

(1992) 01 KL CK 0030
In the High Court Of Kerala
Case No : W.A. No. 881 of 1991

P. Rajan and Another

APPELLANT

Vs

Commissioner of Excise and Others

RESPONDENT

Date of Decision : 23-01-1992

Acts Referred:

Constitution of India, 1950 — Article 47
Kerala Abkari Act, 1077 — Section 18A, 29
Kerala Abkari Shops (Disposal in Auction) Rules, 1974 — Rule 6(2)

Citation : (1992) 01 KL CK 0030

Hon'ble Judges : K.T. Thomas, J;K.S. Paripoornan, J

Bench : Division Bench

Advocate : B. Raghunathan, for the Appellant; V.P. Mohankumar, for Respondents 4 and 5 and V.C. James, Govt. Pleader for Repspondents 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

K.T. Thomas, J.—A foreign liquor retail shop (FLR shop) is located within prohibited distance from certain places of worship and educational institutions at Kadappakada in Kollam Range. Prohibition contains in Rule 6(2)(a) of the Abkari Shops (Disposal in Auction) Rules, 1974 (for short "the Rules"). The shop is housed in building M.C. No. 818. For the abkari year 1991-92, Respondents 4 and 5 got the licence to run the shop being the highest bidders. Appellants, who are residing near the said shop, objected its location. They filed the Original Petition for quashing Ext. P-5, a Government Order by which Commissioner of Excise was directed by the Government to grant licence to the said Respondents as a special case. Learned Single Judge did not interfere and dismissed the Original Petition. This appeal is in challenge of the said judgment of the learned Single Judge.

2. Auction for the right to vend Indian made foreign liquor in Kollam Range was held on 16th March 1991 Respondents 4 and 5 were the highest bidders. The

auction bid in their favour was confirmed on 27th March 1991. As per the second proviso to Rule 6(2)(a) which was in force then, an FLR shop could be located in the place where such a shop was located during "1988-89" notwithstanding the fact that the place was within the prohibited distance. By Ext. B-1 notification. Government amended the said proviso by substituting the year 1988-89 with "1990-91". The second proviso as it stands now reads thus:

Provided further that the toddy shop, arrack shop and foreign liquor retail shop shall be permitted to be located and licensed in such places where they were located and licensed in the Abkari year 1990-91 as a toddy shop or its sub shop, an arrack shop or its sub shop, or a foreign liquor retail shop, respectively.

The amendment of the rule substituting the year with "1990-91" came into force on 1st April 1991, the date from which the licensees (Respondents 4 and 5) had to commence their business. So, they moved the Government for special sanction. It was in the aforesaid background that Government issued Ext. P-5. Material portion of Ext. P-5 is extracted below:

The question of amending the proviso in question considering the general aspect involved in the matter is under examination of Government. In the meantime, however, the shops in question or other shops similarly placed, if any, can be issued licence treating then as eligible for the protection contemplated in the proviso as it existed at the time of auction/negotiation as the case may be if they are otherwise eligible for licence.

3. Learned Single Judge took the view that Ext. P-5 was "issued only to give effect to the rule as it existed on the date of auction and avoid the prejudice caused by a (sic) amendment by inadvertence". According to learned Single Judge "such difficulties arose in many cases and it was not anticipated by the licensees; it became difficult for many licensees to open and run the shops and Government also felt possibility of loss of revenue; it was only to overcome this difficulty that necessary instructions were given in the form of an executive order, pending regular amendment, as an emergency measure therefore, in the ends of justice on account of the peculiar situation the order will have to be given effect to.

4. There is no dispute that the shop is situated within the prohibited distance as contemplated in Rule 6(2)(a) of the Rule. Appellants have averred in the Original Petition that the distance between the questioned shop and an L.P. School, a temple, a guru mandiram, a church and mosque is less than 400 metres. Legislative inhibition (sic) clear from Rule 6(2)(a). Relaxation to the said prohibition is granted only to the limited extent permitted in the proviso thereunder. It is settled law that Government or way authority cannot circumvent statutory restriction through executive orders vide *Sant Ram Sharma Vs. State of Rajasthan and Another*, *State of Maharashtra and another Vs. Chandrakant Anant Kulkarni and others*, and *C.L. Verma v. State of M.P.* ILR 1990 S.C. 463. We cannot agree with the reasoning that the amendment incorporated in the

second proviso to Rule 6(2) was due to "legislative inadvertence". Legislature must be presumed to be aware of all the implications of the words and digits used in the statute. Had this been a case of inadvertence it would have been corrected at least when the matter was brought to the notice of the Government.

5. Learned Counsel for Respondents 4 and 5 referred us to the decision of the Supreme Court in *State of Sikkim Vs. Dorjee Tshering Bhutia and others*, . It has been observed in the said decision that there was no bar for the State Government to act in exercise of its executive power where statutory provisions are unworkable and inoperative and cannot achieve the objectives of the law. That decision is of no help to the Respondents. There is no question of Rule 6(2) (a) of the Rules becoming unworkable or inoperative. In fact the rule works unhampered in many places and serves the objective of the rule. Supreme Court has pointed out in the said decision that "the executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provision, is without jurisdiction and is a nullity".

6. Sri V.P. Mohankumar, learned Counsel for Respondents 4 and 5 invited our attention to Section 18A of the Abkari Act and contended that Government have the power to grant to any person the exclusive or other privilege of selling or supplying liquor by wholesale or by retail. We cannot read Section 18A in isolation. The said section is part of a scheme and the same Act contains Section 29 which empowers the Government to make rules "for the purpose of carrying out the provisions of this Act". We cannot render the rules meaningless and futile.

7. Lastly he contended that this Court may not interfere as the bidders have already invested a huge amount and as the period of licence would expire in two months time. This argument cannot be countenanced as the legislative intent in imposing a prohibition to run liquor shop within a certain distance from places of worship and educational institution, is partly in tune with the Directive Principles of State policy, enshrined in Article 47 of the Constitution of India. It must be borne in mind that there is no right, as such, to conduct a trade in alcoholic liquors. If a man gets the privilege to vend such liquor bound by statutory regulations and restrictions, he cannot be permitted to exercise the privilege by transgressing the restrictions imposed by legislative exercise. The amount he invested or the length of time during which the business can be carried on are no consideration for allowing him to circumvent the law.

We are unable to confirm the judgment of the learned Single Judge. For the reasons adverted to above, we allow this appeal, set aside the judgment of the learned Single Judge and quash Ext. P-5.