

Thomaskutty Vs. The Commissioner of Excise and Others

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Court : Kerala

Decided On : Jan-29-2016

Judge : Dama Seshadri Naidu

Appeal No. : WP(C) No. 20871 of 2015 (H)

Appellant : Thomaskutty

Respondent : The Commissioner of Excise and Others

Judgement :

1. The petitioner is a provisional grantee of the privilege to vend toddy in the toddy shops in Group No.XXI, Kuttanad Range of Alappuzha Division. On the other hand, the fourth respondent was a licensee of the privilege for the year 2013-14 for the same shops. In the oscillation of adjudication at the behest of both the petitioner and the fourth respondent; after going through tumultuous twists and turns, the matter finally resulted in Exhibit P8 order issued by the Commissioner of Excise. He has upheld the fourth respondent's right and declined to confirm the provisional grant in petitioner's favour.

2. The facts in brief are that on 11.07.2013, while the fourth respondent was the licensee of the shops mentioned above, the Sub Inspector of Police, Pulinkunnu Police Station, inspected one of the shops (T.S.No.76) belonging to the petitioner. He found two persons, allegedly the Manager and a Salesman, selling Indian Made Foreign Liquor (IMFL) in the store room. Having arrested those two persons

and having seized eight bottles of Brandy and one bottle of Rum, the Sub Inspector of Police registered Crime No.472/2013 against those two persons and also the fourth respondent, arraying them as accused Nos.1 to 3, for the alleged offences under Sections 55(a)(i) and 56(b) of the Abkari Act ('the Act' for brevity).

3. As a corollary to the registration of the crime, when the Commissioner of Excise suspended the fourth respondent's licence, he approached this Court by filing CrI.M.C.No.3269/2013 under Section 482 of the Code of Criminal Procedure. He obtained Exhibit P9 interim stay of all further proceedings in Crime No.472/2013.

4. Assailing the order of suspension passed by the Commissioner of Excise, the fourth respondent filed W.P.(C) No.20255/2013 and invited a judgment dated 29.08.2013, by which this Court directed the Commissioner of Excise to consider the petitioner's objections to the order of suspension and pass appropriate orders.

5. As can be seen, the Commissioner of Excise, in compliance with the judgment referred to above, conducted an enquiry and passed Exhibit P2 order revoking the order of suspension.

6. In the meanwhile, as the abkari year was coming to an end, the Government on 05.03.2014 issued a notification proposing to auction the privilege to conduct the various toddy shops, including those that were earlier licensed to the fourth respondent. In response to the said notification, the petitioner, among others, applied.

7. On the fourth respondent's part, he initially applied for preference certificate from the third respondent. Having been denied the same, he too participated in the auction held on 02.03.2014 as a general candidate. As there was more than one contestant in the fray, the authorities drew lots, in which the petitioner emerged successfully. On the very same day, the petitioner is said to have remitted an amount of `7,79,700/- as the requisite fee under various heads.

8. The authorities concerned, having provisionally granted the licence to the petitioner, forwarded the petitioner's application to the Commissioner of Excise for its confirmation. In the meanwhile, the fourth respondent filed

W.P.(C)No.6380/2014 questioning, inter alia, the denial of the preferential right to him. This Court initially granted an interim stay not to confirm the sale in petitioner's favour. Subsequently, having come to know about the writ petition, the petitioner got himself impleaded.

9. As the record reveals, eventually this Court disposed of W.P.(C)No.6380/2014 through Exhibit P3 judgment, relegating the matter to the Commissioner of Excise, who is required to take a decision on the rival claims of the petitioner and the fourth respondent: the confirmation of provisional grant in petitioner's favour and the acceptance of the fourth respondent's preferential right.

10. Having heard the rival contentions, the Commissioner of Excise passed Exhibit P4 order dated 23.05.2014 upholding the fourth respondent's claim and thereby denying confirmation of the provisional grant made to the petitioner. This time, it was the petitioner's turn to approach this Court. He filed W.P.(C)No.14191/2014 assailing both Exhibit P2, the order of revocation, and Exhibit P4, the order of granting preferential right to the fourth respondent. He obtained an interim stay of all further proceedings pursuant to Exhibit P4. Finally, this Court through Exhibit P5 common judgment, involving certain other similar cases at the behest of two other provisional grantees, further directed the Commissioner of Excise, apart from setting aside the orders passed earlier by him, to consider the issues afresh. This Court has also directed the Commissioner of Excise to take into account the fact whether the crime had been registered validly.

11. Yet again, the Commissioner of Excise considered the issue, evidently after hearing all the parties concerned, and rendered Exhibit P8 order re-affirming his findings in Exhibit P4 order. Aggrieved, the petitioner has filed the present writ petition.

12. Sri.N.Reghuraj, the learned counsel for the petitioner, has, to begin with, contended that all the orders of the Commissioner of Excise are verbatim, except the rearrangement of the paragraphs: Exhibit P2, Exhibit P4, and Exhibit P8. In elaboration of his submissions, the learned counsel has contended that despite this Court's specific observation in Exhibit P5 judgment that the Commissioner of Excise should consider, among many other things, whether the crime has been

validly registered, the said authority has mechanically re-produced his earlier order.

13. The learned counsel has also contended that Exhibit P8 order is vitiated by procedural irregularities. According to him, the petitioner was initially heard on 06.05.2015 when the fourth respondent did not take part. Subsequently, having issued notice twice to the fourth respondent alone, the Commissioner of Excise heard him to the petitioner's exclusion. Thus contends the learned counsel for the petitioner that Exhibit P8 order is to be set aside on the singular ground that the order was passed behind the petitioner's back: a procedural impropriety.

14. The learned counsel has also drawn my attention to Section 64 of the Act to contend that there is a statutory presumption regarding the commission of an offence and that the presumption applies to any offence under Section 55 of the Act, too. In elaboration, the learned counsel would submit that the fourth respondent has so far not discharged the said presumptive burden, which may be rebuttable, though.

15. The learned counsel has also submitted that Section 56(b) of the Act contains the statutory mandate that if it is not otherwise provided, Section 56(b) should apply. In that context, the learned counsel has drawn my attention to Section 15 of the Act, which prohibits the sale of liquor without a licence. According to the learned counsel, any violation of Section 15 attracts penal action under the residuary provision Section 63 of the Act.

16. The learned counsel has also made efforts to highlight what is said to be the semantic distinction between Rule 5(1)(a) and 5(3) of the Kerala Abkari Shops (Disposal) Rules, 2002 ('the Rules'). According to him, Rule 5(1)(a) refers to the existing licensee's claim, whereas Rule 5(3) refers to a privilege but not a preference of any applicant, rather than a licensee.

17. Adverting to the merits of Exhibit P8, the learned counsel would contend that beginning from Exhibit P2 to Exhibit P8 order, the Commissioner of Excise has been swayed by a singular consideration: that this Court has stayed the criminal proceedings through Exhibit P9. In this regard, the learned counsel has placed

reliance on *State of Kerala v. Komalan* (2010 (2) KLT 190). According to the learned counsel, mere stay of the criminal proceedings does not enure to the licensee's benefit to claim any preferential right. The State in its statement, submits the learned counsel, has also specifically referred to the factum of stay as being the cause for recognising the fourth respondent's claim for preference.

18. Per contra, Sri.M.G.Karthikeyan, the learned counsel for the fourth respondent, has strenuously contended that the fourth respondent is a victim of the official apathy, if not animosity, and contrivance of circumstances, too. To elaborate, the learned counsel has submitted that, while rendering Exhibit P2 order of revocation, the Commissioner of Excise has conducted an elaborate exercise of enquiry and came, prima facie though, to a satisfaction that the fourth respondent is entitled to restoration of his licence. Given the evidence brought on record, according to the learned counsel, that is the only option available to the said authority.

19. Taking me through Exhibit P2, the learned counsel would contend that the officials examined by the Commissioner of Excise have gone on record that accused Nos.1 and 2 in the crime, who were said to have been apprehended by the Sub-Inspector of Police, are not the employees of the fourth respondent. Those officials have also recorded that they are the employees of another licensee. It is also the specific contention of the learned counsel that the fourth respondent was implicated in the crime on the mere premise that he was the licensee though he had no complicity in the crime.

20. In sum and substance, the learned counsel's plea is that in an orchestrated affair, accused Nos.1 and 2 had gained access to the shop in the fourth respondent's absence; based on that, the authorities foisted a crime against the fourth respondent. Trying to repel the contention of the learned counsel for the petitioner that Exhibit P8 does not contain any reasons worth mentioning, he has further submitted that the Commissioner of Excise has taken into account not only Exhibit P9 order of suspension passed by this Court, but also the statements of the officials brought on record in Exhibit P2.

21. According to the learned counsel, in a compendious manner, the Excise Commissioner has considered all the issues and eventually concluded that the

fourth respondent is entitled to the preferential claim. The learned counsel has also submitted that though Exhibit P2 order was challenged in W.P.(C)No.24931/2013 by a person styling himself to be a toddy shop worker, this Court has refused to interfere.

22. Adverting to the merits of the matter, the learned counsel for the fourth respondent would contend that Section 55 underwent an amendment in 1997: A particular portion of the provision has been deleted. In elaboration, the learned counsel has submitted that earlier Section 55 took into its fold the violation of the licensing condition as well. In the light of the amendment Section 55 has suffered, according to the learned counsel, any violation of the licensing conditions could not be brought within the fold of Section 56. He has also drawn my attention to Rule 7 (5) of the Rules to contend that if the entire allegation in Crime No.472/2013 were believed, it would still amount to nothing beyond a violation of the licensing conditions stipulated under Rule 7(5) of the Rules, as has been observed in the impugned order. In support of his submissions, the learned counsel has placed reliance on Exhibits R4(a), R4(c) and R4(e) judgments as well as Mohanan v. State of Kerala (2007 (1) KLT 845/2007 (1) KLJ 436).

23. In reply, the learned counsel for the petitioner has submitted that though there is a reference in Exhibit P2 to the statements of certain officials, it is elementary to bear in mind that the statements do not prove themselves. According to him, unless the deponents are subjected to cross-examination, they will not have any evidentiary value.

24. The learned counsel has further submitted that Exhibit P4(a) judgment, rendered by a learned Division Bench, is an interim order. According to him, when the same issue cropped up for in the next abkari licensing year, this Court in Exhibit P9 judgment negated the contention of the petitioner therein and denied the licence.

25. The learned counsel has also contended that the fourth respondent is not remediless. According to him, if he were to be exonerated in the course of time, his privilege would be revived, and he would be extended the benefits.

26. Heard the learned counsel for the petitioner and the learned counsel for the fourth respondent, as well as the learned Government Pleader, apart from perusing the record.

27. In the judgment rendered in W.P.(C)No. 20619/2015, the case having arisen out of the common order of the Commissioner of Excise, this Court has dealt with all the issues elaborately. The said judgment, therefore, shall be read as part and parcel of this Judgment, and the same judicial dictum shall apply here. It is, however, necessary to address a couple more issues which have been raised only in this case.

28. The offence committed by the fourth respondent is said to be under Sections 55(a)(i) and 56(b) of the Act. Under Chapter IX of the Act, titled 'Penalties', Section 55 deals with illegal import, export, transport, sale, etc., of liquor or intoxicating drug. As per Section 55(a) covers import, export, and transport; whereas Section 55(i) covers sale or storage of liquor or any intoxicating drug. The prescribed punishment shall be imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh. It is pertinent to observe that Section 55 begins with the expression 'Whoever in contravention of this Act'. It means the provision applies across the board, but not limited to the licencees alone. 29. Section 56 of the Act, on the other hand, exclusively deals with the misconduct of licencees. The provision begins as follows: 'Whoever, being the holder of a licence or permit granted under this Act or being the employee of such holder and acting on his behalf. . '. Clause (b) of Section 56 makes it an offence if the licencee or his employee willfully does or omits to do anything in breach of any of the conditions of his licence or permit not otherwise provided for in this Act.

30. The alleged offence committed by the fourth respondent is selling, through his employees if they were IMFL illegally.

31. Chapter VIII contains the special conditions exclusively applicable to licencees of the privilege to vend toddy in independent shops. Rule 9 mandates that the right conferred by a licence under this Chapter extends only to the manufacture and sale of fermented toddy and no other kinds of liquor. Further, no toddy other than that drawn from Coconut, Palmyra, or Choondapana palms, on which tree-tax due

under the Act has been paid, shall be sold by the licensee; all toddy kept or offered for sale shall be natural and conforming to specifications and standards set out by the Government. It also mandates that nothing shall be added to it to increase its intoxicating quality or strength or to alter its natural composition or for any other purposes.

32. Section 64 of the Act deals with the presumption as to the commission of an offence in certain cases. In the case of offences under Sections 55, 55B, 56A, 57, 58, 58A and 58B, one shall presume until the contrary is proved that the accused person has committed an offence under that section in respect of any liquor or intoxicating drug, etc.

33. If we further examine the statutory scheme, Section 15 of the Act prohibits the sale of liquor or intoxicating drug without a licence. Section 63 of the Act is the residuary provision prescribing punishment for the offences not made punishable under the other provisions of the Act. In the end, we may not lose sight of the fact that Rule 5(1)(a) clearly exempts any offence under Section 56 to be a disqualifying factor.

34. If we examine the scheme of the Act, it is evident that the offence alleged to have been committed by the petitioner falls under more than one provision. In such an event, what course of action is available to the authorities; and, conversely, to the petitioner as well.

35. As can be seen, Sections 55 suffered an amendment on 03.06.1997 when, through Act 16 of 1997, the Legislature omitted the words or of any licence or permit obtained under this Act. In other words, prior to the amendment, the principal part of Section 55 read thus:

55. For Illegal import, etc.:- Whoever in contravention of this Act or of any rule or order made under this Act or of any licence or permit obtained under this Act . . .
(a) imports, exports, It is, therefore, evident that, then, a licensee and a stranger were treated on the same footing.

36. In the course of time, as has been indicated above, Section 55 did have the words or of any licence or permit obtained under this Act omitted by way of amendment. Ineluctably, a licensee cannot be made liable for the offences prescribed under Section 55 of the Act. In other words, if an act is an offence both under Section 55, dealing with persons in general; and Section 56, confined to licensees or permit holders, in the light of the amendment, the application of Section 55 to the licensees is excluded.

37. Indeed, apart from Section 55, there are other provisions that deal with other instances of statutory violations made punishable. In that context, the question to be answered is, which provision to the exclusion of others should apply? In this regard, it pays to examine the principle of lenity, a common law principle or doctrine, which as a canon of construction is well established under the rubric of strict interpretation, especially, of the penal law.

38. Black's Law Dictionary (9th Edn.) defines the rule of lenity thus: A court in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments should resolve the ambiguity in favor of the more lenient punishment. After noting down the semantic significance of the principle, we may examine whether the rule can be applied in the present context, i.e., in seemingly civil proceedings. In *Kevin Kasten v. Saint-Gobain Performance Plastics Corporation*, 563 U.S. ---- (2011), the American Supreme Court has held thus:

Finally, we note that Saint-Gobain invokes the rule of lenity in support of its written complaint interpretation. That rule applies primarily to the interpretation of criminal statutes. It leads us to favor a more lenient interpretation of a criminal statute when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute. *United States v. Shabani*, 513 U. S. 10, 17 (1994). We agree with Saint-Gobain that those who violate the antiretaliation provision before us are subject to criminal sanction, 29 U. S. C. 216(a). And we have said that the rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context. See *Leocal v. Ashcroft*, 543 U. S. 1, 11, n. 8 (2004). But after engaging in traditional methods of statutory interpretation, we cannot find that the statute remains sufficiently ambiguous to warrant application of the rule of lenity

here.

39. In fact, in *Leocal* (supra), the American Supreme Court has held, Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

In this regard, it has placed reliance on *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 518 (1992), which lays down the ratio in a plurality opinion to the effect that the rule of lenity can be applied even to a tax statute in a civil setting, once it is accepted that the statute has criminal applications or consequences.

40. In the light of the above discussion, I do not hesitate to hold that Section 55 of the Act has no application to the alleged crime the fourth respondent has been charged with.

41. In *Sudhakaran v. State of Kerala* (2011 (1) KHC 610), the question that arose for consideration was whether, based on the chemical examination report of the second sample, which is favourable to the accused, the prosecution mocked against the accused based on the report of the first respondent be quashed. A learned Single Judge of this Court, on consideration of the Abkari Act and the Rules made thereunder, has held that there is no specific provision in the Abkari Act or the Rules enabling the Court to place reliance on the second sample.

42. In *Rajappan v. State of Kerala* (2012 (2) KHC 657), another learned Single Judge of this Court has held that since the second sample was during the course of criminal proceedings under Section 293 of Code of Criminal Procedure, more reliance can be placed on the second report than the first report. His Lordship has further held that when there are two conflicting reports in one case, the one in favour of the accused should be relied on.

43. In *Komalan* (supra), the question that fell for consideration was whether a stay of abkari case by the Supreme Court against an abkari contractor can be taken as obliterating the case against the contractor. A learned Division Bench of this Court has held that mere stay of the proceedings does not ipso facto obliterate the

proceedings: The licensee facing prosecution, though stayed in the interim, cannot claim any preference under Rule 5(1)(a) of the Rules.

44. In the present instance, the adjudication has not been proceeded with on the strength of the fact that the criminal proceedings against the fourth respondent have been stayed. As such, the ratio of *Komalam* (supra) may not have any relevance in the present instance.

45. In the light of the above statutory principles and the judicial dicta, I am of the opinion that for any breach of the licence conditions, which may have been, incidentally, an offence under the other provisions of the Act, the licensee could be made answerable under Section 56 of the Act, but not other provisions especially penal of the Act.

46. Before concluding the discussion, I may, briefly though, touch upon one last plea of the learned counsel for the petitioner that the Excise Commissioner has heard the petitioner and the fourth respondent at different times. In other words, though the Commissioner heard the petitioner, he did not, however, put the petitioner on notice when he heard the fourth respondent.

47. We cannot be oblivious to the fact that the Excise Commissioner is a quasi-judicial authority, who is not expected to act as a civil court to be bound by the procedural subtleties as have been contained either under the Code of Civil Procedure or under the Indian Evidence Act, neither of which binds the said authority in the strict sense. Indisputably, the Commissioner did follow the principles of natural justice and heard both the parties. If at all he had heard the fourth respondent in the petitioner's absence albeit having heard both the parties at some time or another the petitioner has failed to establish before the Court the prejudice he has actually suffered. There is, therefore, substantial compliance with the inviolable principle: *Audi alterem partem*.

48. Indeed, the petitioner has also a grievance that the Excise Commissioner on all the occasions, despite the remand of the matter on more than one occasion, has repeated his orders verbatim. In other words, he has resurrected the order that had initially been set aside by this Court. Appealing as the submission is, the

issue, however, on a deeper scrutiny assumes a different hue.

49. In the adjudicatory hierarchy, a judicial or a quasi-judicial authority as a matter of verticality of dispensation cannot abdicate his judicial obligation to consider an issue afresh either in the perspective of fact, law, or both. Of course, the adjudicatory parameters do differ based on whether the matter, for example, is in appeal, revision, or review. Under those circumstances, a *literatim* dispensation is to be avoided. For an authority, at the higher level, is expected nay, mandated to approach the issue independently; lest the course of multi-tier adjudication gets perverted.

50. On the other hand, if an authority is required to adjudicate an issue in multiple rounds as a matter of horizontality of dispensation repeating himself is not a cardinal sin, for one cannot copy oneself, so to say. Confining to the facts of the present case, I may observe that the Excise Commissioner, though substantially repeated himself, has addressed the issue as has been expected of a quasi-judicial authority by taking into account all aspects required to be taken care on remand.

In the facts and circumstances, this Court for the reasons mentioned in W.P.(C)No.20619/2015 and for the reasons mentioned above dismisses the writ petition. No order as to costs.

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