

(1982) 02 MAD CK 0030
In the Madras High Court
Case No : Writ Appeal No. 30 of 1982

State of Tamil Nadu

APPELLANT

Vs

C. Vadiappan

RESPONDENT

Date of Decision : 11-02-1982

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Madras Prohibition Act, 1937 — Section 17

Tamil Nadu Arrack (Supply by Wholesale) Rules, 1981 — Rule 5, 6

Citation : AIR 1982 Mad 386 : (1983) ILR (Mad) 1 : (1983) 96 LW 396

Hon'ble Judges : Gokulakrishnan, O.C.J.; Ratnam, J

Bench : Division Bench

Advocate : Advocate General for Govt. Pleader, for the Appellant; G. Ramaswami and R. Gandhi, for the Respondent

Judgement

Gokulakrishnan, Offg. C.J.

1. The respondent herein filed W. P. No. 6568 of 1981 praying for the issue of a Writ of certiorari mandamus or any other appropriate writ,

direction or order, calling for the records relating to the Proceedings of the Commissioner of Prohibition and Excise in Rc.G1/12852/81 dated 8-

8-1981 and quashing the same and also for further directing the State of Tamil Nadu and the Com, missioner of Prohibition and Excise to grant the

privilege for supply of arrack by wholesale in the district of Periyar for the year 1981-82, under the Tamil Nadu Arrack (Supply by Wholesale),

Rules, 1981.

2. The respondent herein had put in an application in response to a Notification dated 4-5-1981 calling for applications for grant of Privilege and

Supply in wholesale arrack to declare in Periyar District. The said application was filed on 17-5-1981 after complying with all the necessary

formalities and also making the necessary deposit of Rupees 30,000, as required -by the Rules. Besides the respondent herein, eleven others also had put in their applications. There was a personal hearing of all the applications on 27-6-1981 and 2-7-1981. Among the persons who had put in applications, two did not appear for the personal enquiry. The Commissioner of Prohibition after making a personal enquiry recommended the respondent for the grant of the license. As per R. 6 (a) of the, said Rules the prior approval of the Government has to be obtained by the Commissioner of Prohibition before the issue of the license. The Government rejected the recommendation of the Commissioner of Prohibition stating that the respondent is already doing money-lending business and that it may not be possible for him to devote full attention to deal with the wholesale business in arrack in Periyar District. The Commissioner of Prohibition in his proceedings dated 8-8-1981 in Rc No. 12852/81 has rejected the application of the respondent herein and communicated the same to him. The said order was received by the respondent on 14-8-1981. Questioning the said rejection, the respondent herein filed the writ petition.

3. In his affidavit filed in sup-port of the writ petition, the respondent herein contended that the Commissioner of Prohibition performed quasi-judicial functions in recommending the name of the respondent and that the Government cannot interfere by rejecting the recommendation of the Commissioner. He has further stated that the prior approval of the Government as envisaged by R. 6 (a) came to be introduced in the rules after the application had been submitted by the respondent and others for the grant of the licence. According to the respondent, the said amendment is not applicable to him and in any event it will not have any retrospective effect so as to get the prior approval of the State, of Tamil Nadu, Inasmuch as the State of Tamil Nadu had not given an opportunity to the respondent before it had reject ed the recommendation of the Commissioner, the rejection according to the respondent, is vitiated on the ground of violation of the principle of natural justice. It was further contended that the Commissioner of Prohibition who has to act as a quasi-judicial functionary in considering the merits and demerits of the applicants for the grant of the licence cannot take any directions from the State of Tamil Nadu. Therefore, the order of rejection has to be quashed. The reasoning given by

the Government for rejecting the application of the respondent, according to the respondent. is irrelevant and the business of money lending cannot

be taken as an adverse point in rejecting the application of the respondent. On the, other hand, the respondent stated, it is an additional

Qualification since he would command necessary finance for the effective carrying on of the business in the wholesale trade of arrack. Finally the

respondent prayed that the rejection made by the Government despite the recommendation made by the Commissioner of Prohibition is illegal and

has to be quashed and a Writ of Mandamus has to be issued directing the grant of licence.

4. The appellants filed a counter-affidavit in the writ petition refuting the allegations of the respondent. The contended that as per sub-sec. (2-A) of

Section 54 of the Prohibition Act, R. 6 (a) was introduced in the rules with retrospective effect, and hence it is valid. The respondent, according to

the appellants, has no fundamental right to carry on trade in arrack and as such he cannot question the vires of the Rules. According to the

appellants, the Rule is perfectly valid and intra vires the Constitution of India. It was further contended by the appellants herein that the order of the

Commissioner is only administrative and hence the respondent has no right to question the same, since he has no fundamental right to carry on

trade in arrack. In regulating this trade, it was claimed that the second appellant herein can impose any condition or restriction and the respondent

has no locus standing to question the same and so long as the State is the owner of these privileges, the contentions of the writ petitioner are

without substance. It was further contended that the proviso to R. 6-A (6 (a)) has retrospective effect and as such the amendment must be

construed to have come into force as and from 3-5-1981. It was then contended that sub-sec. (2) of S. 54 of the Prohibition Act empowers the

Government to frame rules with retrospective effect. Therefore, the appellants claimed that the contention that the rules cannot have retrospective

effect is without substance. It was further contended on behalf of the appellants that the rules do not require any notice to be given before the

Government refuses to give its approval. The appellants contended that the respondent is doing money lending business and he cannot devote full

attention to supply of arrack by wholesale to the 273 retailers of Periyar District which would involve whole time attention. Hence the first

appellant claimed to have rightly decided that the respondent was not suitable for the grant of the Privilege. Finally, the appellants submitted that the

refusal to approve the recommendation made by the Commissioner is in accordance with the rules and as such the contention of the respondent

herein is not sustainable. With these allegations, the appellants wanted the writ petition filed by the respondent herein to be dismissed with costs.

5. A learned single Judge of our High Court who heard the writ petition, found that the power exercised by the Commissioner is quasi-judicial in

nature that the Government notwithstanding the Proviso to R. 6 (a), has no power to interdict the power exercised by the Commissioner, that the

Commissioner is not bound by the direction of the Government, that the Proceedings are violative of the principles of natural justice and that the

reason given by the Government to reject the recommendation of the Commissioner is arbitrary and irrelevant. With these findings, the learned

Judge directed the second appellant herein to issue the licence in favour of the respondent herein. Aggrieved by the judgment of the Court below,

the appellants have preferred the above writ appeal.

6. The learned Advocate-General, by way of his argument, reiterated what all were stated in the counter-affidavit filed on behalf of the appellants

in the writ proceedings and added that the ground for refusing to grant the approval is relevant and valid and in any event, the court can only

remand the case back to the Commissioner for disposal afresh in the light of any observations the court may deem fit to make.

7. Mr. G. Ramaswami, learned counsel appearing for the respondent submitted that it is unnecessary for this Court to go into the other matters

raised by the learned Advocate-General except for the question as to whether the order passed by the Commissioner after getting the disapproval

of his recommendation by the Government is arbitrary and based upon irrelevant consideration. The learned counsel submitted that if the court

comes to the conclusion that the rejection of the application on the ground that the respondent is doing money-lending business is irrelevant and

fanciful, the order has to be set aside by quashing the same. If that is set aside, according to the learned counsel the only course open to the Court

is to direct the second appellant herein to issue the licence in favour of the respondent. According to the learned counsel, if the court comes to the

conclusion that an arbitrary order has been passed it has only to direct the second appellant to issue the licence in favour of the respondent herein,

or, otherwise, the matter will be prolonged, with the result, the licence period which comes to an end by the end of March, 1982, will make the writ

petition infructuous. Mr. G. Ramaswami further contended that it is unnecessary to give any decision on the other issues, such as the power of the

Government to give its prior approval, the quasi-judicial nature of the order passed by the second appellant and on the issue that the Government

cannot superimpose its approval over the quasi-judicial nature of the disposal made by the Commissioner in selecting the respondent herein. Mr.

G. Ramaswami, further submitted that if the court comes to the conclusion that the order passed by the first appellant is arbitrary in nature and

therefore it has to be quashed, he has no objection to the vacating of the findings of the learned single Judge on the other issues, since it is

unnecessary to give findings on these matters for a disposal of the present case.

8. In the light of the above said arguments advanced by the

respective counsel appearing for the parties we shall presently deal with the question as to whether the order passed by the appellant is based

upon irrelevant and fanciful grounds.

8. The learned Advocate General admitted that the test of reasonableness is available to the court even in administrative matters. If it is

unreasonable, the court has power to strike it down, the principles of natural justice are also available, provided any civil consequence is involved

in an order administratively passed by the authorities concerned.

9. It is clear from the facts of the case that the second appellant herein recommended the name of the respondent for granting the licence for supply

of arrack by wholesale in Periyar District. The Government by virtue of the provision contained in the proviso to R. 6 (a) of the Tamil Nadu

Arrack (Supply by Wholesale) Rules, 1981, which states -

Provided that no privilege shall be granted except with the prior approval of the State Government.

refused to give its approval stating that the application of the respondent has to be rejected for the reason that he is already doing money lending

business and that it may not be possible for him to devote full attention to deal in wholesale business in arrack in Periyar District. The learned

Advocate-General submitted that there is no question of any fundamental right in dealing with arrack vested in any citizen and that the respondent

cannot claim as of right to have the licence in his favour for the wholesale business in arrack in Periyar District. It is the case of the Government that

the order passed by the second appellant is administrative in character and that the proviso added to the rule is valid and effective. In this case, it is

clear that the proviso was added to the rule subsequent to the submission of the applications by the respondent and others to get licence for

wholesale business in arrack in Periyar District. It was contended by the respondent that the said rule cannot have any retrospective operation and

therefore the Commissioner, who is the second appellant herein and who has recommended the grant of the licence in favour of the respondent,

must be directed to issue licence, since the prior approval of the Government need not be got in view of the fact that the proviso will not have any

retrospective Operation. The proviso to R. 6 (a) was added on 15-6-1981, and this gives retrospective operation for the said Provision with effect

from 3-5-1981. The learned Advocate-General points out that Section 54 (2-A) of the Tamil Nadu Prohibition Act, which reads-

54. (1) The State Government may make rules for the Purpose of carrying into effect the provisions of this Act

(2-A) A rule or notification under this Act may be made or issued so as to have retrospective effect on and from date not earlier -

(i) the first Sept. 1972 in so far as it relates to toddy; and

(ii) the first Sept. 1974, in so far as it relates to any liquor other than toddy-

(iii) the first May 1981, in so far as it relates to the matters dealt with in Sections 17B, 17C, 17D, 17E and 18B and 18C.

and stated that as per this section, the proviso added will definitely have retrospective effect.

11. It has been further contended by the learned Advocate-General that notification No. 797 dated 15-10-1937 relied on by the learned Judge for

the purpose of giving a finding that" the order of the Commissioner is quasi-judicial in nature, cannot be sustained. In that Notification, Rule 3 reads

as follows-

(3) Appeal to the Provincial Government. An appeal shall lie to the Provincial Government from any order passed by the Board of Revenue,

Separate Revenue, whether on appeal or otherwise.

Provided that where it is specially provided by rule that the decision of the Commissioner shall be final or where a second appeal has been

disposed of by the Commissioner no further appeal shall lie.

The learned Judge, relying upon this rule, and also the nature, of the enquiry conducted by the second appellant herein for recommending the

licence, came to the conclusion that the order Passed by the second appellant is quasi-judicial in nature. The learned Advocate General submitted

that the Board of Revenue was abolished with effect from 1-11-1980. As per this notification, appeal or reference will lie only to the Government.

Thus, subsequent to the notification dated 1-12-1980 the powers exercised by the Board under notification No. 797 dated 15-10-1937, were

exercised by the Government. Since the Government itself has to give approval for the recommendation of the second appellant, there is no

question of any appeal or reference to the Government by virtue of notification No. 797. The learned Advocate General further contended that by

necessary intendment which can be spelt out by the introduction of the proviso to Rule 6 (a), the Government has taken away the appellate Power

vested in the Government by virtue of notification No. 797. To support the above contention, the learned Advocate General cited the decision

reported in Garikapatti Veeraya Vs. N. Subbiah Choudhury, . In that "decision it has been specifically held that the vested right of appeal can be

taken away only by a subsequent enactment if it so Provides expressly or by necessary intendment and not otherwise. Therefore, according to the

learned Advocate General, the right of appeal has been taken away by necessary intendment. If that be so, the order of the Commissioner is only

administrative in character, and cannot be quasi-judicial in character. Even apart from this, the learned Advocate General submitted that the Tamil

Nadu Arrack (Supply by Wholesale) Rules, 1981, is a compact enactment and this special enactment will exclude the notification No. 797 passed

as early as 15-10-1937. These Rules are a complete Code by themselves and therefore the provisions of these rules clearly make out that the

order of the second appellant can only be administrative in character.

12. The learned Advocate General further submitted that unless some civil consequence is involved, the effected party couldn't claim the benefit of

the principles of natural justice to question the order Passed by the Government. According to the learned Advocate General, there is no civil

consequence as such involved in the order Passed by the second appellant herein, which will entitle the respondent herein to question the same on

the ground of violation of the principles of natural justice. To support his contention, the learned Advocate General cited the decision reported in

Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , wherein the Supreme Court has stated that the law must be taken to be well

established that even in administrative proceeding which involves civil consequence the doctrine of natural justice must be held to be applicable.

13. In Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , the Supreme Court has held that (Para

65):-

"Civil consequences" undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivation and non-

pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence,

14. According to the learned Advocate General, the disapproval of the recommendation for the grant of licence in favour of the respondent does

not involve any civil consequence in order to apply the principles of natural Justice.

15. It is the further submission of the learned Advocate General that the finding of the learned single Judge that the Government has no power to

interdict the authority of the Commissioner notwithstanding the proviso to Rule 6 (a) is not correct. According to the learned Advocate General,

the Commissioner is the authority to issue the licence,, but the issue of licence is subject to the prior approval of the Government under the proviso

to Rule 6 (a). To substantiate this contention, the learned Advocate General cited the decision reported in The Purtabpore Co., Ltd. Vs. Cane

Commissioner of Bihar and Others, . In that decision, the Supreme Court accepted that a statutory provision can be made to give binding

instructions to an executive officer entrusted with the task of performing certain statutory obligations. In that decision, the Supreme Court observed

(para 14)-

The executing officer entrusted with statutory discretions may in some cases be

obliged to take into account considerations of public policy and in some context the policy of a Minister or the Government as a whole when it is a relevant factor in weighing the Policy but this will not absolve them from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for them to be given binding instructions by a superior.

16. To further substantiate his contention the learned Advocate General usefully referred to the Bench decision in W. A. No. 368 of 1981 K.

Ramaswami v. Govt. of Tamil Nadu, judgment delivered on 23-9-1981 to which One of us was a party. Balasubrahmanvam J. speaking for the Bench has stated in that judgment as follows-

He (the learned Advocate General referred to Rule 6, in particular and said that even the Commissioner cannot grant a licence to the man of his

choice without the Prior approval of the Governraent, We note, with interest, the express reservation in the rules of the Government's controlling

authority. But we are not inclined to regard it as having any positive content. The proviso to Rule 6 has to be understood strictly in a negative

sense. At best it confers on the Government only a power of the veto. By itself, it does not make the Government the final arbiter between

competing claims. The weighing of the pros and cons and the consideration of the merits and demerits of the applicants remain, from first to last,

with the Commissioner as his sole responsibility. He cannot surrender his duty under these rules to take decision, out of a false sense of frustration

that whatever be his decision, it will yet be subject to ultimate approval by the Government. Again, his task is by no means recommendatory, it is

adjudicatory. The requirement of the Government's prior approval does not mean that the Commissioner should subordinate his individual

judgment, much less silence it. All it means is that in addition to a decision based on the Commissioner's own individual judgment, the rules require

the Government's approval of that decision as necessary for the conferment of the privilege on the chosen individual. We do not mean to suggest

that the Government's power to approve is an empty formality. For its function is to act as a check upon the whims of the Commissioner. A

Commissioner may commit human error, He may have his favourites. Or he may err on a matter of principle. The Government can and must use

the veto power in all such cases. While Government's approval is a necessary - part of the validity of every licence, the enabling power cannot be

employed as a machinery for a review in every case. The discretion of the Commissioner, properly exercised, will have to be respected; approval

can be withheld by the Government only where the Commissioner has misused his discretion.

17. Quoting the above passage, the learned Advocate General submitted that the power given to the Government under the proviso to Rule 6 (a)

is valid and the Government can veto the recommendation made by" the Commissioner, who is the second appellant.

18. The learned Advocate General finally submitted that the reason given by the Government in not approving the recommendations of the second

appellant is correct. According to him, since. there is material on record to the effect that the respondent is carrying on a money lending business,

the Government is correct in not approving the recommendation of the Commissioner. The learned Advocate General further submitted that there

is the question of violation of the principles of natural justice.

19. The learned Judge in his Judgment under appeal has held that the reason given by the Govt. is irrelevant and it has been Riven for the mere

purpose of rejecting the application of the respondent without any basis. The learned Advocate General contended that the ground stated by the

Government is a relevant ground and that the Government has rightly not approved t e recommendation of the Commissioner in favour of the

respondent.

20. The learned Advocate General attacked the direction given by the learned Judge requiring the second appellant to issue the Privilege in favour

of the respondent. According to the learned Advocate General, even if this court should find that the disapproval of the recommendation is on

irrelevant ground the learned Judge could only remit the matter back to the Commissioner for disposal afresh in the light of the observations in his

judgment and the writ court cannot direct the issue of the licence in the writ proceeding itself,

21. Mr. G. Ramaswami learned counsel appearing for the respondent contends that if an administrative order is passed on irrelevant consideration,

irrespective of any civil consequences the order has to be struck down. Mr. G.

Ramaswami cited the decision reported in *Ramana Dayaram Shetty*

Vs. International Airport Authority of India and Others, wherein the Supreme Court has observed (at p. 1636)--

It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary

power over the interests of the individual. Every action of the Executive Government must be informed with reasons and should be free from

arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no

difference whether the exercise of the power involves affectation of some right or denial of some privilege.

22. The learned Advocate-General fairly stated that if the rejection is made on irrelevant grounds even an administrative order can be interfered

with by the court of law for the purpose of setting it aside. Mr. G. Ramaswami submitted that it is enough for the purpose of this appeal if the court

decides the question whether the order of disapproval made by the Government is on irrelevant consideration taking the same to be an

administrative order, The learned counsel would agree for the vacating of the findings of the learned single Judge on all other aspects which the

learned Advocate-General has urged and adverted to in paragraphs (supra), as unnecessary for a disposal of the present case, except for the

finding as regards the irrelevant reason given by the Government for disapproving the recommendation of the second appellant and the direction

given by the learned single Judge requiring the second appellant to issue the privilege in favour of the respondent.

23. Accordingly, we shall be considering presently the two aspects pressed by Mr. G. Ramaswami, on the ground that finding on the other aspects

of the case are unnecessary to give a decision to this writ proceeding.

24. The Tamil Nadu Arrack (Supply by Wholesale) Rules 1981, was framed by virtue of the powers conferred by S. 17-C read with S. 54 of the

Tamil Nadu Prohibition Act 1937 (Tamil Nadu Act I of 1937). These rules were framed for regulating the grant of the exclusive or other privilege

for supplying by wholesale, arrack in the State of Tamil Nadu. Rule 4 of the Rules relates to application for grant of privilege and licence, and it

states-

4 (a). Any person desirous of getting the grant of any privilege and taking a licence for the sale by wholesale of bottled arrack may apply in form-

I, appended to those rules to the Commissioner within the time specified in the notice published under sub-rule (b) of R, 3.

The application fee is Rs. 300 and the licence fee is Rs. 30,000.

25. Rule 5 enumerates the matters to be taken into consideration by the Commissioner in granting the privilege, and they are-

(a) the suitability of the applicant for the grant of Privilege;

(b) whether the applicant is a person who will abide by the provisions of the Act and the rules made thereunder;

(c) the suitability of the site and building selected or to be constructed where the wholesale depot is to be located; and

(d) whether the application is made bona fide on behalf of the applicant himself or in benami of any other person, If these conditions are satisfied,

the privilege has to be granted and the licence issued to the applicant as provided under R. 6. Rule 18 states -

No business other than the one licensed under these rules shall be carried on in the building where the wholesale depot is located.

Thus, the rules, which are a Code by themselves for the grant of licence to supply by wholesale arrack, nowhere prohibits carrying on any business

other than the one applied for under the Rules. The conditions to be satisfied for the grant of licence have been amply spelt out by rule 5. The only

prohibition is that no business other than the one for which licence is applied for shall be carried on in the building where the wholesale business is

located.

26. In W. P. No. 5488 of 1981, a learned Judge of our High Court had occasion to deal with rejection of licence for wholesale supply of bottled

arrack, on extraneous consideration. That case also arose out of the very same Rules now in question before us. The Commissioner refused to

grant the privilege to the petitioner on the ground that he was a bia contractor in the Tamil Nadu Electricity Board and got other items of business

also and that he might not be able to devote adequate attention to the supply of arrack from the wholesale depot to the 401 retail shops. In that

case, the learned Advocate General was not able to support the ground on which the petitioner's claim for the issue of licence was rejected. The

court, finding that the reason given by the Commissioner was not based upon any specific material, nor that any opportunity had been given to the petitioner to dispute the vague statements made by the Commissioner of Prohibition, vacated the order of the Commissioner. In W. A. No. 368 of 1981 which is an appeal from the said W. P. 5488 of 1981, the Bench confirmed the view of the learned Judge and allowed the appeal in favour of the writ petitioner with a direction to the Commissioner to consider the writ petitioner's application afresh on the merits and give it a proper disposal in accordance with the rules.

27. As far as the present case is concerned, it is clear that the respondent had furnished information in his application itself that he is a

moneylender. The Commissioner who considered his application found that he is a suitable person for the grant of the privilege and recommended

his case to the Government for approval since the Commissioner felt that the money lending business will not be conducting the wholesale rack.

The Government, however, would not approve of the recommendation of the Commissioner on the ground that the respondent with his money

lending business could not devote full attention to the wholesale, business of arrack in Periyar Dt. As we have already seen, there is absolutely no

prohibition in the Rules for a recipient of the privilege to carry on other business. the only prohibition being that no other business other than the one

licensed under the Rules, shall be carried in the building where the wholesale business is located. In similar circumstances, this court has found that

a big contract business with the Tamil Nadu Electricity Board would not in any way disentitle a person from getting the privilege of this nature.

Unless a business comes into conflict with the one licensed under these rules, it cannot be said that it may not be possible for the party to devote

full attention to the wholesale business of arrack in Periyar Dt. It is common knowledge that many of the businessmen dealing in wholesale business

do not confine themselves to a single trade alone and they are able to manage such businesses. In the absence of any prohibition in the Rules for a

recipient of the largess to do any other business other than the one licensed under the rules, we do not think it is correct to state that the money

lending business run by the respondent would disable him to devote full attention to the wholesale business in arrack in Periyar Dt. There must be

some acceptable reason or plausible suggestion founded on facts to hold that the money lending business carried on by the respondent would come in conflict with the business of wholesale arrack.

28. In exercising the discretionary powers, the administrative authority must act in good faith, must have regard to all relevant considerations and,

must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter and spirit of the legislation that gives it

power to act, and must not act arbitrarily or capriciously. In the case on hand, the ultimate authority to issue the licence is the second appellant. He

has used his discretion and recommended the respondent's name for the grant of the licence. That recommendation was not approved by the

Government on extraneous and irrelevant consideration, as discussed supra. The deciding authority being the second appellant, the power of

approval is given to the first appellant only to act as a check upon the whimsies of the second appellant. The disapproval of the recommendation

by the Government in our view, is contrary to the observation of the Bench decision in W. A. No. 368 of 1981", already extracted by us in the

foregoing paragraphs. Hence the reason for refusal to grant approval has to be considered as irrelevant and arbitrary., If such refusal is unjust or

arbitrary or the reason given for rejection is irrelevant, the order of rejection even if it is an administrative order, has to be set aside.

29. The next contention put forward by the learned Advocate-General is that the learned single Judge has committed an error in issuing a

mandamus directing the second appellant to issue the privilege in favour of the respondent. Such a direction, according to the learned Advocate-

General, is contrary to the principles laid down by the Supreme Court to the effect that the writ court cannot direct the executive authority to issue

a licence and that it can only remit the matter to such authority with a direction to such authority to exercise the power in accordance with the

observation made by the writ court. We shall now consider as to how far the High Court can direct the issue of the licence in given circumstances.

30. In Veerappa Pillai Vs. Raman and Raman Ltd. and Others, the Supreme Court had occasion to deal with a Bench decision of this court,

wherein this court directed the Regional Transport Authority to grant permits in respect of all the five buses. On appeal, the Supreme Court set

aside the said direction while allowing the appeal. The Supreme Court considered the hierarchy of authorities before whom an aggrieved party can

go by way of an appeal or revision, and on the facts of the case, came to the conclusion that the discretion exercised by the Regional Transport

Authority ought not to be interfered with by the High Court. In the penultimate paragraph of the said judgment, the Supreme Court, after setting

aside the order of the High Court, observed that issue of such a direction by the High Court was in excess of its powers and jurisdiction. We are,

however, of the view that this judgment of the Supreme Court can relate only to the facts and law arising in the said writ proceeding alone. When

there is an hierarchy of authorities to discuss and decide the grant of permit, the High Court-, according to the Supreme Court, acted in excess of

its powers and jurisdiction in straightway directing the Regional Transport Authority to grant the five permits in favour of the writ petitioner.

31. Before considering the facts of the present case and the question as to how far a direction of this nature can be granted in this case, we can

now consider the decision of the Supreme Court in relation to issuing such a direction in appropriate cases.

32. District Registrar, Palghat v. -M. B. Koyyakutty, related to promotion of the writ petitioner as upper division clerk and fixation of his seniority.

The last point that was considered in that case by the Supreme Court was whether it was proper for the High Court to issue positive direction

requiring the District Registrar, Palghat (Appellant) to promote Koyyakutty (writ petitioner) to the upper division cadre and thereafter to determine

his rank in the cadre of upper division clerks. The Supreme Court observed (at P. 1066) -

Ordinarily, the court does not issue a direction in such positive terms; but the peculiar feature of this case is that it has not been disputed that

Koyakutti respondent satisfied the twofold criterion for promotion laid down in the statutory Rule 28 (b) 00. Indeed, the District Registrar, Palghat,

who was impleaded as respondent 3 in the writ petition, expressly admitted in paragraph 8 of his counter-affidavit filed before the High Court "that

the seniority of service is the basis of promotion from the ranks of lower division clerks to the ranks of upper division clerks provided they are fully

qualified by passing the departmental tests for the purpose. It was never the case of the Registrar that Koyakutti was not otherwise fit for

promotion. Indeed, even in the grounds of appeal to this court, incorporated in the special leave petition, it is not alleged that Koyakutti did not

satisfy the criterion of seniority-cum-fitness prescribed by R. 28 (b) (ii). The position taken by the appellant throughout was that this rule should be

deemed to have been "implemented" by the impugned Government notification. It is not correct that the impugned notification merely "implements"

or fills up a gap in the statutory rules. It tends to super add or superimpose by an executive fiat on the statutory rules something inconsistent with

the same. Since the existence of both the criteria viz. seniority and fitness for promotion to the upper division Prescribed by the statutory R. 28 (b)

(ii) in the case of Koyakutti was not, disputed the High Court was justified in issuing the direction it did.

33. In State of Kerala Vs. Kumari T.P. Roshana and Another, , Krishna Iyer J. speaking for the Bench, directed the State Govt. to admit 30 more

willing students who are qualified under the rules and who are students from the colleges affiliated to the Calicut University in order of the marks

secured. The learned Judge further directed that those students will be distributed by the selection committee among the four medical colleges of

Government in an equitable way and their decision will be final. ""The Kerala and the Calicut Universities will be bound to expand the strength of

the medical college concerned for this year in obedience to the direction of the court and the respective bodies under the Universities will act

accordingly". While giving such direction, the learned Judge observed (Para 40)-

Had we left the judgment of the High Court in the conventional form of merely quashing the formula of admission the remedy would have

aggravated the malady, confusion, agitation, paralysis. The root of the grievance and the fruit of the writ, are not individual but collective and while

the adversary system makes the judge a mere umpire, traditionally speaking, the community orientation of the judicial function, so desirable in the

Third World remedial jurisprudence, transforms the court's power into affirmative structuring of redress so as to make it personally meaningful and

socially relevant. Frustration of invalidity is part of the judicial duty; fulfillment of legality is complementary. This principle of affirmative action is

within our jurisdiction under Art. 136 and Art. 32, and. we think the present cases deserve its exercise.

34. In *Charles K. Skeria v. C. Mathew*, AIR 1980 SC 1230 the Supreme Court had again occasion to deal with admission to medical college. In

that case, the Kerala High Court quashed the selection made and directed a fresh selection to the course in accordance with law and in the light of

the observations contained in its judgment. Krishna Iyer, J. speaking for the Bench of the Supreme Court, in appeal, observed Para 9)-

Whatever might be the passion for correct law and provocation on account of governmental indifference, the court, in our view, must use its

power to correct error and promote order and not strike down an illegal error without going forward to affirmative action which may minimise

injury generally. Indeed the judicial process, in its creative impulse, must hesitate to scuttle, salvage wherever possible and destroy only when the

situation is beyond retrieval -a life giving facet forgotten by the High Court when quashing the admission for the year. The positive perspective

justifies the final direction that we issue in the concluding parts of this judgment if we may anticipate, the nature of the relief we have moulded.

In conclusion, the Supreme Court held as follows (Para 33):-

We therefore direct the State of Kerala and the Principal of the Trivandrum Medical College, who is the convener of the selection committee, as

well as the two Universities concerned, to admit into the post-graduate Ophthalmology course Dr. Naomi and Dr. Gopalakrishnan for this year,

The two applicants will report within ten days from today for such admission and the admission will be accorded to them. The Principal of the

Trivandrum Medical College will inform Dr. Naomi about this direction of the court

In this connection, we can also usefully refer to the principle laid down by the Supreme Court in a decision wherein the question arose -

"Can the statutory functionary supplement by fresh reasons when its decision based on certain other reason was questioned in the court of law?

In *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, , the Supreme Court has stated (para 8)-

When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be

supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it- comes to court

on account of a challenge, get validated by additional grounds later brought out.

35. Bearing the above said principles in mind, we can now look into the facts of the present case. The only ground on which the Government refused to give its approval to the recommendation of the second appellant is that the respondent is already doing money-lending business and that it may not be possible for him to devote full attention to deal in wholesale business of arrack in Periyar District. This reason given by the first appellant has been found by as arbitrary and irrelevant. The authority which has to grant licence ultimately is the second appellant. On a consideration of the fact that the respondent is doing money-lending business besides his eligibility for the licence, the second respondent recommended his case for the grant of the privilege for the approval of the first appellant. Once we have come to the conclusion that the first appellant has arbitrarily refused to give the Privilege, there is nothing more to be done by the second appellant who has already recommended the case of the respondent for the grant of the privilege, except to grant the licence in his favour. It is clear from the facts that the respondent.even if he gets the licence now can enjoy the fruits of the licence only till 31-3-1982. If the matter is remitted to the second appellant, he will have to pass the same order, since he was already satisfied and had recommended his case for grant of licence. This would be only an empty formality if really the court wants to give the affirmative remedy to minimise the injury caused to the respondent by his not enjoying the fruits of the privilege for more than three fourths of its term, The facts and circumstances of the present case definitely warrant a positive direction in the Interest of justice so as to enable the respondent to enjoy the fruits of his success. Considering the fact that the period of licence will come to an end by the end of March, 1982, and also taking into consideration the well-laid down principles enunciated in the decisions of the Supreme Court, noticed supra, regarding issue of direction in such circumstances, we feel that this is a fit case in which the direction has to be given to the second appellant in the manner as has been done by the learned sin-ale Judge. We find that the direction in the nature of a mandamus issued by the learned Judge is perfectly justified in this case.

36. Inasmuch as we have held that the disapproval of the Government for the grant of the privilege to the respondent is arbitrary and unreasonable

and that the direction in the nature of mandamus given by the learned Judge to the licensing authorities is correct, we vacate the other findings given

by the learned Judge in his judgment under appeal as being unnecessary for the purpose of this proceeding, to which course the learned counsel for

the respondent, Mr. G. Ramaswami is agreeable as already noticed.

37. Subject to the above observation, the writ appeal is dismissed. There will be no order as to costs.

38. Mr. R. Gandhi, learned counsel for the respondent brought to our notice that" the learned Judge while disposing of the writ Petition directed

the Government to issue the Privilege and licence within a particular date. Taking that into consideration, the authorities concerned are directed to

complete the issuing of the Privilege and also the licence on or before 20th Feb. 1982.

39. Appeal dismissed.