(2005) 12 KL CK 0014

In the High Court Of Kerala

Case No : O.P. No''s. 11062 and 37563 of 2001 and W.P. (C) No''s. 22093 and 31533 of 2004

S. Muraleedharan Pillai APPELLANT

Vs

State of Kerala and Another RESPONDENT

Date of Decision : 20-12-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Drugs and Cosmetics Rules, 1945 — Rule 154, 168
Kerala Spirituous Preparations (Control) Act, 1969 — Section 3(1)
Kerala Spirituous Preparations (Control) Rules, 1969 — Rule 10, 11, 3, 5, 6
Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 83

Citation : (2006) 4 KLT 254

Hon'ble Judges : A.K. Basheer, J

Bench : Single Bench

Advocate : K. Karthikeya Panicker, Daya K. Panicker and T.S. Rajasenan, for the Appellant; D.P. Renu, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Basheer, J.—These petitions, filed under Article 226 of the Constitution of India, raise the following common question:

2. Are excise authorities empowered to initiate action against persons who deal with or sell ayurvedic preparations like Asavas, Arishtas etc., on the ground that they have not obtained a licence in Form S.P. VII issued under Rule 11 of Spirituous Preparations (Control) Rules?

3. Relevant facts and documents that are available in writ petition No. 22093/2003 are being referred to in the judgment for the sake of convenience.

4. The case of the Petitioners is that they have obtained licence to manufacture ayurvedic medicines like Asavas, Arishtas etc., under Rule 154 of the Drugs and Cosmetics Rules, 1945. Ext. P-2 is stated to be a true photo copy of the licence issued in Form 25 D under the rule mentioned above. According to the

Petitioners, by virtue of Ext.P-4 licence also, which is issued in Form L-2 as provided under Rule 83 of The Medicinal and Toilet Preparations (Excise Duties) Rules, 1955, they are entitled to manufacture medicinal and toilet preparations containing alcohol, opium, Indian hemp etc. It is pointed out that Petitioners had paid duty as specified under the rules.

5. The grievance of the Petitioners is that the excise authorities under the Kerala Abkari Act are making searches at the retail outlets where the Asavas and Arishtas, manufactured by them are being sold and their agents and retailers are being constantly harassed. The primary contention is that Asavas and Arishtas being medicinal preparations manufactured on the strength of licence issued by the competent authority under the Drugs and Cosmetics Act and Rules thereunder and also under the Medicinal and Toilet Preparations (Excise Duties) Rules, the Excise Officials are not empowered to make any search or to effect seizure of the products manufactured by the Petitioners. According to the Petitioners such search and seizure are without any authority of law. It is further contended that the excise authorities cannot initiate any prosecution under the provisions of the Abkari Act since there is no violation of any of the provisions contained under the Abkari Act or the Rules thereunder. Are these contentions legally tenable?

6. The term "medicinal preparations" has been defined in Section 3(1) of "The Kerala Spirituous Preparations (Control) Rules, 1969'' as hereunder:

(i) ''medicinal preparation'' includes all drugs containing alcohol or any intoxicating drug, which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for, or in the treatment, mitigation or prevention of disease in human beings or animals under any of the different systems of medicine, namely Allopathic, Homeopathic, Ayurvedic or any other Indian system of medicine.

Similarly Sub-clause K of Rule 3 defines spirituous preparation as-

(i) any medicinal or toilet preparation containing alcohol, whether self-generated or otherwise, or any intoxicating drug,

(ii) Any mixture or compound of wine with medicinal substances, whether the wine is fortified with spirit or not

(iii) Any other substances containing alcohol or intoxicating drug whether self-generated or otherwise notified under Rule 5 to be a spirituous preparation.

7. Rule 6 of the Rules which deals with manufacture of spirituous preparations prescribes that "no person shall manufacture any spirituous preparation except under a licence under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956". It is further provided that "all preparations manufactured without licence under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 and those that are found to be spurious shall be liable to confiscation".

8. Rule 6 of the Rules deals with possession of spirituous preparation without a licence. Rule 10 prescribes that "no person shall possess any spirituous preparation except under and in accordance with the conditions of a licence or permit issued under these rules and in excess of the quantity entered in such licence or permit".

9. It is true that Rule 10 provides that Medical Practitioners specified in the table may possess at any one time ''for their professional use and for issue to their patients for bona fide treatment, mitigation or prevention of disease, preparations upto die limits specified against them in the table, but not for sale on other physician''s prescriptions''. It is not in dispute that sale of spirituous preparations, either on wholesale or retail, can be made in terms of the provisions contained in Rule 11 of the Rules.

10. A wholesale licence for possession and sale of spirituous preparations is issued as provided in Rule 11 in Form S.P. VI, which would enable the holder of the licence to possess and sell spirituous preparations specified in Annexure-I appended thereto at his shop or premises as indicated in the schedule. Similarly a licence in Form S.P. VII authorizes and permits a licensee to sell spirituous preparations in retail at the specified premises.

11. The Petitioners in O.P. 37563/2001 and W.P. (C) No. 22093/2003 who are stated to be Ayurvedic Physicians have been granted licence under both S.P. VI and S.P. VII. True photo copies of those licences are on record as Ext. P-5 and P-6 respectively.

12. It is contended by the Petitioners that the excise authorities cannot insist that the retailers and agents of the Petitioners who stock the Asavas and Arishtas manufactured by the Petitioners at their respective premises, have to hold a retail licence in Form S.P.VH. In other words, the contention is that since the Petitioners as manufacturers have obtained Form S.P.VII licence also to sell their products in retail, their agents and retailers can also stock and sell the products from any other outlet or premises on the strength of the very same licence. I am afraid the above contention is totally misconceived and untenable.

13. As noticed earlier, medicinal preparation as defined under the Rules, 1969 includes all drugs containing alcohol or any intoxicating drug. It is conceded by the Petitioners that all Asavas and Arishtas manufactured by them contain alcohol. But according to them Rule 168 of the Drugs and Cosmetic Rules, 1945 permits presence of self generated alcohol. Therefore, the mere fact that Asavas and Arishtas contain alcohol does not necessarily mean that they are spirituous preparations coming within the mischief of a preparation containing alcohol as defined under Rule 3(i) of Rules 1969. It is thus contended by the Petitioners that the excise authorities will not be empowered to seize Asavas and Arishtas as though they are spirituous preparations and therefore they cannot insist mat for stocking and selling such preparations, retailers have to possess S.P. VII licence. Yet again I am unable to agree with the above contention raised by the

Petitioners.

14. As noticed earlier a person who wants to possess or sell by retail, any medicinal preparation containing alcohol has to necessarily possess SP. VII licence. The contention of the Petitioners is that since they have obtained S.P.VII licence, their agents or retailers need not possess separate licence. According to them, S.P. VII licence obtained by them, would be sufficient This contention is wholly untenable.

15. It may be true that the Petitioners are entitled to manufacture Asavas and Arishtas, on the strength of a licence issued under the Medicinal and Toilet Preparations (Excise Duties) Rules and also under the Drugs and Cosmetics Act and the rules framed thereunder. But it is also pertinent to note that Rule 6 of Rules 1969 mandates that no person shall manufacture any spirituous preparation except under a licence as provided under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956.

16. Likewise Rule 10 of Rules 1969 postulates that no person shall possess any spirituous preparation except under and in accordance with a licence. Rule 11 deals with licence for sale of spirituous preparations either by wholesale or retail (S.P. VI and S.P. VII respectively). Any person who wants to sell any spirituous preparation has to necessarily obtain a licence. Petitioners cannot contend that they being licenced manufacturers of "medicinal preparations" they are entitled to sell and/or market their products through their agents or dealers from any premises or outlets and that too on the strength of S.P. VI or S.P. VII licence as the case may be obtained by them. Petitioners might have obtained licence to manufacture Asavas, Arishtas etc. under the Drugs and Cosmetics Rules or Medicinal and Toilet Preparations (Excise Duties) Rules. But since Asavas, Arishtas and such other products admittedly contain alcohol or other intoxicating drug, thus squarely falling under the definitions of medicinal preparation" and "spirituous preparation" contained in Rules 1969, any person who wants to sell or deal with such preparations has to necessarily obtain a licence as provided under Rule 11 of the above rules.

17. The Petitioners having already taken S.P. VI and S.P. VII licences cannot turn round and say that they are not governed by the provisions contained under the Rules, 1969. Similarly they cannot seek shelter under the licence issued to them under Drugs and Cosmetics Rules, 1945 or Medicinal and Toilet Preparations (Excise Duties) Rules, 1955. Therefore, in my view, the excise authorities are justified in making search and seizure at the premises of the so called retail agents where Asavas and Arishtas manufactured by the Petitioners, are being sold, so long as such retail agents do not possess S.P. VII licence.

18. As rightly pointed out by the learned Government Pleader, condition 1 of Form S.P. VI licence stipulates that "the privilege under this licence extends to the possession and sale of spirituous preparations to other holders of licences in Form S.P. VII for purpose of retail sale, to medical practitioners for supply to

their patients and to hospitals etc". The Petitioners having obtained Form S.P.VI licence are not entitled to say that the conditions under the said licence are not binding on them. Therefore, if the Petitioners want to sell their products to any of their agents or retailers on the strength of S.P. VI or VII licence as the case may be they have to abide by the condition prescribed under such licence. No retailer or wholesale dealer can possess spirituous preparation without a licence; nor can they sell or deal with them except in accordance with the terms and conditions of a licence issued under Rule 11 of Rules 1969.

19. The Petitioner in O.P. No. 11062/2002 and Petitioner No. 1 in W.P (C) 31533/2004 is one and the same. He has produced Form S.P. VI licence which according to him he had obtained for manufacture of Ayurvedic products like Asavas, Arishtas etc. But he has not produced Form S.P. VII licence. According to this Petitioner the excise authorities have been pestering his agents who have been selling his products at the irrespective premises. Petitioner No. 2 in W.P. (C) 31533/2004 is one such retailer/agent. It appears that excise officials registered crime No. 75/2004 against Petitioner No. 2 after a search and seizure. The prayer in this writ petition(31533/2004) is to quash the proceedings in the above crime, registered by Kollam ExciseiRange. Ext.P-5 is stated to be a true photocopy of the mahazar prepared in the above crime. It is seen from Ext P-5 that certain quantities of Madhukasavam, Khadirarishtam etc., were recovered from the premises, where Petitioner had stored them for sale. Admittedly Petitioner No. 2 has not been issued a Form VII licence as provided under the Rules, 1969. Obvioussly therefore, he could not have possessed or stored any Asavam or Arishtam or such other so called medicinal preparations which contained alcohol without a licence. Therefore, I do not find any illegality or irregularity in the action of the excise officials in making a search and seizure.

20. Sri. Karthikeya Panickar, learned Counsel for the Petitioners has invited my attention to an interim order passed by this Court in O.P No.l 1062/2002. In the application for interim direction, the Petitioner had prayed that Respondents and their subordinate officers may be directed not to interfere in any manner with the manufacture and transport or making of Ayurvedic products of Asavas, Arishtas etc., under the authority of the licence issued by the Drugs Controller under the Drugs and Cosmetics Act. There was a further prayer in the application that the Respondents and their subordinates may be directed not to insist for S.P. VII licence from the retail outlets where the products of the Petitioner were being sold. This Court had while allowing the interim prayer, made it specifically clear that the mterim order "will not stand in the way of the authorities to take any action in case the Petitioner is found to be guilty of committing any offence". In my view, the above order is self explicit. Therefore, the Petitioner cannot seek any assistance from the above interim order and contend for the position that the Petitioner is entitled to sell his products through his retail agents notwithstanding the fact that they did not possess Form S.P. VII licence.

21. Having heard learned Counsel for the parties and having perused the

materials on record. I do not find any merit in any of the contentions raised by the Petitioners. Therefore, these petitions fail. They are accordingly dismissed.

