

R.VIJAY KUMAR AND ORS.

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v.

THE COMMISSIONER OF EXCISE AND ORS.

NOVEMBER 5, 1993.

[S.RATNAVEL PANDIAN AND R.M. SAHAI, JJ.]

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*Kerala Excise Act, 1944/Kerala Foreign Liquor Rules, 1974—Rule 13(3)—Renewal of licences and grant or fresh licences—Distinction between—Held—Kerala State Government policy issued on November 9, 1992, for cancellation/non-grant of Foreign liquor licences after 1.4.1993, was contrary to rules without any valid justification.*

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*Practice and procedure—Affidavit—Contents of Averments should be clear and specific.*

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The appellants were owners or proprietors of hotels and restaurants. they were granted FL-3 licences under Rule 13(3) of Kerala Foreign Liquor Rules, 1974, in October 1992 for the year 1992-93, but these licences were cancelled soon thereafter, in view of the policy decision taken by the Government to cancel all Foreign Liquor (Hotel/Restaurant) Licences granted to hotels/Restaurant/tourist homes during the financial year 1992-92. Writ Petitions filed by the appellants challenging the cancellation order were dismissed by the High Court.

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In the Special Leave petitions filed before this Court against the High Court Orders, this Court granted interim stay to enure only upto 31.3.93, with liberty to the petitioners to approach the concerned authorities for renewal of the licence, for the year 1993-94 and a direction to the concerned authorities to dispose of the applications in accordance with law and on merits. However, on the basis of an alleged statement made on behalf of the State to the Press that the licences of the appellants would not be renewed, the appellants approached the High Court for issue of directions to the respondents to renew their licences for the year 1993-94. The High Court directed the respondents to dispose of the appellants' applications for renewal of licences, as directed by this Court. The Excise Commissioner rejected the applications in the light of G.O. dated 9th

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A November, 1992.

B In the appeal, before this Court, on behalf of the appellants it was contended that the Government's policy of prohibition was not in consonance with practice, and it was denying the right to carry on business to the appellants for extraneous reasons, and that renewal of 381 licences, of the licencees who were similarly situated as the appellants, was contrary both to the policy decision of the Government and directive principles of the Constitution. It was also urged that the State being in contempt, for making statement to the Press, in direct conflict with the earlier order of this Court and for rejecting the appellants applications, without examining it on merits, it was not entitled to be heard.

D The respondents contended that the appellants formed a separate class inasmuch as they were issued licences in 1992-93 and, therefore, they could not claim to be in the same group as other licenseees who were operating from before. It was also urged that normally renewal and fresh grant were not dealt with by the same yardstick.

Allowing the appeal, this Court

E HELD : 1.1. Classification which can be sustained must have a reasonable nexus with objective sought to be achieved by the impugned action. Except for the appellants, who are 21 in number, the State could not point out any circumstance which could establish that the policy of prohibition was being enforced or implemented. The validity of the State action has to be judged on positive steps taken by the State for enforcing the policy. The appellants, who were granted licence in 1992-93 and those who are granted licences and are operating, from before are hoteliers and are required under rules to conform to two star hotel standard. Both are required to promote tourism. [613-C-F, 614-B]

G 1.2. The State is not following consistent and uniform policy. First, it announced its intention not to issue any licence. 'afresh' from 18th September 1991 but it did not adhere to it and within a month it issued another order in February 1992 deciding to grant the privilege of selling liquor promotion of tourism. In November 1992 it decided to cancel all H licence issued in current year. If the licences issued in 1993-94 to

licensees operating from before and to the appellants were issued afresh as the rules do not making distinction between renewal and fresh grant, then all licences were on same footing and the attempt to pick and choose the appellants, was contrary to rules without any valid justification. [614-C-D]

2. The rules do not appear to make any distinction between renewal of a licence and its grant. It is true that normally renewal and fresh grant are not dealt with by the same yard stick. However, no pronouncement is made about it. The validity of G.O. Issued on November 9, 1992 is the subject matter of challenge in another appeal, pending before Constitution Bench. [612-F-H]

3. The affidavit filed by the Respondent was not only vague but highly unsatisfactory. The averments in the affidavit should be clear and specific. In the affidavit it was not clarified, if the alleged statement to the press was made or not. It is capable of creating reasonable apprehension in the mind of an ordinary citizen that the respondents did not decide the appellant's applications on objective considerations but on invisible yet apparent pressure from extraneous source. [612-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeals No. 6042 of 1993.

From the Judgment and Order dated 30.3.93 of the Kerala High Court in C.M.P. No. 7947/93 in O.P.No. 42825 of 1993.

G.Ramaswamy, E.M.S. Anam and George Poonthothan for the Appellants.

V.R. Reddy Additional Solicitor General, A.S. Nambiar and M.A. Firoz for the Respondents.

The Judgment of the Court was delivered by

R.M. SAHAI, J. These are four appeals directed against judgment and order of the High Court of Kerala. The appellants are owners or proprietors of hotels and restaurants who were granted FL-3 licences under Rule 13(3) of the Kerala Excise Act in October 1992 for the year 1992-93. Their licences were cancelled soon thereafter as in November

- A 1992 the Government had taken a policy decision to cancel all Foreign Liquor (Hotel/Restaurant) Licences under Rule 13(3) of the Kerala Foreign Liquor Rules 1974 to hotels/restaurant/tourist homes during the financial year 1992- 93. They challenged the orders in the High Court by way of writ petitions. The petitions were dismissed on 1st February 1993.
- B Two Special Leave Petitions were filed against this order. One was numbered as 2310-17 of 1993 and the other as 3391 of 1993. Some of other petitions came up for hearing before the High Court on 4th March 1993 which were decided on 10th March 1993. This order was challenged by Special Leave Petition (Civil) No. 4152 of 1993. In Special Leave Petition Nos. 2310-17 of 1993 and 3391 of 1993 a bench of this Court on 1st March 1993 passed following order :
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"Issue notice both on special leave petitions as well as on petitions for stay. Mr. John Joseph on behalf for Mr. P.K. Pillai accepts notice on behalf of Respondent No. 6. Dasti service is permitted additionally. There will be an interim stay which will enure only upto 31.3.93 in respect of FL-3 licence for the year 1992-93 and the stay will not enure beyond that period.

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- E It is open to the petitioners to approach the concerned authorities for renewal of the licence, if they are so entitled and the concerned authorities thereupon shall dispose of the application in accordance with law and on merits."

- F On 2nd March 1993 it is alleged that a statement was made on behalf of the State to the press that the licence of the appellants shall not be renewed. However, since on 1st March 1993 this Court had permitted the appellants to approach the concerned authorities and yet a statement had been issued on behalf of the State Government the appellants approached the High Court, once again, for issue of direction to opposite parties to renew licences of the appellants for the years 1993-94. This petition was disposed of on 30th March 1993 directing the respondents to dispose of the applications for renewal filed by the appellants as directed by this Court in accordance with law and on merits. In pursuance of this order applications filed by the appellants for renewal of their licence for 1993-94 appears to have been forwarded by the Excise Commissioner to the Board of Revenue which in its turn returned it with instructions to dispose of them
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in the light of G.D. No. 179/92/TD dated 9th November 1992. On 24th May 1993 the Excise Commissioner rejected the applications for renewal in the light of G.O. dated 9th November 1992 as directed by the Board. This order has been challenged by a separate Special Leave Petition (C) No. 5808 of 1993 in which notice was issued on 13th May 1993.

Lengthy arguments were advanced by learned counsel for both the sides. One the questions that was raised was if the appellants have a fundamental right to carry on trade in liquor. This question has been referred to a constitution bench by a bench of three judges of this Court in Civil Appeal Nos. 4708-12 1989. The Civil Appeal Nos. 6043-50 of 1993 arising out of S.L.P. (C) Nos. 2310-17 of 1993; Civil Appeal No. 6051 of 1993 arising out of S.L.P. (C) 3391 of 1993; and Civil Appeal No. 6052 of 1993 arising out of S.L.P. (C) No. 4152 of 1993 are therefore directed to be tagged with Civil Appeal Nos. 4708-12 of 1989.

The appeal arising out Special Leave Petition (C) No. 5808 of 1993 is however confined to the short question if the opposite parties committed any error of law in rejecting the application filed by appellants for renewal of licence for 1993-94. Two basic attacks were made on the correctness of the order dated 24th May 1993. One, that the policy of the Government is not in consonance with practice. It was claimed that even though the State claimed implementation of directive principle of the Constitution it had liberalised import of arrack from outside the State. It was claimed that this unmistakably demonstrate that the State was not interested in enforcing the policy of prohibition but only denying the right to carry on business to the appellants for extraneous reason. The other ground was that the renewal of 381 licences who were similarly situated as the appellants was contrary both to the policy decision of Government and directive principles of the Constitution. It was also urged that the State being in contempt as it not only made statement to the press which was in direct conflict with the order issued by this Court but even rejected the applications filed by the appellants without examining it on merits was not liable to be heard. The State defended both its policy decision and the order.

Although we do not propose to decide if any statement was made on behalf of the State Government and it purported to interfere with the courts of justice as sufficient material has not been placed on record but we consider it necessary to record our disapproval of the nature of affidavit

A filed by the Secretary (Excise) on such and important issue. Paragraph 11 of the counter-affidavit is reproduced below:

B "I submit that the allegation in Para 5 of Special Leave Petition No. 5808 of 1993 that "the Government have made its mind clear, on the very next day of the order of this Hon'ble Court which was prominently flashed in all Malayalam Newspapers in headline news, by the Hon'ble Chief Minister of the State making a statement to the Press that the licences of the petitioners will in no case be renewed for the year 1993-94", is a vague allegation. Since no paper report has been produced, the deponent is not in a position to verify the veracity of the allegation. However, I deny the imputation that the Government had a closed mind."

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D It has been repeatedly emphasised by this Court that averments in the affidavit should be clear and specific. To our dismay it is not only vague but highly unsatisfactory. An officer of such high stature has not cared to discharge his duty with responsibility. He did not come out clearly if the statement made or not. A very flimsy pretext was advanced that the appellants did not produce newspaper reports. Even this much is not stated that the no newspaper published in Malayalam carried such statement. We are constrained to observed that such affidavits instead of assisting in resolving the issues complicate them. It is capable of creating reasonable apprehension in mind of an ordinary citizen, that the opposite party did not decide their applications on objective considerations but on invisible yet apparent pressure from extraneous source. We stop here and say no more as in our opinion it is not necessary, for purpose of deciding this

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F appeal.

G The rules do not appear to make any distinction between renewal of licence and it grant. We find some merit in the submission of the learned Additional Solicitor General that renewal of fresh grant normally are not dealt with by the same yardstick, yet we do not consider it necessary to pronounce on it as validity of the G.D. issued on 9th November 1992 is subject matter of challenge in other appeals which we have directed to be heard along with other appeals pending before Constitution Bench. As stated earlier we are concerned in this appeal only with correctness of the order dated 24th May 1993. The opposite parties have rejected the applications filed by the petitioners on the ground that the State Government

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having taking a policy decision on 9th November 1992 not to issue licences the appellants were not entitle to claim renewal. The order was attempted to be justified by the learned Additional Solicitor General as according to him the appellants formed a separate class inasmuch as they were issued licences in 1992-93 and, therefore, they could not claim to be in the same group as other licensees who were operating from before. According to him since there were two groups or class of persons, one, who were operating from before and the other who were granted licences in the year 1992, the opposite party did not commit any error of law in rejecting the applications of appellants or acted discriminately in renewing the licences of other. We again do not propose to decide this issue in detail or examine it extensively as the validity of the G.O. has been referred to the Constitution Bench. Suffice it to say that the classification which can be sustained must have a reasonable nexus with objective sought to be achieved by the impugned action. The reason for not renewing the licence of the appellants was the prohibition policy that the State is envisaging to enforce. We may agree that this is a valid ground for reducing the number of licensees in the State. We may also agree that such steps can be taken in stages and not at one stroke, but the facts are otherwise. As stated earlier the consumption of liquor has gone up. The volume of imported arrack has been enhanced. Therefore except for the appellants who are 21 number the State could not point out any circumstance which could establish that the policy of prohibition was being enforced or implemented in the State. True, that some public interested persons are agitating but the validity of the State action has to be judged on positive steps taken by the State for enforcing the policy. But in the affidavits filed by the State no material has been brought on record to show that any concrete step has been taken in this regard. Moreover the appellants are hoteliers who granted licence for promoting tourism. No figure has been furnished about traffic in these hotels. The agitation must be against consumption of liquor. How is the State curtailing it by permitting import of arrack has not been explained. In fact it is not disputed in the affidavit filed by the Excise Secretary that import was permitted under new Abkari policy adopted from 1.4.1993 as the State presumed that contractors were purchasing spirit clandestinely and such clandestine imports were adversely affecting State revenue. The affidavit asserts that it 'was to get over the above problem in a logical manner that government desired to make a realistic assumption of consumption'. So on the one hand the Government is taking the realistic

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- A view by permitting import of arrack which is consumed more by common man and its quota in 1992-93 was one crore bulk litre and on the other cancelling licence of 21 persons in the entire State of Kerala who were granted licence for promoting tourism as it would help in achieving the prohibition policy. We do not comment any further on it. The appellants who were granted licence in 1992-93 and those who are granted licence and are operating from before are hoteliers and are required under rules to conform to two star hotel standard. Both are required to promote tourism. In all respects their licences are same. Further the State does not appear to follow the consistent and uniform policy. In June 1992 it announced its intention not to issue any licence, 'afresh' from 18th September 1991 but it did not adhere to it and within a month it issued another order in February 1992 deciding the grant the privilege of selling liquor for promotion of tourism. In November 1992 it decided to cancel all licences issued in current year. If licences issued in 1993- 94 to licensees operating from before and to the appellants were issued afresh as the rules do not make distinction between renewal and fresh grant then all licensees were on same footing and the attempt to pick and those the appellants, in our opinion, was contrary to rules without any valid justification.

- For these reasons appeals arising out of special leave petition nos. 2310-17/93, 3391/93 and 4152/93 are directed to be tagged with Civil Appeal Nos. 4708-12/89.

- Civil Appeal No. 6042 of 1993 arising out of S.L.P. (Civil) No. 5808 of 1993 is allowed. The respondents are restrained from interfering in carrying on of appellants as FL-3 licensees subject to complying with other conditions and payment of annual rental proportionately till their application for grant of licence are decided on merits as directed by this Court on 1st March 1993 without adverting to order dated 9th November 1992 or till the policy decision is enforced uniformly. Parties have to bear their own costs.

I.S.G.

Appeal allowed.