

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 26TH DAY OF FEBRUARY 2015/7TH PHALGUNA, 1936

WP(C).No. 5925 of 2015 (M)

PETITIONER :

**VANJU KAMAL,
PROPRIETOR, HOTEL HILLWAY, KADAKKAL,
RESIDING AT MANJU VILLA, KADAKKAL P.O.,
KOLLAM 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 SECRETARY FOR TAXES DEPARTMENT,
GOVERNMENT OF KERALA, SECRETARIAT,
TRIVANDRUM. PIN-695 001**
- 2. COMMISSIONER OF EXCISE, TRIVANDRUM-695 001**
- 3. DEPUTY COMMISSIONER OF EXCISE, KOLLAM-691 001**
- 4. DISTRICT COLLECTOR, KOLLAM-691 013**
- 5. DISTRICT POLICE CHIEF,
KOLLAM RURAL, KOTTARAKKARA-691 501**
- 6. CIRCLE INSPECTOR OF POLICE,
KADAKKAL. PIN-691 503**

R1 TO R6 BY GOVERNMENT PLEADER SMT. K.A.SANJEETHA

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 26-02-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

WP(C).No. 5925 of 2015 (M)

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1. TRUE COPY OF THE INTERIM ORDER DATED 08.03.2006 IN WP(C) NO.6923/2006.**
- EXHIBIT P2. TRUE COPY OF THE ORDER DATED 02.03.2007 IN WP(C)NO.7026/2007.**
- EXHIBIT P3. TRUE COPY OF THE JUDGMENT DATED 07.02.2008 IN WP(C)NO.4477 OF 2008.**
- EXHIBIT P4. THE TRUE COPY OF THE JUDGMENT DATED 05.03.2009 IN WP(C) NO.5748 OF 2009.**
- EXHIBIT P5. THE TRUE COPY OF THE JUDGMENT DATED 16.02.2005 IN WP(C) NO.5187/2005.**
- EXHIBIT P6. THE TRUE COPY OF THE CIRCULAR DATED 29.04.2009 ISSUED BY THE CHIEF SECRETARY.**
- EXHIBIT P7. THE TRUE COPY OF THE PROHIBITION ORDER DATED 01.03.2014 ISSUED BY THE 4TH RESPONDENT. WITH TRANSLATION**
- EXHIBIT P8. THE TRUE COPY OF THE REPRESENTATION DATED 21.02.2015 SUBMITTED BY THE PETITIONER BEFORE THE RESPONDENTS.**

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.A.TO.JUDGE

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DAMA SESHADRI NAIDU, J.

W.P.(c) No. 5925 of 2015

Dated this the 26th day of February, 2015

JUDGMENT

The petitioner, the Proprietor of a Hotel, has filed the present writ petition assailing Exhibit P1 order issued by the fourth respondent, the District Collector, prohibiting the petitioner and other hoteliers in the vicinity from vending liquor on 28.02.2015 on the occasion of Thiruvathira Festival to be held in Kadakkal Devi Temple in Kollam District.

2. The learned counsel for the petitioner has submitted that Exhibit P1 order prohibiting the petitioner and others from vending the liquor on 28.02.2015 was passed by the fourth respondent very mechanically, without any application of mind. The learned counsel has further submitted that this Court, through Exhibit P5 judgment, has elaborately set out the conditions under which the prohibitory orders could be passed interdicting the right of business of any citizen.

3. The learned counsel has also brought to my notice Exhibit P6 circular dated 29.04.2009 issued by the Government, ostensibly, based on the directions contained in Exhibit P5 judgment of the learned Division Bench of this Court. Reading out from the said circular the conditions under which prohibitory orders could be passed, the learned counsel has strenuously contended that the fourth respondent is not only bound by the judicial directives, but also the policy decisions of the Government, of which he is a component.

4. In elaboration of his submissions the learned counsel has submitted that the fourth respondent ought to have issued Exhibit P1 order at least seven days prior to the date of festival. According to him, the notice was said to have been issued on 20.02.2015, but it actually was served on the petitioner only on 21.02.2015, beyond office hours. According to him, from 21.02.2015 to 28.02.2015 there is no clear seven days' time as has been mandated in Exhibit P5 judgment as well as Exhibit P6 circular of the

Government.

5. Touching upon the other contentions imposed in paragraph 3 of the circular, the learned counsel has also contended that there shall not be any order of interdiction on vague grounds, that the decision is to be based on subjective and objective considerations of the totality of the circumstances and that unless there is cogent material to show that on account of opening liquor shops on that particular day or occasion there is a distinct likelihood of breach of peace and law and order situation, the fourth respondent cannot exercise his power of interdicting petitioner's business for mere asking.

6. The learned counsel has also contended that the petitioner's shop is situated about 1.75 Kms from the place of the Temple, where the festivities are to take place. Eventually, the learned counsel has urged this Court to set aside Exhibit P1 order with a consequential direction to allow the petitioner to carry on his business.

7. Per contra, the learned Government Pleader has submitted that the petitioner's property is situated about

1Km away from the Temple. She has drawn my attention to Exhibit P1 and has submitted that on an earlier occasion three murders occurred on the day of festivities, two of them being in the Wine and Beer parlours. In elaboration of her submissions, the learned Government Pleader has stated that the fourth respondent has taken into account all eventualities; only after consulting the District Police Administration, he came to the conclusion of passing Exhibit P1 order.

8. The learned Government Pleader has also submitted that the order was passed on 20.02.2015, and thereby the petitioner was given sufficient time to take remedial steps in that regard. In other words, it is her contention that the very purpose of providing seven days' time before the beginning of the festivities is to ensure that the affected person has been left with sufficient time to test the validity of the order in question, if the said affected person chooses to.

9. The learned Government Pleader has further stressed that the imposition of seven days' time is not an invariable principle and it is only to serve the purpose of

enabling the affected persons to have recourse to any statutory or legal remedies. According to her, from 21.02.2015 to 28.02.2015 there is a clear seven days' time. Even otherwise, as a matter of alternative submission, the learned Government Pleader has contended that insofar as the condition of time gap is concerned, there is substantial compliance.

10. Adverting to the other conditions incorporated in Exhibit P6, the learned Government Pleader has submitted that all of them have been taken into account by the fourth respondent while issuing Exhibit P1. In this regard, she has placed reliance on an unreported judgment of this Court dated 06.02.2015 in W.P. (C) No.3616/2015. In expatiation of her submissions, the learned Government Pleader has submitted that, though the said judgment has been appealed against, so far the learned Division Bench has not interfered with it, not even by an interim direction.

11. The learned Government Pleader has submitted that this Court, in the said judgement referred to above, has considered an identical issue in the face of similar

submissions made by the respective counsel. According to her, since all the decisions referred to by the learned counsel for the petitioner in the present instance have already been considered in the judgment dated 06.02.2015, what holds the filed presently is the judgment in question, unless and until it is set aside by a Bench of larger strength. Summing up her submissions, the learned Government Pleader has urged this Court to dismiss the writ petition.

12. Indeed, it is a case of *déjà vu*. The learned counsel representing the petitioner has earlier extensively argued another case under similar circumstances in W.P.(C) No.3616/2015, advancing identical submissions. On 06.02.2015, this Court, *per me*, rendered a judgment upholding the order of the District Collector therein. In the course of rendering the judgment, this Court considered all the judgments that were available on the issue up to that point of time, including Exhibit P5 judgment of the learned Division Bench, as well as Exhibit P6 circular issued by the Government.

13. Under almost identical circumstances, this Court in

W.P.(C) No.3616/2015 has observed as follows:

"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."

14. Having extracted *in extenso* the judicial findings in the judgment under reference, I am of the considered opinion that in Exhibit P1 there is sufficient material, being cogent too, to uphold the decision of the fourth respondent concerning imposing a ban on one particular day, i.e. 28.02.2015. A perusal of Exhibit P1 makes it manifestly clear that on earlier occasion three murders occurred on the same day of festivities, two of them taking place in Beer and Wine parlours.

15. Indeed, the learned counsel for the petitioner has contended that the said incident happened in 1990. According to him, subsequently much water has flowed under the bridges. This Court, however, cannot brush aside the findings of the fourth respondent arrived at on his subjective satisfaction, essentially based on the material placed at his disposal by the District Administration, including the police force. More pertinently, the impugned proceedings cannot be interdicted on a mere premise that the incident of multiple murders took place about 15 years ago. As has been observed in the judgment dated 06.02.2015 in W.P. (C) No.3616/2015, this Court cannot wait for another calamity to happen so as to justify the imposition of ban. Indeed, with regard to accidents and calamities, the approach of the administration ought to be that of zero tolerance, rather than that of statistical satisfaction by way of preponderance.

16. Under these circumstances, I do not find any merit in the contention of the petitioner *vis-a-vis* Exhibit P1, which in my considered view cannot be found fault with, much less

judicially interdicted.

With the above observation, this writ petition is dismissed. No order as to costs.

**DAMA SESHADRI NAIDU
JUDGE**

DMR/-