

(2003) 01 KL CK 0015
In the High Court Of Kerala
Case No : O.P. No. 38373 of 2002

P.S. Saseendran

APPELLANT

Vs

Vishwambharan and Others

RESPONDENT

Date of Decision : 21-01-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80, 9, 91, 91(1), 91(2)
Constitution of India, 1950 — Article 226, 227

Citation : (2003) 1 KLJ 265

Hon'ble Judges : K. Padmanabhan Nair, J

Bench : Single Bench

Advocate : Mathew Zachariah and Koshy George, for the Appellant; M. Lalitha Nair (GP), for the Respondent

Final Decision : Dismissed

Judgement

K. Padmanabhan Nair

1. This Original Petition is filed by the defendant in O.S. No. 456 of 2002 on the file of the Munsiff Court, Cherthala

(i) To set aside the process issued and orders passed in the suit.

(ii) To declare that the statutory authorities under the Abkari Act are competent to decide the question whether a toddy shop is located within the prohibited distance from a Temple, and

(iii) to declare that the jurisdiction of the civil court is ousted in matters coming under the provisions of the Abkari Act and that the civil suit filed by the plaintiff is not maintainable.

The Petitioner is the licence holder of Shop No. 10 of Kuthiathode Range in Alappuzha District. He was granted Ext. P2 licence under the provisions of the Kerala Abkari Act after completing all formalities laid down under the Act and Rules made thereunder and depositing a huge amount. When the petitioner

started functioning of the toddy shop the first respondent filed O.S. No. 456 of 2002 before the Munsiffs Court, Cherthala praying for a decree of permanent injunction restraining the petitioner from conducting the toddy shop. Along with the suit, the first respondent filed I.A. No. 1400 of 2002 for an order of temporary injunction restraining the petitioner from conducting the shop at the licenced premises alleging that the toddy shop in question is located within the prohibited distance of 400 meters from Aroor Karthiayani Temple. Though the State of Kerala, Assistant Excise Commissioner and Excise Circle Inspector, were made parties to the suit, were not made parties to the application for injunction. According to the petitioner, those officers are entrusted with the statutory duty of issuing licence to toddy shops and they are deliberately kept out of the party array. It is averred that an Advocate Commissioner deputed by the court below submitted a report and plan without measuring the distance properly. The specific case put forward by the petitioner is that the civil court is not competent to scrutinise the correctness of an action done by the authorities under the Act. But the learned Munsiff passed an order of temporary injunction restraining the petitioner from conducting the shop in the plaint schedule building. The petitioner has filed C.M.A. No. 23 of 2002 before the Sub Court Cherthala challenging the order passed in the I.A. and the C.M. Appeal is pending. It is averred that no notice was issued as contemplated u/s 80 of the Code of Civil Procedure. It is also averred that the first respondent did not seek any exemption from the court from serving notice u/s 80 of the Code of Civil Procedure. It is averred that the Abkari Act is a special statute enacted for the purpose of regulating and controlling the manufacture, sale, import, export, transport and possession of intoxicating liquor including toddy and the Government is vested with the power to appoint competent officers for the purpose of giving effect to the provisions of the Act. According to the petitioner the Act is a self contained one which provides opportunity to aggrieved persons for approaching the authorities under the Act and hence when an authority under the Act exercises the powers, that cannot be challenged before a civil court. It is further averred that the common law provisions are not available to the courts in a case where rights are created by special statutes and the authorities under the Act alone can exercise those powers. It is averred that the issue whether the toddy shop is located within the prohibited distance or not is a matter which can be considered and decided by the Excise Commissioner alone. It is contended that the civil court has overstepped its jurisdiction by entertaining the suit and granting the relief which is to be dealt with by the authorities under the Abkari Act alone. Hence the Original Petition for the relief stated above.

The first respondent has filed the suit for a decree of permanent prohibitory injunction restraining the petitioner from conducting a toddy shop bearing Door No. 415/VB of Aroor Panchayath. It is contended that even before the construction of the building is completed a licence was issued to the petitioner to conduct the toddy shop in a building, which is situated 250 meters away from the famous temple by name Aroor Major Karthiayani Temple. The trial court

restrained the petitioner from conducting the toddy shop in the disputed premises as it is situated within the prohibited distance. The petitioner has filed C.M.A. No. 23 of 2002 before the Sub Court, Cherthala challenging the order of injunction and the same is pending. Thereafter, this original petition is filed.

2. The main argument advanced by the learned counsel for the petitioner is that in view of the fact that the Act is a self contained law specifically enacted for the purpose of regulating and controlling the manufacture, sale, import, export, transport and possession of intoxicating liquor including toddy in the State of Kerala, any person aggrieved by the licence granted under the Act can approach the authorities provided under the Act itself and the Civil court's jurisdiction to entertain and decide any such matter is barred. Section 9 of the CPC provides that the court shall have jurisdiction to try all suits of civil nature unless its cognisance is either expressly or impliedly barred. If the matter is governed by the provisions of special enactments and there is express bar, the civil court will have no jurisdiction try such a case. So I shall consider whether there is any specific bar in the Abkari Act.

3. Section 54A of the Act, which was inserted by section 12 of Act 4 of 1996 deals with bar or certain proceedings. It reads as follows:-

Bar of Certain Proceedings:- (1) No suit, prosecution or other proceeding shall lie against any Abkari Officer or servant of the Government for any Act done or purporting to be done under this Act, without the previous sanction of the Government.

(2) No Officer or servant of the Government shall be liable in respect of any such Act in any civil or criminal proceedings, if the Act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.

A reading of Section 54A of the Act shows that it only protects the officer in respect of the action taken by them under the Statute. Section 72 of the Act also deals with bar or actions. It reads as follows:-

72. Bar of actions:- No action shall lie against the Government or against any Abkari Officer, for damages in any Civil Court for any act bona fide done or ordered to be done in pursuance of this Act, or of any law for the time being in force relating to Abkari Revenue, and all prosecutions of any Abkari Officer, and all actions which may be lawfully brought against the Government or against any Abkari Officer, in respect of anything done or alleged to have been done, in pursuance of this Act shall be instituted within six months from the date of the act complained of and not afterwards. In such action, if for damages it shall be lawful for the Court, if tender of sufficient amounts shall have been made before the action was brought, in awarding the amount so tendered, to refuse costs to the plaintiff and direct him to pay the costs of the defendant.

A reading of Section 72 makes it clear that what is barred u/s 72 is only an

action for damages against the Government and officers. There is no express bar anywhere in the Act for filing a suit to restrain the licensee from conducting the liquor shop within the prohibited distance. The next question to be considered is whether there is any implied bar of jurisdiction. According to the petitioner, the Abkari Act is a special statute which creates a special right and liability and hence the civil court has no jurisdiction to entertain the suit. It is well settled position of law that where a special statute creates a special right or liability and provides a special remedy by a special forum then the jurisdiction of the civil court may be ousted. Even in such cases the jurisdiction will not be ousted if the relevant section in the special enactments provides finality for that purpose of the Act or where the statute does not lay down that all rights and liabilities shall be determined by the special forum or where the remedy provided by the special statute is not adequate.

4. The learned counsel appearing for the petitioner relied on a decision of the Constitution Bench of the Supreme Court reported in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, in which it was held as follows:-

It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

It is well settled position of law that the right to challenge election of an unsuccessful candidate under the provisions of the Representation of the People Act is a special right created by the statute and not a common law right. In the Representation of Peoples Act there are necessary provisions for challenging the election of a returned candidate. It was held no Original Petition under Article 226 of Indian Constitution to quash an order passed by the Returning Officer rejecting a nomination is maintainable before the High Court. So the principle laid down in *Ponnuswami's Case* can have no application to the facts of this case.

5. In *Saina v. Konderi* (1984 KLT 428) a learned Single Judge of this Court after an elaborate survey of the decisions on the point found that a citizen has a right to institute a suit when there is a violation of the statutory provision. It was held as follows:-

Having regard to the peculiar conditions relating to the enforcement of well conceived municipal measures, it is a liberal view that has to be preferred and the restricted view would be a definitely retrograde step. A citizen has a right to institute a suit with a view to ensure effective implementation of the Municipal Regulations, such as the Building Rules in the present case, even in the absence of a specific personal injury to the person suing.

It was further held as follows:-

On a consideration of the judicial opinion on the specific issue in hand, and those expressed here and abroad on the larger aspects of the issue, I am clearly of the

view that any citizen could seek remedy from a court of law, when he can successfully establish the infraction of the law of the country, unless, by express words or by necessary implication he is debarred from doing so.

6. The next question to be considered is whether there is any effective machinery provided under the statute for the redressal of such a grievance. In the Act, there is no provision for challenging the grant of a licence to a stranger on the ground of violation of the provisions of Act or Rules. In this connection it is very pertinent to note that the first respondent is not challenging the right of the petitioner to conduct a toddy shop or the conditions of licence or other aspects. The only challenge is that after obtaining a licence for conducting a toddy shop, the petitioner is conducting the same within 400 meters of a Temple in violation of the Rules. There is no provision in the Act which says that in such a case the stranger should approach any particular officer or a forum for redressal of such a grievance. Of course in rule 12 of the Kerala Abkari Shops Disposal Rules 2001 there is a provisions which confers the power to State to take suo motu revision. Rule 12 in Chapter IX reads as follows:-

The Government may suo motu, revise the orders of the Commissioner of Excise or any subordinate officer, provided that no order shall be passed under this rule unless the person affected by such orders is given an opportunity to be heard.

That Rule does not confer any power on an ordinary citizen to file a revision before the Government. On the other hand, what is contemplated is only a suo motu power to initiate action. That is not an effective remedy at all.

7. The learned counsel appearing for the petitioner relying on the provisions contained in section 26 of the Act argued that section 26 confers power to the Excise Commissioner to cancel or suspend a licence issued under the Act. It is true that the Excise Commissioner is conferred power to cancel or suspend any licence or permit granted under this Act. But in this case, the licence was issued to run the toddy shop in the disputed premises because according to the authorities under the Excise Department, the particular shop in which licence is granted is beyond the prohibited distance from the temple. So the provisions contained in Section 26 of the Act will be of no help the petitioner.

8. The learned counsel for the petitioner has relied on the provisions contained in sub rules (2), (3), (15) and (31) of Rule 6 of the Rules. Sub rule (2) of Rule 6 of the Rules provides that no toddy or foreign liquor shop notified in the Gazette under rule 4 shall be located outside the notified limits. But it is to be noted that the present licence is issued not under the Kerala Abkari Shops Disposal Rules, 2001 but under the Kerala Abkari Shops Disposal Rules, 2002. Rule 7(2) of the Kerala Abkari Shops Disposal Rules 2002 provides that no toddy or foreign liquor-1 shop shall be located outside the permissible limits. The relevant portion of the Rules regarding the manner in which the measurement has to be taken is as follows:-

In calculating distance the basis will be the shortest pathway/lane/street/road

generally used by the public and the sale shall be measured from gate to gate.

Sub-rule (3) of Rule 7 gives power to the Commissioner to order the transfer of shops from one site or locality to the other. Sub-rules (15) and (31) of rule 7 also give power to the competent authority to cancel the licence. The provisions of sub-rule (31) of rule 7 are relevant. Sub rule (31) reads as follows:-

Infraction of any of the rules or the conditions of the licence either by the licensee or by any person in his employment shall (sic) on the licensee the forfeiture of deposit/annual rental and cancellation (sic).

In this case the Excise Authorities themselves had taken a view that there is no infraction of the rules and conditions and that the toddy shop is situated beyond 400 meters of the temple. So no question of the Excise Commissioner initiating action against the petitioner arises in this case. A reading of the various provisions of the Act and the Kerala Abkari Shops Disposal Rules 2001 and 2002 shows that no special machinery is provided for redressal of the grievances of a citizen when the Excise authorities themselves act in collusion with the licensee. The petitioner himself has produced a copy of the plaint which is marked as Ext. P3 in this case. The specific allegation raised in the plaint is that the Assistant Excise Commissioner and the Excise Circle Inspector, Cherthala are colluding with the petitioner and the petitioner had obtained a licence for running the toddy shop in a building situated 250 meters away from the temple known as Aroor Major Karthiayani Temple. It is also alleged that even before completing the construction of the building, the licence was granted by the authorities. In view of the averments contained in paragraphs 6 and 7 of the plaint, it is clear that the petitioner will not get any relief under any of the provisions contained in the Abkari Act or the Kerala Abkari Shops Disposal Rules.

9. Another contention raised by the counsel for the petitioner is that though the Government and its officers are made defendants in the suit, notice contemplated u/s 80 C.R.C. was not issued nor any exemption from the court is obtained. Hence the suit itself is bad., Ext. P3 plaint shows that though the State, Assistant Excise Commissioner and the Excise Circle Inspector are made parties to the suit, no relief is sought against them. They were not made parties to the injunction application also. A reading of the plaint shows that they are only formal parties. So, I do not find any merit in the contention raised by the petitioner that for want of notice u/s 80 C.R.C, the plaint is to be quashed.

10. Another argument advanced by the learned counsel for the petitioner is that the suit is filed without obtaining leave of the court u/s 91 of the Code of Civil Procedure. Section 91 of the CPC reads as follows:-

91. Public (sic) and other wrongful acts affecting the public - (1) In the case of a public nuisance or other wrongful act affecting, or likely to affect the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,-

(a) by the Advocate-General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

There is no allegation that any public nuisance was created by the petitioner. So it is not necessary to seek a declaration and it is also not necessary that the suit shall be instituted by two or more persons. In this case the only allegation is that the Toddy Shop is conducted in violation of the Kerala Abkari Shops Disposal Rules, 2002. In view of the principle laid down in Saina's Case (supra) such a suit is not a suit envisaged or covered by the provisions contained in section 91(1) but are protected under Sec. 91(2) of the Code of Civil Procedure.

11. The learned counsel appearing for the petitioner has argued that a lot of money has been invested by the petitioner and the Government has already initiated Revenue Recovery Proceedings for realisation of the arrears. The mere fact that the petitioner has invested considerable funds is not a ground to permit him to violate the provisions in the Act or Rules. The order of injunction is passed restraining the petitioner from conducting the toddy shop within the prohibited distance of 250 meters from the Temple. There is no blanket injunction from conducting the toddy shop. The petitioner can very well approach the Excise Authorities for lifting the existing shop to a distance of 400 meters. The averments in the O.P itself show that the petitioner is very particular in doing the business even in violation of the orders of the competent court. That cannot be allowed. The learned counsel appearing for the petitioner has vehemently argued that when there is manifest injustice, the High Court will be justified in interfering under Article 227 of the Constitution of India. He relied on the decision reported in Trimbak Gangadhar Telang and Another Vs. Ramchandra Ganesh Bhide and Others, . It is true that when there is manifest injustice, even if there is an alternative remedy available, the High Court can interfere. In Rugmani v. Addl. Sub Judge (1997(1) KLT 729) this court has held thus;-

The power under Article 227 is an extraordinary power and intended to be used only in exceptional cases and not as a substitute for ordinary revisional or appellate powers. The power is not to be exercised for the purpose of getting round provisions of law which may preclude an appeal or revision unless there is a very strong case for interference by the High Court.

In P.K. Joseph Vs. Munsiff Court, Ernakulam and Others, , another Learned Single Judge of this Court has held as follows:-

The jurisdiction vested in this Court under Article 227 of the Constitution is restricted to cases 1 of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice.

In the case at hand, the materials produced by the petitioner himself show that no exparte order of injunction was passed. When the suit was filed, notice was given to the petitioner and the learned Munsiff appointed a commission to conduct local inspection and the Commissioner visited the place twice and submitted two reports. After evaluating the materials on record, the trial court found that the petitioner is running a toddy shop within 400 meters distance which is against the provisions contained in sub-sections (2) and (3) of section 7 of the Kerala Abkari Shops Disposal Rules, 2002 and hence the first respondent-plaintiff is entitled to an order of injunction as prayed for. That is a finding of fact. It is admitted by the petitioner himself that he has filed a C.M.A and that C.M. Appeal is pending. So it is evidently clear that the petitioner was fully aware of the remedy available to him. When a suit is filed and summons is issued, it is open to the petitioner to appear before the court and raise all his objections including the maintainability of the suit. Normally when such an alternate effective remedy is available this Court cannot interfere unless there any exceptional circumstance is pointed out. The petitioner has miserably failed to bring out any such exceptional circumstances. The trial court, after evaluating the materials available on record passed an order of injunction. If that order is not correct, the remedy available to the petitioner is to challenge it by way of filing an appeal, which he has already done. It is evidently clear that this Original Petition is filed with mala fide intentions to circumvent the provisions of law. I do not find any reason to admit the Original Petition and keep it pending. The O.P. is only to be dismissed. But considering the facts and circumstances of the case there will be a direction to dispose of the C.M.A. No. 23 of 2002 pending before the Sub Court, Cherthala and also the O.S. No. 456 of 2002 pending before the Munsiff Court, Cherthala as expeditiously as possible.

In the result, the Original Petition is dismissed in limine. Forward copies of this judgment to the courts below.