

(2015) 08 KL CK 0045
In the High Court Of Kerala
Case No : W.A. No. 548 of 2015

Santhosh and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 21-08-2015

Acts Referred:

Constitution of India, 1950 — Article 47
Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 272

Citation : (2015) 5 KHC 198

Hon'ble Judges : P.R. Ramachandra Menon and Babu Mathew P. Joseph, JJ.

Bench : Division Bench

Advocate : C.C. Thomas, Senior Advocate, Nireesh Mathew, N.P. Prajeesh and M.G. Karthikeyan, for the Appellant; Tom Jose Padinjarekkara, Additional Director General of Prosecution and Babu Joseph Kuruvathazha, Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramachandra Menon, J.—Appellants were the petitioners in WP (C) No. 38400 of 2010. It arises from the common judgment passed by the learned Single Judge in the said case, along with the connected cases, declining interference with regard to the challenge raised against the vires of Ext. P4 notification issued by the Government of Kerala. The main contention was that it was beyond the power, jurisdiction and competence of the State, having not been issued under Section 29(2)(k) of the Kerala Abkari Act and further that presence of starch detected in the samples of "toddy" taken from the petitioners would not attract any offence under Section 57(a) of the Abkari Act. The second appellant is the licensee of toddy shops in Group No. II coming within the area of Excise Range, Mattancherry for the year 2010-11; whereas the first appellant was allegedly an employee in toddy shop No. 14. On 16/08/2010 by about 4.30 p.m. a surprise inspection was conducted by the competent authorities of the Excise Department in the aforesaid shops and samples of toddy were taken. A crime

was registered (as Crime No. 30/2010) based on the report of chemical analysis of the samples revealing presence of starch in all the samples. Ext. P1 is a copy of the Crime and Occurrence report in respect of the alleged offences under Section 57(a) and 56(b) of the Abkari Act. Ext. P2 is a copy of the Mahazar dated 16/08/2010 prepared while taking samples and Ext. P3 is the "Chemical Analysis Report" dated 18/08/2010. According to the appellants, presence of Ethyl Alcohol in the samples of toddy taken from the petitioners is well within the permissible limits, but insinuation is made with reference to mere presence of "starch" and that no percentage or level of quantity of starch is mentioned anywhere in the said report.

2. As per the information collected by the appellants, by resorting to the remedy under the RTI Act, Ext. P6 answers have been given in response to Ext. P5 questions, to the effect that presence of "starch" will be there in all plant specimen, as certified by the authorities/experts of the Kerala Agricultural University. It is also pointed out that, by virtue of the nature of operations performed by the toddy tappers in the course of extracting toddy, it is quite possible that pieces of stalk of matured coconut flower may fall into earthen pot, to which the stalk of coconut florescence, after cutting the tip, is inserted to extract toddy/sap; thus giving rise to the presence of "starch". As such, the notification issued by the Government showing "starch" as an objectionable item under Rule 2(n) of the Kerala Abakari Shops (Disposal in Auction) Rules, 2002 (herein after referred to as "Rules") is not correct or sustainable. It is also contended that, it is not on the basis of any proper and valid notification that the stipulation has been made and that Ext. P4 notification itself is bad in all respects, which cuts the root of registration of the "Crime and Occurrence Report" and the prosecution proceedings. Earlier, the appellants had approached a Single Bench of this Court seeking to quash the "Crime and Occurrence Report" by filing a petition under Section 482 of the Cr.P.C.. In the course of the proceedings, the learned Government Pleader sought to sustain their stand, by producing a copy of the Gazette Publication, notifying "starch" as an objectionable substance, if presence is noted in the toddy, upon which the said case (Crl MC) was withdrawn without prejudice to file a writ petition seeking to challenge the notification. It was accordingly, that WP (C) 38400 of 2010 was filed, seeking to declare Ext. P4 notification, to the extent it includes "starch" as an article prohibited under Section 29(2)(k) of the Abkari Act, as ultra vires and thus to quash Ext. P1 "Crime and Occurrence Report".

3. A counter-affidavit has been filed on behalf of the first respondent/State, seeking to sustain the course and proceedings. It is contended that the licences of all the shops in Group II, Mattancherry Range, during the year 2010-11 were cancelled w.e.f. 15/09/2010 in the light of "Crime and Occurrence Report" prepared by the Inspector, Excise Range Office, Mattancherry, in view of the presence of "starch" detected in toddy, which was a foreign ingredient used for adulteration of toddy. The instance herein is stated as attracting offences, both under Section 57(a) and Section 56(b) of the Abkari Act. The earlier Rule

prescribing the extent of Ethyl Alcohol in toddy was struck down and the matter became final by virtue of the law declared by the Apex Court reported in *State of Kerala and Others Vs. Unni and Another*, . The Rules were subsequently amended in a proper manner and that validity of which was upheld by a Division Bench of this Court as per the decision reported in *Komalan Vs. State of Kerala and Others*, . According to the respondents, Ext. P4 itself denotes that "all toddy kept or offered for sale shall be natural and conforming to such specifications and complying to such restrictions, as may be notified by the Government under Clause (n) of Rule 2".

4. In fact, Ext. P4 notification is stated as issued by the Government, under Rule 2(n) of the Rules, enabling the Government to issue notifications specifying the standards and restrictions in toddy as per scientific studies. It was accordingly, that Rule 9(2) of the said rules have been introduced, validity of which stands upheld by a Division Bench of this Court in *Komalan Vs. State of Kerala and Others*, . Even though "starch" is not an intoxicating substance, presence of "starch" in the sample itself is sufficient to attract the offence, as it has already been declared as an objectionable/prohibited item, as per the notification. It was on the basis of scientific studies and as per the Indian Standard Specifications in IS 8538:2004, to the effect that "starch" is not detected in natural toddy, that the Government issued the relevant notification stipulating that presence of "starch" itself would attract violation of the provisions of law.

5. With regard to the plea of the appellants/writ petitioners that by virtue of "heading" of the provision, no offence will lie against the first petitioner/appellant, he being an "employee"; it is asserted in paragraph 10 of the counter-affidavit that the "licencee" and the "manager" of each shop are equally responsible for each and every offence committed under the Abkari Act/Rules. As per Section 26 of the Abkari Act, the Commissioner is competent to cancel the licence, in the event of any breach committed by the holder of such licence or by his servant or by anyone acting with express or implied permission on his behalf. It is also added that registration of an abkari case against the writ petitioners under Section 57(a) of the Abkari Act will not affect any of their fundamental rights and that sale of toddy is not a fundamental right. That apart, as per Section 64 of the Abkari Act, the holder of a licence or permit under the Act shall be punishable equally as the actual offender for any offence committed by any person in his employment and acting on his behalf, as if he himself had committed the same, unless it is established that all due and reasonable precaution was exercised by him to prevent commission of such offence. After hearing both the sides, the challenge raised against Ext. P4 notification was rejected and the writ petition was dismissed. This in turn is under challenge in this appeal.

6. Heard Mr. C.C. Thomas, learned Sr. Counsel appearing for the appellants and Mr. Tom Jose Padinjarekkara, learned Additional Director General of Prosecution and Additional State Public Prosecutor.

7. The learned Sr. Counsel for the appellants made his submissions as pleaded in the writ petition and the appeal, contending that Ext. P4 is not a valid notification coming within the power, jurisdiction and competence of the Government to have issued the same. Heavy reliance is sought to be placed on the verdict passed by the Supreme Court in *State of Kerala and Others Vs. Unni and Another*, .

8. Validity of Rule 9(2) of the Rules had come up for consideration before a Division Bench of this Court in *State of Kerala Vs. Unni*, , whereby it was held that Rule 9(2) of the Rules fixing strength of Ethyl Alcohol in toddy was not arbitrary or unreasonable. It was taken up before the Apex Court and after considering the matter in detail, the Apex Court observed as per the decision in, *State of Kerala and Others Vs. Unni and Another*, that Rule 9(2) of the Rules, fixing permissible limit of Ethyl Alcohol in toddy was unworkable, vague and unreasonable. Even though the Rules have been amended after the said decision, the position resulted is almost the same without any substantial change and hence requires to be intercepted, submits the learned Counsel.

9. The above version is sought to be rebutted by the learned Additional. Director General of Prosecution and Additional State Public Prosecutor, pointing out that the reason for intervention made by the Apex Court with the Rules as per the decision in *State of Kerala and Others Vs. Unni and Another*, , was with reference to the specific hurdle referred to therein, which now stands rectified by virtue of amendment of the Rules and issuance of necessary notifications. Such amendment has been brought about in accordance with the report of the Indian Standard Institution made available after proper scientific studies. The validity of the amended Rules was accordingly considered by a Division Bench of this Court in *Komalan Vs. State of Kerala and Others*, , and held that prescription of standards of liquor, based on the report of the Indian Standard Institution, was very much sustainable, having been made available after proper scientific studies and further that, there was no conflict between the definition of the term toddy under the Act and the one under the Rules. It is contended that the matter had come up for further consideration before a Single Bench of this Court and as per the decision in *Muraleedharan Vs. State of Kerala*, it was held that the challenge raised against the Rules was not sustainable. It was also observed that, there was no point in seeking to place reliance on the decision in *Balu and Another Vs. State of Kerala*, as it was rendered prior to the amendment of the Rules in the year 2007.

10. The observation of the learned Single Judge as to the object of Section 29 of the Kerala Abkari Act, while declining interference, as contained in paragraph 19 of the judgment, reads as follows:

"19. The object of Section 29 of the Kerala Abkari Act, authorising the Government to make rules by Government Notifications is that Government must be armed with such powers to meet change in social circumstances to control, regulate and govern the manufacture, supply, sale, possession etc of liquor to ensure public safety and health in enforcement of Article 47 of the Constitution of

India, and also to meet the challenges raised by liquor dealers and others in the process of manufacture, sale and transport of liquor. Clause (k) gives powers to the Government to prohibit the use of any article which the Government shall deem to be noxious or otherwise objectionable. The Government notification under challenge, amending Rule 9(2) of the Rules was issued fully in exercise of the powers under Clause (k) to Section 29 of the Act. Just because the Clause (k) is not seen specifically mentioned in the Government Notification, it will not lose its validity or sanctity as Government Order having the force of law. Prohibiting the use of any article in the manufacture of liquor is the specific subject dealt with under Clause (k). If that subject is dealt with under any Government order amending the particular Rule, the said Government Order can definitely be considered as one under Clause (k) to Section 29 of the Act. Law cannot be mechanically interpreted and applied. Negligible infirmity or flaws can be ignored in the process of interpretation of law when the object of the law is unambiguous, and if the Rule made by the Government is to carry out or enforce the object. The objectionable SRO No. 145 of 2007 dated 14/02/2007 prescribing the standards and specifications of toddy, that it shall be free from any added colouring, flavouring or sweetening or other foreign matter like starch, tranquilisers or sedatives or chloral hydrate is well within the powers granted under the amended Rule 9(2) of the Rules. The amended rule now provides that adding anything to liquor to alter its natural composition or basic composition cannot in any circumstance be allowed, and to carry out this object, the Government can, by notification prohibit addition of any foreign matter including starch. Much thought is not required to find that if starch is added to toddy, it will alter its basic or natural composition, thereby increasing the quantity, and the result of such adulteration is that the dealer or the licensee will get unlawful profit or gain. It is to prevent this and other tactics in the manufacture and sale of liquor, the Government amended Rule 9(2), and also issued a notification in terms of the amended Rule 9(2), that toddy shall be free from starch. I find that the Government notifications under challenge are well within the powers of the Government, and I declare that the amended Rule 9(2) of the Rules is not at all ultra vires the rule making powers of the Government under Section 29(k) of the Act. Consequently, all these proceedings will have to be dismissed."

The findings made by the learned Single Judge are in the following terms:

"(a) The amendment brought by the Government of Kerala to Rule 9(2) of the Kerala Abkari Shops Disposal Rules, 2002 by way of Government notification issued in 2007 is well within the rule making powers of the Government under Section 29(k) of the Abkari Act, and it is not ultra vires the rule making powers of the Government.

(b) The Government Notification GO (P) No. 25/2007/TD in SRO 145 of 2007 dated 14/02/2007 is also well within the powers of the Government under Rule 9(2) and Rule 2(n) of the Rules.

(c) The petitioners in these proceedings, as persons facing prosecutions under

the Kerala Abkari Act, are not entitled to claim the benefit of the decision of the Hon"ble Supreme Court in Pepsico case.

(d) The prosecutions under challenge cannot be quashed by way of writ of certiorari or under Section 482 of the Code of Criminal Procedure, as sought by the petitioners.

(e) Disposal of these writ petitions and criminal miscellaneous cases will not prejudice the right of the petitioners to apply for discharge in the Trial Court on factual grounds, or on other legal grounds affecting the sustainability of the prosecution."

The question is whether any interference is to be made in respect of the observations and declaration made by the learned Single Judge. Since the main challenge is with reference to the alleged offence under Section 57(a) of the Abkari Act and the power flowing from Section 29 of the Act (for stipulating the specifications and such other aspects), it will be worthwhile to look into these provisions. Hence said provisions are extracted below:

"29. Power to make rules.--(1) The Government may, by notification in the Gazette either prospectively or retrospectively, make rules for the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision, the Government may make rules:

(a) regulating the mode in which toddy may be supplied to licensed vendors of the same, or to persons who distil spirits from it or who use it in the manufacture of bread;

(b) for determining the number of licenses of each description to be granted in any local area;

(c) for regulating the number, size and description of stills, utensils, implements and apparatus to be used in any distillery, brewery, winery or other manufactory in which liquor is manufactured];

(d) prescribing the instruments to be used in the testing of liquor and the tables of corrections according to temperature to be used therewith;

(e) prescribing the weights to be used for the sale of intoxicating drugs and measures to be used for the sale of liquor;

(f) fixing for any local area the maximum and minimum prices above and below which any liquor or intoxicating drug shall not be sold;

(g) for the warehousing of liquor and intoxicating drugs and for the removal of the same from any warehouse in which they are deposited for deposit in any other warehouse or for local consumption or for export;

(h) for the inspection and supervision of stills, distilleries, breweries, wineries, or

other manufactories in which liquor is manufactured and warehouses;

(i) for the management of any public distillery, brewery or winery or public warehouse established under Section 14;

(j) for placing the storage, import, export, possession, transit or transport of liquor or intoxicating drugs under such supervision; and control as may be deemed necessary for the purposes of this Act;

(k) prohibiting the use of any article which the Government shall deem to be noxious or otherwise objectionable in the manufacture of liquor or of any intoxicating drug;

(l) (1) declaring the process by which spirit manufactured in or imported into the State shall be denatured;

(2) for causing such spirit to be denatured through the agency or under the supervision of Excise Officers;

(3) for ascertaining whether such spirit has been denatured;

(m) regulating the bottling of liquor for purposes of sale;

(n) declaring in what cases or classes of cases and to what authorities appeals shall lie from orders, whether original or appellate, passed under this Act or under any rule made thereunder, or by what authorities such orders may be revised and prescribing the time and manner of presenting appeals and the procedure for dealing therewith;

[(o) xxxx xxxx xxxx]

(p) regulating the power of Abkari Officers to summon witnesses from a distance under Section 44;

(q) for the disposal of articles confiscated and of the proceeds thereof.

(r) for the forfeiture notwithstanding provisions to the contrary contained in the Indian Contract Act, 1872 or in any other law, of the whole or any portion of the kists deposited by persons who purchase the right to sell toddy, arrack, foreign liquors or ganja, in addition to damages recoverable by Government on account of the breach of conditions of sale laid down by the Government from time to time."

"57. For adulteration, etc., by licenced vendor or manufacturer.--Whoever being the holder of a licence for the sale or manufacturer of liquor or of any intoxicating drug under this Act.

(a) mixes or permits to be mixed with the liquor or intoxicating drug, sold or manufactured by him, any drug, other than a noxious drug or any ingredient likely to add to its actual or apparent intoxicating quality or strength, or any article prohibited other than an article which the Government shall deem to be

noxious by any rule made under Section 29, Clause (k), when such admixture shall not amount to the offence of adulteration under Section 272 of the Indian Penal Code.

(b) xxxx xxxx xxxx

(c) xxxx xxxx xxxx

(d) xxxx xxxx xxxx

Shall, on conviction before a competent Court, be punished for each such offence with imprisonment for a term which may extend to five years, or with fine which may to extend to fifty thousand rupees, or with both."

11. Even a plain reading of the above provisions would make it clear that it is always open for the Government to have prescribed the necessary parameters by virtue of the rule making power under Section 29(2)(k) in respect of the issue involved herein. The question is whether Ext. P4 notification issued by the Government (SRO No. 144/07) is in conformity with the said rule making power, or in other words, has the notification been actually issued under Section 29(2) (k).

12. It is true that no specific reference is made to sub-section "2(k)" of Section 29 of the Act, while issuing Ext. P4 notification. But the purpose is quite evident from the notification, which was with intent to achieve the desired objective. As per the said notification, Rule 9(2) of the Rules stands substituted as follows:

"(2) No toddy other than that drawn from Coconut, Palmyra or Choondapana palms and on which tree-tax due under the Act has been paid shall be sold by the licensee. All toddy kept or offered for sale shall be natural and conforming to such specifications, and complying to such restrictions as may be notified by Government under Clause (n) of Rule 2. Nothing shall be added to it to increase its intoxicating quality or strength or to alter its natural composition or for any other purpose."

Such an amendment was necessitated because of the turn of events, as stated in the "Explanatory Note" of the notification. Obviously, the Government brought about the amendment after extensive studies, in consultation with the Chief Chemical Examiner to the Government and other scientific experts, also relying on the Indian Standard Specifications in I.S. 8538 : 2004 of the Bureau of Indian Standards, so as to deal with the definition of "toddy" and as to the scope of Rule 9(2) of the rules.

13. The introductory paragraph of Ext. P4 notification bearing SRO 144/07 reads as follows:

"SRO No. 144/2007.--In exercise of the powers conferred by Section 18A and 29 of the Abkari Act 1 of 1077, the Government of Kerala hereby make the following rules further to amend the Kerala Abkari Shops Disposal Rules, 2002, issued under GO (P) No. 24/2002/TD dated the 30th March, 2002 and published as SRO

No. 198/2002 in the Kerala Gazette Extraordinary No. 376 dated the 30th March, 2002, namely:"

The notification itself says that the same has been issued in exercise of the powers conferred upon the Government by virtue of Section 18A and Section 29 of the Abkari Act. When Ext. P4 notification has been issued with reference to Section 29 of the Act, it has to be ascertained whether it has been issued involving any of the instances separately mentioned under the said provision. To make it more clear; if it satisfies an instance specifically dealt with under a sub-clause/provision, it cannot be termed as defective, merely for the reason that the sub-clause or sub-section has not been separately mentioned in the notification, but for the reference made to the main provision, i.e. Section 29.

14. There is no case for the appellants that the State is having no power or competence to have prescribed the rules under Section 29 and admittedly, the specific source of power in the instant case is Section 29(2)(k). Since Section 29 has been referred to as the source of power in Ext. P4 notification, it can very well be connected to Section 29(2)(k) to infer the specific instance. This being the position, the contention raised by the appellants that Ext. P4 is bad and ultra vires, being not in conformity with Section 29(2)(k) of the Act, is thoroughly wrong and misconceived. The finding rendered by the learned Single Judge is not liable to be assailed under this head.

15. By virtue of amendment of the definition of the term "toddy" and substitution of sub-rule (2) of Rule 9 vide SRO 144/07 dated 14/02/2007, a further notification has been issued in terms of Rule 9(2) of the amended Rules, by way of SRO 145/07 dated 14/02/2007 itself, whereby the specifications have been stipulated with regard to tapping, storage, transportation and sale of toddy, to be in conformity with the same. The specifications/restrictions are as follows:

"1. The ethyl alcohol content of coconut toddy shall not exceed 8.1 per cent, of Palmyrah toddy, 5.2 per cent and sago toddy 5.9 per cent by volume 2. Toddy shall be unpasteurized and natural and shall possess the characteristic flavour derived from the sap and fermentation, without addition of any extraneous alcohol.

2. If the ethyl alcohol content of toddy exceeds the limit prescribed above, it will be deemed that extraneous alcohol has been added to such toddy to increase its intoxicating quality or strength. For all purposes, such extraneous alcohol will be treated as a foreign ingredient

3. Toddy shall be free from any added colouring, flavouring, sweetening or other foreign matters: starch; chloral hydrate, paraldehyde; sedatives, tranquilizers and any other Narcotic Drugs or Psychotropic substances; and any ingredients injurious to health. It shall be free from Escherichia Coli also.

4. Total acid as tartaric acid (expressed in terms of 100 litres of absolute alcohol) shall not exceed 400 gms.

5. Volatile acid as acetic acid (expressed in terms of 100 litres of absolute alcohol) shall not exceed 100 grams."

16. Admittedly, "starch" is an item which has been included under Clause 4 of the above notification. There is a contention for the appellants, that "starch" is not a noxious substance, nor can it be regarded as a substance which can increase the strength or features of toddy, in any manner, so as to attract the offence under Section 57(a) of the Act. The mandate of Section 57(a) takes in three different circumstances in relation to addition/mixing of the material. The first one deals with any drug other than a noxious drug; the second one any ingredient likely to add to its actual or apparent intoxicating quality or strength and the third one is in respect of any article prohibited (other than an article which the Government shall deem to be noxious) by any rule made under Section 29, Clause (k), when such admixture shall not amount to the offence of adulteration under Section 272 of the Indian Penal Code.

17. Based on the various studies conducted by the competent authority and the specifications given by the Bureau of Indian Standards, as referred to in the counter-affidavit filed by the first respondent, presence/addition of "starch" in toddy would change the natural characters of toddy and hence it was found necessary to have it classified as a prohibited item, thus leading to the Notification SRO 145/2007. Such inclusion of "starch" as an objectionable item in the aforesaid notification and the validity of Rule 9(2) of the Rules had come up for consideration before a Division Bench of this Court. The validity of the said provision and inclusion of "starch" as a prohibited item has been upheld as per the decision in Komalan Vs. State of Kerala and Others, . The scope of scrutiny made by the Division Bench is discernible from paragraphs 12 to 16. The only interference made was in respect of the declaration made, that prescription of maximum percentage of alcohol in relation to toddy drawn from Palmyrah and sagopalm was ultra vires and unauthorised and that the vendors of such toddy cannot be found fault with if the percentage of alcohol, in the toddy sold by them goes upto 8.1% (which is the maximum percentage stipulated in respect of coconut toddy).

18. It is also relevant to note that the pleadings raised by the appellants/writ petitioners in the writ petition were more with reference to the objection as to the inclusion of "starch" as a prohibited item in the concerned notification. Though it is stated in "Ground A" of the writ petition, that Ext. P4 is not issued invoking the power under Section 29(2)(k) of the Act, but in a general manner. The writ petition without specifically referring to sub-section 2(k) of Section 29 of the Act; it is further stated that Ext. P4, to the extent it prohibits starch in the toddy in order to attract Section 57(a) of the Act is liable to be declared as ultra vires. The picture becomes more clear from the reliefs sought for in the writ petition. Ext. P4 notification, as such, is not sought to be set aside. The prayer is only to declare Ext. P4 notification/Rules to the extent it includes starch as an article prohibited under Section 29(2)(k) of the Abkari Act as arbitrary, vague,

unreasonable, unworkable and unenforceable/ultra vires. The point for consideration is strictly to be confined to the scope of challenge raised against Ext. P4 notification and nothing more. Whether any offence will lie under Section 57(a) of the Act, based on the factual position involved, is a matter to be looked into by the Trial Court and this Court does not intend to express anything on merit. Similarly, whether the first appellant was an employee or was he functioning as a Manager or acting under the 2nd applicant/Licensee and whether they can be connected with the offence, satisfying the requirements under the relevant provisions of law etc are matters to be considered, based on the evidence to be let in, with regard to which no opinion does require to be made in this case. It is declared that the challenge raised by the appellants against Ext. P4 notification is not liable to be sustained. No interference is warranted in respect of the verdict passed by the learned Single Judge. The appeal stands dismissed.