(2005) 09 KL CK 0027

In the High Court Of Kerala

Case No : W.A. No''s. 997 and 973 etc. of 2005

Ramesh Babu APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 05-09-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 301, 303, 304
Kerala Liquor Transit (Amendment) Rules, 2005 — Rule 3, 3(1), 5, 5(1)
Liquor Transit Rules, 1975 — Rule 11, 3, 3A, 3B, 3C
Pondicherry Excise Rules, 1970 — Rule 113(1)

Citation : (2005) 4 ILR (Ker) 327 : (2005) 4 KLT 372

Hon'ble Judges : Rajeev Gupta, C.J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : M. Pathrose Mathai, P. Ramakrishnan and George Poonthottam, for the Appellant; V.K. Beeran, A.A.G., for the Respondent

Final Decision : Allowed

Judgement

K.S. Radhakrishnan, J.—Constitutional validity of the Kerala Liquor Transit (Amendment) Rules 2005 imposing enhanced fee for transit of liquor through the State of Kerala to Mahe alone, a part of the Union Territory of Pondicherry is under challenge in these appeals as discriminatory and offending free trade and commerce through out the territory of India.

2. Petitioners are engaged in the trade of liquor through various retail shops at Mahe, a part of Union Territory of Pondicherry. Government of Pondicherry in exercise of its powers conferred under Rule 113(1) framed under the Pondicherry Excise Act, 1970 have issued necessary licences for possession and sale of Indian made foreign liquors/foreign liquors and beer in the town of Mahe, which falls under the administration of Government of Pondicherry. Licence permits the licensees to import all kinds of Indian liquor or foreign liquors and beer from outside and also from the manufacturers of the Union Territory of Pondicherry after obtaining a permit issued by the Licensing Authority of the Government of Pondicherry.

3. Transit Permit was not earlier necessary for transporting liquor from the Kerala State to another State. During the year 1989 Kerala State had insisted for transit permits for transporting liquor to Mahe through the State of Kerala. Series of writ petitions were preferred before this Court questioning the imposition of the transit fee which were disposed of by a Division Bench, the judgment is reported in Perumal Wines v. State of Kerala 1989 (2) KLT 924 : ILR 1990 (Ker.) 634. The Bench had taken the view that if liquor is transported from Karnataka State to Mahe, or from Tamil Nadu, Punjab, Maharashtra, Goa, West Bengal etc. to Mahe, even though the liquor has to pass through Kerala State before it reaches Mahe, no transit permit is required under the Act and the Rules, for, there is no movement from one State to the same State, as Mahe is in a different State, the Union Territory of Pondicherry, but when liquor is transported from Pondicherry to Mahe, both within the Union Territory of Pondicherry, that liquor passing through Kerala State required a transit permit.

4. The Kerala State Government later issued SRO No. 386/95 inserting Sub-Rule (3) to Rule 5, as per which, an application fee of Rs. 500/- for each permit was introduced by way of transit fee. Later the application fee was enhanced to Rs. 2500/- per permit by the introduction of SRO. No. 332/96. By the same SRO the State Government also inserted Rule 3A, 3B and 3C providing for escort of liquor. By SRO. 728/01 the Kerala State also amended Rule 3 by inserting "or to any other State" making transit permit mandatory even when liquor is brought from any other State to Mahe, through the State of Kerala. Rule then stood as follows:

"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 or to any other 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, 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.

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."

5. Petitioners used to purchase liquor for sale in their business place at Mahe from Pondicherry as well as from States of Maharashtra, Goa, Karnataka, Tamil Nadu etc. for which necessary permit has been issued by the Government of Pondicherry, the licensing authority of the petitioners. Liquor purchased from the State of Maharashtra, Goa and Karnataka has to be brought to Mahe by road through Kannur District in Kerala State for which petitioners have to obtain necessary permits under the Kerala Liquor Transit Rules, 1975. Petitioners used to bring liquor to Mahe through the State of Kerala after getting necessary permit from the Assistant Excise Commissioner or the Deputy Excise Commissioner on payment of Rs. 2500/- per permit.

6. Petitioners in the month of January 2005 submitted applications for permit before third respondent along with the permit issued by the licensing authority of Pondicherry for transporting liquor to Mahe. Third respondent was duty bound to entertain those applications and issue transit permits on receipt of Rs. 2500/- per permit. No action was taken by the third respondent to issue necessary transit permits. Some of the petitioners then approached this Court for a direction to the third respondent to consider their applications. While so, the State Government issued GO(P) No. 17/2005/ID dated 3-2-2005 amending the transit rules. Amended Rules 3 and 5 read as follows:

"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 or to any other 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, 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.

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."

(Underline supplied)

Applications preferred by the petitioners before the Assistant Excise Commissioner were however, returned to them stating that on the basis of amended rules the power for issuing transit permits to Mahe is conferred on the Excise Commissioner and that the petitioners have to remit an amount of Rs. 25,000/- per permit. Petitioners are aggrieved by the conferment of power exclusively on the Excise Commissioner, Trivandrum and the imposition of Rs. 25,000/- as the fee for transit permit for the transit of liquor to Mahe alone from the State of Kerala.

7. Petitioners contended that the imposition of Rs. 25,000/- towards transit fee on the petitioners for transit permit to Mahe alone is illegal, discriminatory and violative of Article 14 and 19(1)(g) of the Constitution of India. Contention was also raised that the amended rule would make serious inroad on free trade, commerce and intercourse and would also violate Article 301 of the Constitution of India. Petitioners also contended Article 303 does not authorise the State legislature to give any preference to one State over another in the matter of fixation of different transit fee for different State.

8. Learned single Judge dismissed all the Writ Petitions holding that the restriction imposed under the Rules will not offend the stipulations in Article 301 of the Constitution of India. Learned Judge felt that the transit of liquor to Mahe does definitely stand as a class by itself and the object which the rule achieves is regulatory and hence not violative of Article 14 of the Constitution of India. Learned Judge also found no infirmity in conferring power on the Excise Commissioner. Writ Petitions were accordingly dismissed, the judgment of which is reported in Ramesh Babu Vs. State of Kerala, . Aggrieved by the same all these appeals have been preferred.

9. Senior counsel appearing for the appellants Sri .M. Pathrose Mathai and Sri. George Poonthottam, assailed the amended rules on various grounds. Counsel submitted the impugned amendment by way of a proviso to Sub-Rule.(3) of Rule 5 is ultra vires and unconstitutional being violative of Articles. 301 and 304 of the

Constitution of India. Counsel submitted, by the said proviso an oppressive and confiscatory imposition of fee has been inflicted upon the petitioners which is a colourable measure and device to restrict and prohibit the freedom of trade, commerce and intercourse through out the territory of India guaranteed by Article 301 of the Constitution of India. Counsel submitted, the Kerala Liquor Transit Rules generally provide sufficient safeguards to prevent diversion of liquor in transit into the State of Kerala and the imposition of Rs. 25,000/- to Mahe alone is confiscatory. Counsel also pressed the theory of quid pro quo and contended that the fee charged has no rational relationship with the services rendered. Counsel also submitted, the impugned proviso to Rule 5(3) is in violation of Article 303 of the Constitution and is ultra vires since it discriminates the traders of the Union Territory of Mahe from the traders in the State of Kerala or other States like Tamil Nadu, Karnataka etc. Counsel also submitted Government of Pondicherry has issued licence to sell Indian made foreign liquor and has issued import/entry permits to the petitioners and the proviso to Rule 5(3) would affect their freedom of trade in liquor in Mahe. Conferring exclusive power on the Excise Commissioner to issue transit permit, counsel submitted, is discriminatory and would cause considerable prejudice to the petitioners since they have to travel 600 Kms. from Mahe to Trivandrum for getting permit. Petitioners submit that the said provision is oppressive, unjust and unworkable.

10. Learned Addl. Advocate General Sri. V.K. Beeran who appeared for the State submitted that there is justifiable reasons for imposition of enhanced transit permit fee for Mahe compared to other States. It was pointed out that Indian made foreign liquor imported to Mahe in excess quantities were being smuggled from Mahe to Kerala and thereby the Government was losing crores of rupees every month by way of sales tax and excise duty. Government therefore decided to take preventive measures to curb this tendency and take such stern measures against duty evasion by persons applying for permit by imposing fee of transit on liquor to Mahe through the State of Kerala. It was also stated statistics would reveal that liquor meant for Mahe is directly unloaded in Kerala misusing the transport permit and considerable portion of liquor landing up in , Mahe flows back to Kerala through illegal sources. Counsel submitted what is primarily intended by the Government is to impose restriction to prevent illegal inflow of liquor from Mahe to Kerala and consequently the permit fee enhancement is confined only to Mahe.

11. Primary question that falls for consideration in this case is whether the State Government is justified in imposing fee of Rs. 25,000/- for each permit for transit of liquor through the State of Kerala to Mahe alone is discriminatory. The explanatory-note added to the amended portion of Rule 5 reads as follows:

"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 Mane on the strength of Transit Permit issued from the State is very high compared with the adult male population in Mane. 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 Excise duty. Government have decided to take preventive measures against the practice by imposing fee on transit of liquor to Mahe through Kerala."

(Emphasis added)

Petitioners are engaged in the business of sale of Indian made foreign liquor with the licence issued by the Government of Pondicherry. Permit issued by the licensing authority of the Government of Pondicherry also enables them to import all kinds of Indian liquor or foreign liquors and beer from outside the Union Territory of Pondicherry to Mahe. Licencing authority of the Pondicherry Government have already issued necessary permits to the petitioners for import of foreign liquor from the States of Maharashtra, Karnataka, Goa etc. to Mahe. Imported foreign liquor from those States could be brought to Mahe only through the State of Kerala since Mahe is a small enclave of Union Territory of Pondicherry in the Kannur District of the State of Kerala.

12. Kerala Liquor Transit Rules 1975 obliges persons like petitioners to obtain necessary transit permits after paying transit fee which the petitioners used to pay whenever transit pass was required. Petitioners are aggrieved by the imposition of enhanced transit fee to Mahe alone. Kerala State is imposing only a transit fee of Rs. 2500/- to State of Karnataka, Tamil Nadu etc. from the Kerala State except Mahe, a part of Union Territory of Pondicherry. State has no case that the petitioners have violated any of the provisions of the Kerala Liquor Transit Rules, 1975. Rule 3A provides for escort of liquor for transit. Rule 3C provides of deputation of Excise Guards for escorts. Rule 8 also stipulates that no liquor moved under a permit shall be diverted for sale inside the State of Kerala. State has no case that petitioners have diverted any liquor in the State of Kerala. Rule 9 enables the authorities to refuse the grant of permit to any person who has been found guilty or breach of Rule 8. Rule 11 authorises the authorities to impose a fine of Rs. 25,000/- if there is infraction of any of the rules by the permit holder or the owner of the vehicle or any person in their employment. The only reason for imposition of transit fee of Rs. 25,000/- is that the petitioners are transporting liquor to Mahe. If the petitioners are transporting liquor to the State of Tamil Nadu or State of Karnataka they need pay only Rs. 2500/-, but when they transport liquor to Mahe, State demand Rs. 25,000/-. Question posed is whether imposition of this enhanced transit fee is discriminatory and violative of Article 14 of the Constitution of India which would also affect the freedom of trade and commerce guaranteed under the Constitution.

13. Petitioners who are conducting the business in Mahe on the basis of licence issued as per the provisions of the Pondicherry Excise Act, 1970 cannot be treated differently from a licensee who is dealing with foreign liquor either in the

State of Karnataka or in the State of Tamil Nadu. A licence holder either from the State of Tamil Nadu or from the State of Karnataka need pay only an amount of Rs. 2500/-while a person armed with the licence from Pondicherry has to pay an amount of Rs. 25,000/- for transporting liquor to Mahe which, in our view, is clearly discriminatory. We find no intelligible differentia between the person who is holding transit permit from the State of Karnataka or from the State of Tamil Nadu from that of a person who is holding a permit from the State of Pondicherry. Article 14 states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. There is no intelligible differentia between a licensee who is applying for transit permit in the State of Tamil Nadu or in the State of Karnataka to that of a like person from Mahe in the Union Territory of Pondicherry. What is enjoined under Article 14 is that State shall not discriminate between licensees from different States who are similarly circumscribed. Article 14 mandates to ensure equality amongst equals and its aim is to protect persons similarly placed against discriminatory treatment and there should be a substantial basis for classification and there should be a nexus between the basis of classification and the object sought to be achieved by the Act making such classification. Equality before law means, amongst the equals the law should be equal-and should be equally administered and alike should be treated alike.

14. The explanatory note attached to the amended rule supports the rule as a preventive measure to see that liquor landing up in Mahe shall not be smuggled out. Prevention is always better than cure but preventive measure shall not be at the expense of traders. Though an ounce of prevention is worth a pound of cure, why the traders shall bear the brunt and be branded as smugglers, which in our view involves an unfavourable bias. In the counter affidavit filed by the State it is stated as follows:

"The cost of liquor in Mahe is very low compared to that of Kerala. As for instance one bottle containing 750ml.of Mc Dewell Brandy costs Rs. 180/-in Mahe where as in Keralait costs Rs. 245/-.Similarly the other brands are much cheaper in Mahe than in the State of Kerala. This will automatically lead to increase in consumption of liquor not only in Mahe but also in other parts of Kerala by way of illegal inflow of liquor. The consumption of liquor will have adverse effect on the social life of the common people of both Mahe and other parts of Kerala. Moreover, the Government has brought about this amendment with the avowed objective as part of its policy to curtail the transport of illegal flow of liquor to Kerala from Mahe."

Logic behind the imposition of Rs. 25,000/- for transit permit to transport liquor to Mahe is that once the State impose Rs. 25,000/- by way of transit fee there would be price equalisation in Mahe and Kerala. For example, one bottle containing 750 ml. Me Dowell Brandy which costs Rs. 180/- at Mahe would go up at least to Rs. 245/-, thereby liquor inflow to Kerala could be prevented.

15. We find it difficult to accept the said reasoning. Every State has its own liquor

policy. Excise duty and sales tax in Pondicherry is low when compared to that of State of Kerala. By the imposition of transit fee of Rs. 25,000/- to Mahe alone the Kerala State would be indirectly controlling selling price of liquor in Mahe. State of Kerala also can achieve the same objective by lowering price of liquor in the State of Kerala. For example, if State of Kerala can reduce the price of 750 ml. of MC Dowell Brandy from Rs. 245/- to Rs. 180/- there will be equalisation of price in Mahe and Kerala and can curb smuggling from Mahe to Kerala.

16. The object behind the enhanced fee would not support a legislation, but intended only to pull the wool over somebody''s eyes by imposing a higher burden. State should take effective measures to control smuggling. Failure or incapacity of the State to prevent smuggling from Mahe to Kerala is not a reason to burden the persons who are conducting liquor business legally in Mahe. State has no case that the petitioners are indulging in any smuggling activity nor they have a case that they have violated any provisions of the Kerala Liquor Transit Rules. We are therefore of the view, the imposition of transit fee of Rs. 25,000/- to the petitioners alone is nothing but a fiscal barrier involving an element of unfavourable bias so far as Mahe is concerned which is discriminatory and violative of Article 14 of the Constitution of India.

17. The imposition of discriminatory transit fee to Mahe alone is an intentional discrimination and is clearly hit by Article 301 of the Constitution of India which is couched in the terms of the widest amplitude: trade, commerce and intercourse are thereby declared free and unhampered throughout the territory of India, imposition of exorbitant transit fee of more than ten times to Mahe compared to other States would directly and immediately affect the movement of trade which would fall within the prohibition imposed by Article 301. Article 303 provides that neither the Parliament nor the Legislature of a State shall prefer one State over the other in such matter. Freedom of trade, commerce and intercourse guaranteed by Article 301 means freedom to carry on business throughout the territory of India without any obstruction and hindrance. Fiscal barrier like imposition of Rs. 25,000/- for transit permit for Mahe alone would amount to interference with the right to carry on trade, commerce and intercourse through out the territory of India.

18. Petitioners plea on the theory of quid pro quo for imposing transit fee cannot be sustained. The transit fee is always regulatory. The question of quid pro quo is necessary only when the fee is compensatory. The Apex Court in State of U.P. and Others Vs. Sitapur Packing Wood Suppliers etc., held that transit fee being regulatory it is not necessary to establish the factum of rendering service and there is no question of a levy of transit fee being invalidated on the ground that no quid pro quo has been established. But the State cannot make discrimination between a trader in Mahe and other States who are qualified to carry on trade or business on the basis of disproportionate transit fee between themselves. The apex court in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, held when State permits trade or business in potable liquor with or

without limitation, the citizen has the right to carry on trade or business subject to the limitation, if any, and the State cannot make discrimination between citizens. Enhanced transit fee to Mahe and Mahe alone is clearly arbitrary and discriminatory. Under such circumstance we are inclined to set aside the transit fee of Rs. 25,000/- imposed for transit of liquor through the State of Kerala to Mahe and they also need pay only Rs. 2500/- like other permit holders from other States. The Kerala Liquor Transit Rules 2005 to the extent of imposing Rs. 25,000/-for transit permit to Mahe is held to be unconstitutional and arbitrary and violative of Article 14 of the Constitution of India.

19. The amended rule confers power on the Excise Commissioner alone to grant the permit for transporting liquor to Mahe. Facts would evidently show that the same would cause considerable inconvenience to the persons like the petitioners who will have to traverse about 600 kms. from Mahe to Trivandrum for getting each and every permit, which would indirectly increase the expenses in the conduct of their business in Mahe and further increase of price of liquor in Mahe. In any view we find no reason to interfere with the power conferred on the Excise Commissioner, but we are sure, the State Government would bestow serious attention to confer power to highly placed officer near Mahe, so that, the inconvenience caused to the petitioners could be avoided. We are therefore inclined to allow all the appeals and set aside the judgment of the learned single Judge and quash GO(P) No. 17/2005/TD dated 3rd February, 2005 imposing an amount of Rs. 25,000/- for transit of liquor through the State of Kerala to Mahe.

