

J. Viswanatha Reddy vs Government Of A.P. Rep. By Its ... on 10 April, 2008

Author: C.V. Nagarjuna Reddy

Bench: C.V. Nagarjuna Reddy

ORDER

C.V. Nagarjuna Reddy, J.

1. The petitioner, whose Form A-4 licence issued under the provisions of the A.P. Excise (Lease of right of selling by shop and conditions of licence) Rules, 2005 (for short, 'the Rules') to sell liquor in retail was cancelled, filed this writ petition seeking invalidation of the orders passed by the hierarchical authorities by issue of a writ of Certiorari.

2. The facts crisply stated are as under:

The petitioner was the successful bidder for running a retail liquor shop at Vellatur, Pendimarri Mandal, Kadapa District. He was granted licence bearing No. 117/2006-08 in Form A-4 under the Rules for a period of two years from 01.07.2006 to 30.06.2008. On 26.01.2007, respondent No. 5 along with his staff conducted a search and found 77 cartons of spurious liquor bottles of Bagpiper Whisky, with each of the 3693 bottles containing 180 ml. Consequently, respondent No. 5 registered a criminal case bearing crime No. 162 of 2006-07 on his file for offence under Section 34-A of the A.P. Excise Act, 1968 (for short, 'the Act').

3. While the said criminal case was pending, respondent No. 4 issued proceedings vide Rc. No. B3/32/2007 dated 27.01.2007 by which the petitioner's licence was suspended and simultaneously he issued a show cause notice calling for explanation from the petitioner against the proposed cancellation of his licence. Respondent No. 4, after considering the explanation filed by the petitioner on 06.02.2007, issued proceedings in Rc. No. B2/704/2006 dated 23.02.2007, whereby he cancelled the licence granted in favour of the petitioner. An appeal filed by the petitioner against the said order of cancellation ended in its dismissal by proceedings Rc. No. B/60/2007 dated 01.03.2007 of respondent No. 3 and the second appeal filed by the petitioner met the same fate with its dismissal by respondent No. 2 by order dated 07.05.2007. The petitioner carried the matter in revision before respondent No. 1, which dismissed the same by affirming the orders passed by the original and appellate authorities vide G.O. Rt. No. 531 dated 20.02.2008.

4. A few days before the impugned order was passed by respondent No. 1, the criminal case against the petitioner came to be disposed of by the learned Special First Class Magistrate for Prohibition

and Excise Offences, Kadapa (for short, 'the Criminal Court') by his judgment dated 14.02.2008. The said criminal case ended in the petitioner's acquittal. The petitioner made a representation on 28.02.2008 before respondent No. 4 for restoring his licence, in the light of the judgment of the criminal Court. On 29.02.2008, respondent No. 6 issued a re-notification in respect of the shop in question for granting a fresh licence to run the shop for the remaining licence period i.e., from 01.03.2008 to 30.06.2008, fixing 08.03.2008 for conducting auction. At that stage the pet filed the present writ petition. This Court by order dated 04.03.2008, while admitting the writ petition, permitted auction to be held subject to the condition that the same shall not be confirmed.

5. The respondents filed counter-affidavit along with the application for vacating the said order. When the said application came up for hearing, with the consent of the learned Counsel for the writ petitioner and the learned Government Pleader for the respondents - vacate stay petitioners, the writ petition was taken up for hearing and the same was accordingly heard.

6. Sri N. Subba Reddy, learned Counsel representing Sri N.Siva Reddy, learned Counsel for the petitioner submitted that the order of cancellation passed by respondent No. 4 and affirmed by respondent Nos. 3 to 1 is required to be recalled in the light of judgment dated 14.02.2008 passed by the Criminal Court in Calendar Case. No. 33 of 2007. The learned Counsel placed reliance on the judgment of the Supreme Court in Capt. M. Paul Anthony v. Bharat Gold Mines Limited and Anr. and of this Court in R. Yadaiah and Anr. v. Prohibition and Excise Superintendent, Ranga Reddy District, Hydeabad and Anr. in support of the above said contention.

7. Per contra, the learned Government Pleader for Prohibition and Excise contended that the scope of departmental and criminal proceedings being distinct from each other, mere acquittal of the petitioner in the criminal case does not entitle him to seek automatic restoration of the licence cancelled in the departmental proceedings. In support of his contention he placed reliance on the judgments of this Court in State of Andhra Pradesh, represented by District Collector, Kurnool and Anr. v. B.V. Narayana 1990 (1) ALT 415 and K. Penchal Reddy v. Special Chief Secretary to Government, Revenue (Excise-III) Department, Government of A.P. and Ors.

8. Having regard to the submissions of the learned Counsel for the respective parties, the point that arises for consideration is whether Form A-4 licence, which was cancelled following the departmental proceedings under the provisions of the Act and the Rules deserves to be restored in the light of the judgment of the criminal Court in CC.33 of 2007 dated 14.02.2008? Before undertaking a discussion on the abovementioned point, it is necessary to keep in view the well settled law laid down in a number of Constitution Bench judgments of the Supreme Court that a citizen has no fundamental right to carry on business in intoxicants, which is considered as a pernicious trade (See Cooverjee v. Excise Commissioner, Ajmer , State of Assam v. Sristikar , Nagendranath Bora v. Commissioner of Hills Division , Har Shankar v. Dy. Excise Commissioner and Khoday Distilleries Limited v. State of Karnataka .

9. Grant of licences, privileges and permits for carrying on trade in liquor is covered by Chapter VI of the Act and the Rules made thereunder. In respect of lease of right of selling Indian liquor and Foreign liquor, the Rules govern the procedure for granting licences, execution of agreements,

selection of premises and various conditions subject to which the licencees are permitted to sell the liquor. Section 31 of the Act occurring in Chapter VI empowers the authority granting licence or permit to cancel or suspend the same for various reasons, which include breach by the licensee or any of his servants or any one acting on his behalf, with his express or implied permission, of any of the terms and conditions of the licence.

10. Rule 37 of the Rules reads as follows:

Indian Liquor or Foreign Liquor not to be adulterated:- The Indian Liquor or Foreign Liquor offered for sale or stored in the licensed premises shall not be of substandard, deteriorated, spurious or adulterated and the license shall not tamper with the Indian Liquor and Foreign Liquor in any manner so as to alter their quality, strength, nature of quantity.

11. Under Rule 56 every holder of the lease under these Rules shall comply promptly with all orders or directions issued from time to time under the Act, and the rules and orders made thereunder and shall abide by all the conditions of the lease/permit.

12. Under Rule 57 a lease, licence or permit may be suspended, cancelled or withdrawn in accordance with the provisions of Section 31 or 32 of the Act and the lease may be re-auctioned.

13. Condition 2 of Form A-4 licence reads as under:

The licensee is prohibited from purifying, colouring and flavouring the Indian Liquor or mixing any material therewith and from blending another kind of Indian Liquor with it or to keep to his possession other than liquor authorized under this licence.

14. In addition to cancellation of a licence under Chapter VI, Chapter VII of the Act provides for penalties for the offences indicated therein. Section 34 with which Chapter VII commences provides that whoever in contravention of the Act or of any Rule, notification or order made, issued or passed thereunder or of any licence or permit granted or issued under the Act inter alia imports, exports, transports, manufactures, collects or possesses or sells any intoxicant shall on conviction be liable for being convicted and sentenced with imprisonment and fine varied on the basis of the quantity of intoxicants as prescribed in the notification issued by the Government.

15. Section 37 prescribes penalties for adulteration of intoxicants and they include sentence of imprisonment on conviction as prescribed in the said provision. Section 37-A provides for penalty for adulteration resulting in death etc. Similarly, various penalties are prescribed by the said chapter for various offences and in the context of the present case, it is not necessary to discuss in detail the nature of penalties prescribed for the various offences.

16. A careful analysis of the abovementioned provisions would indicate that manufacture, possession, transport or sale of liquor by the licencees in contravention of the provisions of the Act, Rules, notifications issued thereunder and the conditions of licence leads to cancellation or

suspension of licences or permits under Chapter VI of the Act and fastening of criminal liability by imposing various penalties as prescribed under Chapter VII of the Act. In other words, while Chapter VI provides for departmental proceedings leading to civil consequences of cancellation/suspension of licences/permits, Chapter VII envisages criminal consequences.

17. The law is well settled that the scope of departmental and criminal proceedings is different and distinct from each other. While in the former, preponderance of probabilities is sufficient, in the latter proof beyond reasonable doubt is sine qua non for convicting a person for a criminal offence. (see *B.C. Chaturvedi v. Union of India* (1996) 6 SCC 750, High Court of Judicature at Bombay through its Registrar v. *Shashikant S Patil* (2000) 1 SCC 416, High Court of Judicature at Bombay through its Registrar v. *Udaysingh* AIR 1997 SC 2286. This principle laid down by the Supreme Court while dealing with service jurisprudence equally applies to any proceedings dealing with the civil rights vis--vis the criminal liability. While examining the point framed supra, this settled legal position shall be kept in mind.

18. In his order dated 23.02.2007 passed by respondent No. 4, it is stated that on 26.01.2007 at about 4.30 p.m. on reliable information the Prohibition and Excise Inspector, Kadapa, along with his staff and mediators conducted search in a house adjacent to the Government Veterinary Sub-centre at Yellatur Village of Pendlimarri Mandal, that at the time of search the petitioner, who is the licensee of M/s. Viswam Wines was present in the house and he admitted that he took the same on monthly rent from July, 2006 for keeping empty bottles and during the search the departmental staff found 77 cartons of spurious liquor comprising 3693 bottles of Bagpiper Whisky bearing fake adhesive labels and manufacturer labels. The Station House Officer, Kadapa, tested the strength of the liquor and veracity of labels and their genuineness with reference to Bagpiper whisky bottles supplied by APBCL and found that the strength of the seized bottles was 22 UP as against the approved strength of 25 UP. A panchanama was prepared and the petitioner stated that he purchased the said cartons for Rs. 1000/- each, which is less than the cost of the liquor supplied by APBCL, from an unknown person and that he stocked and possessed the said bottles in his rented house while conducting their sale at his licenced premises. It is further stated in the said order that during the search, the Prohibition and Excise Inspector, Kadapa, drew a sample of one nip each from all the 77 cartons, sealed and labeled the sample bottles as well as the remaining case property, that after informing the grounds of arrest, he arrested the petitioner and seized the sample bottles and case property and brought the same to the Prohibition and Excise Station, Kadapa and a case was registered in Crime No. 162/2006-07 under Section 34 (a) of the Act. The petitioner was sent to judicial custody on 27.01.2007. At the request of the Prohibition and Excise Inspector, Kadapa, proceedings under Section 31 of the Act were initiated and the petitioner's licence was suspended under Section 31(1)(b) of the Act on 27.01.2007. A show cause notice was issued on the same day. Respondent No. 4 took note of the explanation of the petitioner to the effect that he offered a sum of Rs. 32.8 lakhs, which is very high due to cut throat competition and being a faction affected area, the un-successful bidders bore grudge against him and wanted to hamper his business and that on 26.01.2007, the shop was closed, he was suddenly intercepted by some persons and whisked away to a nearby place where his signatures on certain papers were forcibly obtained by planting alleged liquor under a make shift seizure. Respondent No. 4, however, did not believe the version of the petitioner and cancelled his licence. Respondent No. 3, who is the appellate authority, in his order

dated 01.03.2007 relied on the FIR, Panchaname report of Station House Officer, case diaries etc., in confirming the order of respondent No. 4. Similarly, respondent Nos. 2 and 1 dismissed the appeal and revision respectively.

19. In the counter-affidavit filed by respondent No. 5 the allegation regarding the search and seizure of the house adjacent to the Government Veterinary Sub- Centre, the presence of the petitioner, seizure of 77 cartons of spurious liquor with fake adhesive labels and the strength of the liquor being 22 UP have been reiterated. It is also alleged that the petitioner was present all through the search and seizure and signed on the mediators report drafted at the scene of offence. In the counter-affidavit 77 cartons of spurious liquor is termed as huge haul and it is averred that the activity indulged in by the petitioner in seeking to sell the spurious liquor and consumption of the same is likely to cause the death of the consumers. That on the information given by the Senior Assistant Public Prosecutor (Admn), the Collector and District Magistrate, Kadapa, ordered to file appeal and accordingly an appeal was filed before the District and Sessions Court, Kadapa on 13.03.2008 and the same is presently pending. It is also averred that the petitioner's acquittal in a criminal case has no bearing on the departmental proceedings in which all the authorities concurrently held that the petitioner indulged in violation of the statutory provisions and the conditions of licence by indulging in hoarding of the stock of spurious liquor, meant for sale in his licenced premises under the guise of duty paid liquor.

20. In B.V. Narayana (3 supra) a similar question as the one in the present case arose whether the acquittal of the respondents in criminal proceedings would render the cancellation of licence illegal. The learned Judge relied on the judgment in Toddy Tappers Cooperative Society, Kothakota v. The Excise Superintendent, Mahaboobnagar and Ors. 1986 (2) ALT 19 (NRC) and held that there is nothing in the Act or in the Rules to show that the action taken under Section 31 of the Act is dependant on the result of the action taken under Section 37 of the Act and that they are two independent proceedings. It was further held that as the proceedings under Section 31 had become final, the fact that the respondent was acquitted of the offences in the prosecution launched under Section 37 of the Act, does not affect the validity of the action that had already been taken under Section 31 of the Act.

21. In K. Penchal Reddy (4 supra) also this Court considered a similar question. After analyzing the provisions of Chapters VI and VII of the Act, this Court held that the provisions of Sections 28 to 33 relating to licences and permits are contained in Chapter VI while the offences and penalties are dealt with under Chapter VII and that these two chapters being independent of each other, the departmental proceedings for breach of the terms and conditions of licence and the offences and penalties have nothing to do with each other.

22. In R. Yadaiah (2 supra) on which heavy reliance is placed by the learned Counsel for the petitioner, the learned Single Judge held that if on the same set of facts a competent criminal Court had arrived at a particular conclusion, the licencing authority is expected to take into consideration the said fact also while making an order in relation to either renewal of licence or cancellation of licence and that at least to this limited extent, definitely the acquittal recorded by the competent criminal Court will be relevant. A reading of the said judgment shows that the earlier judgments of

this Court in Toddy Tappers Cooperative Society (5 supra) and B.V. Narayana (3 supra) have not been cited before the learned Judge. Moreover, I find from this judgment that the learned Judge has not discussed whether the acquittal of the accused in the criminal case was based on analysis of evidence and consequently honourable one or the same was a result of the Court giving benefit of doubt on account of prosecution failing to establish the guilt of the accused beyond reasonable doubt as in the instant case. Though the learned Judge noted the contention advanced by the learned Government Pleader that Sections 31 and 37 of the Act deal with departmental proceedings and penal action respectively and even if the proceedings under Section 37 end in acquittal, the departmental authorities are entitled to take action under Section 31, he has not undertaken any discussion on the scope and ambit of the two provisions.

23. I am in respectful agreement with the view taken by this Court in Toddy Tappers Cooperative Society (5 supra), B.V. Narayana (3 supra) and K. Penchal Reddy (4 supra) that the proceedings under Sections 31 and 37 are independent of each other and acquittal of the accused for an offence under Section 37 has no bearing on the departmental proceedings. As observed by me earlier, while Section 31 deals with the civil consequences, Section 37 deals with criminal consequences. In denying the life and personal liberty of a citizen, proof beyond reasonable doubt is required to be established while such a requirement is not necessary in a departmental proceeding. This is evidently the reason why the Legislature did not make the provisions of Section 31 subject to Chapter VII. In dealing with cases arising under the Excise Act, the Courts cannot be oblivious of the serious adverse consequences, which the society would suffer on account of sale of spurious and adulterated liquor. If the provisions of Section 31 are treated as subject to the provisions of Chapter VII, it would more often yield hazardous results, for in many a case the accused are acquitted on account of independent witnesses turning hostile as happened in the instant case and it is a notorious fact which this Court is bound to take judicial notice of that more often than not the independent witnesses are won over by the accused making them turn hostile. If the outcome in the departmental proceedings is made dependant upon acquittal in criminal cases, invariably it would lead to a situation where a person, who indulges in adulteration and violation of one or the other statutory provisions and terms and conditions of licence, will merrily continue to carry on the liquor trade to the serious detriment of the society at large.

24. The learned Counsel for the petitioner placed heavy reliance on Paul Anthony (1 supra). It is therefore necessary to consider the facts of that case. That case pertains to service dispute of an employee, who was dismissed from service and also prosecuted on the same set of charges and common evidence, which was considered in the departmental proceedings. On an analysis of the same evidence, which was considered in the departmental proceedings, the criminal Court gave honourable acquittal to the employee. The Supreme Court held that the employee was denied payment of subsistence allowance, which was likened to slow poisoning and held that the ex-parte departmental proceedings conducted against him as he was disabled from attending the departmental enquiry on account of non-payment of subsistence allowance stood vitiated. While so holding, the Supreme Court further observed in para 34 as under:

There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were

based on identical set of facts, namely, "the raid conducted at the appellant's residence and recovery of incriminating articles therefrom". The findings recorded by the Inquiry Officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by police officers and panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the Inquiry Officer and the Inquiry Officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand.

25. In my considered view the ratio in the judgment in Paul Anthony (1 supra) cannot be applied to the present case. While the said case related to the service of a Government employee, the present case arose under the provisions of the Excise Act, where no person can claim fundamental right to carry on business in liquor trade.

26. Further unlike in Paul Anthony (1 supra), the Criminal Court in the instant case acquitted the petitioner by giving benefit of doubt. In this context it is necessary to discuss the said judgment.

27. Before the learned Magistrate 9 witnesses were examined. PWs.1 to 3 are the non-departmental independent witnesses. A careful reading of the judgment of the criminal Court reveals that the petitioner's acquittal is mainly based on the fact that PWs. 1 and 2, who were stated to have witnessed the seizure and signed the panchanama, did not support the case of the prosecution as they turned hostile. The learned Magistrate had this to say:

PWs.1 and 2 are the panch witnesses who are the main witnesses in this case. Both of them were turned hostile. Their testimony was not supporting the prosecution case. Admittedly both the witnesses were independent witnesses. PW.1 who is the taxi driver, PW.2 is the another witness both of them have not spoken any material evidence and further their evidence was discarded and even in the chief-examination of the prosecution not supporting any material evidence. But as per the case on hand PW.7 proceeded along with PWs.1 and 2 and others to the scene of offence to strengthen the prosecution case. But absolutely, there is no such material evidence were available on hand and they have nothing was spoken any such type of material evidence. Simply they have been stated that they do not know about the case of the prosecution. Both of them have picked up by PW.7 from the police station while they were in their work. So their evidence is totally discarded.

28. The learned Magistrate relied on the circumstances spoken to by PWs.1 and 2 that they were picked up from police station whereas according to the version of PWs.8 and 9 they were picked up from veterinary hospital and held that failure of the departmental officers in securing the presence of independent witnesses available in and around the scene of offence is fatal to the prosecution case and in this regard he relied on the judgment of this Court in *Gajamker Narayana v. State of A.P.* 2005 (3) ALT Criminal Page 1. After eschewing the evidence of PWs.1 to 3, who turned hostile, the learned Magistrate discarded the evidence of PW.7, the Prohibition and Excise Inspector, Kadapa on the ground that he was the one, who detected the offence and arrested the accused and hence he ought not to have conducted investigation and the accused cannot be convicted based on such investigation. The learned Magistrate also relied on the circumstances that PW.3, the VAO, who issued Ex.P4 certificate that the premises from which the contraband was seized belonged to PW.4 and also PW.4 turned hostile, came to the conclusion that the prosecution failed to prove that the property is with the possession of the accused beyond all reasonable doubt by non-examination of the independent witnesses, such as the neighbours to the house from where the seizure has taken place.

29. A careful scrutiny of the criminal Court judgment would thus go to show that all the independent witnesses turned hostile and the learned Magistrate held that the prosecution failed to prove the charge against the petitioner beyond all reasonable doubt. It is therefore not a case of honourable acquittal of the petitioner.

30. I am therefore of the considered view that the general proposition as contained in *Paul Anthony* (1 supra) on which reliance is placed by the learned Counsel for the petitioner that if the departmental and criminal proceedings are based on the same set of charges, the departmental authorities are bound to consider the judgment of the criminal Court, cannot be applied to the cases relating to business in intoxicants, which are described as *res extra commercium* and in which a citizen is held to have no fundamental right to trade or carry on business, by a catena of judgments of the Supreme Court to which a reference was made at the outset.

31. Before parting with this case, it is necessary to observe that the learned Counsel for the petitioner has not argued on the correctness or otherwise of the findings contained in the orders of respondent Nos. 1 to 4 and the only contention advanced by them is that in the light of the judgment of the criminal Court, the respondents are bound to reconsider their decision of cancelling the petitioner's licence. Having regard to my findings rendered supra, the writ petition fails and is accordingly dismissed.

32. As a sequel to dismissal of the writ petition, WPMP. No. 6001 of 2008 and WVMP. No. 933 of 2008 are dismissed as infructuous.