. The question to be considered is whether the action of the Excise Commissioner in suspending the licence of the appellants herein is liable to be stayed or set aside for the reason that, the same has been initiated before the result of analysis of the 'B' sample was available? Though a number of Single Bench decisions have been cited before us, we do not find that the above question has been addressed by any of the decisions.

9. In *Sudhakaran v. State of Kerala* [2011(1) KLT 977] on which reliance has been placed by the learned Government Pleader, the question was whether in view of the report of the second sample, the prosecution launched against the accused based on the chemical analysis of the first sample could be quashed. The learned Single Judge held that the report of chemical examination of the second sample could not be held to have superseded the chemical examination of the first sample. Therefore, it has been held that, the accused was not entitled to the relief of quashing of a criminal prosecution initiated against him on the said basis. According to the learned Senior Counsel for the petitioners, the correctness of the said decision is pending consideration of the Supreme Court. However, the said situation does not arise in these cases because here, reports of chemical examination of the second sample are not available. Nor is any relief for quashing the criminal proceedings sought.

10. The learned Senior Counsel has placed reliance on the decision in *Joshy George v. State of Kerala* [2011 (4) KHC 818] and *Rajappan and another v. State of Kerala* [2012(2) KHC 657]. We notice that what was considered in those cases was whether criminal proceedings initiated against the accused could be quashed relying on the report of chemical examination of the second sample which show that the volume of Ethyl Alcohol present in the sample was within the permissible limits. As already noticed by us, the impact of chemical examination of the second

sample on the prosecution launched is not an issue involved in these cases. Exhibit P5 judgment by which, a Writ Petition filed in similar circumstances has been disposed of directing the parties to maintain the status quo until report of the chemical analysis of the second sample was received has also not addressed the above question. What has been held in the said decision is that since the right of the licensee to get the second sample tested has been affirmed by this Court in various decisions, it was sufficient that the parties were left to abide by the result that was to be obtained. The unreported judgments and orders on which reliance has been placed, have also proceeded to grant interim orders of stay of proceedings until the report of chemical examination of the second sample was obtained. Therefore, the decisions cited before us are of no assistance in deciding the contentions that are raised in these Writ Appeals. Since the learned Government Pleader has raised a contention that the power to suspend a licence available to the Excise Commissioner was independent and uncontrolled by the other provisions on which reliance has been placed by the appellants, we shall consider the said question.

11. Section 26 of the Abkari Act reads as follows:-

Power to recall licenses, etc.- The Commissioner may cancel or suspend any license or permit granted under this Act:-

(a) if any fee, duty, tax or rental payable by the holder thereof be not duly paid; or

(b) in the event of any breach by the holder of such license or permit or by his servant, or by anyone acting with his express or implied permission on his behalf, of any of the terms and conditions of such license or permit; or

[(bb) if the holder thereof or his servant, or anyone acting with his express or implied permission on his behalf, sells or stores for sale liquor in any place other than the licensed premises; or

(c) if the holder thereof is convicted of any offence against this Act or of any cognizable and non-bailable offence or of any offence under the Dangerous Drugs Act, 1930, or under the Trade and Merchandise Marks Act, 1958, or under

Sections 478 to 489 of the Indian Penal Code; or (d) where a licence or permit has been granted on the application of the holder of an exclusive or other privilege or of a farmer under Section 20 on the requisition in writing of such person; or

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

A reading of the above provision leaves no doubt in our minds that the power to recall licences available to the Excise Commissioner is an exclusive and independent power that is meant to be exercised in the circumstances contemplated by the said provision. The various clauses in the said provision show that the power to cancel a licence could be invoked by the Excise Commissioner in a variety of circumstances. Thus, it could be invoked where a licensee does not pay the fee, duty, tax, rental etc. payable by the said person, in cases where there is a breach of any of the terms of the licence by either himself or his servant, where he stores or sells liquor in places other than the licensed premises, where he is convicted of an offence etc. The power has been granted to the Excise Commissioner to be exercised by him taking into account the relevant facts and circumstances of each case. Such exercise is not conditional upon either the registration of a crime or the obtaining of a report of chemical examination. The power has been conferred on the Excise Commissioner with the object of ensuring that a person who has been granted the privilege of vending liquor or other privileges under the Act abides by the terms and conditions subject to which such permission or privilege has been granted. In other words, the power to suspend the privilege or licence is a concomitant part of the power of the Excise Commissioner to grant the licence or the privilege in favour of the licensee. It cannot be denied that the authority that has parted with the privilege in favour of the licensee is also vested with the power to revoke such permission or licence, where circumstances warrant such action. Therefore, we do not find any grounds to hold that the power under Section 26 is restricted by any of the other provisions of the Act or Rules. The exercise of such power is controlled by the stipulations contained in the said provision itself. Therefore, the Excise Commissioner is perfectly within the limits of his authority to suspend a privilege or licence, wherever the circumstances warrant such action. We do not find that any of the

decisions on which reliance has been placed has addressed the above aspect of the matter.

12. In the present case, the samples taken from the respective toddy shops of the appellants show on chemical analysis, the presence of starch and ethyl alcohol in excess of the permissible limits. Therefore, criminal prosecutions have been launched against them. As rightly contended by the learned Government Pleader, in these cases therefore, there is prima facie evidence of the fact that, the toddy that was being sold by the appellants did not measure up to the standards stipulated by the Act and the Rules. In such circumstances, the Excise Commissioner cannot be expected to remain with folded hands, awaiting the result of chemical examination of the second sample or the final outcome of the criminal proceedings that are initiated. Any such inaction on the part of the Excise Commissioner could result in serious detriment to the public interest, since the possibility of grave consequences, as pointed out by the learned Government Pleader, of even a liquor tragedy could not be ruled out. In such circumstances, it is only appropriate that the privilege granted to the licensee is suspended, since his integrity has become suspect, so as to ensure that he does not carry on sale of the toddy that does not satisfy the standards stipulated by the Act and the Rules. In the above view of the matter, we do not find anything wrong in the action of the Excise Commissioner in suspending the licences issued to the appellants and directing them to show cause why their licences should not be cancelled. The alternative of permitting a licensee to carry on his trade, ignoring the report of chemical analysis against him, would only expose the public to the danger of being sold the sub-standard toddy of which, a sample had been subjected to the chemical examination. Such a consequence has to be avoided at any cost.

13. The contention of the learned Senior Counsel for the appellants is that, if the report of chemical examination of the second sample is in favour of the appellants, the action presently initiated would be rendered a futile exercise. In the process, the appellants would have been subjected to needless prejudice, hardships and losses for which, there would be no justification. It is true that if ultimately, the appellants are found to be innocent and the proceedings initiated are found to be based on a mistaken report of chemical analysis, the proceedings would have to

be dropped. However, the prospect of exposing innocent public to the danger of being supplied with sub-standard toddy or spurious liquor is beset with consequences of far dangerous proportions. Therefore, it is the more serious consequence that should be avoided. It is trite that, considerations of public interest should outweigh the private interests of the Abkari contractor for profits. Once the licence holder is found to be guilty of culpable conduct, even prime facie, it is only appropriate that he is moved out of the scene, so as to prevent him from indulging in the culpable conduct again. His privilege could be restored to him after he clears himself of the cloud of culpability. We notice that, various other provisions of the Rules also contemplate violations which could visit a licensee with the consequence of suspension of his licence. Rules 5,7 and 9 of the Disposal Rules contain such provisions. It is worth noticing that, Rule 5(1) provides for restoration of the privilege to the licensee, where it is later on found that he was innocent.

14. In the present case, the samples that were taken have been found to be substandard on the basis of the reports of the chemical examinations conducted. Therefore, this is a case in which there is prima facie evidence of the fact that, the toddy that was being sold by the appellants was not of the prescribed quality. Hence, it was incumbent on the Excise Commissioner to have initiated action as required by law. In the present case, by issuing the impugned proceedings, the licences of the appellants have been suspended. We are not satisfied that the said action was either uncalled for or without any basis. As we have already held, to permit the appellants to carry on their activity of vending toddy and to await the report of Chemical Examination of the second sample ignoring the report of examination of the first sample, is a course beset with grave risk and serious consequences to the public at large. If the appellants are innocent, their licences would be restored after they are cleared of the accusation against them. The further contention that, there was no justification for suspending the licences in respect of their other toddy shops for the only reason that the sample from one of the shop rooms was found to be sub-standard also is only to be rejected. The privilege or licence granted to the petitioner is personal. When he is found to be indulging in selling of adulterated toddy in one of his toddy shops, it cannot be expected that he would sell genuine toddy in the other shops allotted to him. The

only presumption available is that, he would be indulging in the same activity of selling sub-standard toddy through his other shops also. Therefore, it cannot be said that cancellation of licences in respect of the entire range is bad.

15. After the filing of these appeals, as per separate orders dated 19.12.2015 produced as Annexure A in both the cases, the Excise Commissioner has cancelled the licences issued to the appellants herein. After cancellation of the licences, proceedings were initiated for resale of the privilege. We have, by interim orders passed in I.A.11/2016 in W.A.2717/2015 and I.A.109/2016 in W.A.2644/2015 granted a stay of the resale that was proposed. The said interim order of stay is still in force. Since a resale would give rise to creation of rights in favour of third parties, viz., the purchasers at the resale, we order that the interim order of stay of resale shall continue until the chemical analysis report of B sample is received. In the result:

i) These writ appeals fail. They are accordingly dismissed.

ii) The interim orders of stay against resale granted in I.A.11/2016 in W.A.2717/2015 and 109/2016 in W.A.2644/2015 shall continue until the chemical analysis report of B sample is received.

iii) There shall be no order as to costs.

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