
(2010) 07 KL CK 0017

In the High Court Of Kerala

Case No : Writ Petition (C) No. 21143 of 2009

Kalarikkal Hotels (P) Ltd.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 23-07-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 47
Foreign Liquor Rules — Rule 1, 13, 13(3), 13A, 39
Kerala Abkari Shops (Disposal in Auction) Rules, 1974 — Rule 6(2)

Citation : (2011) 1 ILR (Ker) 1041

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : C.C. Thomas and K. Jaju Babu, for the Appellant; N. Sudha Devi, Government Pleader and V. Krishna Menon, S.C. for Guruvayoor Devaswom, for the Respondent

Judgement

T.R. Ramachandran Nair, J.—The Petitioner who has established a three star hotel at West Nada, Guruvayoor is aggrieved by the communication issued by the Government as per Ext. P-3 rejecting the application for grant of FL-3 licence.

2. The description of the hotel in the writ petition shows that it is having 65 rooms along with 2 Banquet halls and the Ministry of Tourism, Government of India has given it the star classification as per Ext. P-1 order.

3. They applied for licence to open a bar, as per Ext. P-2 application dated 15-4-2008. It is pointed out that the same is situated nearly 400 metres from the Guruvayoor Temple and even after reckoning the 100 metres of freezed zone around the Temple, the same is situated at a distance of 288 metres. Altogether, there are 3 hotels having FL-3 licences near Guruvayoor Temple and according to the Petitioner, compared to those 3 star hotels, the distance to the Petitioner's hotel, namely, Hotel Mayura Residency is more from the Temple. All the three hotels are situated in front of the Temple in the East Nada.

4. It is pointed out that a large number of tourists and travellers are visiting

Guruvayoor and, therefore, the Petitioner thought of having a bar licence.

5. It is pointed out that the decision taken by the Government as per Ext. P-3 is illegal in the sense that the rejection of the application on the ground that Guruvayoor is a prominent pilgrim centre and the local need does not justify the grant of licence is arbitrary and discriminatory.

6. The Respondents have filed separate counter-affidavits. The Guruvayoor Devaswom which is impleaded as the additional fourth Respondent has also filed a counter-affidavit.

7. Heard the learned Senior Counsel for the Petitioner Shri C.C.Thomas, the learned Government Pleader Smt. N. Sudha Devi and Shri V. Krishna Menon for the Guruvayoor Devaswom. The learned Senior Counsel Shri C.C. Thomas submitted that the hotel is situated beyond the prohibited distance prescribed under Rule 13(3) of the Foreign Liquor Rules i.e. 200 metres from the Temple and, therefore, no objection can be taken on that score. It is pointed out that the finding that the local need do not justify the grant of licence cannot be accepted in the light of the fact that three bar hotels are functioning on the Eastern Nada. It is further pointed out that as the conduct of the bar hotels in the locality is not prohibited, the Government could not have taken recourse to public interest or other similar reasons to deny the licence to the Petitioner as the same will be discriminatory. The learned Senior Counsel for the Petitioner relied upon the decision of this Court in O.P. No. 11291/1998 produced as Ext. P-4, and that of the Apex Court in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, . It is pointed out that the authorities concerned in the Excise Department have recommended Ext. P-2 application for issuance of a licence and as the Petitioner conforms to all the conditions provided under the Rule, he has the right to get the licence.

8. Per Contra, the learned Government Pleader pointed out that Guruvayoor is not a tourist centre but it is a well-known pilgrim centre and in the light of the enabling provision of Rule 13A of the Foreign Liquor Rules read with Clause 22 of the Conditions under FL-3 licence, the order Ext. P-3 is well-founded. It is pointed out that the licence can be refused on grounds of public interest or expediency and that aspect has been considered by the Government. There were objections from the Guruvayoor Devaswom Managing Committee and the Guruvayoor Brahmana Samootham against granting bar licence to the hotel near to the Temple. Being a prominent pilgrim centre in South India, the grant of a bar licence in such a holy place is against the local needs i.e. against the interest of devotees and public. The complaint of the Administrator, Guruvayoor Devaswom was also considered by the Government while taking the decision.

9. The learned Standing Counsel for the Guruvayoor Devaswom submitted that crores of people visiting the place are not tourists but devotees and it is not a tourist centre but a well-known pilgrim centre. The Devaswom has already decided to acquire 100 metres of land around the Temple for security and safety

of the Temple and for development. The Petitioner's hotel is situated in the South-Western side on the outer ring road of Guruvayoor. Therefore, it is situated within the zone of pilgrim activities and more establishments are being established by the Devaswom very close to the outer ring road.

10. Further, in paragraph (7), of the counter-affidavit of the Devaswom, it is mentioned that the Guruvayoor Devaswom Office, Rest Houses, Guruvayoor Devawom Quarters etc. are situated very close to the outer ring road where the Petitioner's hotel is situated. A further contention raised is that the Petitioner's hotel is situated nearer to the Temple than the other 3 bar attached hotels. It is pointed out therefore that the decision taken by the Government is perfectly justifiable. The counter-affidavit also shows that the Guruvayoor Municipality had also requested the Guruvayoor Devaswom to bring to the notice of the Government, the objections for granting licence to the bar hotel near the Temple.

11. Therefore, the first question is whether on mere fulfilling of the conditions under Rule 13(3) regarding the distance rules, the Petitioner is entitled as a matter of right to get licence. Going by Rule 13(3) of the Foreign Liquor Rules, "no licence shall be issued to Hotels or Restaurants which are located within 200 metres from an educational institution, Temple, Church, Mosque or burial ground". Here, we are concerned with Rule 13A which is extracted below:

13A. No licence of any of the above descriptions shall be issued.--(1) If the local needs do not justify the grant of a licence;

(2) If the Commissioner considers for reasons to be recorded in writing that the grant of a licence is likely to have an adverse effect on the revenues of the State;

(3) If the Commissioner considers that there is likelihood of privilege being misused;

(4) If the applicant has been convicted of any cognizable offence or any offence under the Abkari Act, 1077, the Prohibition Act, 1950 (13 of 1950), Narcotic Drugs and Psychotropic Substances Act, 1985 (Central Act 61 of 1985), The Spirituous Preparation (Interstate Trading and Commerce) Control Act, 1955 or Medical and Toilet Preparations (Excise Duties) Act, 1955 (Central Act 16 of 1955); and,

(5) If the applicant is not financially sound and is incapable discharging his responsibilities in the matter.

The other important rule which is relevant is Rule 39 which reads as follows:

39. No licence will be issued for a shop which is situated or which is intended to be opened in a place where on grounds of public interest or expediency it is objectionable to permit any traffic in liquor.

and in Clause 22 of the Conditions under FL-3 licence which is relied upon by the Government is in the following terms:

No licence will be issued for a shop which is situated or which is intended to be opened in a place where on grounds of public interest or expediency it is objectionable to permit any traffic in liquor.

12. Relying upon the judgment of the Apex Court in *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, , the learned Senior Counsel for the Petitioner submitted that when the State has permitted trade of business in liquor, the State cannot discriminate between citizens to carry on business in liquor subject to the restrictions. Therefore, as the Petitioner is qualified going by Rule 13(3) and the hotel is not within the prohibited distance, licence has to be granted automatically. If the concern of the State is that no licence can be granted to hotels nearby the Temple premises, then there is no explanation for the grant of licence to the other 3 hotels, but they are also being renewed every year. Therefore, it is pointed out that the whole objection cannot be supported. As far as the local need is also concerned, it is argued that the local need can be found out only after granting licence as held by this Court in Ext. P-4 judgment.

13. The provisions to be considered are Rule 13A of the Foreign Liquor Rules and the conditions of licence. Going by item (1) of Rule 13A, if the local needs do not justify the grant of a licence, the application can be rejected. Clause 22 of the Conditions under FL-3 licence is important apart from Rule 39 of the Foreign Liquor Rules. It gives ample power to the Government to take a decision on an application for grant of licence and to reject it on the ground of public interest or expediency.

14. The very same issue has been considered by this Court in various decisions. In *Sambamoorthy v. Excise Inspector* 1985 KLT 1150, the challenge was against FL-3 licence granted to Anr. hotel in Guruvayoor itself. This Court considered the power of the Government under Rule 39 and it was held that such considerations are relevant while taking a decision for grant of licence. It was further held that even if the hotel is outside the distance limit in all cases, that does not mean that a licence can be granted or has to be granted. The objection there, was against the grant of FL-3 licence to hotel Navaratna Gardens in Western Nada, Guruvayoor. The importance of the Temple was noticed by this Court in the following words: "Guruvayoor Temple is one of the most important temples in South India, where devotees from all over India, gather every day to offer their prayers". The relevant findings have been rendered in paragraph Nos. 24 and 25 in the following words:

24. There is yet Anr. fatal defect for the grant. The licence can be granted only if the place is not objectionable either on grounds of public interest or expediency (Rule 39 of the Foreign Liquor Rules). The authority has to consider whether, even apart from Rule 6(2), the place is objectionable or not. It seems that the Department/Board takes the view that wherever there is provision in a hotel such as ten lettable rooms, attached bath rooms, two airconditioned rooms, etc. (as mentioned in Rule 1 of the Foreign Liquor Rules) FL-3 licence is automatic if the rental of Rs. 1,50,000 is paid. This is wrong. The authorities may still have to

consider whether the hotel/restaurant is located in a place where selling of liquor can be permitted in public interest or whether it is expedient to allow sale of liquor in such premises. In the present case, the hotel is in the Western Nada of the Guruvayur Temple. The Assistant Commissioner himself reports that the hotel is 541 metres away from the Guruvayur Temple. Under Rule 6(2), liquor cannot be sold within 400 metres, from an educational institution or Temple. That does not mean, that outside this distance limit in all cases, a licence can be granted or has to be granted.

25. Independent of Rule 6(2) also, the authorities have to consider whether the land site or shop is a place fit for being licenced to sell liquor. There may be cases where, even if the site is beyond the prohibited distance, it shall not be proper, desirable or expedient to grant liquor licence in public interest. To my mind, in a place like Guruvayoor, where devotees from all over India assemble in thousands everyday, the authorities may have to consider whether a place even outside the distance limit prescribed under Rule 6(2) can be licensed at all to sell liquor.

15. The power conferred on the Government under Rule 13A of the Foreign Liquor Rules and Clause 22 of the Conditions under FL-3 licence are therefore, relevant. The Petitioner has sought for FL-3 Licence on the plea that the Petitioner is having "intention to provide better facilities to tourists and promoting business" [paragraph (2) of the writ petition]. The Petitioner has admitted in paragraph (8) of the writ petition itself that "Guruvayoor is a prominent pilgrim centre in South India". Rule 13(3) considers grant of licence specifically, "in the interests of promotion of tourism in the State to hotels of three stars and higher classification". Therefore, the important question to be considered in such circumstances is whether grant of licence will promote tourism in the State. Government was of the view that the Temple town Guruvayoor is a prominent pilgrim centre, which is supported by the Guruvayoor Devaswom by stating that it is not a tourist centre but a pilgrim centre. In that view of the matter, the considerations which prevailed upon the Government are clearly that in public interest and expediency, licence is not to be granted to the hotel near the Temple. Rule 39 of the Foreign Liquor Rules is also therefore relevant in deciding the said issue. Rule 39 also grants ample power to the Government not to grant licence to a shop in a place where public interest or expediency for traffic in liquor.

16. This Court in P.A. Chacko v. Board of Revenue 1986 KLT 340 considered the effect of Rule 13 and 13A of the Foreign Liquor Rules in the light of Article 47 of the Constitution of India and it was held thus:

Clause 22 of the Conditions under FL-3 licence provides, that "no licence will be issued for a shop which is situated or which is intended to be opened in a place where on grounds of public interest or expediency, it is objectionable to permit any traffic in liquor". It is evident from the above provision that there should be an objective assessment preceding the grant of a licence, and such assessment

should comprehend the local needs justifying the grant of licence. Another matter which has to be ascertained is whether it is objectionable to permit any traffic in liquor in the premises for which licence is sought on grounds of public interest or expediency. Considerations comprehended by Rule 13A of the Foreign Liquor Rules and Clause 22 of the conditions of licence do comprehend the question of proximity of the premises to places of religious worship or institutions imparting education, which are matters for consideration by the licensing authority, even apart from the provisions contained in Rule 6(2)(b) of the Kerala Abkari Shops (Disposal in Auction) Rules. Even assuming that FL-3 Hotel (Restaurant) Licence is not covered by the prohibition contained in Rule 6(2)(b) of the above rules, the licensing authority, has an obligation to consider whether the permission of traffic in liquor is objectionable on grounds of public interest or expediency. In the context of the imperatives of Article 47 of the Constitution of India, as a leading light for governance of the country, I have to read into the duties of the licensing authorities, an obligation to consider whether the grant of such licence would promote the objective of bringing about prohibition in consumption of alcohol, except for medicinal purposes. Even if the prohibition contained in Rule 6(2)(b) of the Kerala Abkari Shops (Disposal in Auction) Rules may not strictly apply to the grant of an FL-3 licence, the same yardstick has to be applied in the context of public interest and expediency, which are prescribed as guiding principles in the matter of grant of even an FL-3 licence.

The Government in the counter-affidavit has averred that the principles as above were also considered by the Government while passing the impugned order.

17. Herein, one of the contentions raised by the learned Senior Counsel appearing for the Petitioner, relying upon Ext. P-4, is that the question whether local need is there or not can be considered only after permitting the Petitioner to open the bar and start functioning. Ext. P-4 is the judgment of the Division Bench of this Court in O.P. No. 11291/1998. That was a case where the application was filed for renewing FL-3 licence which was not renewed for a number of years and for shifting it to Anr. place. It was rejected stating that the Petitioner's bar was not functioning for so many years. One of the reasons for rejecting it was that there is no public necessity for a new bar in the location. It is in that context that the Division Bench observed in paragraph (5) as follows:

...In so far as public need is concerned it is premature on the part of the Respondents to say that there is no public need. The public need can be ascertained only after permitting the Petitioner to open the shop and start functioning. The order does not give any reason as to why the public need is not there....

In fact, the provision under Rule 13A of the Foreign Liquor Rules was not examined by the Bench and only Rule 13 was considered and the above view was taken especially since the Petitioner was having the licence and the Petitioner wanted a shifting of the place.

18. The scope of the rules have been considered by a Full Bench of this Court in *Biju Joseph v. Chacko* 1992 (2) KLT 312 (F.B.). Grant of FL-3 licence to a bar hotel was under dispute therein. The grant of licence was successfully challenged before this Court and the writ petition was allowed. It was held by the learned Single Judge that the conditions under Rule 13A are sufficient to deny licence to the applicant therein. After referring to Rules 13 and 13A as well as condition No. 22 of the Conditions under FL-3 licence. The Full Bench in paragraph (10) held as follows:

10. ...It is therefore, clear that while granting a licence to a Bar in a hotel in FL-3 form, it is necessary for the authorities to consider (i) whether the local needs do not justify the grant of a licence, (ii) whether the licence is likely to have an adverse effect on the revenues of the State, (iii) whether there is likelihood of the privilege being misused etc. as mentioned in Rule 13A and it will also be necessary for the authorities to consider whether the shop is situated or is intended to be opened in a place where on grounds of public interest or expediency it is objectionable to permit any traffic in liquor. This Court can come to the conclusion that if while granting any licence in FL-3 form to a hotel or restaurant opening a Bar, this principle is violated, the same is clearly liable to be quashed.

Therefore, whether the bar is situated or is intended to be opened in a place, where on grounds of public interest or expediency it is objectionable to permit any traffic in liquor, are matters which should be considered by the authorities concerned. The Full Bench was of the view that while granting the licence, the Board of Revenue has not kept in mind either the broad provisions of Article 47 of the Constitution or the particular specific factors mentioned in Rule 13A and Clause 22 of the Conditions of FL-3 licence. In the light of the above view, the stand taken in Ext. P-4 by the Division Bench has to be understood in the facts of the case. Evidently, the prescription under Rule 13A and its effect have not been considered by the Division Bench as already noticed. The term "local need" has got a wider meaning.

19. It is vehemently argued that the order is discriminatory in nature in the light of the fact that 3 other bar hotels were granted licence earlier. It is in that context the principles relied upon by the Apex Court in *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, , were relied upon by the learned Senior Counsel for the Petitioner. The said decision shows that the Apex Court was of the view that every citizen has no fundamental right to do trade or business in liquor. But, it was held that "When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business". The same is heavily relied upon by the learned Senior Counsel for the Petitioner.

20. Herein, the learned Counsel for the Guruvayoor Devaswom and the learned

Government Pleader submitted that the 3 bar hotels are situated beyond 1 km. of the Temple towards the Eastern Nada.

21. The alleged violation of Article 14 has to be examined in the light of the fact that the entitlement of the Petitioner for grant of licence has been rejected by relying upon Rule 13A as well as Clause 22 and, evidently, the principles under Rule 39. Therefore, when the Petitioner's application has been rejected on such other legal grounds, the Petitioner cannot contend that the same is arbitrary and discriminatory on the grounds that some other eligible persons have been granted licence. This principle is also evident from various decisions of the Apex Court. In *Krishnasamy Reddiar Educational Trust Vs. Member Secretary, National Council for Teachers Education and Another*, wherein the Appellant challenged the order on the ground that in similar circumstances, an order was passed by the Respondent in favour of the other institutions and, therefore, the same is discriminatory, the Apex Court held thus in paragraph (20):

20. Regarding the order passed in *Sabari Education Society*, apart from the distinguishing features as pointed out by the learned Counsel for the Respondent, a review application has also been filed and is pending, as stated by the learned Counsel for NCTE. Moreover, once it is held that the action of the Respondent in imposing condition is legal and valid, even if an order is passed in favour of any other institution, the Appellant cannot invoke Article 14. In our considered opinion, that is not the sweep of Article 14 of the Constitution.

22. Herein, as I have already held, the order passed by the Government is justified in the light of Rule 13A, Clause 22 of the Conditions of FL-3 licence and Rule 39. In that view of the matter, the Petitioner cannot bank upon the grant of licence to other 3 hotels that also long time back. It is now well-settled by the decisions of the Apex Court that, if any illegality has been committed in favour of any other party that cannot be a ground for attacking the rejection of the said benefit to a party concerned by relying upon Article 14 of the Constitution of India. In *Union of India (UOI) and Another Vs. International Trading Co. and Another*, , the said principle was laid down in the following terms in paragraph (13):

13. What remains now to be considered, is the effect of permission granted to the thirty-two vessels. As highlighted by learned Counsel for the Appellants, even if it is accepted that there was any improper permission, that may render such permissions vulnerable so far as the thirty-two vessels are concerned, but it cannot come to the aid of the Respondents. It is not necessary to deal with that aspect because two wrongs do not make one right. A party cannot claim that since something wrong has been done in Anr. case direction should be given for doing Anr. wrong. It would not be setting a wrong right, but would be perpetuating Anr. wrong. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India (in short "the Constitution") cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold.

It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the Respondents cannot strengthen their case. They have to establish strength of their case on some other basis and not by claiming negative equality.

Herein, even if it can be taken hypothetically the grant of licence to 3 other hotels was wrong, the Petitioner will not be justified in seeking a benefit on the concept of negative equality.

23. The next question is whether this Court should exercise the discretionary jurisdiction under Article 226 of the Constitution. Going by the provisions which are relevant here, Rule 13A, Clause 22 of the conditions of FL-3 licence and Rule 39, it is up to the Government to exercise its discretion in a matter like this where a grant of licence is sought for. It cannot be disputed or rather it is admitted by the Petitioner also that Guruvayoor is a well-known pilgrim centre, it cannot be termed as a tourist centre. Therefore, in a location like this, to grant licence to a bar hotel, the Government has thought that in public interest and expediency, the same need not be granted. There is ample statutory support for the said reason also. The discretionary power is thus exercised by the Government against the Petitioner. The learned Senior Counsel for the Petitioner submitted that if it is found that the order is bad for violation of Article 14 of the Constitution, then the matter has to be reconsidered by the Government. There are more reasons than one to reject the said argument. This Court is only exercising the power of judicial review under Article 226 of the Constitution. In such circumstances, the scope of intervention is limited in the sense that this Court is not sitting in appeal over the decision of the statutory authority or the Government as the case may be. This Court cannot, therefore, interfere with the decision and substitute its own decision in the matter. It is well-settled that judicial review is concerned not with the merits of the decision, but the decision-making process itself. In *Tata Cellular Vs. Union of India*, , Their Lordships were of the view that the scope of interference in such matters is governed by the *Wednesbury* principles and it was laid upon thus in paragraphs 94 and 95 that:

Therefore, it is not for the court to determine whether particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) **Illegality.**--This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) **Irrationality**, namely, *Wednesbury* unreasonableness.

(iii) **Procedural impropriety.**

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

24. The learned Counsel for the Devaswom submitted that the matter was considered by the Government in the light of the directions issued by the Division Bench in W.P. (C) No. 20711/2008, a public interest litigation filed by a devotee opposing the grant of licence to the Petitioner herein. The Division Bench disposed of the matter in the following words:

5. Therefore, in our opinion, the reliefs sought for by the Petitioner in this writ petition cannot be granted by us. However, we only observe, that the Respondent authorities while granting any new licence for Bar Restaurants, toddy shops etc., in the precincts of the Temple will take into consideration the distance Rules and also the other statutory provisions provided under the Act and also the objections that may be raised by the general public.

It is therefore submitted that the Government was well within its rights to consider the application under the statutory provisions and after considering the objections that may be raised by the general public. There was an objection filed by the Guruvayoor Brahmana Samootham as well as the Guruvayoor Devaswom Managing Committee in that regard, which was also considered by the Government

25. Judged in the light of the above, it cannot be said that the view taken by the Government is so irrational and perverse or against statutory provisions warranting interference by this Court in Article 226 of the Constitution. This Court cannot obviously substitute its reasons for that of the Government. If it is found that the decision of the Government is supported by statutory principles and public interest, such an order cannot be found to be illegal or arbitrary on any ground. For all these reasons, the writ petition is dismissed. No costs.