

M.S. Jayaraj vs Commissioner Of Excise, Kerala And ... on 29 September, 2000

Equivalent citations: AIR 2000 SUPREME COURT 3266, 2000 AIR SCW 3674, 2000 (6) SCALE 674, 2000 (7) SCC 552, 2000 (1) JT (SUPP) 487, 2001 (4) LRI 949, 2000 (9) SRJ 228, (2000) 159 TAXATION 569, (2000) 3 KER LT 820, (2000) 4 SCJ 184, (2000) 7 SUPREME 105, (2000) 6 SCALE 674

Bench: K.T. Thomas, R.P. Sethi

PETITIONER:

M.S. JAYARAJ

Vs.

RESPONDENT:

COMMISSIONER OF EXCISE, KERALA AND OTHERS

DATE OF JUDGMENT: 28/09/2000

BENCH:

K.T. Thomas & R.P. Sethi

JUDGMENT:

THOMAS, J.

L...I...T.....T.....T.....T.....T.....T.....T..J Leave granted.

A bidder in auction for the privilege of vending foreign liquor within a circumscribed range was permitted by the Excise Commissioner to have his domain shifted to another range. On hearing the said news a hotelier who is doing business in the latter range was distressed and she quickly approached the High Court for thwarting the said move. At the first round the hotelier failed to checkmate the bidder as a single judge of the High Court declined to grant the relief prayed for by her. However, she succeeded on the second round, when a Division Bench of the High Court, on the appeal filed by her, quashed the order of the Excise Commissioner. This appeal by special leave is by the aforesaid bidder for restoration of the benefit which he secured from the Excise Commissioner.

In the State of Kerala, the right to sell foreign liquor is restricted by statutory provisions. The Government of Kerala has formulated rules for it under the Kerala Abkari Act and one set of such rules is called the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 (for convenience it would be referred to as the Auction Rules). The Government has the authority, under the said rules to

notify in the Gazette the limits of each area (range) wherein the shop or shops could be located for vending such foreign liquor. Officers are authorised by the Government to auction the right to vend foreign liquor from each such shop and for such period as may be fixed. Person who offers the highest bid would normally be preferred for conferring the privilege to vend foreign liquor and licence would be issued to him for that purpose. Among the different types of licence only two are relevant for the purpose of this case. One is called Licence for the privilege of possession of Indian made Foreign Liquor for sale to public in sealed bottles without the privilege of consumption on the premises. As the said licence is to be issued in Form FL-1 it can be termed as such hereinafter. The other is called Hotel (Restaurant) Licence and it is to be issued in Form FL-3. (It can be referred to as such hereinafter).

FL-3 licence consists of the privilege to sell foreign liquor for consumption within a room specifically approved for the purpose to residents in the hotel or boarding houses, including their guests. FL-1 licence is for the privilege of selling foreign liquor in sealed bottles containing a quantity above 180 ml.

For the facts in this case the following events are to be narrated: On 13.3.2000 appellant participated in the auction held in respect of a shop to be located within a range called Changanassery Excise Range consisting of the areas falling within the limits of Changanassery Municipality. Appellant was the highest bidder and he quoted above Rs.63 lakhs. On his being chosen for the licence appellant remitted a portion of the bid amount on the same day.

He failed to find out a suitable place to locate the shop within the boundaries of Changanassery Excise Range. Hence he applied to the first respondent (Commissioner of Excise, Kerala) for permission to locate the shop outside the said range. On the same day the application was forwarded by the second respondent (Assistant Excise Commissioner of the district) with a recommendatory note. The Excise Commissioner granted permission to the appellant on 12.4.2000 for shifting the shop to another range called Karukachal which comprises of the areas falling within Karukachal Panchayat. (That range is situate next to the Changanassery range.) The third respondent, who is running the hotel and restaurant at Karukachal and who obtained FL- 3 licence to supply foreign liquor in peg measurements to patrons visiting the hotel, filed a writ petition before the High Court under Article 226 of the Constitution for quashing the aforesaid permission granted by the first respondent. Third respondent contended mainly that the Excise Commissioner had no authority to pass such an order. In defence of the permission so granted the Excise Commissioner and the second respondent relied on Rule 6(2) of the Auction Rules.

Learned single judge of the High Court, while dismissing the writ petition, held that Rule 6(2) of the Auction Rules contains such powers for the Excise Commissioner to pass. He also held that the order granting permission to locate the shop outside the limit of the originally shown range is not proved to have been vitiated by any mala fides.

Third respondent filed an appeal before the Division Bench of the High Court and learned Judges of the Bench reversed the order passed by the single judge holding that the Commissioner of Excise has no power or jurisdiction under Rule 6(2) to transfer an Abkari or foreign liquor shop outside the

limits notified in the Gazette under Rule 4 of the Auction rules. The Division Bench did not seriously take the objection raised by the present appellant that writ petitioner had no locus standi to challenge the order of the Excise Commissioner. However, learned Judges observed that the writ petitioner is a licensee having FL-3 licence and was running a hotel-cum- restaurant in Karukachal Panchayat and hence the order permitting the appellant to shift the shop to Karukachal Panchayat would affect her rights. Resultantly the Division Bench quashed the order on the Excise Commissioner though learned Judges granted two weeks time to dispose of the stock of liquor acquired by the appellant for the purpose of selling the same in exercise of the licence granted to him.

Shri P. Krishnamurthy, learned senior counsel, who argued for the appellant, adopted a two-pronged onslaught on the judgment of the Division Bench of the High Court. First is that the High Court ought not to have entertained the writ petition filed by the third respondent as she is a rival businesswoman who cannot have locus standi to file the petition. Second is that the Division Bench failed to trace the power of the Excise Commissioner which power has been conferred on him by the first proviso to Rule 6(2) of the Auction Rules. Shri C.S. Vaidyanathan, learned senior counsel who argued for the third respondent, contended that the locus standi of the third respondent for moving the High Court is no concern now as the learned single judge of the High Court had already entertained the writ petition and decided it on merits only. Alternatively, learned counsel contended that the third respondent is not, in fact, a rival businesswoman and she need be regarded only as a resident of Karukachal Panchayat who is entitled to assail any order passed by a statutory authority in violation of law. Without prejudice to such contention learned counsel made an endeavour to support the interpretation placed by the Division Bench of the High Court on Rule 6(2) of the Auction Rules.

Shri P. Krishnamurthy, learned senior counsel relied on the decisions of this Court in the Nagar Rice & Flour Mills and ors. vs. N. Teekappa Gowda & Bros. and ors. {1970(1) SCC 575}; Jasbhai Motibhai Desai vs. Roshan Kumar Haji Bashir Ahmed & ors. {1976(1) SCC 671}; Thammanna vs. K. Veera Reddy and ors.{1980 (4) SCC 60}; Dr. Duryodhan Sahu and ors. vs. Jitendra Kumar and ors. {1998(7) SCC 273} in order to bolster up his contention that the third respondent had no locus standi to maintain a petition under Article 226 of the Constitution in respect of the impugned order passed by the Excise Commissioner.

It is not discernible from the Judgment of the learned Single Judge whether appellant had raised the issue of locus standi before him. But appellant did raise it before the Division Bench. In this appeal also he endeavoured to contend that the right of the third respondent is not affected by the order passed by the Excise Commissioner as the licence granted to her is only for selling liquor in small quantity and that too only to those persons who visit the hotel and restaurant, whereas the appellant is not permitted to sell it like that. We too feel that if the business of the third respondent is to be carried on in accordance with the rules such business cannot affect the business of the appellant. In that view of the matter appellant would not be a rival trader or a rival business contender for the third respondent. Perhaps bearing in mind this aspect the third respondent maintained the stand in the counter affidavit filed in this Court that her objection against the order of the Excise Commissioner is as a citizen of Karukachal Panchayat and she is entitled to raise such objection.

In this context we noticed that this court has changed from the earlier strict interpretation regarding locus standi as adopted in *Nagar Rice & Flour Mills and ors. vs. N. Teekappa Gowda & Bros.* and ors.{1970(1) SCC 575} and *Jasbhai Motibhai Desai vs. Roshan Kumar Haji Bashir Ahmed & ors.*{1976(1) SCC 671} and a much wider convass has been adopted in later years regarding a persons entitlement to move the High Court involving writ jurisdiction. A four Judge Bench in *Jasbhai Motibhai Desai* (supra) pointed out three categories of persons vis-à-vis the locus standi: (1) a person aggrieved; (2) a stranger; (3) a busybody or a meddlesome interloper. Learned Judges in that decision pointed out that any one belonging to the third category is easily distinguishable and such person interferes in things which do not concern him as he masquerades to be a crusader of justice. The Judgment has cautioned that the High Court should do well to reject the petitions of such busybody at the threshold itself. Then their Lordships observed the following: The distinction between the first and second categories of applicants, though real, is not always well demarcated. The first category has as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of persons aggrieved. In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be persons aggrieved.

A recent decision delivered by a two Judge Bench of this Court (of which one of us is a party Sethi, J.) in *Chairman Railway Board & ors. vs. Chandrima Das & ors.* {2000 (2) SCC 465} after making a survey of the later decisions held thus: In the context of public interest litigation, however, the Court in its various judgments has given the widest amplitude and meaning to the concept of locus standi. In *Peoples Union for Democratic Rights v. Union of India* {1982 (3) SCC 235} it was laid down that public interest litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to court. [See also *Bandhua Mukti Morcha v. Union of India* {1984 (3) SCC 161} and *State of H.P. v. A Parent of a Student of Medical College* {1985 (3) SCC 169} on the right to approach the court in the realm of public interest litigation.] In *Bangalore Medical Trust v. B.S. Muddappa* {1991(4) SCC 54} the Court held that the restricted meaning of aggrieved person and the narrow outlook of a specific injury has yielded in favour of a broad and wide construction in the wake of public interest litigation. The Court further observed that public spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on a technical or conservative yardstick of the rule of locus standi of the absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere busybody.

In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi. So we proceed to consider the contentions on merits.

Chapter 1 to 4 of the Auction Rules contain various regulations regarding fixation of the limit of each range, how to conduct the auction for each or lot of shops etc. Chapter 5 of the Auction Rules contains two rules (Rule 6 and Rule 6A) under the title General Conditions applicable to licensees of toddy, arrack or foreign liquor 1 shops. Though Rule 6 consists of 39 sub-rules we are concerned only with the first three of them. Hence those three sub-rules are extracted herein: 6(1) No licensees of any toddy, foreign liquor shop shall be permitted to sell or possess toddy or foreign liquor or cocobrandy outside the local limits specified in his licence. (2) No toddy or foreign liquor shop notified in the Gazette under Rule 4, shall be located outside the notified limits, but with the previous sanction of the Assistant Excise Commissioner it may be removed from one place to another within such limits. However, no such shop shall be located in or removed to place within an area declared as a project area. No toddy shop shall be located within 400 meters and no Foreign Liquor 1 shop shall be located within 200 meters from an educational Institution, Temple, Church, Mosque, Burial ground, Harijan Colonies or Tribal Colonies:

Provided the Excise Commissioner may for sufficient reasons to be recorded in writing and subject to such conditions as he may deem necessary to impose, order to remove from any place, any toddy shop or Foreign Liquor 1 shop to a place outside the limits specified in this sub-rule:

Provided further that if any educational institution, Temple, Church, Mosque or burial ground comes into existence subsequent to the grant of licence, it shall not disentitle such shops for continuance:

(3) it shall be competent to the Board of Revenue to order the transfer of shops from one site or locality to another site or locality or to alter the specified limits of any shop even during the currency of the contract or to order any shop to be closed in the interest of public peace or morality or on grounds of expediency and in such an event of transfer, alteration or closure, the contractor shall have no claim for compensation.

The repeated usage of the negative expression no in sub-rules (1) and (2) looms large therein. By such usage the legislature has imposed absolute ban on certain activities e.g. no licensee shall be permitted to sell foreign liquor outside the local limits specified in his licence as in sub-rule (1) and no foreign liquor shop shall be located outside the notified limits as in sub-rule (2). Then again no foreign liquor shop shall be located within the distance fixed as from certain institutions. There is no proviso nor any explanation as for sub-rule (1) but the proviso is placed only below sub-rule (2). Therefore, sub-rule (1) must work out by itself unexpanded or unrestricted by any other clause.

The first proviso to sub-rule (2) is intended to refer to sub-rule (2) above. This can be discerned from two indications. One is the fact that the said proviso has been placed in the said sub-rule only. Second is that its scope is restricted to a place outside the limit specified in this sub-rule. The contention of the appellant is that the above words can have relation to the limits specified in sub-rule (1) because the limit envisaged in the second sub-rule is practically the same as the limit indicated in sub-rule (2).

We have difficulty to accept the said contention for more than one reason. If the rule making authority had intended it to be so they would have effortlessly used the words outside local limits specified in the licence in the proviso because the same words have been used in sub- rule (1). As the proviso gives powers to the Excise Commissioner to order removal of a shop to a place outside the limits specified in this sub-rule it can only refer to the limits specified in that sub-rule and not elsewhere. It must be noted in this context that sub-rule (2) specifies certain limits such as within 400 meters (for toddy shops) and within 200 meters (for FL-1 shops) from certain institutions mentioned therein. It is with reference to those limits which are specified in sub-rule (2) that the proviso confers power on the Excise Commissioner to pass order for removal.

Otherwise the absolute ban incorporated in sub-rule (1) would become meaningless. It is also worthy to notice that the only exception from the ban contained in sub-rule (1) is provided in sub-rule (3), extracted above. A superior authority like the Board of Revenue alone was vested with that power in the interest of public peace or morality or on grounds of expediency.

(Shri P. Krishnamurthy submitted that the Board of Revenue in Kerala stood abolished in 1997 and in that place Government is substituted in statutes.) If so, even for the Government to order transfer of a shop from one locality to another it cannot be done unless there is existence of the exigency indicated in sub-rule (3). How could it be conceived that a subordinate officer can do it without any such exigency.

We, therefore, concur with the interpretation placed by the Division Bench of the Kerala High Court on the scope of the proviso to Rule 6(2) of the Auction Rules. It means that Excise Commissioner has no authority to permit shifting of a foreign liquor shop from one range to a totally different range. Consequently the order passed by the first respondent Excise Commissioner in favour of the appellant is without authority of law and it has been rightly struck down by the Division Bench of the High Court. Accordingly we dismiss this appeal.

Learned counsel for the appellant lastly made a plea that the amount deposited by him pursuant to the bid, should be refunded to him as the appellant was not able to operate the foreign liquor shop mainly on account of the unauthorised order passed by the Excise Commissioner. It is open to the appellant to make the application for such refund. We direct the Government to pass orders thereon within one month from the date of such application.