

P. Krishna Moorthy Vs The District Collector, The Senior Regional Manager, The District Manager and P.K. Chandrasekar

Court: Madras High Court

Date of Decision: Nov. 18, 2010

Acts Referred: Constitution of India, 1950 " Article 21

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: K. Mahendran, for the Appellant; R. Janakiramulu, for R1 Special Government Pleader, V. Karthikeyan, for R2 and R3 and S. Palanivelu, for R4, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.

The petitioner has filed the present writ petition seeking for a direction to the respondents 1 to 3 to consider his

representation dated 24.08.2009 and the consequent direction to shift the TASMACH Retail Vending Shop No. 5274 situated in the

Kanchivanamswamy Temple at Melur to any other place.

2. When the matter came up on 04.12.2009, the learned Counsel appearing for the respondents 1 to 3 takes notice and private notice was

ordered to the fourth respondent. Subsequently, on 01.04.2010, this Court directed the first respondent, the District Collector, to depute his

officials to inspect the shop and find out whether the shop is situated near a temple as well as the Girl's school and to submit a report.

Subsequently an Advocate Commissioner was also appointed on 13.04.2010 to inspect the sites and take measurements in the presence of the

petitioner as well as the officials of the respondent department. By a further order dated 21.05.2010, this Court directed to produce the entire files

in order to ascertain whether the shop was situated in a Government Poramboke land.

3. The third respondent, the District Manager, TASMACH, Madurai District, filed a counter affidavit dated 29.06.2010. A reference was made to

the report of the Advocate Commissioner, wherein it was found that from the shutter of the shop to the front main entrance of the temple is 76.0

meters. If it measured on aerial direction it is 60.6 meters and from the shop to the western side compound wall of temple it is 57.0 meters and

from backside wall of bar to western side compound wall of the temple it is 52.0 meters. Likewise, the Government Girls Higher Secondary

School is situated at 95.0 meters. From the shop to the front compound wall of Government Girls Higher Secondary School is 78.0 meters.

4. On the strength of the report, the third respondent contended that the shop is not located within the prohibited distance as per Rule 8 of the

Tamil Nadu Liquor Retail Vending (in Shops and Bars) Rules, 2003 and therefore, he requested for dismissal of the writ petition.

5. The rental agreement produced shows that the shop is located in the property belonging to the Kanchivanasamy Temple and the Ambalakars

did not have any qualms to let out the Tasmac shop and the bar in the temple land.

6. Mr.K. Mahendran, the learned Counsel for the petitioner, submitted that apart from Rule 8, in which a shop must not be located within a

prohibited distance, he also made reference to the various complaints to the authorities by the village people. One such representation dated

24/08/2009 signed by several residents of the villagers. It was forwarded to the respondents, and the acknowledgement receipt was also enclosed

in the type set of papers. Similarly a reminder was also sent on 09.10.2009.

7. The substance of the complaint was that the TASMAC shop was located on the road leading to bus stand on the main road and near the

Government Girls Higher Secondary School and the local people are suffering due to the customer, after getting fully drunk lying in road margin

nudely and the girls are mainly disturbed by seeing such sceptical view.

8. In the counter filed by the third respondent except a reference was made to that representation, there is no denial of the allegations made therein.

Their hyper technical stand was that the shop was located beyond the prohibited distance from the school and temple. The allegations made in the

representation forwarded to the respondents, had not been replied till date though it is a serious case involving public interest.

9. It is not as if only in cases relating to the rules for location of shop being infringed, relief can be given by this Court.

10. A Division Bench of this Court presided by Eliphe Dharma Rao, J vide Judgment The Tamil Nadu State Marketing Corporation Limited v.

R.m. Shah and Ors. reported in 2010 (2) CWC 337 (DB), dealt with similar cases and in paragraph 9 to 17 it was observed as follows;

9. It is true that the retail vending rules provide that no shops shall be established within a distance of 50 metres in Municipal Corporations and

Municipalities and 100 metres in other areas, from any place of worship or educational institutions. However, that does not mean that the liquor

shops so established would get a licence automatically to cause nuisance to the local people. The prescription of distance for opening the Bar is a

matter between the state and the excise licensees. Merely because the shop is situated beyond the distance stipulated in the rules it cannot be said

that there would be no nuisance to the people of that area. The distance rule takes care of only the place of worship or educational institutions. It

does not say that the liquor shops should be away from residential houses. The nuisance created by the drunkards would extend even beyond the

safety area prescribed under the rules. Therefore, it all depends upon the facts and circumstances of each case. The factum of location of the shop

beyond the prohibited distance would not come to the rescue of the licensee of liquor shops in the event of there being perennial nuisance to the

residents of the area.

10. The appellant is right in their contention that there is nothing in the statute which prohibits conduct of liquor bar in residential zone. But such

absence of restriction would not stand in the way of challenging the location of liquor bars which causes nuisance to the residents of the area.

11. It is a fact that some of the liquor shops are functioning from early morning till midnight without adhering to the time schedule. Therefore, the

fact that the liquor shop has been functioning in the area for a considerable period cannot be put against the public when they approach the

authorities with complaints of nuisance accompanied by a request to shift the liquor outlet. It is not as if the liquor shop would earn business only if

it located in a commercial or residential area.

12. However, there is a word caution. The attempt of the public should not be to shift the liquor shop in a selective manner. There should be public

interest behind any such move. The request for such closure should not be with a hidden agenda and the allegations of nuisance should not be at

the instance of rival traders in liquor.

13. There is nothing on record to suspect the bonafides of the respondents 1 to 4 in their request to shift the liquor Bar.

14. Therefore we reject the contention of the appellant that no direction could be issued to shift the liquor shop in case the shop is located beyond

the prohibited distance.

15. The right to life guaranteed under Article 21 would include every aspect of life so as to make the life real and meaningful. The right to lead a

peaceful life without any kind of nuisance has to be considered as one amongst the many facets of Article 21. India is a welfare state. The state is

expected to promote the well being of its people. It is true that the State has to generate funds for undertaking welfare measures. The trade in

liquor otherwise known as Res-extra-commercium is a major source of revenue to the State. But the generation of revenue should not be at the

expense of the peaceful life of the people.

16. The Code of Criminal Procedure 1973 contains provisions for abatement of nuisance. Section 133 of the Code of Criminal Procedure 1973

reads thus:

133. Conditional order for removal of nuisance.(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive

Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on

taking such evidence (if any) as he thinks fit, considers.

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be

lawfully used by the public; or(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health

or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or

merchandise should be removed or the keeping thereof regulated; or

(c) ...

(d) ...

(e) ...

(f) ...

Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance or carrying on such trade or occupation,

or keeping any such goods or merchandise, or owing, possessing or controlling such building, tent, structure, substance, tank, well or excavation,

or owning or possessing such animal or tree, within a time to be fixed in the order.

(i)to remove such obstruction or nuisance;

or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or

merchandise, or to regulate the keeping thereof in such manner as may be directed; or

16. Therefore in the event of there being a public nuisance in a particular area the people are not without a remedy. The nuisance caused to the

public on account of the functioning of liquor shops would give a cause of action to the affected people to approach the Magistrate u/s 133 of

Code of Criminal Procedure or to take other legal measures to abate such nuisance.

17. The Supreme Court had an occasion to consider the scope of Section 133 of Code of Criminal Procedure in Municipal Council, Ratlam Vs.

Vardichan and Others, .

The Supreme Court held that Section 133 is categorical, although reads discretionary; and judicial discretion when facts for its exercise are present,

has a mandatory import. It was also held that discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise.

The Supreme Court further observed thus;

9. So, the guns of Section 133 go into action wherever there is Public nuisance. The public power of the magistrate under the Code is public duty

to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present as here.

11. With reference to the locus standi of such petitioners it was observed as follows;

20. Therefore, we are of the considered view that any person who is deprived of peaceful life on account of the nuisance created by a liquor shop

could challenge the action in locating the shop in a residential or semi-residential locality as offending the right to life guaranteed under Article 21 of

the Constitution of India notwithstanding the fact that the liquor shop satisfies the distance criteria.

21. In case the statutory authorities consider these local issues with a sense of responsibility there would be no occasion for the common man to

approach the courts with Public Interest. Litigation adding numbers to the Himalayan arrears in courts. The authorities should be sensitive to such

issues of public importance. They should also realize that the people of this great nation are the political custodian of power and the Government is

accountable to the people.

12. In the light of the above, the petitioner has locus standi to file the writ petition. The serious allegations made in the writ petition by the villagers

regarding the shop located closer to the Government Girls School (located within 78 meters) creating problems for the school girls cannot be

brushed aside. The fact that the distance between the shop and the Government Girls School is 78 meters, may escape the rule relating to

prohibited distance, but, the fact that hundreds of girl students are passing that shop every day and the bus stand was located nearby as well as the

complaints made by the villagers are not denied by the respondents and by the legal precedent set out by the Division Bench, this writ petition must

be allowed. Accordingly, the writ petition is allowed.

13. The respondents 1 to 3 are directed to shift the TASMAR Retail Vending Shop No. 5274 situating near the the Kanchivanamswamy Temple

at Melur to any other place within a period of four weeks from the date of receipt of a copy of this order. A compliance report must be sent to this

Court by the first respondent (District Collector, Madurai) without fail. Consequently, connected miscellaneous petition is closed. No costs.