

(1978) 08 KL CK 0028

In the High Court Of Kerala

Case No : Original Petition No's. 3505 and 3701 of 1975

P.M. Nianan and Others

APPELLANT

Vs

The Executive Officer, Anikad and Others

RESPONDENT

Date of Decision : 16-08-1978

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : AIR 1979 Ker 18 : (1979) CriLJ 372

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.; T. Chandrasekhara Menon, J; K. Bhaskaran, J

Bench : Full Bench

Advocate : K.S. Sebastian, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Gopalan Nambiyar, C.J.—These writ petitions challenge the vires of Rule 10 of the Kerala Food Adulteration Rules. In respect of the contravention of the said Rule, there was a criminal prosecution of the petitioners in these writ petitions. The validity of the Rule was canvassed in revision proceedings before this Court u/s 482 of the Cr. P. C. The Rule was upheld -- vide P.K. Gopinathan Nair and Others Vs. The Executive Officer and Another, These writ petitions are now filed to declare the Rules ultra vires.

2. The learned Advocate-General placed before us the decision of this Court reported in P.K. Gopinathan Nair and Others Vs. The Executive Officer and Another, He also cited the Supreme Court decision in Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, where it was ruled by the Supreme Court that where on the revisional jurisdiction, the High Court dismisses the revision after hearing both the parties, the order of the appellate court becomes merged with the order made in revision, and thereafter the appellate order cannot be challenged or attacked by another set of proceedings in the High Court under Article 226 or 227 of the Constitution. The principle of merger of orders of

inferior courts would not become affected or inapplicable by making any distinction between a revision and an appeal. It was also ruled that the right of appeal is one of entering a superior Court and invoking its aid and interposition to redress the error of the court below. When the aid of the High Court is invoked on the revisional side, it is done because it is a superior Court, and it can interfere for the purpose of rectifying the error of the court below. Section 115 of the Civil P. C. circumscribes the limits of that jurisdiction, but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. In view of the above principle laid down by the Supreme Court and of the prior decision in P.K. Gopinathan Nair and Others Vs. The Executive Officer and Another, we see no merit in these writ petitions. We dismiss them with no order as to costs.

3. Although the cases were in the hearing list and were called on Friday -- and again today -- counsel for the petitioners was absent. We have heard the arguments of the learned Advocate-General who appeared for the State, and counsel for the Panchayat, one of the respondents in these writ petitions.

4. Issue carbon copy of this judgment to all counsel, on usual terms.

[C. M. P. No. 11516 of 1978 for rehearing was allowed on 4-8-1978 and the final judgment on rehearing was delivered on 16-8-1978]

Gopalan Nambiyar, C.J.

5. These writ petitions attack the validity of Rule 10 of the Prevention of Food Adulteration Rules framed by the State Government u/s 24 of the Prevention of Food Adulteration Act. The attack is on the ground that the rule is outside the rule-making power granted by Section 24 of the Act. The petitioners in these writ petitions are being prosecuted for violation of Rule 10 of the Rules in that they did not take out a licence for dealing in rice, wheat and other things.

6. Section 24 of the Food Adulteration Act reads :

"24. Power of the State Government to make rules.-- (1) The State Government may, after consultation with the Committee and subject to the condition of previous publication, make rules for the purpose of giving effect to the provisions of this Act in matters not falling within the purview of Section 23.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may--

(a) define the powers and duties of the Food (Health) Authority and local authority :

(b) prescribe the forms of licences for the manufacture for sale, for the storage, for the sale and for the distribution of articles of food or any specified article of

food or class of articles of food, the form of application for such licences, the conditions subject to which such licences may be issued, the authority empowered to issue the same, the fees payable therefor, the deposit of any sum as security for the performance of the conditions of the licences and the circumstances under which such licences or security may be cancelled or forfeited.

(c) direct a fee to be paid for analysing any article of food or for any matter for which a fee may be prescribed under this Act;

(d) direct that the whole or any part of the fines imposed under this Act shall be paid to a local authority on realisation;

(e) provide for the delegation of the powers and functions conferred by this Act on the State Government or the Food (Health) Authority to subordinate authorities or to local authorities.

(3) All rules made by the State Government under this Act shall, as soon as possible after they are made, be laid before the respective State Legislatures."

It will be seen from the Section that the State Government's rule making power extends only to matters not falling within the purview of Section 23. In respect of such matters, it extends under Clause (b) to prescribe the forms of licences for the manufacture, sale, storing etc. of any article of food. We may turn to Section 23 of the Act, which, in so far as it is material, is as follows:

"23. Power of the Central Government to make rules. -- (1) The Central Government may, after consultation with the Committee and subject to the condition of previous publication, make rules--

XX XX XX XX (f) prohibiting the sale or defining conditions of sale of any substance which may be injurious to health when used as food or restricting in any manner its use as an ingredient in the manufacture of any article of food or regulating by the issue of licences the manufacture or sale of any article of food;

(g) defining the conditions of sale or conditions for licence of sale of any article of food in the interest of public health."

In pursuance of the powers u/s 23 of the Act, the Central Government have framed Rule 50 which is as follows:

"50. Conditions for licence. -- (i) No person shall manufacture, sell, stock, distribute or exhibit for sale any of the following articles of food except under a licence--

(a) milk of all classes and designations, (b) milk products, such as cream, malai, curd, skimmed milk curd, chhanna, skimmed milk chhanna, cheese, processed cheese, ice-cream, milk ices, condensed milk sweetened and unsweetened, condensed skimmed milk sweetened and unsweetened, milk powder, skimmed milk powder partly skimmed milk powder, khoa. infant milk food, table butter,

deshi butter

- (c) edible animal body fats such as beef fat, mutton fat, goat fat and lard,
- (d) edible vegetable oils,
- (e) edible fats including margarine,
- (f) pulses, grams, nuts, starches, sago suji, flours, such as maida, besan and articles made out of flour including bakery products,
- (g) non-alcoholic beverages such as carbonated water,
- (h) tea, coffee, cocoa and chicory.
- (i) spices and condiments, whole or ground, including saffron, curry powder, mustard seeds, asafoetida and compounded asafoetida,
- (j) sweetening agents such as aa sugars, honey, gur or jaggery,
- (k) flavouring agents, anti-oxidants, emulsifying and stabilising agents, and preservatives permitted for the use in food and food-container wrappers,
- (l) artificial sweeteners,
- (m) confectionery, sweetmeats and savoury,
- (n) ice candies,
- (o) edible gelatin,
- (p) edible molasses,
- (q) coconut.

Provided that the fruit products covered under the Fruit Products Order, 1955 and , Vanaspati, manufactured, stocked sold or distributed by factories licensed for the purpose shall be exempted from the above rule.

(1) One licence may be issued by the licensing authority for one or more articles of food."

(2) The State Government or the local Authority shall appoint licensing authorities.

(3) A licensing authority may with the approval of the State Government or the local authority by an order in writing delegate the power to sign licences and such other powers as may be specified in the order to any other person under his control.

(4) If articles of food are manufactured, stored, or exhibited for sale at more than one place, separate application shall be made, and a separate licence shall be issued, in respect of each such place:

Provided that this shall not apply to itinerant vendors who have no specified

place of business and who will be licensed to conduct business in a particular area within the jurisdiction of the licensing authority.

(5) Before granting a licence for manufacture, stock or exhibition of any of the articles of food in respect of which a licence is required, the licensing authority shall inspect the premises and satisfy itself that it is free from sanitary defects. The applicant for the licence shall have to make such alteration in the premises as may be required by the licensing authority for the grant of a licence.

(6) Omitted.

(7) Proprietors of hotels, restaurants and other food stall (including mobile and itinerant food stalls) who sell or expose for sale savouries, sweets or other articles of food shall put up a notice board containing separate lists of the articles which have been cooked in ghee, edible oil, vanaspati and other fats for the information of the intending purchasers.

(8) omitted,

(9) No licensee shall employ in his work any person who is suffering from infectious, contagious or loathsome disease.

(10) No person shall manufacture, store or expose for sale or permit the sale of any article of food in any premises not effectively separated to the satisfaction of the licensing authority from any privy, urinal, sullage, drain or place of storage of foul and waste matter.

(11) All vessels used for the storage or manufacture of the articles intended for sale shall have proper cover to avoid contamination.

(12) Every manufacturer (including ghani operator) or wholesale dealer in butter, ghee, vanaspati, edible oils, and other fats shall maintain a register showing the quantity manufactured, received or sold and the destination of each consignment of the substances sent out from his manufactory or place of business, and shall present such register for inspection whenever required to do so, by the licensing authority.

(13) An itinerant vendor granted a licence under these rules, shall carry a metallic badge on his arm showing clearly the licence number, the nature of articles for the sale of which the licence has been granted, his name and address and the name and address of the owner if any, for whom he is working. His containers of food and the vehicle shall also be similarly marked. In addition to the metallic badge the vendor shall if so required by the State Government or the local authority carry an identity card with his photograph and the number of the licence. The identity card shall be renewed every year.

(14) The nature of articles of food for the sale of which a licence is required under these rules shall be mentioned in the application for licence. Any objectionable, ambiguous or misleading trade name shall not be approved by the licensing authority.

(15) Every licensee who sells any food shall display a notice board containing the nature of the articles which he is exposing or offering for sale."

The State Government in its turn acting under the provisions of Section 24 of the Act has framed the Kerala Prevention of Adulteration Rules 1957. Rule 10 of the same states:

"10. No person shall sell, stock and exhibit for sale or distribute any food without a valid licence issued under these rules:

Provided however Government may exempt any food from the operation of this rule."

The argument, in brief, is that the Government's power of rule making, u/s 24 is only in respect of matters not falling within the purview of matters not falling within the purview of Section 23; that licensing in respect of sale of food stuffs falls within the province of the Central Government u/s 23(f), and that the power had actually been exercised by framing Rule 50; with the result that the State's rule-making power would not be available for exercise in respect of licensing sale of articles of food; and most certainly, not in respect of those specified in Rule 50 of the Central Rules. This being so, Rule 10 framed u/s 24, purports to cover the field of licensing for sale of articles of food, for which the centre alone is given the power u/s 23(f), and in respect of which, the States have no power u/s 24. In exercise of the Centre's power it has provided for licensing for sale only in respect of articles covered by Rule 50. The impugned Rule goes far beyond the field delimited for its operation. To that extent, therefore, the rule must be regarded as beyond the powers of the State. The argument thus presented is attractive and we were inclined to accent the same -- vide 1965 KLT 221, which has taken note of the Central Government's rule making power.

But the learned Advocate General flaunted an objection that the petitioners in these cases, on an earlier occasion, had come to quash the criminal charge u/s 482 of the Cr. P. C. and had raised, inter alia, the contention that the rule now impugned is ultra vires and the said contention had been found against by a Division Bench of this Court. The decision is reported -- vide P.K. Gopinathan Nair and Others Vs. The Executive Officer and Another, Paragraph 8 of the judgment shows the contention raised by the petitioners which is stated as follows :

"8. The legal contention raised by the petitioners is that the rule making power contained in Section 23 of the Act is vested in the Central Government and the Central Government have made Rule 50 pursuant to the aforesaid power. Although Section 24 of the Act provides the State Government with power to make rules regarding matters which are outside the scope of Section 23, the petitioners' counsel would contend, that since rules have already been made by the Central Government, the State Government cannot make rules regarding the same matter. The relevant State rule is Rule 10 of the Kerala Prevention of Food Adulteration Rules, 1957, for short the Kerala Rules, which reads :

"No person shall sell, stock and exhibit for sale or distribute any food without a valid licence issued under these rules."

The Central rule is Rule 50 of the Prevention of Food Adulteration Rules, 1955, for short, the Central Rules, which enumerates the various articles of food for which a licence is necessary to sell, stock, distribute or exhibit for sale."

And the matter was dealt with by this Court in paragraph 9 of the judgment as follows :

"9. Counsel for the Panchayat contended that Section 28(f) and (g) of the Act related to prohibition or defining the conditions of sale of any substance which may be injurious to health and defining the condition of sale or conditions for licence of sale of any article of food in the interests of public health. Section 24 of the Act enables the State Government to make rules for the purpose of giving effect to the provisions of the Act in matters not falling within the purview of Section 23. Therefore, it cannot be said that Rule 10 enacted by the State Government is either a usurpation of the powers vested in the Central Government or in excess of the power conferred u/s 24 of the Act on the State Governments. All that the rule states is that no person shall sell, stock and exhibit for sale or distribute any food without a valid licence. If the petitioners are able to satisfy the Court below that a licence is not necessary for the articles of food which they sell, stock and exhibit for sale or distribute, they are entitled to relief from that Court. But we would like to make it clear that reading Sections 23 and 24 together and Rule 50 of the Central Rules and Rule 10 of the Kerala Rules together, it cannot be said that Rule 10 is either invalid or beyond the jurisdiction or on account of excessive jurisdiction."

There can be no doubt that the contention regarding the validity of the Rule was expressly raised before this Court on the earlier occasion, in proceedings which this Court had jurisdiction to deal with and decide; and that there was an express decision by this Court in the said proceedings. The said decision operates as res judicata against the writ petitioners. On this ground these writ petitions must fail. They are accordingly dismissed with no order as to costs.

Counsel for the petitioners attempted to raise other contentions before us, such as that the prosecution had been instituted without the consent of the Panchayat as required by Section 20 of the Act. But this is a matter to be urged before the criminal court and not in these writ proceedings.