(1990) 11 KL CK 0021

In the High Court Of Kerala

Case No : O.P. No. 8681 of 1990 and Connected cases Confirmed in W.A. No. 800 of 1990.

M.P. Sadasivan and others — APPELLANT

Vs

Excise Inspector and others — RESPONDENT

Date of Decision : 09-11-1990

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : (1991) 1 KLJ 145

Hon'ble Judges : K. Sreedharan, J

Bench : Single Bench

Advocate : P.C. Chacko and Rajan Joseph, for the Appellant; K. Sudhakaran, Advocate General, for the Respondent

Judgement

K. Sreedharan J.

1. Same question arise for consideration in all these Original Petitions. So, I consider it advantageous to depose of them by this common judgment. I am treating O.P. No. 8681/90 as the main, petition. Parties and documents referred to in this O.P. are dealt with as they are arrayed therein. Petitioners are some of the licencees of arrack shops situated in districts of Palakkad, Thrissur and Ernakulam. They bid the auction held in March, 1990. Even before auction the Kerala Abkari Shops (disposal in Auction) Rules, 1974, hereinafter referred to as ''the Rules'', was amended by introducing Rule 8A. That rule provided for the supply of arrack in sealed bottles of different measurements to contractors in the Districts of Palakkad, Thrissur and Ernakulam through the Kerala State Beverages (Manufacturing and Marketing) Corporation''s (hereinafter referred to as ''the Beverages Corporation'') Warehouses The supply through the Beverages Corporation was to be effective from 1-10-1990, Petitioners started running the arrack shops from April, 1990, with bulk supply effected through the various distilleries. The Commissioner of Excise issued Circular dated 24-9-1990 by which his subordinates were directed to implement certain instructions. They

were:

(i) No sale of arrack other than bottled arrack supplied by the Kerala State Beverages Corporation should be made by the arrack contractors in Ernakutam, Thrissur, and. Palakkad Districts on and after 1-10-1990.;

(ii) The entire quantity of arrack available with the contractors should be disposed of before close of the shop on 30-9-90.

(iii) Notice directing the individual shop owners to sell out the entire quantity available with them on or before 30-9-90.

(iv) Shop owners should be directed to remove Vats bottling machines, corking machines, containers etc from their godowns and shops immediately after the close of business on 30-9-1990.

In pursuance to the above circular, the Excise Inspectors issued notices to individual contractors informing them that the entire stock at the time of the closure of the shop on 30-9-1990 will be sealed and seized. Petitioners were told that with effect from 1-10-1990 they will not be allowed to sell arrack in loose quantities but only in the manner and form in which it is supplied to them from the Warehouses of the Beverages Corporation. These actions taken by the officers of the Excise Department and the Circular issued by the Commissioner of Excise on 24-9-1990 are under challenge.

2. While arguments on these petitions were in progress Government issued notification, S.R.O. No. 1362/90 in the Gazette dated 11-10-1990. That notification provided that retail sale of arrack by arrack shop licencees in the districts of Palakkad, Thrissur and Ernakulam shall be only in scaled bottles as supplied through the Beverages Corporation and that loose sale of arrack should not be made in the shops.

3. The main arguments advanced by the learned counsel representing the petitioners are, in a nut shell, as follows: Rule 8A of the Rules which was in force on the date of the auction stated that the supply of arrack to the contractors after 1-10-1990 will be in sealed bottles through the Beverages Corporation. Nowhere it was stated that the arrack supplied in bottles will have to be sold as such and not in loose quantities. The licencees had taken the arrack from distilleries in bulk quantities after paying duty, price, sales tax and income tax. That was being sold to customers according to their requirements. The action taken by the excise authorities to seize and seal the same is arbitrary. By paying huge amounts petitioners purchased the privilege of Vending arrack during the abkari year 1990-91. They acquired the right to vend arrack during that period. That right was in relation to loose sale of arrack. During the continuance of the contract Government are having no power to effect any change adversely affecting the rights of the contractors. Licencees of arrack shops and foreign liquor shops were entitled to sell arrack and foreign liquor in loose quantities. The action now taken by the Government treats the licensees of arrack shops

differently. This differential treatment infringes the equality provision contained in Article 14 of the Constitution. So also the arrack shops situated in the Districts of Palakkad, Thrissur and Ernakulam are treated differently from those in the other districts of the State. This also constitute a hostile discrimination. Hence it is contended that the licencees of arrack shops in the three districts should be allowed to sell arrack in loose quantities to the customers even though the supply to them through the Beverages Corporation is in sealed bottels. I shall proceed to deal with these arguments in detail.

4. Liquor tragedies occurred in Punalur and Vypin, a few years back. A large number of people who consumed arrack had to face death on account of adulteration. A still large number lost their eye sight. Innumerable became invalid. Such ghastly incident happened on account of the consumption of adulterated arrack. Similar instances have happened elsewhere outside Kerala as well. All those instances are traceable to consumption of adulterated arrack. No report or such occurrence is so far available in relation to consumption of any other variety of liquor. To find out the ways and means to prevent occurrence of such instances in future the Government appointed a high power Commission headed by Shri A.P. Udayabhanu. They examined the entire aspects for preventing the sale of illicit liquor and to protect the liquor from adulteration. The Commission submitted its report on 29-8-1988. One of the recommendations of the Commission was to ensure sale of arrack to the consumer in sealed bottles. Based on this recommendation Government took a decision to permit sale of arrack only in sealed bottles supplied through the Beverages Corporation from 1-40-1990 onwards initially in three districts. While announcing the abkari policy for the year 1930-91 it was specifically mentioned that arrack will be supplied in sealed bottles from 1-1-1990 onwards in the districts of Palakkad, Thrissur and Ernakulam In implementation of that policy rule 8A of the rules was introduced in the rules. The Government''s intention was to see that the ultimate consumer gets arrack in sealed bottles.

5. Arrack was being supplied from distilleries in bulk quantities. The quantity so supplied by the distilleries should be sold in the same quality and strength to the consumer without any adulteration whatsoever. The licencees were not expected to add anything to it to increase its intoxicating power or for reducing its strength. While so, Rule 8A was introduced providing for the supply of arrack in sealed bottles through the Beverages Corporation in the three districts of Palakkad, Thrissur and Ernakulam. If the supply was to be so effected in sealed bottles can the contractors open the bottles and supply arrack to the consumer? If they are so allowed, the purpose for which Rule 8A'' was introduced will be defeated.

6. The argument advanced by the learned counsel representing the petitioners is that at the time of auction sale they were only told about the supply of arrack in sealed bottles through the Beverages Corporation instead of bulk supply from distilleries. They were not told that they cannot sell arrack in loose quantities to

the consumer. Insistence to sell arrack in sealed bottles only has gone to interfere with their right under the contract. Even though the right to vend arrack is a privilege, that privilege as gar as the abkari year 1990-91 is concerned matured into a right in so far as the petitioners are concerned. That right is not to be interfered with, it is argued, during the subsistence of the contract, that is till 31-3-1991.

7. By Ext. F16 S.R. O No. 319/90 dated 3-3-90 Government published its liquor policy on the privilege of vending Toddy, arrack and foreign liquor in retail shops for the period from 1-4-1990 to 31-3-1991. It is conceded before me that this policy binds the petitioners and all contractors. Clause (3) of Ext. P16 stated that auction sale will be held subject to the conditions set forth in the Kerala Abkari Shops (Disposal in Auction) Rules, 1974. Chapter-V of the Rules deals with general conditions applicable to licensees of toddy shop, foreign liquor retail shops and foreign liquor wholesale shops. Rule 6 (39) states that licensees shall be bound by the rules which have been passed under the Abkari Act, hereinafter referred to as ''the Act'' and which may hereafter be made under the said act or under any law relating to Abkari Revenue which may hereafter be made. So the licensees are not only be governed by the Rules that existed on the date of the auction but also by the rules that are to be made during the Abkari year as well. In view of this specific provision, no licensee who has bid the privilege of vending arrack can successfully raise a contention that the conditions imposed at the time of grant of the privilege cannot be varied during the abkari year. The grant of licence to carry on sale of arrack does not by itself take away the pernicious character of the activity as such. Inherent obnoxious quality of the activity is not erased by the grant of the privilege. Nor does a socially acceptable characteristic is injected into it by the grant of licences. The conditions of the licence can be varied by the Government.

8. The Government is faced with the problem of avoiding adulteration in arrack. They have taken a policy decision to supply arrack in sealed bottles to the contractors who in turn art to sell it in the same condition to the actual consumer. That policy decision was taken after getting the issue examined by a competent expert committee. Is the court to strike down the policy decision merely because it feels that it interferes with the alleged rights of the auction purchasers or on the ground that another policy would have been fairer or more scientific and logical ? Can the contractors who have bid the privilege of vending arrack attack the policy decision so taken by the Government on the ground that they are discriminated against those who get the right to vend foreign liquor because they still continue to have the right to open bottle and sell foreign liquor in loose quantities ? While considering the applicability of Article 14 with reference to the business in liquor which is inherently pernicious, the court should be slow to interfere with the policy laid down by the Government. The court should allow large measure of latitude to the State Government in determining its policy in regulating manufacture and trade in liquor. The grant of licence for sale of liquor is essentially a matter of economic policy. The court

would hesitate to intervene or to interfere with what the Government had done unless it appears to be arbitrary or mala fide. The Government, as stated earlier, basing on the recommendation of the expert committee took a decision to supply arrack to the consumers in sealed bottles. That has in a way gone to regulate the business activities of the contractors. As stated by the United States Supreme Court in Claude R. Wickard Vs. Roscoe C. Filburn. (87 Law. Ed. 317 U.S. 111) :

The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

Justice Frankfurter has observed Secretary of Agriculture Vs. Central Roig Refining Company (94 Law. Ed. 338 U.S. 604):

Suffice it to say that since Congress fixed the quotas on a historical basis it is not for this court to reweigh the relevant factors and, per chance, substitute its notion of expediency and fairness for that of Congress. This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons. This court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation.

Determination of choice of priorities and formulation of perspective there of are matters of policy. The policy preference and priorities are not to be determined by courts. The Supreme Court in R.K. Garg Vs. Union of India AIR 1981 SC 2138 pointed out that the laws relating to economic activities should be viewed with greater latitude than laws toching civil rights such as freedom of speech, religion etc. Legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait jacket formula This is particularly true in cage, of legislation dealing with economic matters. In State of M.P. and Others Vs. Nandlal Jaiswal and Others, Their Lordships west on to state that what was said in regard to legislation relating to economic matters must apply equally ill regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestal as legislative judgment in to far as judicial deference is concerned. In complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and, therefore, its validity cannot be tested on any rigid a priori considerations or on the application of any strait jacket formula. While adjudging the constitutional validity of an executive decision relating to economic matters, certain measure of freedom or ''play'' in the ''joints'' to the executive must be afforded.

9. Violation of the equality provision contained in the Constitution was pressed into service on the ground that sale of loose arrack alone is now sought to be restricted by the impugned actions. Foreign liquor retail licensces are allowed to sell liquor in loose quantities to the customers. White they can open the bottle

and serve the customers according to their requirement, arrack alone is differently treated. Non inclusion of foreign liquor licensees within the ambit of this restriction it is argued, is arbitrary and violative of the provisions contained in Article 14 of the Constitution. I do not find any merit in this contention so as to interfere with the policy decision of the Government. Court cannot insist the Government to regulate trade of all types of liquor in any particular manner. The effort of the Government to prevent a particular evil affecting arrack cannot be interfered with on the ground that it is not covering the whole range of liquor trade. In The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, the Supreme Court observed:

The piecemeal approach to a general problem permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt. Administrative expedients must be forged and tested. Legislators, recognising these factors, may wish to proceed cautiously, and courts must allow them to do so.

So, the steps taken by the Government are not to be interfered with by this court on the ground that restrictions are imposed only on the sale of arrack and not on the sale of foreign liquor.

10. Rule provides for special conditions applicable to the licensees for the privilege of vending arrack. Chapter VII of the Rules contains special provisions. The monthly quota of arrack to be sold by the licensee is to be fixed by the Department. The arrack kept and offered for sale should be unadulterated and should be of the same quality and strength as issued from the distilleries or warehouses. The right of the licensees extend to the sale of arrack of the specified strength only. Contractors and suppliers of arrack are prohibited from holding any interest in the vending of other intoxicant in any part of their supply area without the permission of the Government. Government are to fix the price of arrack. Contractors are to sell the same at the price fixed by the Government. Government have a right to vary the same during the currency of the contract. The rules thus show that arrack is treated differently from other types of liquor. Petitioners bid in auction the right to vend arrack knowing this special characteristic. There-after they cannot now put forward a contention that the arrack is differently treated from other kinds of liquor.

11. Petitioners challenge is against the imposition of this restriction on the contractors of Palakkad, Thrissur and Ernakulam. While contractors in other districts are having un-restricted right to sell arrack in loose quantities, an unreasonable restriction has been imposed on those in the three districts of Palakkad, Thrissur and Ernakulam. This circumstance is also put forward as a ground of discrimination. I do not find any merit in this argument. The entire State is divided into three zones for the enforcement of the Abkari Act. Central

zone covers areas comprised in the Districts of Idukki, Ernakulam, Thrissur and Palakkad. On account of the terrain of Idukki District that area has been excluded for the time being from the implementation of this scheme The policy is implemented in the other three districts forming part of the Central Zone. I do not find any vice in extending the scheme to these three districts.

12. Yet another contention that was raised by the petitioners is against Ext. P15 notification dated 11-10-1990. That notification was issued under the powers conferred by Sections 13A, and 18A of the Act. These sections, it is alleged, do not empower the Government to issue a notification in the nature of Ext. P15. Consequently, it was argued that the said notification is issued without authority. As stated earlier, the Government published their abkari policy for the year 1990-91 by issuing Ext. P16 notification. That notification was one issued in exercise of the powers conferred by Section]8A of the Act. It was in pursuance to that notification petitioners secured the privilege of vending arrack. Invoking the same power Government are entitled to issue notification restricting the said conditions of the privilege. A notification issued under the Abkari Act is to be taken to have the force of law, as per Section 69 of the Act. In P.J. Varkey v. State of Kerala (1972 KLT 815) a Division Bench of this Court held that the notifications issued us. 18A of the Act are to be treated as Rules validly passed us. 29 of the Act. Same view has been followed by another Bench in State of Kerala V.K.K. Vasudevan (1981 KLT 878). Ext. P16 notification categorically stated that the auction sale is subject to the condition set forth in the Rules. Rule 6 (39) states that licensee shall be bound by all existing rules and also by Rules which may be made subsequently. Ext. P15 notification is Rule made subsequent to completion of the contract. That Rule should also bind the petitioners because of Rule 6 (39) of the Rules. In these circumstances, I hold that Ext. P15 is a valid notification having the force of law and it binds the contractors.

13. Till 30-9-1990 petitioners were directed to lift the stock of arrack from distilleries. Supply was in bulk quantities. They could not sell out the entire stock so lifted by the evening of 30-9-1990. They are having undisposed of stock with them By orders of this court that stock was kept under seal Later petitioners were allowed by this court to sell the sealed stock of arrack in the neighboring districts where the sale in loose is allowed. Even-after such sale, it is submitted that they are having some more stock which has to be replaced.

14. Government have the power to seize the stock of arrack u/s. 65 of the Act if the conditions mentioped therein are satisfied. Rule 6 (7) of the Rules authorises the officers of the Excise Department to take possession of liquor found unfit for consumption or suspected to have been tampered with. Only, under these circumstances can the stock of liquor be seized. Respondents have no case that the stock of arrack as on 30-9-1990 was seized on any of the above conditions. So, the seizure has to be interfered with because the petitioners came by the stock legally and that stock is not found to be in any way unfit for human consumption. Its seizure is not supported by law. In these circumstances I put it

to the learned Advocate General whether it was possible for the Government to replace that stock by supplying equal quantity of arrack in sealed bottles through the Beverages Corporation. At the instance of the Court learned Advocate General placed the matter before Government and the Government rightly and graciously accepted the suggestion to replace the stock after testing it for ascertaining the purity and strength. In these circumstances I direct the petitioners to bring the stock for replacement to Ernakulam for testing it in the Regional Laboratory. On testing if it is found to be of required strength and purity, it will be replaced by same quantity in sealed bottles supplied by the Beverages Corporation. The difference in value must be paid by the petitioners. Petitioners can get this stock from Ernakulam itself. Respondents will make necessary arrangement to carry out this process without any delay.

The Original Petitions are disposed of in the above terms.

