

(2009) 07 AP CK 0034

In the Andhra Pradesh High Court

Case No : Writ Petition No. 18526 of 2008 and batch

Ujelly, T.C.S.

APPELLANT

Vs

Govt. of A.P. and Others

RESPONDENT

Date of Decision : 03-07-2009

Acts Referred:

Andhra Pradesh Excise (Grant of Licence to Sell Toddy, Conditions of Licence and Tapping of Excise Trees) Rules, 2007 — Rule 12, 16, 27, 27(1), 3
Andhra Pradesh Excise Act, 1968 — Section 31, 31(1)
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 112, 114
Penal Code, 1860 (IPC) — Section 481, 482, 483, 484, 485

Citation : (2009) 5 ALT 679 : (2009) 3 APLJ 192

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : A. Jagannatha Rao, N. Sridhar Reddy, S. Venkateswara Reddy, D. Ramakrishna, D.L. Pandu, S.A. Razak, B. Nagi Reddy, M. Damodar Reddy and B. Sai Ram Goud, for the Appellant; G.P., for the Respondent

Final Decision : Allowed

Judgement

C.V. Nagarjuna Reddy, J.—In this batch of writ petitions, the issues of facts and law are common. Therefore, these cases are heard and being disposed of together with the consent of the learned Counsel for the respective parties. Prototype show cause notices issued by respondent No. 2 to the petitioners, Toddy Tappers Cooperative Societies in Mahabubnagar District, are assailed in this batch of writ petitions.

2. The background facts leading to the filing of these writ petitions are as under:

3. The petitioners hold licences granted by respondent No. 2 under which they are permitted to draw toddy from the trees allotted to them and sell to their consumers. The licences contain certain conditions subject to which the petitioners carry on their activities. The petitioners are also governed by the provisions of the Andhra Pradesh Excise Act, 1968 and The Andhra Pradesh

Excise (Grant of licence to sell toddy, conditions of licence and tapping of excise trees) Rules, 2007 (for short, "the Act" and "the 2007 Rules"). In the event of the petitioners indulging in contravention of any of the licence conditions, under the provisions of the Act and the Rules their licences are liable for suspension or cancellation. Respondent No. 2 is empowered to initiate proceedings for such suspension and cancellation.

4. In purported exercise of his powers, respondent No. 2 issued the impugned show cause notices. The substance of these notices is that on the direction issued by respondent No. 1, detailed study on enumeration of actual number of tapable sendhi/toddy trees available within 50 Kms from the toddy shops in Mahaboobnagar District was undertaken in the month of December, 2007, that during the said study, enumeration of tapable trees was made and that it was observed that there is a huge variation between the toddy yield and the toddy consumption ranging from 1:10 to 1:20 ratio, that the report of the Assistant Commissioner, Prohibition and Excise, Mahaboobnagar revealed that the average quantity of toddy consumed by the consumers in each of the shops of the petitioners is far higher than the average toddy yield. The show cause notice mentioned number of trees allotted to each petitioner, the average toddy yield per day, the average number of consumers visiting the shops and the average quantity of toddy consumed by them. Placing reliance on those figures, it is stated in the show cause notice that as huge variation between the quantity of toddy received from the topes of the petitioners to their shops and the quantity of toddy consumed by the consumers was evident and such a variation was not possible unless the licensee intentionally indulged in manipulation and altering the quantity and the quality of toddy received from the tope. It is further stated by respondent No. 2 that the figures collected during the enumeration of the trees go to show that the petitioners are indulging in illegal and unauthorized manipulation of quantity of toddy by increasing its quantity and thereby the petitioners violated Rule 16 of the 2007 Rules by altering the quantity and quality of the toddy amounting to adulteration. Respondent No. 2, therefore, called upon the petitioners to show cause why their respective licences shall not be cancelled. These notices are assailed in this batch of writ petitions.

5. The averments contained in the affidavits are almost common. Broadly, the petitioners questioned the show cause notices on two grounds; (i) that the procedure being followed by the respondents in seeking to establish the alleged adulteration by the petitioners is ultra vires the provisions of the Act and the 2007 Rules and (ii) that there is no scientific basis for arriving at the conclusion that there is a variation between the average toddy yield from the allotted trees and the average consumption of toddy from the petitioners' shops.

6. Sri P. Bhagavan Reddy, Prohibition and Excise Superintendent, Mahaboobnagar District, filed counter-affidavit in one of the writ petitions, namely, WP. No. 14380 of 2008.

7. At the hearing, the learned Government Pleader for Prohibition and Excise

submitted that as the averments in all these writ petitions are almost common, this counter-affidavit may be treated as a common counter in all the cases. In his counter-affidavit, respondent No. 2 stated that respondent No. 1 issued directions vide his circular No. 12944/2007/CPE/A1, dated 21.03.2007 to the officials concerned to make a detailed study on enumeration of the actual number of tapable Sendhi/Toddy trees available within the distance of 50 kms and the actual yield of toddy and the quantity consumed in the shops of the Tappers" Cooperative Societies situated in Mahaboobnagar District as a sample study, that the local excise officials, who were well versed with the enumeration of trees, carried out the enumeration work in 1223 topes situated in 63 revenue mandals of Mahaboobnagar District, that the enumeration/study work started on 03.12.2007 was completed on 22.12.2007 in three phases and that the enumeration/study revealed the following facts:

1. All the toddy shops are situated within the permissible distance of 50 kms from the toddy tope.
2. There is huge variation between yielding of toddy and consumption of toddy by the consumers at the ratio of 1:10 to 1:20 from place to place.
3. In majority of topes situated in the District tapping is not being done even though trees are available. The volume of tapping varies from 10 to 20% from place to place.

8. It is further averred that the Assistant Commissioner of Prohibition and Excise (Enforcement), Mahaboobnagar zone submitted a final report of TCS/TFT study on the number of trees available, their actual yield and actual toddy consumed, to respondent No. 1 along with his letter dated 18.01.2008 and that after receiving the final report of enumeration, respondent No. 1 issued proceedings dated 23.02.2008, directing the Deputy Commissioner, Mahaboobnagar to issue notices to the licencees of the toddy shops concerned, as there is a huge variation between the yield of toddy from trees available and consumption of toddy by the consumers at the ratio varying between 1:10 and 1:20, that the Deputy Commissioner, Prohibition and Excise, Mahaboobnagar in his proceedings dated 12.03.2008 directed respondent No. 2 to issue notices to the licencees on the basis of the findings in the final report and that accordingly the impugned show cause notices are issued. Respondent No. 2 justified issue of these notices by stating that from the huge variation between the average yield and consumption of toddy, it is evident that the licencees are indulging in manipulation of quality and quantity of toddy and are thereby violating Rule 16 of the 2007 Rules. He further pleaded that violation of the Rules constitutes violation of the conditions of the licence for which action can be initiated u/s 31(1)(b) of the Act either for suspension or cancellation of the licences and that the impugned proceedings being only in the nature of show cause notices, the petitioners can submit their explanations.

9. The learned Counsel for the petitioners and the learned Government Pleader

for Prohibition and Excise reiterated the respective pleadings of the parties.

10. The question that arises for consideration is whether the impugned notices are valid and sustainable in law?

11. The 2007 Rules govern granting of licences and functioning of toddy shops. Rule 3 prescribed that the right to sell toddy shall ordinarily be granted by assigning the toddy shops to Tappers Co-operative Societies or individual tappers under "Tree for Tappers Scheme" under a licence to be ordinarily granted for a period of five excise years.

12. Rule 5 inter alia prescribed procedure for grant of licence, fixation of rentals etc. Rule 8 deals with selection of premises and under Rule 9 sales shall be conducted within the licenced premises. Rule 12 prohibits sale of any intoxicant other than toddy in the licenced shops. Rule 16 prohibits adulteration of toddy and Rule 27 prescribed detailed procedure for drawal of the samples. As Rules 16 and 27 are very relevant in the context of the present adjudication, it is apposite to reproduce them hereunder:

16. Adulteration of toddy prohibited:

Toddy which is sold or offered for sale in the ship shall be unadulterated. The licensee shall not vary or manipulate the intoxicating quality or strength of toddy either by mixing any foreign ingredient or otherwise. The licensee shall not keep within the premises of the shop any material injurious to health, which may be used for adulteration of toddy.

Explanation: Mixing of sugar in toddy is permissible.

27. (1) Drawal of the samples:

Any prohibition and Excise Officer, not below the rank of Sub-Inspector of Prohibition and Excise or Food Inspector appointed under the prevention of Food Adulteration Act, 1954, shall be competent to inspect at any time and to take samples from the toddy possessed by the licensee or any other person, for the purpose of analysis. Such officer shall take three

(3) samples in the presence of the licensee or his agent or other person in charge of the licenced premises or who is found selling toddy in the said premises, after conducting a panchanama. The samples shall be sent to the Court having jurisdiction with a requisition to send, one of the samples expeditiously to the chemical examiner of the Prohibition and Excise Department having jurisdiction in the region, in which licenced premises are situated or to any independent laboratory as instructed by the Commissioner for chemical examination. If the sample sent to the chemical examiner/laboratory is damaged, in transit or otherwise before the completion of the analysis, the Court may be requested by the concerned officer to send a second sample to the chemical examiner/ laboratory. If the licensee desires that the sample should be sent for analysis to an independent laboratory he may apply to the Prohibition

and Excise Superintendent within three (3) days of the drawal of sample. In case, where licensee or any one of his Now karnama holder was not present at the time of taking of sample, the licensee may apply to the concerned Prohibition and Excise Superintendent within seven (7) days from the date of communication of drawal of sample. The application should be accompanied by a demand draft for an amount sufficient to cover the analysis charges. If no such application is filed within the requisite time limit the licensee shall not be entitled to seek analysis thereafter. On receipt of the application within the time and with requisite demand draft, the concerned officer shall request the court to send a sample to the independent laboratory;

Provided that any adverse analysis report will constitute sufficient cause for the purpose of exercising the power u/s 31 of the Act, by the authority granting licence or permit to safeguard the public health.

Provided further that the officer requesting the Court to send a sample to an independent laboratory on the application of the licensee has to indicate the name of the independent laboratory to the Court.

Explanation: Independent laboratory means any laboratory over which the Government of Andhra Pradesh has no control.

(2) Manner of Packing, Sealing, Labeling and Addressing the Samples:

All sample of toddy taken under Sub-rule (1) shall be packed, fastened and sealed in the following manner, namely:

(a) The stopper shall first be securely fastened so as to prevent relevant leakage of the contents in transit.

(b) The bottle, jar or other container shall then be completely wrapped in fairly strong thick paper. The ends of the paper shall be nearly folded in and affixed by means of gum or other adhesive.

(c) A proper slip of the size that goes round completely from the bottom to top of the container bearing the signature and code of the inspecting officer, shall be pasted on the wrapper, the signature or the thumb impression of the person from whom the sample has been taken being affixed in such a manner that the paper slip and the wrapper both carry a part of the signature or thumb-impression:

Provided that in case, the person from whom the sample have been taken refuse to affix his signature or thumb-impression, the signature or thumb-impression of the witnesses, shall be taken in the same manner;

(d) The paper cover shall be further secured by means of strong twine or thread both above and across the bottle, jar or other container, and the twine or thread shall then be fastened on the paper cover by means of sealing wax on which there shall be atleast four distinct and clear impressions of the seal of the sender, of which one shall be at the top of the packet, one at the bottom and the other two on the body of the packet. The knots of the twine or thread shall be covered

by means of sealing wax bearing the impression of the seal of the sender.

(3) Manner of Dispatching the Samples:

The samples after following procedure laid down in Sub-rule (2) shall be forwarded to the Court as specified in Sub-rule (1) immediately after the drawal of the samples but not later than the succeeding day by any suitable means. A copy of the specimen impression of the seal, used to seal the sample shall be sent to the chemical examiner separately by registered post or delivered to him or to any person authorized by him.

(4) Contents of one or more similar sealed containers having identical labels to constitute the quantity of a sample:

Where toddy is sold or stocked for sale or for distribution in sealed containers having identical labels of declaration, the contents of one or more such containers as may be required to satisfy the minimum quantity necessary for conducting analysis as deemed sufficient by the chemical examiner shall be treated as part of the sample. The quantity of sample sent for analysis shall be considered as sufficient unless the chemical examiner reports to the contrary.

(5) Spot Test by Prohibition and Excise Officers:

It shall be lawful for an officer of and above the rank of Prohibition and Excise Sub-Inspector to subject the toddy or any other substance that is available in the licenced premises or in its vicinity to chemical examination by a test conducted on the spot in order to find out prima facie whether the toddy has been adulterated with drugs or chemicals in order to enhance its intoxicating quality.

Provided that it shall be the responsibility of the licensee to report forthwith in the nearest Prohibition and Excise Station any possession storage or sale of toddy by unauthorized persons within the area/locality where he holds licence.

13. Rule 37 authorizes any Prohibition and Excise Officer not below the rank of Sub-Inspector to enter and inspect the shop and examine licence, measure the toddy etc. It also obligates the licensee to furnish the necessary receptacles at the time of inspection for the measurement of toddy and also make available inspection book in Form TS4 for recording notes of inspection.

14. Rule 38 empowers the officer of the Prohibition and Excise Department, who is competent, to inspect, seize or prohibit toddy from being sold when he found the same unfit for human consumption or to have been adulterated or diluted in any manner. He is also empowered to destroy such toddy on the spot, after duly following the procedure for drawal of samples.

15. Rule 39 envisages cancellation of licence either for default of payment of dues or for the licensee indulging in adulteration. The first proviso to the said Rule, however, permits the Toddy Tappers Cooperative Societies to disqualify the members of the Managing Committee and remove them from the primary membership, if it was found indulging in adulteration for the first time and

thereafter the society may be continued with eligible tappers/members on being imposed fine as prescribed by the Commissioner of Prohibition and Excise. Under the second proviso, if the society is found indulging in adulteration for the second time, the toddy shop licence can be cancelled after following due procedure. It further provided that if there are any eligible tappers in such society after cancellation of shop licence of the society, the licence may be granted under tree for tapper scheme and the members of the Managing Committee will be disqualified in getting any licence under the Rules.

16. Part IV of the Rules deals with the provisions relating to tapping of trees, which include making available excise trees for tapping to the societies, sale of toddy drawn from the trees alone, conditions, subject to which the licensee shall tap excise trees, allotment of excise trees, technical specification of toddy etc.

17. Licence for the retail sale of toddy is issued in Form TS.1. The Form contains five conditions. Condition No. 2 prescribed that the licence is subject to special and general conditions relating to the sale of toddy and other rules and orders, which are in force and also the rules and orders if enforced after issue of the licence from time to time. Condition No. 3 made the licence subject to cancellation or suspension, at will by the Commissioner of Excise.

18. Form TS.2 prescribed standard form of counterpart agreement for lease of right to sell toddy in retail. The Form prescribes that the licensees should abide by all the special and general conditions applicable to retail sale of toddy, all the provisions of the Act and the conditions laid down in the 2007 Rules and other conditions relating to tapping of trees and sale of toddy that are existing and which may be amended from time to time.

19. Section 31 of the Act empowers the licence granting authority to cancel or suspend licence for the reasons envisaged in Clauses (a) to (e) of Section 31 (1), which "are reproduced hereinbelow:

- (a) if any duty or fee payable by the holder thereof is not duly paid; or
- (b) in the event of any breach by the holder thereof or by any of his servants or by any one acting on his behalf with his express or implied permission, of any of the terms and conditions thereof; or
- (c) if the holder thereof or any of his servants or any one acting on his behalf with his express or implied permission, is convicted of any offence under this Act; or
- (d) if the holder thereof is convicted of any cognizable and non-bailable offence or of any offence under (the Narcotics Drugs and Psychotropic Substances Act, 1985) or under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, or under the Trade and Merchandise Marks Act, 1958, or u/s 481, Section 482, Section 483, Section 484, Section 485, Section 486, Section 487, Section 488, or Section 489 of the Indian Penal Code or any offences punishable u/s 112 or Section 114 of the Customs Act, 1962 (irrespective of the fact whether such

conviction relates to the period earlier or subsequent to the grant of licence or permit; or)

(e) if the conditions of the licence or permit provide for such cancellation or suspension at will.

20. From the analysis of the provisions of the Act, Rules, the terms and conditions of the licence and conditions of counterpart agreement referred to above, it is quite evident that the power to suspend or cancel the toddy licences is vested with respondent No. 2, who is the licencing authority. Adulteration of toddy is one of the many reasons which entail in such suspension or cancellation of the licence. In case of adulteration, Rule 27 prescribes exhaustive procedure. As per the said procedure, three samples shall be drawn in the presence of the licensee or his agent or any other person in-charge of the licenced premises or who is found selling toddy in the said premises under a panchanama; the samples shall be sent to the Court having jurisdiction with a requisition to send one of the samples expeditiously to the chemical examiner of the Prohibition and Excise Department having jurisdiction in the region, in which licenced premises are situated or to any independent laboratory for chemical examination, as instructed by the Commissioner. Under the said provision, a right is vested in the licensee to request for sending one of the samples to an independent laboratory. Under the proviso to Rule 27(1), adverse analysis report will constitute sufficient cause for the purpose of exercising the power u/s 31 of the Act for suspension/cancellation of licence.

21. There is thus a definite procedure prescribed by the Rules for the competent authority to exercise the power of suspension/cancellation of the licence. Undisputedly, this procedure is not followed in any of the present cases before the impugned show cause notices were issued. It is not stated by the respondents either in the show cause notices or in their counter-affidavit that samples were drawn from any of the shops run by the petitioners and sent for chemical analysis report. The proposed action is not based on the factum of adulteration actually found indulged in by the petitioners, but on the assumption that it would not have been possible for the petitioners to sell toddy in excess of the actual yield without indulging in dilution/ adulteration. No provision of the Act or the 2007 Rules stipulated this method, which is followed by the respondents for arriving at such a conclusion. The respondents have given a go-by to the prescribed procedure and innovated a method, which is not envisaged either by the Act or the 2007 Rules. In the considered view of this Court, such a method is de hors the legal provisions and without sanction of law.

22. The law is well settled that if law requires a particular thing to be done in a particular manner, it must be done in that particular manner or not at all *Gujarat Electricity Board Vs. Girdharlal Motilal and Another*,

23. The learned Government Pleader for Prohibition and Excise submitted that since the Tappers Cooperative Societies are indulging in large scale adulteration,

which rendered it almost impossible for the inspecting officials to physically inspect each and every counter for finding out whether they indulged in adulteration or not, the Commissioner of Prohibition and Excise issued circular dated 23.11.2007 providing for a new method by which adulteration could be presumed. He placed reliance on Section 3(1) of the Act in support of his contention that the Commissioner is entitled to prescribe such procedure. I have carefully considered this submission and I have not felt persuaded to accept the same.

24. u/s 3(1), the Commissioner of Prohibition and Excise appointed by the Government by notification functions subject to the general or special orders of the Government and he shall be the chief controlling authority in all matters connected with the administration of the Act. This power conferred on the Commissioner is in relation to the matters pertaining to the administration of the Act. It therefore pre-supposes that while exercising his powers and discharging his functions, the Commissioner is bound to act in conformity with the provisions of the Act and the Rules made thereunder and not in derogation or independent of the same. The Commissioner is not vested with the power to prescribe any procedure, which is not contemplated by the Act or the Rules made thereunder.

25. I have carefully gone through circular dated 23.11.2007 issued by the Commissioner which reveals that in his opinion some officers of the department in collusion with the toddy contractors are indulging in corrupt activities, which are damaging the image of the department apart from affecting the Government revenue. The purported object of the new method appears to be to curb the menace of adulteration of toddy and to protect the real toddy tappers from the middlemen. While this Court appreciates the concern shown by the Commissioner for the rampant corruption in the department and large scale adulteration, I am afraid he is not empowered to prescribe a procedure, which is alien to the statutory provisions to arrest these evils. Apart from the question of sustainability or otherwise or the reasonableness of the method by which adulteration is presumed, the Commissioner cannot introduce a new procedure, which has no sanction of law. As noted, he is not delegated with power to make Rules or prescribe any procedure different from what is prescribed by the statutory provisions. Therefore, howsoever laudable the object in issuing the circular may be, the same is ultra vires the powers of the Commissioner. While there can be no restriction on the Commissioner to collect the data regarding the availability of the tapable trees, the actual yield of toddy in respect of each shop and the variation between the actual yield and sales, these statistics by themselves cannot be made the basis for drawing a presumption that the petitioners are indulging in adulteration. At best, they can be used to keep a watch over the shops where variation between the toddy drawn and toddy sold is noticed. Even in those cases, the respondents are bound to follow the procedure prescribed in Rule 27 before arriving at the conclusion that the particular society has indulged in adulteration.

26. Apart from the absence of legislative sanction for the procedure, which the respondents attempted to follow for detecting adulteration, the said method also suffers from lack of rational and reasonable approach. While no fault can be found in the procedure followed by the respondents up to the stage of enumeration of the trees, it is not shown by them either in the show cause notices or in the counter affidavit as to how and on what basis they have arrived at the actual quantity of sale by each of the societies. Unless each of the shops was inspected, the actual toddy received by the shops is verified and sales statistics are collected, the respondents cannot safely conclude that there is variation between the toddy drawn and toddy sold. Neither in the show cause notice, the abovementioned procedure is stated to be followed nor it is pleaded in the counter-affidavit that with reference to each of the shops such a procedure is followed. Therefore, the very assumption on which the show cause notices were issued, namely, that there is variation between the toddy drawn and the toddy sold is not based on a full proof data collected in the presence of the licensees or their authorized agents.

27. Ordinarily, this Court will not interfere at the stage of show cause notice while exercising its writ jurisdiction under Article 226 of the Constitution of India. But in these cases this Court has no option other than interdicting the proposed action envisaged in the show cause notices, because the whole basis on which action is initiated is without the sanction of law and ultra vires the powers of the respondents. Therefore, all the show cause notices impugned in this batch of writ petitions are quashed.

28. The writ petitions are accordingly allowed.

29. As a sequel to disposal of the writ petitions, in the manner indicated above, the respective WPMPs filed in this batch of cases stand disposed of.