

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 6TH DAY OF FEBRUARY 2015/17TH MAGHA, 1936

WP(C).No. 3616 of 2015 (B)

PETITIONER(S):

**1. THOMAS GEORGE, MANAGING PARTNER,
HOTEL ZION, KOZHENCHERY,
PATHANAMTHITTA DISTRICT.**

**2. MARY KURIAN, MANAGING PARTNER,
HOTEL PARK, KOZHENCHERY,
PATHANAMTHITTA DISTRICT.**

**BY ADVS.SRI.THOMAS ABRAHAM,
SMT.MERCIAMMA MATHEW,
SRI.V.RENJITH KUMAR,
SRI.ASWIN.P.JOHN.**

RESPONDENT(S):

**1. STATE OF KERALA,
REPRESENTED BY ITS CHIEF SECRETARY,
GOVERNMENT OF KERALA, SECRETARIAT,
THIRUVANANTHAPURAM-695 001.**

2. COMMISSIONER OF EXCISE, TRIVANDRUM-695 001.

3. DEPUTY EXCISE COMMISSIONER, PATHANAMTHITTA-689 001.

4. DISTRICT COLLECTOR, PATHANAMTHITTA-689 001.

**5. DISTRICT SUPERINTENDENT OF POLICE,
PATHANAMTHITTA-689 001.**

**6. THE MALABAR MAR THOMA SYRIAN CHRISTIAN
EVANGELISTIC ASSOCIATION, REPRESENTED BY IT'S
GENERAL SECRETARY, THIRUVALLA - 689 101.**

**R1 TO R5 BY GOVT. PLEADER SMT.C.K. SHERIN.
R6 BY ADVS. SRI.SURIN GEORGE IPE,
SRI.M.V.BIPIN.**

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 06-02-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

rs.

APPENDIX

PETITIONER'S EXHIBITS:-

- EXT.P1 - TRUE COPY OF THE PROHIBITION ORDER BEARING DATED 02-02-2015.
- EXT.P2 - TRUE COPY OF THE JUDGMENT DATED 16-02-2005 IN WP(C).NO. 5187/2005.
- EXT.P3 - TRUE COPY OF THE REPRESENTATION DATED 03-02-2015 SUBMITTED BY THE PETITIONERS BEFORE THE RESPONDENTS.
- EXT.P4 - TRUE COPY OF THE ORDER DATED 04-07-2008 IN CONTEMPT OF COURT CASE NO.1210/2006.
- EXT.P5 - TRUE COPY OF THE CIRCULAR ISSUED BY THE CHIEF SECRETARY OF THE GOVERNMENT OF KERALA.
- EXT.P6 - TRUE COPY OF THE INTERIM ORDER DATED 20-02-2006 IN WP(C).NO. 4987 OF 2006.
- EXT.P6(A) - TRUE COPY OF THE JUDGMENT DATED 09-02-2007 IN WP(C).NO. 3444 OF 2007.
- EXT.P6(B) - TRUE COPY OF THE JUDGMENT DATED 06-02-2008 IN WP(C).NO. 4304 OF 2008.
- EXT.P6(C) - TRUE COPY OF THE INTERIM ORDER DATED 09-02-2009 IN WP(C).NO. 4185 OF 2009.
- EXT.P6(D) - TRUE COPY OF THE INTERIM ORDER DATED 07-02-2014 IN WP(C).NO. 3785 OF 2014.
- EXT.P7 TRUE COPY OF THE PROHIBITION ORDERS ISSUED BY THE 4TH RESPONDENT IN 2011.
- EXT.P7A TRUE COPY OF THE PROHIBITION ORDERS ISSUED BY THE 4TH RESPONDENT IN 2012.
- EXT.P7B TRUE COPY OF THE PROHIBITION ORDERS ISSUED BY THE 4TH RESPONDENT IN 2013.
- EXT.P7C TRUE COPY OF THE PROHIBITION ORDERS ISSUED BY THE 4TH RESPONDENT IN 2014.
- EXT.P7D TRUE COPY OF THE PROHIBITION ORDER NO.B5-45972/04 DATED 11/02/2005.

RESPONDENT'S EXHIBITS:-

NIL.

//TRUE COPY//

P.A TO JUDGE

rs.

C.R.

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 3616 of 2015

Dated this the 06th day of February, 2015

JUDGMENT

Maramon convention, a religious festival or gathering, is an annual affair, so is the filing of writ petitions by the 'affected' persons in that respect. As was the case on previous occasions, this year, too, the fourth respondent issued Exhibit P1 proceedings directing the petitioners and other hotel owners within a radius of one kilometre of the Maramon Convention area not to vend liquor from 08.02.2015 to 15.02.2015, i.e., during the convention. Ostensibly, the fourth respondent has issued Exhibit P1 proceedings invoking powers under Section 54 of the Abkari Act 'the Act' for brevity). Aggrieved thereby, the petitioners approached have this Court.

2. The learned counsel for the petitioners has straight away drawn my attention to Exhibit P2 judgment, rendered

by a learned Division Bench of this Court, to contend that this Court has already deprecated the attitude of the executive in invoking Section 54 of the Act mechanically without paying attention to the consequences flowing therefrom. The learned counsel has further submitted that, subsequently, when contempt proceedings were initiated based on Exhibit P2 judgment, this Court in Exhibit P4 judgment, dated 07.07.2008, expressed deep displeasure at the attitude of the District Collector in issuing orders, in the nature of Exhibit P1, at the very end, i.e., just a couple of days before the convention could begin, thereby trying to deny the affected persons right to challenge the orders appropriately. He has further submitted that in the light of Exhibit P4 judgment rendered by this Court, the Government issued Exhibit P5 circular detailing under what circumstances Section 54 of the Act could be invoked.

3. Drawing further attention to the interim directions and judgments given on various occasions by this Court in Exhibits P6 (a) to (d), the learned counsel would contend that on every occasion this Court has observed that the authorities cannot afford to pass orders interdicting the

rights of those persons who had the requisite license to carry on their business without actually appreciating the ground realities. In the end, summing up his submissions, the learned counsel would contend that even in the present instance Exhibit P1 was issued only on 03.02.2015 though the order would bear the date of 02.02.2015. According to him, not even a week's time has been given to the petitioners and other affected persons to lay challenge against Exhibit P1, and that it is in clear violation of Exhibit P1 judgment of this Court, as well as Exhibit P5 circular issued by the Government.

4. In further elaboration of his submissions, the learned counsel would contend that the convention is a pious gathering and that it is untenable to think that the participants in the convention would be inclined to consume liquor in violation of the religious tenets. According to him, Exhibit P1 was issued under a misconception, without any proper appreciation of the ground realities. In other words, it is the contention of the learned counsel that Exhibit P1 is a product of non-application of mind, required to be set aside.

5. *Per contra*, the learned Government Pleader has submitted that the fourth respondent issued Exhibit P1 proceedings based on the representation of the organisers of the religious convention. She has further submitted that the fourth respondent has in turn consulted the law enforcement agency of the District, i.e. the fifth and sixth respondents, and later, on an objective consideration of the issue, has taken a decision to enforce the ban on sale of liquor for eight days. According to her, it lies entirely in the discretion of the executive to take a decision with regard to enforcement of a ban in terms of Section 54 of the Act, and that this Court is ill-suited to sit in an appeal on the decision taken after examining all the issues involved therein. She has also brought to my notice a judgment dated 09.02.2011 in W.P. (C)No.3764/2011, the one filed, in fact, by the very petitioners herein. This Court, eventually, dismissed the writ petition upholding the proceedings issued under Section 54 of the Abkari Act.

6. In reply thereto the learned counsel for the petitioners has submitted that judgment dated 09.02.2011 had been appealed against, but later it was closed as

infructuous.

7. When I dictated the matter in the open Court up to this point, the learned counsel for the petitioners sought time to produce other materials to establish that the convention being an annual affair, the authorities have been issuing orders in a mechanical manner without applying their mind. Having produced certain material the very next day, the learned counsel for the petitioners has carried on his arguments in a spirited manner spanning across three consecutive days of varying durations.

8. The learned counsel for the petitioners, showing the orders issued by the fourth respondent in the previous years, has strenuously contended that all of them are verbatim but for the dates. Especially with reference to the interim order given by this Court last year concerning the convention held then, the learned counsel would contend that there was no law and order problem that year at all, despite this Court permitting the petitioners and other vendors in the vicinity to carry on with their trade. Though he has further contended that since 2012 there has been continuous judicial interdiction, interim though, of the orders passed by the

fourth respondent, the learned Government Pleader, however, has submitted on instructions that in 2012 and 2013 this Court refused to interfere with the orders passed by the Executive Magistrate.

9. To summarize the submissions of the learned counsel for the petitioners, it is to be stated that, every time, despite clear and cogent observations by this Court, the fourth respondent has been issuing the orders prohibiting the petitioners and other businessmen from carrying on their business in liquor without providing clear seven days' time. The other contention is that, to sustain Exhibit P1, there is no cogent material at the disposal of the fourth respondent, inasmuch as it is a routine and ritualistic order passed without any application of mind. The learned counsel has also laid heavy stress on the scope of Section 54 of the Abkari Act to underline that time and again this Court has observed that the power under Section 54 cannot be exercised for mere asking.

10. Heard the learned counsel for the petitioners and the learned Government Pleader for the respondents, apart from perusing the record.

11. The singular issue that presents itself for consideration in the writ petition is whether the fourth respondent has exercised powers under Section 54 of the Act, while passing Exhibit P1 order, after an objective consideration of the ground realities. In other words, whether Exhibit P1 can be termed as a speaking order on application of mind, as has been required under Exhibit P5 circular?

12. Initially, addressing the issue that last year when this Court stayed the operation of the order of the fourth respondent, no untoward incident occurred, I am inclined to observe that preventive measures cannot be a matter of statistics. Prevention of crime is not based on preponderance of probabilities or possibilities, but is based on zero tolerance. To quote a quotidian case, it can be stated that law enjoins a citizen from riding a motor-cycle without wearing a helmet, not that he meets with an accident the moment he goes on the street without wearing one; it is only to ensure that accidents never happen.

13. If a person having the requisite licence to carry on the business is prevented from exercising his right to

business under the mandate of any statute, if at all the said person has a grievance that he has been made to suffer any loss on that account, his remedy, at best, can be to seek the necessary compensation or remission, as the case may be. I am conscious of the fact that no lawful activity of a citizen can be prevented on a mere apprehension of law and order problem or breach of societal tranquility. States failure, if any, to maintain law and order cannot be an excuse to prevent a citizen from practicing his fundamental rights. I am afraid when it comes to the petitioners', time and again Courts have held that a right to carry on business in liquor is no fundamental right, but is only a privilege extended by the State on the principle of *res extra commercium*. Once the said privilege is withdrawn under any circumstance, with necessary statutory backing though, at best the petitioner can seek remission for the period the privilege stands withdrawn.

14. In fact, the learned counsel for the petitioners has placed reliance on **Kora Abraham v. State of Kerala and others** [2008 (1) KHC 894], wherein this Court has observed thus:

"5. The statutory duty of the police under S.149 of the Code of Criminal Procedure and S.29 of the Kerala Police Act 1961 to prevent the commission of cognizable offences, if the police are notified, is not a duty that can be washed off. Such empowerment of the police is as part of the police power of the State and it is part of the police duty to ensure that none takes the law into his hands...The state and the police cannot stand as mute spectators, if one exceeds his limit in the matter of exercising his fundamental right to freedom of expression in terms of the Constitution. Therefore, if the private respondents, in the process of holding the 'dharnas', lead to any situation where a cognizable offence is likely to be committed and if there is a reasonable apprehension that a cognizable offence is about to be committed, it is the bounden duty of the police to prevent the commission of such offences..."

15. I cannot have any quarrel with the legal proposition extracted above; however, the dictum was laid down in the context of a person exercising his fundamental rights under Article 19(1)(a) of the Constitution of India. A validly licensed toddy shop was objected to by certain private persons. When they staged *dharnas*, this Court has said that so long as they were peaceful, they could not be objected to. Eventually, as a result of the *dharnas*, the police recommended for the closure of shop *permanently*. In that context, this Court has held that the right cannot be denied at the threshold on a mere apprehension that it leads to a law and order problem. Any transgression in exercise of a

person's fundamental right can always be met with suitable remedial measures thereof. I fail to see, despite my best efforts, how the above ratio applies to the facts of the present case, for there can be no precedent without reference to the fact situation it is obtained under.

16. Even with regard to fundamental rights — though it is not the case here — short of total abrogation or obliteration, a right under Article 19(1) of Constitution of India is always subject to reasonable restriction. The position with regard to trading in a substance like liquor is much less defensible on the ground of unreasonable restriction.

17. At any rate, once a competent authority forms an informed opinion and thereby comes to a conclusion, after considering all the material at his disposal, that to maintain law and order or to preserve peace and tranquility in the society, he is required to take certain measures, that subjective satisfaction, indeed, may not be disturbed by this Court, unless it has got compelling reasons to do so. An executive, who is best suited to have hands on assessment of a situation, should be given sufficient play at the joints so that the administration can go on unhindered. An opinion is

an opinion, so long as it is not outrageously chimerical, offending the *Wednesbury's* unreasonableness. There is no irrefragability to any opinion, which can be genuinely doubted or differed from, but such doubt or difference cannot dethrone it from the pedestal of acceptability. In fact, this Court has tellingly observed in **Aneesh Kumar v. District Collector**, [2012 (2) KLT 91], thus:

"9. The statutory requirement contemplated under 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...*"

(emphasis added)

18. Recently, a learned Division Bench of this Court in an unreported judgment dated 09.05.2014 in W.A. No. 673 of 2014 reiterated the same reasoning holding that once the

District Collector is of the opinion that there are chances of a law and order situation arising and that, to prevent such instances, it is necessary to prohibit the sale and consumption of liquor during a particular period, the opinion of the executive cannot be dismissed outright as unreasonable and untenable.

19. On a consideration of the totality of circumstances, I am of the considered opinion that Exhibit P1 cannot be held to be unreasonable, much less arbitrary. In the facts and circumstances, this Court regrets its inability to persuade itself to hold that Exhibit P1 is a product of non-application of mind or *ultra vires* of the third respondent with reference to Section 54 of the Act.

20. Nevertheless, it is noted with definite displeasure that despite repeated directions from this Court, the authorities have never chosen to adhere to the time frame fixed by this Court in Exhibit P2 judgement, i.e., issuing a notice sufficiently in advance — at least by maintaining a clear gap of seven days. In the present instance too, the notice is said to have been served on 3rd or 4th of this month, thereby leaving hardly any time for the petitioners to pursue

their remedies, if any, against the order. Indeed, the petitioners had to take the pains of making a mention before this Court to have an out of turn hearing of the matter. I expect, not unreasonably, the authorities to take note of this and ensure in future that they abide by the judicial directive of this Court in Exhibit P2 judgment.

21. It is further made clear that, if the petitioners suffer any adverse financial consequences in the face of Exhibit P1 order, which seems to be obvious on account of the ban imposed for a particular period, they are at liberty to take appropriate remedial steps in that regard seeking remission or any other relief.

With the above observations, this Court disposes of the writ petition. No order as to costs.

**DAMA SESHADRI NAIDU
JUDGE**

DMR/-