

(1979) 10 AP CK 0010
In the Andhra Pradesh High Court
Case No : Writ Appeal No. 198 of 1979

K. Gopal Rao

APPELLANT

Vs

Excise Superintendent, Adilabad and Others

RESPONDENT

Date of Decision : 26-10-1979

Acts Referred:

Andhra Pradesh Excise Act, 1968 — Section 31, 63(1)
Constitution of India, 1950 — Article 226(3)

Citation : AIR 1980 AP 301 : (1980) 1 APLJ 65

Hon'ble Judges : Ramachandra Rao, J; P.A. Choudary, J

Bench : Division Bench

Advocate : A. Panduranga Rao, for the Appellant; Govt. Pleader for Excise, for the Respondent

Judgement

P.A. Choudary, J.—The right to vend liquor in our State is governed by the Andhra Pradesh Excise Act, 1968 (hereinafter referred to as "the Act"). Section 13 of the Act forbids the sale of liquor except under a licence. For the Abkari year 1978-79, the writ appellant obtained under the provisions of the above Act, an excise licence to vend arrack from Advelly group of arrack shops. Section 31 of the Act empowers the Excise authorities to suspend or cancel a licence under certain circumstances and conditions. The Excise Superintendent, Adilabad, purporting to exercise his powers u/s 31 of the Act, cancelled the appellant's licence by his order dated 11-5-1979 holding that the appellant's partner one Ganga Gowd, had committed an Excise offence at Mujigi by selling adulterated toddy at the latter's licensed toddy shop. Challenging that order of cancellation, the appellant had filed a writ petition which was dismissed by our learned brother Chennakesav Reddy, J., on 27-6-79 on the ground that the appellant had been given a right of appeal by Section 63 (1) of the Act to make a complaint against the aforesaid order of the Excise Superintendent, Adilabad, and, therefore, that statutory provision read with Article 226, Clause (3) of the Constitution would operate as a jurisdictional bar for this Court to entertain any Writ Petition

challenging the order of the Excise Superintendent, Adilabad. It is against this order of the learned Judge, the present writ appeal has been filed.

2. The one and the only question which this writ appeal raises for our consideration is whether in view of Article 226, Clause (3) of the Constitution as it existed at the relevant time, the existence of Section 63 (1) of the Act operates as a bar to the jurisdiction of this Court to entertain the appellant's writ petition filed against the order of the cancellation passed by the Excise Superintendent, Adilabad.

3. The original Constitution worded Article 226 in the widest language possible. That provision of the Constitution conferred, for the first time on all the High Courts, power and jurisdiction to issue writs, orders and directions for the enforcement of the fundamental rights and also for any other purpose. For what other purposes, under what circumstances, and at whose instance these powers are to be exercised are all left open and unspecified by the language of the original Constitution. The original Article 26 of the Constitution was intended to bear the major part of the burden of policing the rule of law. *Ubi jus Ibi Remedium*, is its battle cry. It is no wonder what the people of our country who have so much realized through their suffering in the recent times the truth of this ancient saying not merely extolled Article 226 and welcomed it more than any other part of the Constitution but some of them had even called it as "Conscience of the Constitution". It may be, because of this reason that despite several amendments the Constitution had undergone, Article 226 was left almost untouched. The First Amendment to Article 226 in the year 1963 is not a diminution of its authority but is only an accession of further strength, for it widened the territorial jurisdiction of Art. 226. It was under the Constitution 43rd Amendment, Article 226 suffered a major depletion of its majesty and authority which we may mention had been restored to it by the 44th Amendment of the Constitution with which we are not concerned in this writ appeal. In the form of Art. 226, Cl. (3) introduced by the 42nd Amendment, the High Courts had altogether been denied jurisdiction to issue writs in all cases excepting those for the enforcement of fundamental rights where there is any other remedy provided for the redressal of the grievance by or under any other law. Prior to the 42nd Amendment, the existence of a statutory remedy intended to redress a grievance did not operate as a Constitutional bar for the High Courts to issue writs to set right the wrong done. But under the 42nd Amendment, the existence of such a remedy was made to operate to oust the writ jurisdiction of the Courts.

4. In *Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar*, the Supreme Court interpreting Article 226, as it stood prior to the 42nd Constitution Amendment, observed,

"It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ".

Similarly, in *Municipal Council, Khurai and Another Vs. Kamal Kumar and*

Another, , the Supreme Court ruled,

"Though the High Court would not ordinarily entertain a petition under Article 226 of the Constitution where as alternative remedy is open to the aggrieved party, it has jurisdiction to grant relief to such a party if it thinks proper to do so in the circumstances of the case".

Under the 42nd Amendment by means of Article 226, Clause (3), "no petition for the redress of any injury Shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force".

5. It is, therefore, clear that if Article 226, Clause (3) of the Constitution would apply to the facts of the present case, this court would not have any jurisdiction to entertain the appellant's writ petition. For the applicability of Article 226, Clause (3), there must be a statutory remedy provided by law for the time being in force. Section 63 (1) of the Act which reads as follows: -

"Any person aggrieved by an order passed by any officer, other than the Commissioner or Collector, under this Act, may, within forty five days from the date of communication of such order, appeal to the Deputy Commissioner".

Does appear to provide such a statutory remedy as contemplated by Article 226, Clause (3). It should, therefore, follow that the appellant must be put out of Court on the ground that he has "other remedy" for the redressal of his grievance.

6. But the appellant's counsel argued before us that Section 63 (1) of the Act does not fall within the description of Article 226, Clause (3). He argued in support of his contention that the appellate provision contained in Section 63 (1) of the Act would be available only against orders passed "under the Act". As the order passed by the Excise Superintendent, Adilabad, is a nullity, it cannot be said to be an order passed "under the Act". The appellant's counsel in other words argued, that the appellate provision contained in Section 63 (1) of the Act would be available only against invalid orders passed by the authorities "under the Act". In support of this contention, the appellant mainly relied upon a Full Bench decision reported in Ahmedabad Cotton manufacturing Co. Ltd. v. Union of India, AIR 1977 Guj 113.

7. Although there are observations in the judgment of the Gujarat Full Bench which support the contention of the appellant, we do not think that they are decisive in deciding the present writ appeal before us. The Gujarat Full Bench reasoned that "the orders ex facie without jurisdiction or in violation of fundamental principles of judicial procedure which were not real but purported orders", would not escape the judicial scrutiny of the High Court under Art. 226 of the Constitution. The above quoted observations of the Gujarat High Court lay down that a statutory remedy within the meaning of Article 226, Clause (3) would normally cover only invalid orders and not void orders. The Gujarat judgment, therefore, does not say that a statute cannot provide for a remedy

either by way of appeal or a revision against what may be called as "void orders". In the latter part of its judgment, the Gujarat Full Bench had clearly laid down,

"If the Act remedy is so wide as to cover even purported orders so that no part of the activity of the authority is a collateral activity, the Act having provided for direct remedies to such a wide extent, that remedy would have to be first exhausted."

The Gujarat Full Bench, therefore, clearly recognizes the legal possibility of a statute providing for an alternative remedy even against the so called "void orders". For the applicability of Gujarat principle, it is, therefore, not enough for the appellant to contend that the impugned order is totally without jurisdiction but it is also essential for the appellant to successfully argue that that order is not the one passed "under the Act" and, therefore, Section 63 (1) of the Act. Independent of the provisions of the Act. Independent of the provisions of the Act, the Excise Superintendent has no power to cancel the licence. His is the authority to cancel the licence. Similarly, his power to cancel the licence on the ground that the appellant's partner had committed an Excise offence is one relatable to section 31 (2) of the Act. Before cancelling the appellant's partner had committed an Excise offence is one relatable to Section 31 (2) of the Act. Before cancelling the appellant's licence, the Excise Superintendent had issued a notice to the appellant. It is, therefore, clear that the order of cancellation of the appellant's licence of Advelly group of arrack shops however, wrong or illegal it may be is one done pursuant to the Excise Act. Without that Act, the question of cancellation of the licence of the appellant by the Superintendent does not arise. An act which is done pursuant to a statutory authority even though illegal cannot but be considered as having been done under that Act. It is all the more so where the authority which has cancelled the licence cannot trace its power to any other source except the Act. It is, therefore, clear that the provisions of Section 63 (1) of the Act take in all orders passed pursuant to the Excise Act. The intention of the Act is clearly to provide a cheap and quick remedy against the orders of the Excise Authorities without reference to the fact whether the orders are legal or illegal. Section 63 (1) of the Act deliberately did not use the limiting words such as "by virtue of" which would have probably confined the appellate provisions only to those orders that can strictly trace their parentage to the Act. For these reasons we reject the argument of the appellant and hold that the appellate provisions of Section 63 (1) would operate in conjunction with Article 226, Clause (3) to debar the appellant from invoking the jurisdiction of this Court in the present case.

8. In principle also we are unable to agree with the main decision of the Gujarat High Court. The Gujarat decision makes a distinction between a real order and a purported order and holds that the bar of Article 226, clause (3) would operate only in case of a real order. This one time judicially fashionable distinction that has been well received into the jungle of English Administrative Law has now

become almost obsolescent by reason of the recent judgment of the House of Lords *Anisminic Ltd. v. The Foreign Compensation Commission*, (1969) 2 AC 147 on which the Gujarat Full Bench depends so heavily, According to the classical view the question of jurisdiction would arise at the commencement and not in the course of nor at the conclusion of trial. According to the classical theory, a Tribunal which legally enters up on an inquiry cannot, therefore, be guilty of a jurisdictional excess, for it has jurisdiction to decide rightly or wrongly. This position was clearly reversed by the House of Lords in *Anisminic* case (1969) 2 AC 147. The House of Lords in that case had almost said that there is jurisdiction for the Court or the Tribunal if the decision is right in law, none if it is wrong. According to the *Anisminic* case 9(1969) 2 AC 147, a real but a legally wrong adjudication would be in no different or better legal position than a purported adjudication. As Mathew J. said, "*Anisminic* leaves the Courts or Tribunals virtually with no margin of legal error". (*Shri M.L. Sethi Vs. Shri R.P. Kapur*,). If we strictly follow *Anisminic* case in interpreting Article 226, Clause (3), Article 226, Clause (3) would nearly be a dead letter. We find it, therefore, difficult to follow the basis of the decision of the Gujarat Full Bench in holding that Article 226, Clause 93) would not apply to a purported adjudication.

9. We think it right to approach the whole problem from the point of the rule in *Heydon's* case (1584 76 ER 637). Prior to the 42nd Amendment, a statutory alternative remedy was no bar to the jurisdiction of a Writ Court to issue a Writ. The matter was left to the judicial discretion. Now the 42nd Amendment intends to bring about a change in this legal situation. The 42nd Amendment, therefore, makes the existence of such a remedy a clear bar to the exercise of jurisdiction. Courts interpreting a constitutional amendment cannot but take full note of these changes. With great respect, we cannot, therefore, agree with the Gujarat view.

10. What we say would equally apply to *Marchhia Sahun and Another Vs. The State of West Bengal and Others*, .

11. The real meaning of Article 226, Clause (3), however, distasteful to judicial conscience it may be, is to exclude the applicability of writ jurisdiction in all cases where the statute provides for an efficacious remedy (of course, fundamental rights being excluded). A Full Bench judgment of our High Court in *The Government of India and Others Vs. The National Tobacco Co. of India Ltd., Calcutta*, , interpreting Article 226, Clause (3) did not lay down any rule accepting the distinction made by the Full bench of the Gujarat High Court. Bound as we are by the Full Bench of our High Court, persuaded as we are by the Correctness of that decision, we prefer to follow the judgment of our Full Bench reported in *Govt. of India v. National Tobacco Co. of India Ltd.* (supra) to that of Gujarat High Court reported in *Ahmedabad Cotton manufacturing co. Ltd. v. Union of India* (AIR 1977 Guj 113) (FB).

12. The Impugned order in this case has been made by an Excise Officer who as we have already noted, is a statutory functionary clothed with authority to cancel Excise licence. His order may be right or wrong, but still it is, as we have held,

one made "under the Act". Inasmuch as the order is one made "under the Act", the appellant has a right of appeal assured to him u/s 63 of the Act. That provision for appeal operates as a bar for the entertainment of the present writ petition. The argument of the appellant that an order illegally made cannot be called as an order made under the Act, does not appeal to us. The implication of this argument is that an appeal can only be filed against an order made by the lower Excise authorities in conformity with and in accordance with the statute. Probably in such a case, there is no need for anyone to file an appeal at all. The Statute when it speaks of appeals against orders made under the Act, must be intended to cover every type of order cancelling or suspending a licence made by an Excise authority. The argument of the appellant would give the word "under" a greatly restricted meaning which belongs to the words "by virtue of". In the circumstances agreeing with the appellant's counsel's argument would involve the substitution of the word "virtue" in the place of "under" which we cannot obviously do. Further the argument if accepted denudes the appellate provision of its efficacy.

13. In the circumstances, we, agree with the conclusion of our learned brother and dismiss this Writ Appeal without costs. There shall be no advocate's fee.

14. Appeal dismissed.