
(2005) 05 KL CK 0016

In the High Court Of Kerala

Case No : Writ Petition (C) No. 13343 of 2005 (L)

Sujesh V.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 23-05-2005

Acts Referred:

Citation : (2005) 2 KLJ 200 : (2005) 3 KLT 221

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : C.C. Thomas, M.G. Karthikeyan, Nireesh Mathew, Joseph George, Niju Mathew and Stefphy John Attokaran, for the Appellant; M.P. Madhavan Kutty and T.R. Ravi (G.P.), for the Respondent

Judgement

K. Balakrishnan Nair

1. In an open bid followed by drawing of lots, the petitioner was allotted Toddy Shop No. 33 of Kanjirappally Excise Range on 15-4-2005. Pursuant to the allotment, he remitted the kist amount for one year, advance contribution for Worker's Welfare Fund etc. But, the grant of licence in his favour was not confirmed, in view of Ext. P1 order passed by the Excise Commissioner on 16-4-2005. The brief facts which led to the passing of Ext. P1 are the following. Mr. M.R. Vijayan Nair was the licensee of the above said toddy shop during the financial year 2003-04. The licence in his favour was not renewed for the year 2004-05, for the reason that he was an accused in the abkari case. Later, he committed suicide on 10-2-2005. The 4th respondent, widow of the said Vijayan Nair filed a representation on 23-3-2005, praying to renew and transfer the licence of T.S. No. 33 in her favour. This Court on 12-4-2005 directed the Excise Commissioner to consider the same. In the meantime, auction proceedings as per the Rules were held on 15-4-2005, at which the shop was allotted to the petitioner. Allowing the 4th respondent's application, the Excise Commissioner passed Ext. P1 order on 16-4-2005. So, the Writ Petition is filed, challenging Ext. P1.

2. According to the petitioner, there was no licensee during the year 2004-05. Rule 5(18) of the Kerala Abkari Shops Disposal Rules, provides for renewal and transfer of licence in favour of the legal heirs, if only the licensee dies during the currency of the licence. In this case, at the time of the death of the 4th respondent's husband, he was not a licensee. Therefore, it is submitted that Ext. P1 order has been passed without jurisdiction. It is not supported by any provisions of the Abkari Act or Rules framed thereunder. So, the petitioner seeks to quash Ext. P1.

3. The 4th respondent has filed a counter affidavit, supporting the impugned order. According to her, there was no licensee during the year 2004-05. So, she was eligible for renewal of the licence. Taking into account all these facts and also taking into account the plight of the widow and children, Ext. P1 order has been passed by the Excise Commissioner, it is contended. Therefore, the 4th respondent prays, this Court may not interfere with the order of the Excise Commissioner, which has been passed to help the legal heirs of an ex-licensee. The learned Government Pleader appearing for the official respondents pointed out that the grant in favour of the petitioner has not become final for want of approval from the Excise Commissioner. Therefore, he is not entitled to get a direction to confirm the grant in his favour.

4. Though, the grant in favour of the petitioner is not confirmed, he has got a legal right to have his claim for confirmation considered fairly by the Excise Commissioner. So, his rights are affected by Ext. P1. Though, the case of the 4th respondent deserves sympathy, there is no provision in the Abkari Act or the Rules framed thereunder for transferring a licence, if only the licensee dies during the currency of the licence. So, Ext. P1 is plainly ultra vires and unauthorised. If, on a sympathetic ground, this Court declines to interfere, the same will destroy the legitimacy of the judicial process. Further, when an order is found to be illegal, normally, the petitioner is entitled to get an order quashing that illegal order ex debito justitiae. If the quashing is to depend on the discretion of the court, the same will cut at the root of rule of law.

5. Lord Shaw in Scott v. Scott (1913) AC 417) observed that "To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand". The learned author H.W.R. Wade in his Administrative Law 6th Edition said:

There are grave objections to giving the courts discretion to decide whether governmental action is lawful or unlawful: the citizen is entitled to resist unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion.

The learned author then quotes the above quoted words of Lord Shaw and says:

If the courts were to undermine the principle of ultra vires by making it discretionary, no victim of an excess or abuse of power could be sure that the law would protect him.

6. The above statement of law of the learned author has been noticed with approval by the Divisional Court in *Bugg v. Director of Public Prosecutions* (1993) 2 All ER 815) and by Lord Hoffmann in his speech in the House of Lords in *R v. Wicks* (1997) 2 All ER (HL) 801). In the light of the above principles, the fervent plea of the learned counsel for the 4th respondent that this Court should decline jurisdiction, cannot be accepted. Since, Ext. P1 is unauthorised, it is quashed. The 2nd respondent is directed to consider the claim of the petitioner for confirmation of the allotment of T.S. No. 33 of Kanjirappally Excise Range for the year 2005-06, in his favour, within two weeks from the date of production of a copy of this judgment.

The Writ Petition is disposed of as above.