

KERALA STATE TODDY SHOP CONTRACTORS  
ASSOCIATION

v.

T.N. PRATHAPAN, MLA & ORS.  
(Civil Appeal Nos. 8895-8896 OF 2014)

SEPTEMBER 01, 2014

[DIPAK MISRA AND VIKRAMAJIT SEN, JJ.]

*Foreign Liquor (Compounding, Blending and Bottling), Rules 1975: r.28A - Writ petition filed before High Court highlighting the grievance that as per r.28A of the Rules of 1975 framed under Kerala Abkari 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 r. 28A, had issued orders to allow the sale of IMFL on 1st of September, 2009 from the licensed premises which was totally unlawful - High Court was required to interpret r.28A of the Rules - While disposing of the writ petition, High Court declared r.7(11)(vii) of Kerala Abkari Shops Disposal Rules 2002 by virtue of which toddy shops were allowed to function on 1st of September, 2009 as discriminatory and unreasonable - On appeal, held: Suo motu assumption of jurisdiction by High Court was totally uncalled for - High Court fell into grave error by declaring another Rule as discriminatory - The judgment 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 - Kerala Abkari Act - s.71.*

*Constitution of India, 1950: 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 - While interpreting the effect and impact of a particular rule relating to a different*

- A *sphere, the High Court in exercise of its power under Article 226 of the Constitution, cannot declare another rule as unconstitutional without any challenge to the same and further without impleading the affected parties even in representative capacity.*
- B. **A PIL was filed before the High Court under Article 226 of the Constitution of India highlighting the grievance that as per Rule 28A of the Foreign Liquor (Compounding, Blending and Bottling), Rules 1975 framed under Kerala Abkari Act, the licenced premises for**
- C **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) on 1st of**
- D **September, 2009 from the licensed premises which was totally unlawful.**

- The High Court referred to Rule 28A of the Rules and took note of Section 71 of the Kerala Abkari Act and opined that unless Rules are amended, the Government**
- E **is bound to direct the IMFL shops to be closed on 01.09.2009. The High Court took note of the prescription made under Rule 7(11) (vii) of the Kerala Abkari Shops Disposal Rules, 2002 (2002 Rules) wherein a proviso was incorporated in 2003 by virtue of which the toddy shops**
- F **were allowed to function on the first day of English calendar month. The High Court opined that the proviso appended to the said Rule was directly contrary to the main Rule and created a discrimination between the sale of IMFL and toddy shops and therefore the exemption**
- G **granted under the proviso to 2002 Rule was discriminatory as there was 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**
- H **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. The High Court further directed the State Government to pass orders in case of toddy shops to remain closed on 1st September, 2009. The issue for consideration was 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.

Allowing the appeals, the Court

HELD: 1. A perusal of Rule 28A of Foreign Liquor (compounding, Blending and Bottling Rules, 1975) showed 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. The High Court opined that unless the Rules are amended, no notification, contrary to the rules, could be issued. As far as this aspect was concerned, there was no challenge by any vendor dealing with IMFL. What was assailed before this Court was the view expressed by the High Court as regards Rule 7(11)(vii) of the 2002 Rules. The said Rule was declared discriminatory. 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 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. In the case at hand, the High Court was required to interpret Rule 28A

A of the Rules. Under such circumstances, the High Court  
 fell into grave error by declaring another Rule as  
 discriminatory and unreasonable. Suo motu assumption  
 of jurisdiction in this regard was totally uncalled for and,  
 therefore, that made the judgment and order declaring the  
 B 2002 Rules as discriminatory sensitively susceptible. 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. [Paras 6, 7, 9, 13 to 15] [595-A-E, H;  
 C 597-C-G]

*State of Uttar Pradesh V. Kartaar Singh AIR 1964 SC  
 1135: 1964 SCR 679; State of Andhra Pradesh & Anr. V. K.  
 Jayaraman & Ors. AIR 1975 SC 633; Union of India V. E.I.D.  
 Parry (India) Ltd. AIR 2000 SC 831: 2000 (1) SCR 537; State  
 D of Haryana V. State of Punjab & Anr. (2004) 12 SCC 673:  
 2004 (2) Suppl. SCR 849 - relied on.*

**Case Law Reference:**

E	1964 SCR 679	Relied on	Para 9
	AIR 1975 SC 633	Relied on	Para 10
	2000 (1) SCR 537	Relied on	Para 11
	2004 (2) Suppl. SCR 849	Relied on	Para 12

F CIVIL APPELLATE JURISDICTION : Civil Appeal No..  
 8895-8896 of 2014.

G From the Judgment and order dated 28-08-2009 of the  
 High Court of Kerela at Ernakulam in Writ Petition(c) No. 24769  
 of 2009(s) and in Writ Petition No. 24962 of 2009.

WITH

H Civil Appeal Nos. 8897-8898, 8899-8900, 8901-8902 &  
 8903-8904 of 2014.

C.S Rajan, V.K. Biju, Gaurav Srivastava, G. Prakash, Roy A  
Abraham, Himinder Lal, A. Raghunath, E.M.S. Anam, Jogy  
Scaria, K. Rajeev for the Appearing Parties.

The Judgment of the Court was delivered by

**DIPAK MISRA, J.** 1. Leave granted. B

2. 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. C D

3. As the factual matrix would uncurtain, 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 E F G

H

A 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.

C 4. We have heard learned counsel for the parties and perused the record.

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

D "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,
- E (ii) Birthday of Sree Narayan Guru,
- (iii) Commemoration day of Mahatma Gandhi,
- (iv) Samadhi day of Sree Narayana Guru,
- F (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.
- G (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.
- H (vii) The first day of all English calendar month."

6. 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.

7. 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 assèverated 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.

8. 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.

9. 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*

A *Pradesh V. Kartaar Singh*<sup>1</sup>, wherein while dealing with the constitutional validity of Rule 5 of the Food Adulteration Rules, 1955, the Court opined thus:

B "(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 Art. 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 Art. 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration."

D 10. In *State of Andhra Pradesh & Anr. V. K. Jayaraman & Ors*<sup>2</sup>, 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.

E 11. In *Union of India V. E.I.D. Parry (India) Ltd*<sup>3</sup>, a two-Judge Bench has observed thus:

F "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..."

1. AIR 1964 SC 1135.

2. AIR 1975 SC 633.

H 3. AIR 2000 SC 831.

12. In *State of Haryana V. State of Punjab & Anr*<sup>4</sup>. A  
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." B

13. 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. C  
D

14. 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. E

15. 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. F

Devika Gujral

Appeals allowed. G

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4. (2004) 12 SCC 673.