
(2005) 03 KL CK 0042

In the High Court Of Kerala

Case No : Writ Petition No. 5464, 5466 and connected cases of 2005

Ramesh Babu

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 30-03-2005

Acts Referred:

Constitution of India, 1950 — Article 11, 14, 19, 226, 245

Kerala Abkari Act, 1077 — Section 24, 29(2), 5(1)

Kerala Liquor Transit Rules, 1975 — Rule 3, 4, 5, 6

Citation : (2005) 3 KLT 759

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : C.C. Thomas, P. Ramakrishnan and Preethi Ramakrishnan, for the Appellant; V.K. Beeran, A.A.G. and M.K. Aboobaker, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

R. Basant, J.—Challenge is raised by the petitioners in these Writ Petitions against the amendments to the Kerala Liquor Transit Rules, 1975 (hereinafter referred to as "the Rules"). Rules 3 and 5 of the Rules were amended by Ext.P7 notification dated 3.2.2005. I extract below the amended rule showing particularly the nature of the amendment.

Rule 3: Permit for transit of liquor:

No liquor shall be allowed to be moved from one place in a State to another place in that State through the territory of the State of Kerala except under a permit issued by the Assistant Excise Commissioner of the Division through whose jurisdiction it is proposed to be moved.

Provided that when liquor has to be moved through more than one Excise Division, the permit shall be issued by the Deputy Commissioner of Excise and when liquor has to be moved through more than one Excise Zone by the Excise

Commissioner. "Provided further that when liquor has to be moved through the State of Kerala to Mahe the permit shall be issued by the Excise Commissioner".

Rule 5: Grant of Permit:

(1) On receipt of an application, the Assistant Excise Commissioner, the Deputy Commissioner of Excise or the Excise Commissioner as the case may be, shall, if he is satisfied as to the genuineness of the application, issue the permit.

[Provided that the Excise Commissioner may authorise an officer working in the Board of Revenue (Excise) not below the rank of an Assistant Excise Commissioner/Assistant Secretary to issue the permit on behalf of the Commissioner.]

(2) A permit granted under Sub-rule (1) shall be in Form T.P. and shall be in printed forms and in duplicate. Each permit shall bear a consecutive number and must be sealed with the private seal of the officer issuing the permit in addition to his office seal.

[(3) The permit issuing authorities shall collect from the applicant a fee of [Rs. 2,500/- (Rupees two thousand five hundred only)] for each permit in FORM T.P before the permit is issued.]

"Provided that a fee of Rs. 25,000/- (Rupees twenty five thousand only) shall be collected for each permit issued for the transit of liquor through the State of Kerala to Mahe".

(Amended portion is underlined.)

2. The purpose which the amendments seek to achieve is narrated in the explanatory note in the following words.

Explanatory Note

(This does not form part of the notification but is intended to indicate its general purport).

It has come to the notice that the import of Indian Made Foreign Liquor to Mahe on the strength of Transit permit issued from the State is very high compared with the adult male population in Mahe. It was understood that even if the whole male members of Mahe consumed 300 ml. of Indian Made Foreign Liquor per day, they require only half of the IMFL imported. It was evident that the Indian Made Foreign Liquor imported to Mahe in excess was smuggled out to Kerala and the Government of Kerala was losing crores of rupees per month by way of Sales Tax and duty. Government have decided to take preventive measures against the practice by imposing fee on transit of to Mahe through Kerala.

The notification is intended to achieve the above object".

3. The Kerala Liquor Transit Rules, 1975 was published in the Kerala Gazette on 10.2.1976 and it has remained without any successful challenge against its

constitutional validity till now. It is of significance to note that even in these Writ Petitions the validity of Rules 3 and 5 prior to their amendment are not challenged and the only prayer is that the amendment may be struck down as unconstitutional, so that the unamended rules will be restored.

4. By the relevant amendments, it is stipulated first that transit of liquor through the State of Kerala to the Union Territory Mahe can be permitted only by the Excise Commissioner. It is further submitted that a fee of Rs. 25,000/- must be paid for each such permit for transit of liquor through the State of Kerala to Mahe while in respect of transit to other States/Union Territories the licence fee will continue to be Rs. 2,500/-per permit.

5. To avoid unnecessary details and discussions, it may straight away be noted that the counsel for the petitioners assert and the learned Additional Advocate General for the State concedes that the fee payable is to be reckoned only as a licence fee u/s 24(a) of the Kerala Abkari Act. There is no contention that the levy is to be reckoned as a luxury tax or excise duty under the provisions of the Kerala Abkari Act. The levy initially under Rule 5 as also the enhanced fee under amended Rule 5 are traced to the statutory power u/s 24(a) of the Kerala Abkari Act. The relevant rule is sought to be justified only u/s 29(2)(j) of the Kerala Abkari Act. No discussion as to whether the levy is to be reckoned as tax or licence fee is hence necessary or warranted. Levy is claimed only as licence fee.

6. After hearing counsel for all the contestants, the nature of challenge raised against the amendments can be summarized as follows.

1) The amendment is discriminatory in nature in as much as transit of liquor to Mahe through the State of Kerala is treated as different from transit to other States/Union Territories.

2) The imposition of higher fee and the insistence that only the Excise Commissioner can grant the permits for transit of liquor to Mahe is arbitrary, unreasonable, irrational and unsustainable.

7. I am not oblivious to the attempts made to contend that the amended rules would offend the mandate of Article 245 of the Constitution, which stipulates that a State law can have no extra territorial application. It is unnecessary to consider that aspect in any greater detail in as much as the Rule as such is not challenged and it is only the amendment of the Rule which is challenged.

8. I do also take note that an attempt was made to assail the amendments made on the ground that they offend the stipulations of Article 301 of the Constitution in as much as they restricts and impede inter State free trade, commerce and intercourse throughout the territory of India which is a basic structure of the Constitution as held in *Tata Iron and Steel Co. Ltd. Vs. Their Workmen*, .

9. A regulatory restriction as imposed under the Rules, it is by no trite cannot be held to offend the stipulations in Article 301 of the Constitution. It is so held in *State of Karnataka and Another Vs. Hansa Corporation*, . Article 245 of the

Constitution can also have no application as the restriction imposed is only relating to the transit within the State of Kerala. Imposition of levy for export of articles from the State or transit within the State cannot be said to have extra territorial application as to offend Article 245 of the Constitution. Here again at the risk of repetition it must be noted that in as much as the unamended Rules are not challenged, the attempt to assail amendment on the ground of Articles 245 and 301 cannot also succeed.

10. Coming to the first ground of challenge the petitioners cannot have any right under Article 19 of the to carry on the trade in potable alcoholic beverages and the State has unfettered right to regulate trade and business in such articles. The challenge, as held in *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, can in the instant case be only under Clauses (g) and (h) in para. 2 which are extracted below:

g) 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.

(h) The State can adopt any mode of selling the licences for trade or business with a view to maximize its revenue so long as the method adopted is not discriminatory.

The only question is as to whether Article 14 of the Constitution is offended by imposition of the two additional regulatory measures under the amendment.

11. It is contended that Article 14 is offended in so far as transit to Mahe is treated differently from transit to other States/Union Territories. This contention ignores factual realities. The Union Territory of Mahe is a small area of land surrounded/land locked by the territory of the State of Kerala. A look at the map would reveal that the Union Territory of Mahe has a total area of only about 9 sq.kms. The total population is only about 37,000 persons. Except on a short stretch where it touches the Arabian Sea on the west, on all its other boundaries we have the State of Kerala. It has a peculiar geographic shape. It has long boundaries as it lies over a long stretch of land in a linear geographic shape. The point is the territory of Mahe is virtually land locked within the State of Kerala and has very long porous boundaries/borders with the State of Kerala on all sides except on a short stretch where the territory of Mahe touches the Arabian Sea.

12. Classification is inherent in legislation. Article 11 does not require that every regulatory statute must apply to all in the same business. Discriminations are permissible. It is permissible for reform to take one step at a time. Article 14 does forbid class legislation, but it does not forbid reasonable classification for the purpose of legislation. To pass the test of permissible classification two conditions must be fulfilled, they are

1) The classification must be founded on a cogent differentia which distinguishes

persons of that class that are grouped together from others left out of the group and

2) Such differentia must have rational relation to the object sought to be achieved by the statute in question.

13. In the instant case transit of liquor through the State of Kerala to Mahe is treated differently. Considering the geography of Kerala perhaps the main or the only or the most important transit of liquor through the State of Kerala is to the Union Territory of Mahe. Not that transit through the State of Kerala to other States may not at all take place, but it is true that the main bulk of the transit must be through the State of Kerala to Mahe as transport to Mahe through land cannot take place except through the State of Kerala. That being the situation, transit to Mahe does definitely stand as a class by itself. Land locked Mahe depends on transit through Kerala for the arrival of articles including liquor. I do not in these circumstances find merit in the contention that treating Mahe differently is vitiated by vice of reasonable classification.

14. The object which the Rules seek to achieve is certainly regulatory. Under the guise of transit of liquor to Mahe the Rules/law applicable within the State of Kerala cannot be offended. The rate of excise duty, luxury tax etc., payable in Mahe is admittedly much lower than the excise duty/luxury tax payable in the State of Kerala. Such a system inherently brings forth the risk of the transited liquor after reaching Mahe flowing back into Kerala through its very long porous boundaries/borders. It also attracts the risk of the liquor meant to be transited not reaching Mahe and being consumed/concealed before it reaches Mahe - whether in collusion with the excise staff or without their knowledge. Unless the transit of liquor to Mahe is for the purpose of genuine use within Mahe, it would certainly invite the illicit activity of the liquor flowing back to the State of Kerala through the very long porous boundaries/borders of Mahe thereby offending the financial interests of the State. Regulation in transit to Mahe therefore has a particular purpose to serve. The genuine transit of liquor to Mahe should not be impeded. At the same time non bona fide transit merely to enable liquor to flow back to Kerala offending the financial interests of the State has to be prevented. Therefore both the tests referred above - tangible and reasonable differentia and nexus to the purpose which the regulatory rule has to achieve, are both present. In these circumstances, attempt to assail the special provisions under the amended rules to regulate transit of liquor to Mahe does not suffer from the vice of offending Article 14 of the Constitution. All engaged in the business of transit of liquor to Mahe would be controlled and guided under the stricter provisions of the amended rules and therefore the vice contemplated under Clause (g) of *Khoday Distilleries Ltd. v. State of Karnataka* referred above does not at all exist. The challenge on the first ground must hence fail.

15. Secondly it is contended that the rule is unreasonable, oppressive, irrational and is hence liable to be assailed. Unreasonableness of the rule is certainly a ground on which the rule can be assailed. The learned counsel for the petitioners

relied on the decisions in *Pankajakshy v. George Mathew* 1987 (2) KLT 723 and *N.C. Narayanan Nair v. State of Kerala* 1988 (1) KLT 894, which follow the earlier decision of the Supreme Court in *I.E. Newspapers (Bombay) P. Ltd v. Union of India*. A rule which is manifestly arbitrary, unworkable, perverse and irrational can be assumed to be ultra vires the provisions of the Statute as the legislature cannot be assumed to have invested the delegated authority with power/jurisdiction to make such a rule. That position is well taken and there can be no objection that an unreasonable, irrational, manifestly arbitrary and unworkable rule can be struck down not on the mere ground that it is unreasonable but on the ground that it is so arbitrary and unworkable that the legislature would not have intended to delegate authority to make such a rule to the delegated authority. It therefore is to be considered whether stipulations in the amended rules are so arbitrary and unworkable as to assume that it is ultra vires and beyond the rule making competence delegated to the delegated authority u/s 29(2)(j) of the Kerala Abkari Act.

16. It requires to be considered now whether the two stipulations brought in by the amended rules are arbitrary and unworkable. Even prior to the amendment three authorities were named under Rule 3 as competent authorities to grant the permit. The Assistant Excise Commissioner of the division was the official entitled to grant the permit when the movement under the permit was through one division only. When movement through two excise divisions was involved, the Dy. Commissioner of Excise was the official invested with powers to grant permit under the provisions of Rule 3 and where liquor in transit was moved through more than one Excise zone, the Excise Commissioner alone was the person competent to issue the permit.

17. Thus the Excise Commissioner is not granted authority to issue the permits after the amendment only. Even earlier, he had jurisdiction to grant transit permits if the transit had to be undertaken through more than one zone. Thus by merely specifying that for transit to Mahe the Excise Commissioner alone shall have jurisdiction to grant permit, no new authority was created nor was the Excise Commissioner invested with any fresh powers for the first time to grant permits. He already had such powers. There must already have been such machinery to grant permits when Excise Commissioner is the authority to grant permit. It will not be inapposite in this context to note the first proviso to Section 5(1) which realistically takes note of the probable difficulties which the Excise Commissioner may face. I am informed that there is only one official for the whole State as Excise Commissioner. He can authorize "an officer working in the Board of Revenue (Excise) not below the rank of Assistant Excise Commissioner/ Assistant Secretary" to issue the permits on his behalf. The argument that the Excise Commissioner will rarely be available at his head quarters and that permit seekers will find it very difficult to obtain permit from him, are thus found to be of no substance at all. Even now under the rules prior to amendment certain categories of permits had to be issued only by the Excise Commissioner and in stipulating that only Excise Commissioner can issue permits for transit of liquor

to Mahe it cannot be said that there is any such inherent and manifest arbitrariness or unworkability as to conclude that the amended rule is beyond the jurisdiction and competence of the delegated authority for subordinate legislation the Government.

18. The Government on materials before it came to the conclusion that much more liquor than what is required for the bona fide consumption of the inhabitants of Mahe was being transited to Mahe. The explanatory note as also the counter affidavit clearly reveal this aspect. Every male member in Mahe must be consuming about 300 ml. of foreign liquor per day if the amount of liquor transited to Mahe were to be justified. Even some women may be drinking in Mahe. Persons who pass through Mahe may be finding it convenient to consume liquor while in Mahe. All these possibilities cannot be completely ruled out. But the fact remains that when the Government perceived the need to exercise greater vigil and only the highest official of the Excise department, the Excise Commissioner, must be jurisdictionally competent to issue such permits, the Government was certainly not acting arbitrarily. It was not acting irrationally. The input that much more than what is genuinely required for bona fide consumption in Mahe was being transited to Mahe was definitely a relevant input to the Government to feel or assume that the facility for transit was being misused for non genuine transit to Mahe. In these circumstances a Government which feel compelled to amend the rules to prevent this perceived malady cannot be said to be acting arbitrarily or irrationally.

19. The learned Additional Advocate General, for the State, concedes that the Government is not able to place complete trust and faith in the subordinate officials of the Excise department. This amounts to branding its own officials/ personnel as undependable and dishonest, this is perverse; this is arbitrary and irrational, it is contended. I find no merit in this contention also. Certain departments of the Government, it is common knowledge, are more susceptible to corruption. This is not essentially because of the unworthiness of the personnel, it is also because of the opportunities available. A Government which realistically takes note of the propensity for corruption of officers of the lower/ middle strata and insists that such a sensitive jurisdiction must be handled by the highest official of the Excise Department or his trusted nominee is certainly not acting arbitrarily. If the subordinate officials can be corrupt, how is it that the Excise Commissioner will not be corrupt? I do not find any substance in this query. The authority competent to grant the transit permit has to entertain the satisfaction that the prayer to issue permit for transit is "genuine". Entrustment of that responsibility to the highest official of the department or his trusted and specified delegate, according to me, in respect of the transit to Mahe, is a move/ measure to assure greater adherence to virtue and can by no means be held to be arbitrary.

20. Practical difficulties is urged to substantiate the contention that the rules is unworkable. As soon as an import permit is issued by the excise authorities at

Mahe, application for transit permit can also be made under Rule 4. The Excise Commissioner or his specified delegate can definitely issue transit permit specifying the period during which the vehicle can enter territory of State of Kerala and the time within which it must exit from such territory. The argument that vehicles carrying liquor will have to remain in the border till application is made for transit permit and such permit issued is thus found to be of no merit at all. Application for transit permit can be made even before the vehicle reaches the entry point into the State of Kerala and the movement from the point of commencement of transportation need start only after such transit permit is obtained. The argument that all vehicles carrying liquor will have to wait outside the entry excise check post at the border for long is thus found to be of no substance at all. If the volume of work so demands, the Government can certainly consider more convenient location of the delegated official under the proviso to Rule 5(1). These imaginary difficulties pressed into service cannot persuade this Court to overlook or ignore the need perceived and the efficacy of the remedy prescribed for the malady in the wisdom of the rule making authority.

21. The real purpose is to centralise the grant and for the political executive to influence such grant or permits, it is contended. This remains in the realm of empty assertion and there is no tangible data to affirm the same. That hypothetical possibility cannot also persuade this Court to invoke the power of judicial review against an amendment to the rules intra vires and properly framed."

22. Finally it is contended that the levy of licence fee is unjustified because there is no quid pro quo. The Government does not render any such service to the permit holders to justify the hike of the present fee of Rs. 2,500/- to the amended fee of Rs. 25,000/- it is contended. No services are rendered as to justify such hike in the licence fee for transit to Mahe alone, it is urged.

23. At the first instance I must not that the relevant rule - Rule 5 is regulatory in character. It is not compensatory in nature, character or purpose. It is by now trite that imposition of a regulatory fee cannot be assailed on the ground that no services are rendered in return. The State has to incur expenses incidentally for regulation and control of the activity or transit. The fee leviable and payable by the transitors under the impugned amended Rule 5 is a regulatory fee for which, quid pro quo is not at all necessary. The dividing lines between fees and tax may be getting thinner but the dividing line is not obliterated even now. No one has a contention that the levy is not a fees but is a tax. A perusal of the rules clearly show that the Government must incur expenditure for enforcing the regulatory prescriptions. The entry check post and the exit check post with the requisite number of officials and infrastructure will have to be maintained. Excise guards must be deputed to accompany the consignment of liquor in transit. Officials will have to be engaged for checking enroute. If the transit is not genuine, the liquor will flow back into Kerala and greater number of personnel will have to be engaged to prevent such flow back. The long porous boundaries/borders will

have to be patrolled to ensure that such liquor which is transited into Mahe does not come back to the State to the detriment of its financial interests. Regulatory measures to check transit and to prevent non genuine and mala fide transporters will certainly oblige the State to spend more to employ officials, to provide infrastructure, to bring the offenders to book etc.

24. In the decisions reported in Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others, , State of U.P. and Others Vs. Sitapur Packing Wood Suppliers etc., and in the latest decision reported in State of Bihar and Others Vs. Shree Baidyanath Ayurved Bhawan Private Ltd. and Others, , in which the earlier judgments have been referred to, it has clearly been held that while considering the imposition of a regulatory fee consideration of quid pro quo will not be necessary. There must be a very real and effective difference between a regulatory fee and a compensatory fee so far as the concept of quid pro quo is considered.

25. In respect of the compensatory fee payable it is not the law any more that the fee collected must be spent for providing services to the one who pays the fee. The decision reported in State of W.B. v. Kesoram Industries Ltd. (2004) 10 SCC 332 clearly lays down that

"It is not necessary that the service rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from the whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged."

26. Of course all these decisions insist that even the regulatory fee should not be unreasonable. Reliance is placed on the decisions reported in Kewal Krishan Puri and Others Vs. State of Punjab and Another, to contend that at least 2/3 or 3/4 of the fee must be used for return of services for the one who pays the licence fee. At the first instance it is now trite that such concept is not applicable to regulatory fees. The fee in that case - Keval Krishnan Puri - was a compensatory fee. In the instant case the fee levied is only regulatory. In return for the privilege granted for transiting liquor through the State of Kerala to Mahe the State insists on payment of licence fee. The State requires amounts to enforce the regulation, to pay for officials charged with the responsibility of receiving permit applications, processing the same, grant the same, ensure compliance with the provisions and to prevent the misuse. By no stretch of imagination can it be held that the levy of an amount of Rs. 25,000/- per permit in the peculiar facts and circumstances of transit of liquor to land locked Mahe is excessive.

27. It will certainly be in the interests of the State to ensure that only bona fide applicants apply for permit and only they get permits. That bulk transporters will be favoured is no reason to strike down the rule on the ground that the levy is

excessive. Under Rule 6 a person duly licenced to deal in liquor alone is permitted to apply for transit. If there is piecemeal transit of lesser quantities, the State may have to incur the same expenditure for processing applications, providing escort etc. Therefore the insistence that Rs. 25,000/- must be paid as transit fee per permit would ensure that genuine transporters resort to such transit and transporters of smaller quantities in which there is greater possibility for abuse will be discouraged. In any view of the matter sufficient materials are not available before the Court to come to the conclusion that the levy of Rs. 25,000/- as licence fee per permit in respect of transit to Mahe is grossly unreasonable as to render the rule liable to be struck down by invoking the powers of judicial review under Article 226 of the Constitution.

28. I am in these circumstances satisfied that the impugned amendment to the Kerala Liquor Transit Rules are perfectly within the competence of the rule making delegated authority, the Government and the same does not deserve to be struck down for any reason.

29. These Writ Petitions are, in these circumstances, dismissed.