

(2012) 01 KL CK 0122

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 1398 of 2012

T.K. Aneesh Kumar and Others

APPELLANT

Vs

The District Collector, Alappuzha and Others

RESPONDENT

Date of Decision : 24-01-2012

Acts Referred:

Kerala Abkari Act, 1077 — Section 54

Citation : (2012) 2 KarLJ 190 : (2012) 2 KLJ 190

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : K. Ramanathan, for the Appellant; M.T. Sheeba (GP), for the Respondent

Judgement

C.K. Abdul Rehim, J.—Challenge in this writ petition is against Ext. P4 order issued by the District Collector in exercise of powers conferred u/s 54 of the Abkari Act. In Ext. P4 the District Collector had issued direction to close down toddy shops situated within 2 Kms from St. Andrews Basilica, Arthunkal, on the dates on 19.01.2012, 20.01.2012, 26.01.2012 and 27.01.2012, in connection with a festival conducted in the Basilica. It reveals that such an order is issued in view of ensuring smooth conduct of the festival and for preservation of public peace. It is evident from Ext. P4 that the proceedings was issued on the basis of an application submitted by the authorities of the Basilica and on taking into consideration of the reports submitted by the Deputy Commissioner (Excise) Alappuzha and the District Police Chief, Alappuzha. Petitioners are challenging Ext. P4 mainly on the ground that the same was issued in an arbitrary manner. According to the petitioners, for issuing the impugned proceedings the District Collector had only considered the reports of the Excise Commissioner and the District Police Chief, which will only indicate that a large crowd, including ladies and children, will be participating in the festival. The same cannot be taken as a valid ground to apprehend breach of public peace. The reasoning that such a prohibition is imposed considering the expected crowd, is not a sustainable ground, is the argument. It is contended that, unless it is reported that there is

apprehension of law and order situation or breach of public peace, such an order was not at all warranted. Learned counsel for the petitioners also pointed out that Rule 7 (10) of the Kerala Abkari Shops Disposal Rules 2002 enables the Deputy Commissioner (Excise) to regulate the working hours of toddy shops. Hence an order to close down the shops for the full day was not warranted. Sum and substances of the contentions is that, Ext. P4 was not warranted based on any factual situation prevailing which will indicate that public peace has been put to danger. Petitioners pointed out that there was no antecedents of any crime registered in connection with the festival. Further contention is that Ext. P4 will violate the rights protected under the constitution. Petitioners also raise contention to the extent that Ext. P4 was issued without affording any opportunity of hearing. Lastly, the petitioners contended that Ext. P4 is not a notice issued as contemplated u/s 54.

2. Heard, learned Govt. Pleader appearing on behalf of the respondents. It is contended that Ext. P4 was served on the petitioners through authorities of the Excise Department on 16.01.2012 and on 17.01.2012, respectively. It is further contended that Ext. P4 was issued on the basis of an application submitted by the authorities of the church, after calling for detailed reports from the Excise authorities as well as from the Police authorities. It is only after subjective satisfaction arrived by the District Magistrate that the impugned order was issued, on the basis of the finding that it is necessary to prohibit sale of toddy on the respective dates for preservation of public peace.

3. While considering the challenges raised, I am reminded of the fact that the petitioners are not entitled to claim protection of fundamental rights under the Constitution with respect to business or trade in liquor, as settled through various precedents of this court and the honourable Supreme Court. The contention regarding non-serving of Ext. P4 need not be considered, since the petitioners have chosen to challenge its validity itself, and in view of the specific contention of the respondents that Ext. P4 was served on the petitioners through the Excise authorities.

4. Challenge against jurisdiction of the District Magistrate cannot be sustained, since the petitioners have not raised any valid dispute on the authority of the District Magistrate. The only question need be considered is as to the justifiability or reasonableness of the decision taken by the District Magistrate in issuing such an order. On a perusal of Ext. P4 it is revealed that, the application submitted by the authorities of the Church was to prohibit sale of toddy within 2 Kms, for the entire period of the festival from 10th January 2012 to 27th January, 2012. It is indicated in Ext. P4 that, the Excise Commissioner had reported that the prohibition need be imposed only on 19th, 20th and 27th of January, considering that more crowd will be on those days. The District Police Chief had recommended for prohibition of sale on 20th January also, in addition to the days recommended by the Excise Commissioner.

5. In this regard I take note of a decision of this court (Division Bench) in W.P.

(C)No. 5187/2005, dated 18.02.2005. The observations contained therein are as follows :-

Mr. C.K. Abdul Rehim, learned Senior Government Pleader after obtaining instructions from the Government submits that this is not imposed as a policy decision of the Government. If that be so, the District Magistrate exercised the power in the facts and circumstances of a particular situation, which cannot be called continuous or perpetual and are only momentary. It is stated that about four years back, the members who attended the convention, had attacked the Bars and other shops where intoxicating drinks were being sold. But, this cannot be a ground to exercise the powers u/s 54 of the Act for this year. The above provision is a transient provision and has to be invoked only when there is law and order situation or there is a reasonable apprehension of breach of peace and public tranquility. The fact that, about four years back, there was rioting by members of the convention, protesting against the operation of the bars and other shops dealing in intoxicants, cannot be a ground for the District Magistrate to order closing of the said Bars and shops for this year as it is the duty of the District Magistrate to supervise the law and order situation and Superintendent of Police to tackle law and order problem. It is admitted that the District Magistrate or Superintendent of Police cannot lay down a policy of closure of Bars and shops dealing in intoxicants. If that be so, the exercise of the powers u/s 54 of the Act cannot be mechanical and merely because there is a letter of the Superintendent of Police, Pathanamthitta expressing concern that there is every likelihood of breach or peace if sale of alcohol and liquor is allowed within a periphery of two kilometers of the above convention, the said vague letter cannot form basis for imposition of the ban for a total period of nine days during which the convention is held. It is also pertinent to mention that there is no remission granted to the petitioner in the license fee which had been paid for the said period. Learned Senior Government Pleader Sri. C.K. Abdul Rehim submits that under Sub-Rule 26 of Rule 6 of the Kerala Abkari Shops (Disposal in Auction Rules), 1974, no remission can be granted and there is a dictum laid down by the Supreme Court to that effect. If that be so, imposition of ban by the District Magistrate, without there being any policy decision of the Government, results in unreasonable restriction in the conduct of the business when that business is allowed to be conducted, as the license had been granted after receipt of license fee of Rs. 18 lakhs per annum".

6. Pursuant to the above judgment the State Government had issued a circular No. 7497/A2/09/TD dated 29.04.2009, prescribing the following instructions to District Collectors for strict compliance while exercising powers u/s 54. The instructions are:-

(a). An order u/s 54 of the Abkari Act shall be passed at least one week prior to the event in respect of which the same is issued in order not to stifle legal remedies available to those who may be aggrieved such orders. (b). Section 54 of the said Act shall be invoked only when there is a law and order situation or

there is a reasonable apprehension of breach of peace and public tranquility and the circumstances so warrant.

(c). The exercise of the powers under the said section may not be mechanical and if there is any apprehension of breach of peace and public tranquility, the grounds or acceptable reasons in support of such apprehension shall be stated in the order.

(d). The order shall not be on vague grounds and a speaking order shall be passed.

(e). The order shall not be based on desirability but to the objective and subjective satisfaction of the district collector that there is possible breach of peace or law and order.

(f). There shall be cogent material to show that on account of opening of liquor shops there is a distinct likelihood of breach of peace and law and order situation.

(g). The facts and circumstances of a particular situation shall not be treated as continuous or perpetual warranting an order u/s 54 for the coming year.

7. Considering the above cited judgment, the dictum is that Section 54 is a transient provision and has to be invoked only when there is law and order situation or there is reasonable apprehension of breach of peace and public tranquility and it cannot be exercised on the facts and circumstances which are perpetual or continuous, but only on circumstances which are momentary. In the instructions given through the circular of the State Government it is reiterated that Section 54 shall be invoked only when there is law and order situation or there is a reasonable apprehension of breach of peace and public tranquility.

8. The statutory requirement contemplated u/s 54 is only, an apprehension in the mind of the District Magistrate regarding any breach of peace. The wording in the Section, "as he may think necessary for the preservation of the public peace" indicate that, the District Magistrate need only to be satisfied that such a prohibition is necessary for preserving public peace. Merely because there was no antecedents of any criminal case or breach of peace, during the previous years, or merely because there was no such incidents occurred during the intervening days of the festival, it cannot be contended that the apprehension of breach of peace is baseless, especially with respect to the particular dates on which there will be more crowd. When the apprehension is supported by reports of the competent authorities, the satisfaction regarding necessity for issuing such a direction for preservation of peace, cannot be questioned. I am of the view that the action taken by the District Magistrate in such circumstances cannot be held as unreasonable or arbitrary. The materials which prompted the District Magistrate to arrive at such conclusions regarding necessity for preservation of public peace, is well reflected in the order itself. It need not be based on any specific antecedents of breach of peace or registering of crimes earlier. Being the Executive Magistrate conferred with powers under the Code of Criminal

Procedure with respect to maintenance of public order and tranquility, the action of the District Magistrate in this regard need only support of materials for his subjective satisfaction with respect to necessity for issuing such a direction. The power in this regard is some what preventive in nature and is discretionary to a great extent. I do not find any reason to hold that the District Magistrate had exercised jurisdiction vested on him in any manner violating the ambit and scope of the provision or the instructions issued by the State Government, in this regard. Merely because the Assistant Excise Commissioner is empowered to regulate working hours of toddy shops, under Rule 7(10) of the Abkari Shops Disposal Rules, it cannot be argued that the District Magistrate should not exercise jurisdiction vested u/s 54.