SUPREME COURT OF INDIA

Kerala State Toddy Shop Contractors Association

Vs.

T.N. Prathapan

C.A. Nos. 8895-8896 of 2014

(Dipak Misra and Vikramajit Sen JJ.)

01.09.2014

JUDGMENT

DIPAK MISRA, J.

1. Leave granted. A batch of public interest litigation was filed before the High Court of Kerala at Ernakulam Under Article 226 of the Constitution of India highlighting the grievance that as per Rule 28A of Foreign Liquor (Compounding, Blending and Bottling), Rules 1975 (for brevity 'the Rules') framed under Kerala Abkari Act (for brevity 'the Act'), the licenced premises for sale of liquor in respect of the licences issued under the Rules are required to remain closed on the days specified in the Rules but the State of Kerala and its functionaries, in violation of Rule 28A, had issued orders to allow the sale of Indian Made Foreign Liquor ("IMFL" for short) on 1st of September, 2009 from the licensed premises which was not legitimate in law and totally unlawful.

2. As the factual matrix would uncertain, the High Court referred to Rule 28A of the Rules and took note of Section 71 of the Act and opined that unless Rules are amended, the Government is bound to direct the IMFL shops to be closed on 01.09.2009. At that juncture, the High Court took note of the prescription made Under Rule 7(11)(vii) of the Kerala Abkari Shops Disposal Rules, 2002 (for short, "the 2002 Rules) wherein a proviso has been incorporated in 2003 by virtue of which the toddy shops have been allowed to function on the first day of English calendar month. The High Court opined that the proviso appended to the said Rule is directly contrary to the main Rule and creates a discrimination between the sale

of IMFL and toddy shops and hence, the exemption granted under the proviso to 2002 Rules is discriminatory as there is no apparent rationale or logic for having different standards in respect of IMFL and toddy shops. Being of this view, the High Court issued a writ of Mandamus restraining the Respondent-State and its functionaries from departing or deviating from the existing ban of opening the licensed premises for the liquor as provided Under Rule 28A of the Rules, i.e. the ban prohibiting the first day of the English calendar month; 1st September, 2009. Quite apart from that, the High Court further directed the State Government to pass orders in case of toddy shops to remain closed on 1st September, 2009. The said judgment and order is under assail in the present batch of appeals by the Kerala State Toddy Shop Contractors Association and others.

3. We have heard learned Counsel for the parties and perused the record.

4. Rule 28A of the Rules reads as follows:

> "28A The licensed premises for sale of liquor in respect of all the licences under these rules shall remain closed on the following days:
>
> (i) Birthday of Mahatma Gandhi,
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> (ii) Birthday of Sree Narayan Guru,
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> (iii) Commemoration day of Mahatma Gandhi,
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> (iv) Samadhi day of Sree Narayana Guru,
>
> (v) The days of poll and two days preceding the day of the General Election or Bye-election and on the day counting of votes and the day succeeding thereto.
>
> (vi) The day of poll and the day preceding that day of the elections/bye-elections day the Corporation/Municipal Wards/Panchayat Constituencies and in the day of counting of votes and the day succeeding thereto.
>
> (vii) The first day of all English calendar month."

5. On a perusal of the said Rule, it is luminous that licensed premises for sale of liquor are required to remain closed on the first day of all English calendar month. There can be no dispute that first September is the first day of English calendar month for the purpose of IMFL shops. As is evincible, an apprehension was expressed before the High Court that the State Government was inclined to issue a notification to overlook the said date. It was contended on behalf of the State that the Government has power to issue notification Under Section 71 of the Act. The High Court, as has been stated herein-before, opined that unless the Rules are amended, no notification, contrary to the rules, could be issued. As far as this aspect is concerned, there has been no challenge by any vendor dealing with IMFL.

6. What is assailed before this Court is the view expressed by the High Court as regards Rule 7(11)(vii) of the 2002 Rules. The said Rule has been declared discriminatory. At the very outset, it is necessary to state that though various grounds have been asseverated with regard to the justifiability of the 2002 Rules, regard being had to the provisions contained in the Act and the definition of toddy as finds place in Section 3(8) of the Act and the difference between toddy and the IMFL, we are not inclined to dwell upon the same.

7. The seminal issue for consideration is whether, while interpreting the effect and impact of a particular rule relating to a different sphere, the High Court in exercise of its power Under Article 226 of the Constitution, can declare another rule as unconstitutional without any challenge to the same and further without impleading the affected parties even in representative capacity.

8. As is evident, in the writ petition, there was no assail to the 2002 Rules. There was no pleading in that regard and no relief was sought on that score. In this context, we may profitably notice the observations of this Court in State of Uttar Pradesh v. Kartaar Singh AIR 1964 SC 1135, wherein while dealing with the constitutional validity of Rule 5 of the Food Adulteration Rules, 1955, the Court opined thus:

> "(15) .....if the rule has to be struck down as imposing unreasonable or discriminatory standards, it could not be done merely on any a priori reasoning but only as a result of materials placed before the Court by way of

> scientific analysis. It is obvious that this can be done only when the party invoking the protection of Article 14 makes averments with details to sustain such a plea and leads evidence to establish his allegations. That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the rules offend Article 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration."

9. In State of Andhra Pradesh and Anr. v. K. Jayaraman and Ors. AIR 1975 SC 633, it has been observed that when an averment is made that a particular Rule is invalid for violating Articles 14 and 16 of the Constitution, relevant facts showing how it is discriminatory ought to have been set out.

10. In Union of India v. E.I.D. Parry (India) Ltd. AIR 2000 SC 831, a two-Judge Bench has observed thus:

> "There was no pleading that the Rule upon which the reliance was placed by the Respondent was ultra vires the Railways Act, 1890. In the absence of the pleading to that effect, the trial Court did not frame any issue on that question. The High Court of its own proceeded to consider the validity of the Rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law..."

11. In State of Haryana v. State of Punjab and Anr. (2004) 12 SCC 673, reiterating the principle, this Court has held that:

> "..... merely saying that a particular provision is legislatively incompetent [ground (ii)] or discriminatory [ground (iii)] will not do. At least prima facie acceptable grounds in support have to be pleaded to sustain the challenge. In the absence of any such pleading the challenge to the constitutional validity of a statute or statutory provision is liable to be rejected in limine."

12. From the aforesaid authorities, it is clear as day that in the absence of any assertion how a particular provision offends any of the Articles of the Constitution, the same cannot be adverted to. It is a settled principle of law that a

person who assails a provision to be ultra vires must plead the same in proper perspective.

13. As we find in the case at hand, the High Court was required to interpret Rule 28A of the Rules. Under such circumstances, the High Court has fallen into grave error by declaring another Rule as discriminatory and unreasonable. Suo motu assumption of jurisdiction in this regard is totally uncalled for and, therefore, that makes the judgment and order declaring the 2003 Rules as discriminatory sensitively susceptible. Consequently, the appeals are allowed and the judgment and order of the High Court, as far as it declares the 2002 Rules as ultra vires in respect of the toddy shops being kept open on the first day of all English Calendar month is set aside. There shall be no order as to costs.