(1991) 10 KL CK 0042

In the High Court Of Kerala

Case No : O.P. No. 9561/91

Jose Kuruvinakkunnel APPELLANT

Vs

Assistant Excise Commissioner and Others RESPONDENT

Date of Decision : 29-10-1991

Acts Referred:
Bar Councils Act, 1926 — Section 3(4)
Foreign Liquor Rules — Rule 13(3), 19, 31, 32, 34
Kerala Abkari Act, 1077 — Section 26, 29, 56, 67A, 67F

Citation : (1991) 10 KL CK 0042

Hon'ble Judges : Chettur Sankaran Nair, J

Bench : Single Bench

Advocate : Mathai M. Paikeday, for the Appellant; M.B. Kurup, General, for the Respondent

Final Decision : Allowed

Judgement

Chettur Sankaran Nair, J.—Petitioner challenges Ext. P-6 order of first Respondent cancelling Ext, P-1 bar licence issued to him. On the strength of the said licence which is valid till 1st April 1992, Petitioner had been running a bar at ''Hotel Mayura'' Mannuthy, Thrissur. Petitioner was not granted necessary permits for drawing supplies of foreign liquor, for use in the bar since sometime in August, 1991. Upon that, Petitioner moved this Court by O.P. 8938/91. Meanwhile, a memo was issued to Petitioner, alleging violation of Section 56(b) and (c) of the Abkari Act. On 9th September 1991, an interim direction was issued in that petition, directing first Respondent to enquire into certain allegations, take a decision and submit a report by 12th September 1991. On 12th September 1991, the Additional Advocate General appearing for Respondents, submitted that Petitioner had violated conditions of the licence, and that action was contemplated against him for that reason. After hearing both sides, an order was passed:

The Assistant Excise Commissioner will pass such orders as he is entitled to, on

13th September 1991 and communicate the same to Petitioner. I do not indicate the nature of the order to be passed. But, an order will be passed in accordance with law.

2. The direction was to pass such orders as the Assistant Excise Commissioner "is entitled to". Ext. P-6 order followed, cancelling Ext. P-1 licence and imposing a fine. The reason stated for this is that, Petitioner had allowed one K.P. John to run the bar since 10th July 1991, violating Rule 19 of the Foreign Liquor Rules and condition No. 13 of Ext. P-1 licence. Enquiries made by the Department and admissions made by K.P. John and one O.J. Emmanual, regarding transfer of business, persuaded first Respondent to cancel the licence.

3. Learned Counsel for Petitioner challenged Ext. P-6 order on grounds of mala fide and as violative of principles of natural justice, in that it did not adhere to requirements of notice postulated by Section 67A of the Abkari Act. It is also alleged that Rule 34 of the Foreign Liquor Rules (hereinafter referred as "the Rules"), conferring powers on the first Respondent to cancel a licence, was ultra vires.

4. Learned Advocate General submitted that the licence to vend foreign liquor was granted to Mayura Hotel, and that after the Mayura Hotel was transferred to K.P. John, the bar had no independent existence. Referring to Rule 13(3) of the Rules, the Advocate General submitted that the bar is intended for the needs of the hotel, that certain requirements regarding number of rooms and nature of rooms, etc., are prescribed and that dehors a hotel, a bar cannot be run. At any rate, even the licence to vend foreign liquor was transferred by Petitioner to K. P. John by an agreement dated 10th July 1991 (Ext. P-5), and that is a clear violation of Rule 19 of the Rules and condition 13 of Ext. P-1 licence, according to the Advocate General. He submitted further that Rule 34 contained a power independent of Section 26, and in addition to that.

5. The first contention that Ext. P-6 was issued by first Respondent, for extraneous reasons at the instance of the Inspector General of Police (Headquarters), cannot be countenanced. It is not stated in what manner the said Officer influenced the decision of first Respondent. More importantly, that Officer is not a Respondent, and allegations made against a party without notice to him cannot be acted upon.

6. The next contention is that the power of cancellation of licence can be exercised only by the Commissioner of Excise, and not by a subordinate authority, in the light of Section 26 of the Abkari Act. That section reserves the power to cancel a licence in the Commissioner of Excise, while conferring power to impose lesser punishments on subordinate officers. Rule 34 which enables the Assistant Excise Commissioner to exercise the same power, is therefore ultra vires submits counsel. Rule making power u/s 29 cannot be exercised to enlarge powers available to an Assistant Commissioner, according to counsel. He referred to condition 16 of Ext P-1 licence, to reinforce the contention that the power of

cancellation is available only to the Commissioner of Excise, Reference was also made to Rules 31, 32, 40 of the Rules and Section 67F of the Abkari Act, to highlight the same them. Counsel relied on the decisions in State of Punjab and Another Vs. Hari Krishan Sharma, , Bar Council of Delhi and Others Vs. Surjeet Singh and Others, , Board of Directors of Andhra Pradesh Co-operative Central Land Mortgage Bank Ltd. and Others Vs. Chittor Primary Co-operative Land Mortgage Bank Ltd. and Others, Abraham v. The Sales Tax Officer 1964 KLT 21 (Page) affirmed in Sales Tax Officer, Ponkunnam v. K.I. Abraham AIR 1967 S.C. 1823 and Powell v. May 1946 (1) K.B. 330 to support his contention that Rule 34 is ultravires.

7. In answer, the Advocate General submitted that the question of ultravires does not arise in the circumstances, as the power under Rule 34 is a power independent of Section 26. According to him, the field officers know the local conditions better, and they cannot wait for the Commissioner to act, as a measure of expedition may be necessary in certain situations. He relied on the decision M.P. Sahadevan v. Excise Inspector 1991 (1) K.L.J. 145 and P.J. Varkey v. State of Kerala and Ors. 1972 K.L.J. 815 to submit that rules have the same force of law, and that Conditions in the licence bind the licensee. The submission is beyond reproach. Relying on State of M.P. and Others Vs. Nandlal Jaiswal and Others, R.K. Garg and Ors. v. Union of Indta and Ors. AIR 1981 S.C. 2138 and The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, the Advocate General further submitted that the rules embody matters of policy, and that interference may. not be made with matters of policy. A question of policy, does not arise for consideration.

8. The question that comes into sharp focus, is whether Rule 34 and Ext. P-6 order which was issued under that rule, are ultra vires. An act or an order, or a rule is ultra vires, if it is outside the authority conferred by law. To quote H.W.R. Wade:

An act which is for any reason in excess of power (ultra vires) is often described as being outside jurisdiction. ''Jurisdiction'' in this context means simply ''power'', though sometimes it bears the slightly narrower sense of ''power to decide'', eg. if applied to a statutory tribunal. It is a word to which the courts have given different meanings in different contexts.... An administrative act or order which is ultravires or outside jurisdiction, is void in law.

9. Section 26 enumerates the powers conferred on different authorities. The power of cancellation of a licence is conferred on the Commissioner, and power to impose other punishments is conferred on authorities subordinate to the Commissioner. I understand the conferment of power of cancellation on the Commissioner, as an exclusion of that power from authorities subordinate to him. Rule 34 cannot confer on the Assistant Commissioner, a power larger than the power conferred by Section 26 itself. Otherwise put, what the section has denied to the Assistant Commissioner, cannot be granted to him by the rule. The rule making power u/s 29 cannot be exercised to enlarge or modify or annual the

contents of Section 26 itself. The argument advanced by the Advocate General that Rule 34 confers a power independent of Section 26, cannot commend acceptance. Besides, the rule making power u/s 29 is for limited and enumerated purposes, and conferment of penal powers is not one of the purposes contemplated by that section. A power of delegation is not envisioned by the rules, either. It may be, as the Advocate General submitted that the conditions in the licence bind the licencee. But, a power of cancellation by the Assistant Excise Commissioner is not visualised by the conditions in Ext. P-1 licence. On the contrary, the power of cancellation inhere only in the Commissioner of Excise, in the light of condition No. 16. That condition incorporates in the licence, the powers, u/s 26.

10. In the decision in Bar Council of Delhi and Others Vs. Surjeet Singh and Others, the Supreme Court considered the vires of rules framed by the State Bar Council, laying down conditions of eligibility. Section 3(4) of the Bar Councils Act empowered the Central Bar Council to prescribe such conditions. The rules made by the State Council, prescribing conditions were found to be ultravires. Likewise, in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., the Supreme Court held that a levy cannot be imposed under a byelaw or rule, unless the statute empowered to do so, and that the rule making authority cannot exceed its mandate. It is useful to refer to the decision in Powell v. May 1946 (1) K.B. 330. The King''s Bench held that it was beyond the power of a County Council to make a byelaw relating to gambling, contrary to the conditions in the Act of Parliament. The byelaw was held void.

11. As observed by H.W.R. Wade, rules and regulations not duly made under the Act of Parliament, are legally ineffective. Courts must determine validity of delegated legislations, by applying the test of ultra vires, just as they do in other contexts. Acts of Parliament have sovereign force, but legislation made under delegated power can be valid, only if they conform exactly to the power granted. This is the view in Hoffman La Roche and Co. v. Secretary of State 1975 Appeal Cases 295, Laker Airways v. Department of Trade 1977 Q.B. 643 and a catena of other decisions. The Supreme Court has approved this view, as seen from the decisions cited.

12. The clear import of Section 26 is that the power of cancellation is reserved for the Commissioner of Excise, while other powers are conceded to subordinate authorities. The enumeration u/s 26 implies an exclusion. What is excluded by the statute, cannot be conferred by the rules and the rule making authority cannot do, what the Act does not enable it to do Precisely that was done in the instant case. The conferment under Rule 34 is also beyond the rule making power u/s 29. The rule, to the extent of conferring the power of cancellation on an Assistant Commissioner of Excise, is therefore ultra vires and unenforceable. Ext. P-6 made in exercise of a power not available to first Respondent, is without authority.

13. The Advocate General contended that the circumstances clearly show that

Petitioner had violated a condition of the licence, by transferring the privilege to vend foreign -liquor to K.P. John. The fact that a daily rent of Rs. 900 is payable by K.P. John to Petitioner, in addition to a security deposit of Rs. 1.5 lakhs, is suggestive that the right conferred on John was not merely the right to run the hotel, submits Advocate General. The argument though attractive, need not be considered, as no power is available to the first Respondent to cancel the licence. It is equally unnecessary to consider the argument of Petitioner relating to principles of natural justice.

14. Since no power of cancellation is available to the Assistant Commissioner--first Respondent, to cancel a licence, as Rule 34 is ultravires of the Act, Ext. P-6 has to be quashed and is accordingly quashed. It is also declared that Rule 34(ii) and (iii) of the Foreign Liquor Rules is ultra vires. I do not think it necessary to grant any other relief.

Original Petition is allowed. Parties will suffer their costs.