

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

MONDAY, THE 9TH DAY OF NOVEMBER 2015/18TH KARTHIKA, 1937

WP(C) .No. 9086 of 2015 (I)

PETITIONER:

M/S.HOTEL VIJAYA PALACE AGED 64 YEARS
THATTASSERY, CHAVARA, KARUNAGAPALLY
KOLLAM REPRESENTED BY ITS MANAGING
PARTNER SRI.VIJAYAN PILLAI.

BY ADVS.SRI.BECHU KURIAN THOMAS
SRI.PAUL JACOB (P)
SRI.ENOCH DAVID SIMON JOEL
SRI.S.SREEDEV
SRI.RONY JOSE
SRI.GEORGE A.CHERIAN

RESPONDENT(S) :

1. STATE OF KERALA
REPRESENTED BY THE SECRETARY
DEPARTMENT OF EXCISE GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM - 695 001

2. COMMISSIONER OF EXCISE
COMMISSIONERATE OF EXCISE
THIRUVANANTHAPURAM - 695 001

3. DEPUTY COMMISSIONER OF EXCISE
KOLLAM-691001.

4. DISTRICT MAGISTRATE
COLLECTORATE, KOLLAM - 691 001.

R BY SENIOR GOVERNMENT PLEADER SRI. R. PADMARAJ

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09-
11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 9086 of 2015 (I)

APPENDIX

PETITIONER(S) ' EXHIBITS

EXT.P1 - TRUE COPY OF THE FL-3 LICENSE FOR THE PERIOD 2014-15 ISSUED TO THE PETITIONER.

EXT.P1(a) - TRUE COPY OF THE PANCHAYAT LICENCE DTD.21-04-2014 VALID TILL 31-3-2015

EXT.P1(b) - TRUE ENGLISH TRANSLATION OF EXT.P1(a)

EXT.P2 - TRUE COPY OF THE ORDER DTD.12-3-2015 ISSUED BY THE 4TH RESPONDENT

EXT.P2(a) - TRUE ENGLISH TRANSLATION OF EXT.P2

EXT.P3 - TRUE COPY OF THE JUDGMENT DTD.23-03-2013 IN WPC.8115/2013 ON THE FILES OF THIS HON'BLE COURT.

RESPONDENT(S) ' EXHIBITS : NIL

[CR.]

P.R. RAMACHANDRA MENON

&

BABU MATHEW P. JOSEPH, JJ.

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W.P(C) No. 9086 of 2015

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Dated, this the 9th day of November, 2015

JUDGMENT

Ramachandra Menon, J.

Whether the power of the District Magistrate under Section 80 (1) (h) (v) of the Kerala Police Act, 2011 could be invoked to close down a hotel with FL3 licence as a temporary measure in connection with the festival in a nearby temple, instead of invoking the power and procedure under Section 54 of the Kerala Abkari Act, is the question to be considered in this matter. The decision rendered by a learned Judge of this Court in W.P.(C) Nos. 2574 and 2575 of 2013 holding that the power and authority is simultaneous under both the Statutes to meet the situation or in other words, it is alternative, is doubted by another learned single Judge of this Court, thus causing the reference to be answered by this Court. The basis for the doubt expressed is that, according to the learned Judge who made the reference, power under Section 80 of the Kerala Police Act is

'legislative' and not administrative; unlike the power of the concerned authority under Section 54 of the Kerala Abkari Act, which is purely 'administrative'.

2. As rightly observed by the learned Judge while making the reference, the issue is quite 'academic' in so far as the cause of action mooted in the writ petition was already over and the situation has been remedied by the interim order passed by this Court while entertaining the writ petition. No further relief requires to be granted, but for the necessity to answer the question referred for consideration. However, in order to focus the issue on the legal question, the minimum reference to the factual sequence is necessary.

3. The petitioner was running a 3 star hotel under the name and style as 'Hotel Vijaya Palace', on the strength of Ext.P1 FL3 licence issued in the year 2014 - 2015 and Ext. P1 (a) licence issued by the local authority. While so, Ext. P2 order dated 12.03.2015 was issued by the 4th respondent banning the sale, purchase and distribution of liquor within a radius of 3 kms. on 24.03.2015 and 25.03.2015 in connection

with the annual festival of the Kottankulangara Devi Temple, Chavara, Kollam district. This was sought to be intercepted by filing the writ petition, contending that, no untoward incident had ever been reported during the conduct of the festival for the past several years; that the petitioner's hotel was situated more than 2 kms. away from the temple; that the impugned order was passed just as routine measure, without proper application of mind and that the same was issued in violation of the principle of 'audi alteram partem'.

4. During the course of hearing before the learned single Judge, it was pointed out that similar orders were being issued in connection with the temple festivals/Maraman convention/such other instances, just as a matter of course. Originally, said orders were being passed under Section 54 of the Kerala Abkari Act, that too, on the eve of the day on which the order was to be given effect to. This very much adversely affected the rights and interests of the parties concerned, particularly, when no opportunity was provided to contest the matter, establishing that no circumstance envisaged under

Section 54 of the Abkari Act was involved. It was being pursued as a short cut method, without taking any step to meet the law and order situation, if so necessitated, making a vague reference to the chance for accumulation of crowd/public and desire of the police/administration to have the liquor shops closed for the days in question. This caused huge loss to the persons like the petitioner, who had to pay nearly Rs.22 lakhs per year for obtaining the licence and further, no claim for remission was being entertained in respect of the closure of the shop, despite no fault on their part.

5. On raising the challenge on earlier occasions, it was being intercepted by this Court, alerting the authorities concerned as to the ingredients to invoke the power under Section 54 of the Abkari Act. The position was made clear by a Division Bench of this Court way back on 16.02.2005 in W.P. (C) No. 5187 of 2005 as well; also observing that, the intervention made therein was only in respect of the petitioner concerned, in view of the factual reasons noted therein. The

relevant portion of the said judgment was extracted by a learned Judge of this Court while rendering the judgment dated 05.03.2009 in W.P.(C) Nos. 5748 and 6149 of 2009. After setting aside the impugned order, confining the relief only to the petitioners therein, following the course pursued by the Division Bench as aforesaid, it was further observed that it was desirable to close down the liquor shops, when large number of persons assemble during festivals, for more than one reason, but it shall be in accordance with law, and that the Government was free to impose any such measure as a 'policy decision'. It was in the said circumstances, that the learned Judge directed to cause issuance of orders under Section 54 of the Abkari Act at least one week prior to the event. The observation in paragraph 7 in this regard reads as follows :

"7. I am also of opinion that it is desirable to close down liquor shops when large number of persons assemble for a festival for more than one reason. But when law prescribes a mode of closing licensed

liquor shops, orders in that regard can be passed only in accordance with that law, which has been succinctly laid down in the judgment of the Division Bench, interpreting Section 54. In fact, I find that the Division Bench had in that judgment categorically held that the Government can impose such restriction as a policy decision. I am unable to understand why the Government cannot impose such restrictions in public interest as a policy decision in that regard, on days of specified festivals or other functions. I am of opinion that the Government will do well to do that, at least now. I also direct that hereinafter orders under Section 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 by such orders. The Chief Secretary to the Government shall issue appropriate instructions to all District Collectors in the State to see that the above direction is strictly complied with by them."

6. Pursuant to the above judgment, the first respondent/State issued a Circular bearing No.

7497/A2/09/TD dated 29.04.2009 insisting strict compliance by the District Magistrates while invoking the power under Section 54 of the Abkari Act. The instructions as aforesaid, given under **clauses 'a to g'**, are as given below:

"(a) An order under Section 54 of the Abkari Act shall be passed at lest 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 by 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 under Section 54 of the coming year."

7. The main contention mooted before the learned single Judge, who made the reference, was that the routine intervention as a matter of course as done earlier virtually became impossible by virtue of the intervention made by this Court, followed by Circular dated 29.04.2009 issued by the Government. It was in the said circumstances, that as an alternative/substitute, a 'short cut device' was invented and an order like Ext. P2 was issued imposing temporary ban without notice/opportunity of hearing, with reference to power

under Section 80 (1) (h) (v) of the Kerala Police Act.

8. After making a comparative analysis of the above two provisions [Section 54 of the Abkari Act and Section 80 (1) (h) (v) of the Kerala Police Act], the learned single Judge observed that the power conferred upon the District Magistrate under Section 80 of the K.P. Act was rather '**legislative**' and not administrative. For exercising the legislative power, there was no question of any compliance of natural justice, but the function had to be discharged by the competent authority in the manner as provided under the Statue i.e. after consultation with the local authority and also the District Police Chief. After making the regulations to meet the situation, it has necessarily to be published as specified, which is of general in nature and not targeted against a particular shop or individual or as a temporary measure. According to the learned Judge, such power could not have been exercised to impose a temporary ban to close down an abkari shop or hotel with FL3 licence, referring to the temple festival as in the instant case, that too, without

adhering to the procedure/complying with the formalities to make it valid and sustainable. It was also observed that, if the power under both the Statutes was concurrent/alternative/substitute for any reason, the 'principle of lenity' had to be applied and if so, it was for the District Magistrate to have acted under Section 54 of the Abkari Act, which has procedural safeguard engrafted to it, by virtue of judicial intervention of this Court and the Circular issued by the Government in this regard. Accordingly, the reference was made on the following questions :

"(1) Whether the ratio laid down in *M/s. San Tourist Home & Another v. State of Kerala & Others* (W.P.(C)Nos.2574 & 2575 of 2013), that a District Magistrate can take recourse to either Section 80 of the Kerala Police Act, 2011 or Section 54 of the Abkari Act is correct, given the fact that Section 80 of the Kerala Police Act, 2011 is a secondary legislative provision not meant to be

a devise to circumvent the statutory safeguards available to a person under Section 54 of the Abkari Act, the Circular issued by the Government of Kerala, and also the judicial dictum laid down by this Court in various judgments concerning imperative requirement of observing the principles of natural justice before invoking Section 54 of the Abkari Act?

(2) If it were to be accepted that the District Magistrate could invoke either Section 80 of the Kerala Police Act, 2011 or Section 54 of the Abkari Act, is not the District Magistrate bound to act under Section 54 of the Abkari Act, which has the procedural safe guard engrafted to it, as can be seen from the Circular and also the judicial dictum of this Court, based on the Rule of Lenity?"

9. When the matter came up for consideration of this Court on 03.07.2015, it was heard in detail and this Court

found it necessary to add one more question to be answered in the reference which was formulated as;

"(3) whether Section 54 of the Abkari Act contemplate any "prior notice" or any opportunity of hearing to meet the objective ?"

The matter was heard elaborately in the above perspective as well.

10. To have an effective scrutiny, it is necessary to have a look at the relevant provisions under both the enactments, which are reproduced below :

Section 54 of the Abkari Act

"54. Closing of shop for the sake of public peace: It shall be lawful for the [District Magistrate] by notice in writing to the licensee, to require that any shop in which liquor or any intoxicating drug is closed at such times or for such period as he may think necessary for the preservation of the public peace.

If a riot or unlawful assembly is apprehended or occurs in the vicinity of any such shop, it shall be

lawful for any Magistrate, or for any Police Officer who is present, to require such shop to be kept closed for such period as may be necessary."

Section 80 of the Kerala Police Act.

"80. District Magistrate to make regulations.-

(1) The District Magistrate may in consultation with the Local Self Government and with the District Police Chief make and notify regulations, from time to time, in any local area, as he deems fit, for the following purposes:-

(a) preventing any activity, damaging, defiling or destroying of public property, or endangering public hygiene or environment or defiling water bodies and water sources;

(b) preventing the dumping of any material in any public place other than at such times and places specified by the competent authority including the Local Self Government;

(c) controlling the movement, not in conformity with regulations specified in this regard, of any waste or hazardous materials through public streets and to or from houses and buildings on public streets, in order to ensure necessary hygiene;

(d) regulating the exposure or movement in any street of persons or animals suffering from contagious or infectious diseases, the carcasses of animals or human beings, or parts of such carcasses or waste from abattoirs or deadly biological or chemical products;

(e) regulating the construction, repair and demolition of buildings, platforms and other structures which may endanger the users of any street or public place;

(f) formulating and regulating the steps for co-ordination among Departments and between the Police and such Departments before undertaking any work on the streets for purposes such as provision for electricity, water, sewage, exchange of information, communication, removal, repairs, advertising, digging, separation etc. in a manner affecting the traffic, prior to commencement of such work so as to enable the Police to make suitable alternative arrangements during the period of such work and to reduce inconvenience caused to the public;

(g) making arrangements to ensure that owners

or occupiers of property, clean and disinfect their respective houses and surroundings and shifting the persons and animals deceased or suspected to be deceased, in order to prevent spreading of epidemic or contagious diseases;

(h) regulating, in order to prevent obstruction, inconvenience, annoyance, risk, danger, injury etc. to passers-by or to the residents in the vicinity,-

(i) activities relating to places of public resort;

(ii) arrangements relating to public safety in streets, public places and buildings in such places;

(iii) the blasting of rocks;

(iv) any construction, repair or maintenance work;

(v) any commercial activities.

(2) Every such regulation shall be published at the place where it is to be implemented and all persons concerned shall be liable to comply with the same."

11. Mr. Bechu Kurien Thomas, the learned senior counsel appearing for the petitioner, submits, with reference

to Sections 72 to 79 of the Kerala Police Act, that Section 80 of the Kerala Police Act stands on a different footing. When the proceedings under Sections 72 to 79 of the said Act are targeted against the individuals or organizations by specific orders, Section 80 is of general in character, which in fact is a departure from the other provisions. Under Section 80, so as to frame the regulations, it is very much obligatory for the District Magistrate to have a consultation with the Local Self Government and also with the District Police Chief. According to the learned counsel, the power in this regard is only to 'regulate' and that the same does not contemplate any prohibition. It is also contended that 'publication' of the regulation made is important and that such publication has necessarily to be in the 'gazette', to have any statutory force or atleast in a 'local daily' having wide circulation. It must be read as akin to the rule making power of the Government under Section 129 of the Act, which can be brought into force only by publication in the gazette. Reliance is sought to be placed on the decision rendered by the Apex Court in **Harla**

Vs. The State of Rajasthan (AIR 1951 SC 467) as to what the publication means (paragraph 8). With regard to the scope of publication, reference is made to the verdict of the Apex Court in **State of Maharashtra Vs. Mayer Hans George [AIR 1965 SC 722]** (paragraph 45) as well. The learned counsel submits, with regard to question/point No.3 added by this Court, to be answered in the reference, that, even if the Statute does not say anything as to opportunity of hearing/notice, the principles of natural justice mandates the same, which has to be read into it by virtue of the ruling rendered by the Apex Court in **Swadeshi Cotton Mills Vs. Union of India [AIR 1981 SC 818]**, except where extreme urgency is involved/established.

12. The learned Government Pleader sought to sustain Ext. P2 order and submitted that the circumstances contemplated under Section 80 of the Kerala Police Act is also to meet the exigencies as in the instant case and that the Executive Magistrate was well within his competence to have invoked the said power. It stated that the provision only

contemplates 'publication in the area', which in fact has been done and as such, there cannot be any grievance under this head. No publication in the 'gazette' or a 'local daily' is envisaged under the Statute and hence the precedents cited across the Bar are of no application to the case in hand.

13. Section 80 of the Kerala Police Act obviously deals with the power of the District Magistrates to make regulations. The power to regulate will naturally involve the power to prohibit as well, in appropriate cases, to the appropriate extent. But this power has to be exercised by the District Magistrates **in consultation with the Local Self Government and the District Police Chief.** The consultation with the Local Self Government cannot be meant as to communication/correspondence or consultation with the 'Secretary' of the Local Self Government. The matter has to be considered by the 'Representatives of People' in the Local Self Government and their view has to be communicated to the District Magistrate through the Secretary, to be considered while framing the regulations. This is in addition to

the consultation with the District Police Chief. After completion of these formalities, the regulations are to be framed by the District Magistrate, as the District Magistrate deems fit for meeting the purposes as specified under clauses 'a to h' of S.80 (1) of the Police Act from time to time and it has necessarily to be published in the area where it is to be implemented; as envisaged u/s 80(2) of the Act, so as to make all the persons concerned liable for complying with the same. So, the process involves different stages/steps as to the systematic activity which visualizes the legislative intent behind it, to the extent such legislative power is vested upon the District Magistrate, as conferred by the Statute (which has already been notified in the gazette). As such, the power of Executive Magistrates under Section 80 of the Kerala Police Act is within the limited sphere of legislation for meeting the purpose/object of the Statute and it stands on a different pedestal, than the administrative power being exercised by the District Magistrate. We are in full agreement with the learned single Judge who made the order of reference holding

that the power under **Section 80** of the K.P. Act is '**legislative**'; whereas the power under **Section 54** of the Abkari Act is rather '**administrative**'.

14. Having found that the power under Section 80 of the K.P. Act is 'legislative', the question is whether Ext. P2 has been issued in full compliance with the mandate of the provision. Ext. P2 reveals that, in connection with temple festival, the temple administrative committee had requested the District Magistrate to impose 'liquor ban' within the radius of 3 kms from the temple, in connection with the temple festival on 24.03.2015 and 25.03.2015, lest there should be any threat to the law and order situation. This has been readily acceded to by the District Magistrate, after calling for a report from the Secretaries of the Chavara and Neendakara Panchayats, apart from the report sought for and obtained from the City Police Commissioner, Kollam and the authorities of the Excise and the Revenue Departments; in turn ordering closure of liquor shops within a radius of 3 kms. It is true that the same is not addressed or targeted against the petitioner

alone, but is of a general nature. However, the fact remains that it cannot be considered as 'regulation', envisaged under Section 80 of the Kerala Police Act in exercise of such legislative function. The petitioner cannot insist that publication has to be effected in a gazette or local daily, as sub section 2 of Section 80 is quite categorical that such publication is to be effected at the place where it is to be implemented; so as to regulate the ongoing activity. The function that has to be discharged by the District Magistrates under Section 80 of the Kerala Police Act is different from the power to pass administrative order to meet the exigencies under Section 54 of the Kerala Abkari Act. This being the position, it was not at all correct or proper for the District Magistrate to have invoked the power under Section 80 (1) (h) (v) of the Kerala Police Act to have issued Ext.P2 and as such, the said proceedings cannot have any legal backing. Since the temple festival is already over and Ext. P2 order was intercepted by this Court by passing an interim order on 24.03.2015, no further relief does require to be extended to

the petitioner.

15. However, it has to be considered whether the District Magistrate/competent authority is having power to meet the need of the hour, if at all any riot or threat to the law and order situation is resulted or is apprehended, with reference to the power under Section 54 of the Abkari Act. The necessity to read the principles of natural justice into the provision, as ordered by a learned Judge of this Court vide the judgment dated 05.03.2009 in W.P.(C) Nos. 5748 and 6149 of 2009, led to issuance of the Circular dated 29.04.2009 by the Government as mentioned hereinbefore. But such proceedings, to be issued with a minimum gap of 'one week' prior to the event as ordered by the learned single Judge and as stipulated by the Government in the Circular, can only be in relation to the '**first limb**' of Section 54 of the Kerala Abkari Act. If there is any imminent danger or threat, the position is separately carved out under the '**second limb**' of Section 54 of the Abkari Act, whereby it is stipulated that, if any riot or unlawful assembly occurs or apprehended in the vicinity of any

such shop, it shall be lawful for any Magistrate, or for any police officer, who is present to require such shop to close down for such period as may be necessary. This is to meet the 'need of the hour' and denotes an emergent situation, where the principles of natural justice have to be given a 'gobye'. If issuance of prior notice is to be read into the 'second limb', the purpose of the Statute would be defeated, which cannot be the intention of the law makers. It is very much open for the Executive Magistrate to rise to the occasion, analyse and appreciate the situation and pass appropriate orders in accordance with law to promote the rule of law, meeting the law and order situation. This is more so, since, as observed by the Division Bench of this Court in the judgment dated 16.05.2005 in W.P.(C) 5187 of 2005, the said verdict shall not be read or understood as to preclude the District Magistrate to exercise the powers under Section 54 of the Abkari Act in future and that the same could be invoked, if the circumstances so warranted, subject to the rider as aforesaid.

15. In the above facts and circumstances, we make it clear that, in so far as the circumstance under the '**first limb**' of Section 54 of the Kerala Abkari Act is involved, the procedure as evolved by the Government as per the Circular dated 22.09.2014 shall be strictly complied with, giving a minimum of one week's notice; whereas in a case involving the '**second limb**', it is open for the District Magistrate or the concerned Police Officer present, to pass appropriate orders, to have the concerned shop/shops closed down for such period, as may be necessary, without any prior notice.

With the above observations, the reference stands answered and the writ petition stands closed.

Sd/-

**P. R. RAMACHANDRA MENON,
JUDGE**

sd/-

**BABU MATHEW P. JOSEPH,
JUDGE**

kmd

/True copy/

P.A. to Judge