

Gopalan Vs. State of Kerala

Gopalan Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/903333

Court : Kerala

Decided On : Mar-26-2010

Reported in : 2010(2)KLT255

Judge : K. Balakrishnan Nair and; P.N. Ravindran, JJ.

Acts : Kerala Abkari Act - Sections 55; ;Kerala Abkari Shops Disposal Rules, 2002 - Rule 5(1) and 5(3); ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 173(2) and 320(2)

Appeal No. : W.A. No. 555 of 2010

Appellant : Gopalan

Respondent : State of Kerala

Advocate for Def. : Benny Gervasis, Government Pleader

Advocate for Pet/Ap. : Renjith B. Marar,; L. Rajesh Narayan and; Lakshmi N. Kai

Disposition : Appeal dismissed

Judgement :

K. Balakrishnan Nair, J.

1. The writ petitioner is the appellant. The point that arises for decision in this appeal is concerning the construction to be placed on Clause (i) of Sub-rule (3) of

Rule 5 of the Kerala Abkari Shops Disposal Rules, 2002 (hereinafter referred to as 'the Rules').

2. The brief facts of the case are the following:

The appellant was the licensee of T.S. No. 22/2007-2008 of Idukki Excise Range. It was renewed for the years 2008-2009 and 2009-2010 also. In the meantime, a crime was registered against him as Crime No. 7/2008 by the Excise Officials, alleging offences under Sections 55(a) and 55(i) of the Kerala Abkari Act. The final report in that case has been filed before the Judicial First Class Magistrate's Court, Idukki. The learned Magistrate took cognizance of the offence and issued summons to the appellant. The appellant appeared and after hearing him, the case has been committed, as per C.P. No. 35/2009 to the Sessions Court, Thodupuzha for trial. In view of the above developments, the appellant apprehended that he may be disqualified from participating in the auction, invoking the provisions under Rule 5(3) of the Rules and therefore, the Writ Petition was filed, seeking the following reliefs:

(i) declare that the petitioner is entitled to participate in the auction for conduct of toddy shop included in the Group in which Toddy Shop No. 22/2009-2010 (Cheruthony) of the Idukki Excise Range even though C.R. No. 7/08 of the Idukki Excise Range has been registered.

(ii) issue a writ in the nature of mandamus or any other writ, direction or orders commanding the respondents to permit the petitioner to participate in the auction and to extend the privilege to the petitioner for the conduct of the Toddy Shops included in the Group consisting of the Toddy Shop No. 22/2009-10 (Cheruthony) of the Idukki Excise Range for the year 2010-2011.

It was contended before the learned Single Judge that in view of Rule 5(3)(i) of the Rules, the appellant/writ petitioner can be made ineligible to participate in the auction, if only the Sessions Court has framed charge against him and the trial has commenced. Only on commencement of the trial after the framing of the charge, it can be said that he is charged with an offence and prosecution proceedings are pending against him. But, the learned Single Judge, relying on the decision of this

Court in *Yesudas v. S.I. of Police* : 2008(1) KLT 245, took the view that after the lodging of the F.I.R. before the court and during the period of investigation by the police, it can be held that prosecution is pending against the appellant. In that view of the matter, the Writ Petition was dismissed in limine. Hence this appeal.

3. We heard the learned Counsel for the appellant and also the learned senior Government Pleader for the respondents. In view of the proceedings pending before the learned Sessions Judge, the appellant is not claiming preference under Section 5(1)(a) of the Rules. But, he claims, he is eligible to participate in the auction, if a proper construction is placed on Clause (i) of Sub-rule (3) of Rule 5 of the Rules. According to him, he can be said to be charged with an offence only when the Sessions Court frames charge against him after preliminary hearing. The possibility of discharge of the accused by the learned Sessions Judge cannot be ruled out. In this case, the charge is yet to be framed. Only after framing the charge, it can be said that prosecution proceedings are pending against him. In view of the above legal position, the appellant submits, the disqualification under Sub-rule (3) of Rule 5 of the Rules is not attracted in this case. The appellant relied on the decision of a learned Single Judge of this Court in *Vijayan v. Excise Commissioner* 2002 (3) KLT 646, in support of his submissions.

4. The learned senior Government Pleader, on the other hand, submitted that the decision of this Court in *Yesudas* (supra) lays down the correct legal position. Further, it is pointed out that in this case, the Excise Officials have completed the investigation and filed the final report under Section 173(2) of the Cr.P.C. That means, the Excise Officials have filed the charge before the Court. Therefore, it can be said that the appellant is charged with the offence. Thereafter, the learned Magistrate has taken cognizance and on finding that the offence is exclusively triable by the Court of Sessions, committed the same to the learned Sessions Judge for trial. So, prosecution proceedings can be said to be pending, at any rate, from the stage of the learned Magistrate taking cognizance of the offence, if not from an earlier point of time, it is submitted.

5. We considered the rival submissions made at the Bar and perused the materials on record. Rule 5(3)(i) of the Rules reads as follows:

5. The Grant of privilege of vending Toddy shall be subject to the following conditions, namely:

(1)....

(3) No applicant is eligible for the privilege of any group if he:

(i) is charged with an offence relating to illicit liquor or prosecution proceedings are pending against such applicant before a court of law.

In Vijayan's case (*supra*), a learned Single Judge of this Court held that only after framing charge, it can be said that the accused is charged with an offence. It was also held that only thereafter, it can be said that prosecution proceedings are pending against him. But, in Yesudas's case (*supra*), another learned Single Judge of this Court, while interpreting Section 320(2) of the Cr.P.C., held that after the registration of the crime when investigation is going on, it can be held that prosecution is pending against the accused before the court concerned.

6. By filing the final report under Section 173(2) of the Cr.P.C., the prosecution charges the accused with the offence. On going through the report, the learned Magistrate takes cognizance of the offence. If it is triable by the learned Magistrate, charge will be framed against him, if it is a warrant case. If it is a summons case, summary of the accusation will be read out to the accused and his plea will be recorded. Depending on the plea of the accused in both the cases, further proceedings in the case will commence. The appellant canvasses for a narrow interpretation of the provisions of the rule and to understand it in the manner canvassed by him. The provisions of the rules have to be understood in the light of the purpose behind them and also the meaning of the words as understood in common parlance. Normally, upon receipt of an information, the investigating officer registers a crime and forwards the report to the learned Magistrate having jurisdiction over the area. Thereafter, the investigation is completed by preparing mahazars, seizing material objects, questioning the witnesses, arresting the accused etc., and after completion of the investigation the final report is filed under Section 173(2) of the Cr.P.C. It contains a draft charge by the police also. So, as far as the prosecution is concerned, at that stage the

accused is charged with an offence. The prosecution proceedings can, definitely, be said to be pending before a court of law, once the Magistrate takes cognizance of the offence and issues process for the appearance of the accused. Having regard to the scheme of the rules and the setting in which Rule 5(3) is placed, we think, the narrow meaning attributed to the words of the above rule that the accused can be said to be charged with an offence if only the court formally charges him and he is facing prosecution if only further proceedings are taken after framing the charge, cannot be upheld. The appellant is disqualified if he is charged with an offence relating to illicit liquor or prosecution proceedings are pending against him. Either one of them is sufficient to disqualify him. Even assuming he can be said to be charged with an offence-only on the court framing a charge against him, we have no doubt in our mind that once the learned Magistrate takes cognizance of the offence, it must be held that prosecution proceedings are pending against him.

7. So, we think, the decision in Vijayan's case (*supra*) does not lay down the correct legal position. Since in this case, the case is committed and is pending before the learned Sessions Judge, it is unnecessary for us to decide whether the appellant can be said to be facing prosecution on registration of the crime, as held by this Court in Yesudas (*supra*). It will be a hypothetical issue as far as this case is concerned. So, in view of our above finding, the appellant is ineligible to apply for the privilege to vend toddy in the toddy shop, by virtue of the operation of Rule 5(3)(i) of the Rules.

In the result, the Writ Appeal fails and it is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com