

Sunil Vs. State of Kerala

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Court : Kerala

Decided On : Feb-16-2006

Reported in : 2006(2)KLT851

Judge : M. Ramachandran and; A.K. Basheer, JJ.

Acts : Foreign Liquor Rules, 1953 - Rule 2; Abkari Act - Sections 55 and 56; State Excise Rules; Kerala Rectified Spirit Rules, 1972 - Rule 2

Appeal No. : W.A. Nos. 533 and 1715 of 2002

Appellant : Sunil

Respondent : State of Kerala

Advocate for Def. : Viju Thomas, Government Pleader,; Renjith Thampan and; G

Advocate for Pet/Ap. : C.C. Thomas,; Joe Joseph Kochikunnel,; George Thomas

Judgement :

M. Ramachandran, J.

1. A batch of writ appeals along with a few Original Petitions/Writ Petitions had come up for hearing together. Original Petitions had been posted along with the writ appeals taking notice of the circumstance that identical issues have been agitated. The writ petitions had been filed challenging the constitutionality of SRO

Nos. 326/96 and 225/98, whereby amendments were brought to Rule 2 of the Foreign Liquor Rules.

2. The learned Judge had granted substantial reliefs to the petitioners recognising the merit of the contentions raised, but however taking notice of the circumstance that the petitioners had challenged a Rule after it had been deleted from the statute book and the delay had not been appropriately explained, he had refused to entertain arguments about the sustainability of the consequential proceedings. The follow up proceedings of prosecution initiated in enforcement of the Rule thus were to continue. The petitioners have filed the appeals, aggrieved that full reliefs were not granted. Government had chosen to file the writ appeals feeling aggrieved about the declaration that had been granted in favour of the petitioners, viz., that the amended rules, which had come to the statute book in substitution as SRO 235/98, had been declared as invalid and inoperative.

3. Mr. C.C. Thomas and Joe Joseph Kochikunnel had led the arguments on behalf of the petitioners in the Original Petitions/appeals. Sri Viju Thomas, learned Government Pleader, had appeared on behalf of the Government. The appeals and writ petitions were taken up for orders on 27-01-2006. Later on the, date, the learned Government Pleader made an oral submission that he had instructions to place a few more details, and opportunity may be given to make further submissions.

4. Taking notice of the request, the matter was reposted. In the meanwhile, I.A. No. 356 of 2006 in W.A. No. 1715 of 2002 was filed by the appellants, whereby additional materials in the form of an affidavit sworn to by the Assistant Excise Commissioner (Law), Ernakulam had been brought on record. The respondent in the writ appeal also had submitted a statement through his counsel Sri. C.C. Thomas.

5. The parties were further heard on 16-2-2006 and the submissions presented by them were duly taken notice of. Sri. Joe Joseph Kochikunnel also had supplemented his arguments with reference to the further materials placed.

6. The Excise Commissioner had pointed out that the claim of the writ petitioners that they were entitled for variation of 3% V/V from 42.8% V/V strength declared by the Government is not sustainable, and the contention as above had arisen from a misconception of fact. It had been claimed that the Government had the authority to fix the strength of alcohol dehors those prescribed by the ISI standards. In fact, it had been pointed out that variation from one degree to 1.75 degree was incorporated in the rules, taking notice of the requirements of the industry. It had been further contended that since as per ISI specifications 3% variation is of the declared strength, it can come only to 2.25 degree, and in case of measurement by volume, the variation could be come only to 1.28% V/V.

7. The statement filed on behalf of the petitioners in the writ petition canvassed for a position that the plea as above had never been raised. It was stated that the variation as authorised, referred to in the affidavit, was not acceptable. It had been further urged that even if the contention is accepted, the licensees are entitled to get a permissible variation of 2.25 degree and the retailer licensees are entitled to get 1.75 degree (one per cent) over and above the permissible variation of 2.25 degree given to the manufactures. Therefore, it was urged that any rule fixing the variation of strength of ethyl alcohol as a offence shall be only in respect of incidents where the inspection revealed variation over and above 4 degree ($2.25 + 1.75$) or 2.285% ($1.285 + 1$). According to him, in any case, therefore Rule 2 of the Rules deserves to be read down. In the course of the discussion, we may refer to these aspects as well, since a full adjudication can be there only after taking notice of these revelations as well.

8. Since reliefs had been granted by the learned single Judge, it becomes necessary that we do take notice of the facts, which had been highlighted in petitions, viz., O.P. No. 15618 of 1998 and O.P. No. 23222 of 1999. This alone would give a comprehensive picture. O.P. No. 15618 of 1998 had been disposed of along with a few other petitions on 06-11-2001. W.A. No. 583 of 2002 has been filed by the petitioners to the extent reliefs had been negatived. The Government has filed W.A. No. 1715 of 2002 pointing out that the interference made in favour of the petitioners was unwarranted.

9. The first petitioner in O.P. No. 15618 of 1998 was working as a Barman of Hotel Picnic, Manjeri. The said hotel enjoyed a FL-3 licence during the relevant times. FL-3 licence is issued under the Foreign Liquor Rules authorising sale of liquor. The second and third petitioners are the licensees, in respect of the establishment.

10. Samples had been drawn by the officers of the Excise Department in respect of the Indian Made Foreign Liquor (for short IMFL), dispensed from the establishment on 12-04-1997. The report of the Chemical Examiner showed that the three samples of IMFL respectively contained 42.30, 40.74 and 41.24 percentage of ethyl alcohol. The content of the alcohol in the drink kept for sale was found as having a lower strength than standards prescribed by the Foreign Liquor Rules. This was sufficient to constitute an offence under the Act. Prosecution steps consequently were initiated against the petitioners by registering Crime No. 14/97, under Sections 55(i) and 56(b) of the Abkari Act (Act 1 of 1077). In effect, this had been subjected to challenge. Inter alia, the petitioners had also challenged Rule 2 as it existed on the date of the inspection carried out. At the time of filing of the writ petitions, of course the above Rule had been withdrawn, and it had been got substituted because of an amendment, whereby marginal relaxation had been granted pertaining to the standards of strength. This too, according to the petitioners, were objectionable and the second amendment, as above also, was challenged in the writ petitions, the details of which could be dealt with later.

11. O.P. No. 24222 of 1999 is filed almost in an identical circumstance. The first petitioner therein is a registered Association of owners of hotels having FL-3 licences. Petitioners 2 to 4 are holders of FL-3 licences. The first petitioner has taken up the cause of members of the Association, including that of petitioners 2 to 4, who have been similarly proceeded against, as in the case of the petitioners in O.P. No. 15618 of 1998. Contentions which had been raised in O. P. No. 15618 of 1998 had been reiterated in the Original Petition and the prayer is that relief already granted by judgment dated 6-11-2001 is to be extended to persons represented by them. Further relief has been claimed viz., a declaration that proceedings initiated against their members are without the authority of law and requires to be set aside. Petitioners have also prayed for issue of a writ of

mandamus directing the Government and its officers not to proceed against the licence holders for violation of Rule 2 of the Foreign Liquor Rules, if the variation is within 3% V/V of ethyl alcohol in the liquor sold by them. The principal prayer, which had been urged, was to declare that Rule 2 of Foreign Liquor Rules introduced on 29-3-1996 and amended on 5-3-1998 were invalid, unconstitutional and therefore unenforceable.

12. The argument of the appellants/ petitioners, of course at the initial round, and repeated in the appeals, could be summarised as follows:

The Excise Manual is the basic document in force in the State of Kerala and it refers to different varieties of liquor, the degree of strength and the variation of strength, etc. Of course, it was always a condition of permit that only liquor which satisfied the standards prescribed mandatorily were to be vended. But no special penal provisions were there in the Rules, For the first time', by SRO 326/96 on 29-3-1996, provisions were introduced prescribing tolerance of 1 degree proof under or over the proof strength for the purpose of Rule 2 of the Foreign Liquor Rules. Subsequently, by SRO No. 225 of 1998 on 5-3-1998 the Government had increased the above variation limit (tolerance limit) to 1.75 degree proof under or over the required proof strength.

13. The principal submission is that both the notifications, as above are irrational and were not in conformity with the Indian Standard Specification, which stipulated the tolerance limit as +3% V/V. This was equivalent to 5.25 degree proof. Only the later SRO referred to the Indian Standards prescribed, and provided for a greater admissible variation. The argument is that when advertence was made to the Indian Standard Specification, a reduced range of tolerance, viz., 1 degree or even 1.75 degree was inadequate and therefore impermissible. This is because it required the licensees to achieve standards which were not possible to be reached at any time. Thus, the suggestion was that once a manufacturer himself is permitted to enjoy a tolerance limit of 3% of the contents of ethyl alcohol, the implementation of Rule 2, whereby a condition is incorporated in the licence permitting only a lesser tolerance, was per se illegal.

14. The averments in the first Original Petition went on to show that after the introduction of amendment to Rule 2 on 29-3-1996, several cases were got registered for violation of Rule 2. It had been pointed out that the Kerala State Beverages Corporation was the wholesale distributor and when they themselves could not enforce the range of tolerance, the retailers were not to be found fault with. It is argued that in fact it was taking notice of this delicate situation that the Government had amended Rule 2 on 5-3-1998 and the stipulation of 1 degree proof was substituted by 1.75 degree proof, which worked out equal to variation of 1 % V/V.

15. Petitioners highlight that the initial amendment, which led to prosecution steps as also the amended Rules, both suffered from the vice of unreasonableness. They worked against realities. When the manufacturers were given allowance of +3% for the content of ethyl alcohol by volume, fixation of 1 degree, which was equivalent to 0.57% V/V, and still later the allowance of 1.75 degree, which worked out 1% of the volume, were not realistic. It had, therefore, been prayed that the amendment brought about, which was not in conformity with the Bureau of Indian Standards, is per se arbitrary and unreasonable, and were liable to be struck down as plainly irrational. Resultantly, further request was that if the variation was within 3% V/V in respect of ethyl alcohol, the proceedings for prosecution were not to be followed up.

16. The learned single Judge had noticed that Rule 2 of Foreign Liquor Rules originally issued on 17-01-1953 read as following:

The minimum strength at which imported Indian made foreign spirits can be sold are 35 degree UP of gin and 25 degree UP for all other kinds of spirits.

Noticing that the Rule did not provide for any variation, SRO 32/96 came to be issued, which was to the following effect:

However, the actual proof spirit content of such liquor may be 1 degree proof under or over the above proof strength.

This was a condition of licence in respect of licences issued thereafter. Learned Judge had also noticed that by SRO 225/98, it was provided that the actual proof spirit content could be 1.75 degree proof under or over the above proof strength in line with the Indian Standard Specification.

17. As a matter of fact, the petitioners were not satisfied with the tolerance limit prescribed by 1998 notification as well, as according to them, they were not realistic. As could be gatherable from the submissions, the stress of the petitioners always was on the basis of the standards prescribed by the Bureau of Indian Standard Institute. Exts. P1 and P2 had been produced in O.P. No. 15618 of 1998 to show the Indian Standard of alcoholic drinks. Requirements under Clause 5 thereof, in respect of ethyl alcohol content for brandies could be extracted herein below:

The ethyl alcohol content in brandies shall be 42.8 percent by volume [25 degrees under proof] at 15/15C when determined according to the method prescribed in 3 of IS 3752:1988. The tolerance limits for ethyl alcohol content shall be +3.0 percent of the declared strength. However, the ethyl alcohol content and its tolerance may vary according to the Rules and Regulations prescribed by the State Excise Rules.

18. The learned Judge had accepted the contention raised by the petitioners that a variation up to 3% of the declared strength could be admissible. Such conclusion was followed up by holding that 3% is equivalent in terms to 5.25 degrees. In fact, it had been observed in the judgment that this conversion is not disputed. Therefore, a finding was recorded that licencees could sell liquor having proof strength above or below 5.25 degree, as the variance was recognised by the expert body, and it was not as if their individual contribution for variation in strength might be there. If that be the case, prescription of 1 degree or even 1.75 degree permitted by the relevant SROs, would have been insufficient and arbitrary.

19. On this reasoning, it had been held that when an outside manufacturer manufactures Indian made foreign liquor based on the standard specified in the Indian Standards, necessarily there is possibility for variation of plus or minus 3%

of alcohol content, equal to 5.25 degree UP in respect of the liquor vended. Thereby the ultimate conclusion arrived at was that it was a case where the petitioners had established the unworkability of the Rule and this paved way to unreasonableness. Finding that a subordinate legislation, which is unreasonable, did not deserve to exist, the amendments were struck down. The reliefs were confined to S.R.O. of 1998. It had been held further that as the earlier provision brought in as per SRO 326/96 stood deleted by the time the writ petitions were filed, the petitioners were not justified in challenging such deleted provision. They had not satisfactorily explained reasons for the delay.

20. Mr. C.C. Thomas, appearing for the petitioners/appellants, submits that when the Court had found unreasonableness in the legislation, it was too technical to reject the reliefs, on the ground of laches. Further he refers to the circumstance that prosecution steps had been initiated only later on and there was no justification in alleging that the petitioners were sleeping on their rights. Advertence had also been made to decisions of the Supreme Court, reported in : AIR 2000 SC2732 General Finance Co. v. C.I.T. and which followed the earlier decisions : 2000(119)ELT257(SC) Kolhapur Cane Sugar Works Ltd. v. Union of India, : [1984]1SCR594 Motor General Traders v. State of A.P. Counsel submitted that the principle enunciated was that when declaratory reliefs were sought for, passage of time would not have come to the disadvantage of citizens. Essentially, when the Court found the provision arbitrary, the petitioners thereafter were not to be directed to be kept high and dry; it was against the principles of fair play.

21. The argument as above is impressive, since if as a matter of fact the statutory provision was irrational, a citizen should not have been put to vagaries, prejudice and protracted prosecution, even though the offending provision had been deleted from the statute book. But we necessarily have to go slightly deeper to the issues, since although belatedly, as briefly referred to earlier, fresh materials had been brought to our attention, which were not there in the pleadings of the parties. Therefore, second look about the veracity of the contentions urged has become essential. The learned Judge had been led to certain assumptions, which apparently suffer from factual errors, as could be gatherable from the additional affidavit and statement. The details of these we may attempt to pin point.

22. The tolerance limit prescribed by the Bureau of Indian Standards of course is a reliable piece of evidence, and if there was unworkability of a prescription in the Rules, vis-a-vis such set standards, the position would have been as canvassed by the petitioners. But, an examination of the provisions compels us to come to a conclusion that there has been a mistake of fact and the petitioners basically, therefore, were disentitled to urge such a contention with success, while developing the arguments, perhaps at least with respect to the later notification.

23. The Kerala Rectified Spirit Rules 1972, by Rule 2(g), defines 'proof spirit', as following:

proof spirit means a mixture of alcohol and water, which at a temperature of 51 F weigh ' twelve thirteenth part of an equal volume of distilled water, has a density of 0.91984 at 60 F and contain 49.76 percent by weight of water or 57.06 percent by volume of alcohol.

24. It is a property of alcohol that the total volume stands reduced when it is mixed with water. It is the above behaviour which has led to the long winded definition. The assessment of duty on spirit is based on the texture known as 'Proof. The petitioners in O.P. No. 24222 of 1999 had brought in certain facts which may be relevant in this context. It is averred that the term 'proof comes from the method used in testing the strength of liquor. The standard now used in India is the English standard commonly known as London proof. As per the definition of 'proof spirit', it contains 49.24 per cent by weight of alcohol and 50.76 per cent of water. However, when the volume is compared, it should be 57.06% alcohol by volume, as its weight is lesser than distilled water. In a given case, if alcohol is separated from water, presence of alcohol will be 57.06% in volume. Simultaneously it would yield 46.68% of water, comprising a total of 103.74. But when mixed again, it surrenders its boisterous nature. Because of contraction, they converge to hundred parts, as of old.

25. If the alcohol percentage is multiplied by a factor of $\frac{7}{4}$, roughly the resultant figure is the degree of proof strength. As a corollary, if the degree of proof strength is multiplied by a factor of $\frac{4}{7}$, the percentage of alcohol could be arrived at. 25 degree UP strength thus is to contain 42.86% of alcohol by volume and this is

what has been provided by Rule 2 of the Foreign Liquor Rules, in respect of Brandies, Whiskies etc. The proof strength of Gin, however, is 35 degree consequent to higher alcoholic content.

26. After the prescription of permissible variation was introduced on 29-03-1996, the position was that allowable variation was 1 degree proof, roughly equal to 57% by volume. The materials made available indicate that this was found by the Government as inadequate when tested with actualities as well as Bureau of Indian Standards. As a consequence, the next notification, replacing the earlier provision, provided for a greater permissible variation of 1.75%. This in effect permitted enhanced tolerance limit of 1 % by volume.

27. These stipulations/conditions had been attacked by the petitioners as offending the norms prescribed by the Bureau of Indian Standards.

28. However, Exts. PI and P2 in O.P. No. 15618 of 1998 in fact show that the tolerance limit could be 3% of the declared strength. The petitioners presented this position as 5.25% by volume. But fact remains that variation has to be in proportion to the declared strength alone, and 3% thereof. The additional affidavit filed in fact attempts to throw light in these regions. We can easily find that the tolerance limits prescribed by the Bureau of Indian Standard is plus or minus 3% of the declared strength alone viz., of 42.86% V/V. Therefore, it worked out only between 41.52 and 43.08 by volume and not between 37.55% and 48.05%, as contended by the petitioners. We are definite in our mind that such a wide tolerance or variation was not acceptable by any prescription. Therefore, the provision introduced as 1.75 degree proof by the Rules in 1998 was well in consonance with the Bureau of Indian Standards and the prescription of 1 degree proof under or over as prescribed by 1996 notification alone might have been objectionable. The learned Judge had committed an error in holding that 3% spoken to in Ext. PI is equivalent in terms to 5.25 degree. Since the Government had not disputed the above, further probe at that time was not found as necessary.

29. Our ultimate conclusion therefore is that the reasoning, which had led to the judgment and the declaration, is not sustainable. Petitioners could have had a valid contention about the unreasonableness in respect of 1996 notification, where

the standards laid down by Bureau of Indian Standards have been omitted to be noticed. But, this position has been set right by the later notification. Therefore, we have to hold that if at all only the earlier, 1996 notification required to be held as arbitrary.

30. In this background, we have to see how the reliefs could be moulded. The learned Judge had held that the notification of 1996 had been subjected to challenge after it was taken away from the statute book, and therefore the challenge was not sustainable. But on the facts of the case, although the appeals by the licensees do not deal with this specific issue, especially since the writ appeals have been clubbed with a few writ petitions, where the 1996 amendment is also challenged, appropriate follow up directions require to be issued, as applicable to all the cases. But, simultaneously, we hold that the Government was justified in taking a stand that the learned Judge erred in setting aside the amendment of Rule 2 of the Foreign Liquor Rules, brought about by SRO 225/98. The amendment is valid and operative.

31. Although, at the time of challenge, the 1996 notification was not there, on the strength of the authorities relied on by the petitioners, to which reference is made earlier, we feel that the FL-3 licence holders and their employees have to be granted reliefs from the vagaries of the deleted Rule, which demonstrably is shown as arbitrary. It should be therefore presumed that SRO 326/96 was never in the statute book, and all steps taken for prosecution, by whichever authorities, are to be discontinued. However, settled matters are not to be reopened.

32. We reiterate that we do not find anything objectionable as far as SRO 225/1998 and the consequent amendment brought to Rule 2 of the Foreign Liquor Rules, which had come operative from 05-03-1998. The tolerance prescribed by the amended rule is in consonance with the standards prescribed by the Bureau of Indian Standards, The judgment, in so far as it strikes down the notification, therefore, requires to be interfered with. The findings and the directions, pertaining to SRO 225/1993, will stand vacated. We uphold the notification and the Rule. If there have been enforcement proceedings, the affected persons will have the right to opt for compounding the offence, as had been extended by general orders,

during the pendency of these proceedings, and to which reference had been made by the Government Pleader. A discrimination is not called for.

33. Mr. Joe Joseph Kochikunnel, on behalf of the Kerala Bar Hotels Association, submits that the Rules, Circulars and instructions are to be precise and unambiguous and also should have relevance to the practical situations, the nature of the industry and the workability of the transactions. According to him, in respect of the sensitive commodity, the grievances, which have been highlighted from time to time, have so far practically gone unnoticed. Therefore, the submission is that the Government be directed to adopt a sympathetic view to the plight of the dealers, if grievances are placed before the Government by way of representations, and timely reasonable guidelines are to forthcome.

34. Although this does not come strictly within the purview of the writ petitions, we are of the opinion that if such representations are filed by the Association, the Government are to examine the nature of the grievances urged, with an open mind. We leave it at that.

35. The writ appeals and the writ petitions are disposed of, in the light of the above observations and directions. We make no order as to costs.