

PRESENTED ON 30.10.2019

**BEFORE THE HON'BLE HIGH COURT OF KERALA AT
ERNAKULAM**

WP(C) No. 25901/2019

Vilasini

: Petitioner

Vs.

State of Kerala & Others

: Respondents

**REPORT SUBMITTED BY AMICUS CURIAE AS DIRECTED
BY THIS HON'BLE COURT IN ORDER DATED 9.10.2019**

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Introduction

1. I am the amicus curiae appointed by this Hon'ble Court in the above case. In the above writ petition, this Hon'ble Court observed that there is an 'underlying concern' in many writ petitions including the present one, challenging the locus of a toddy shop near to residential areas, which is the right to privacy of the residents.

The Case Pleaded in Writ Petition

2. The principal ground in which the challenge in the above writ petition is based is that the toddy shop is shifted to a place near an *Anganwadi*, which according to the petitioner is an educational institution. However, this ground may not be of much assistance to the petitioner, since this Hon'ble Court in *Susy v. Commissioner of Excise*¹ have already held that *Anganwadi* is not an educational institution for the purpose of Rule 7(2) of the *Kerala Abkari Shops Disposal Rules, 2002* [hereinafter called '2002 Rules'].

3. Though the petitioner thought it fit to challenge the setting up of toddy shop on the above ground, a close reading thereof would reveal that it is only a ruse. The real

¹ 2017 (3) KHC 331

grievance of the petitioner is raised in Ground E of the writ petition. It is stated that the area wherein the petitioner lives is a residential area, where women and children are always on the move. The presence of drunkards around almost all the time of the day is creating a circumstance, whereby, the right to peaceful living of the people in the locality is adversely affected. She further states: The drunken men use abusive words against women and children who pass by the toddy shop, which is near a bus stop.

The Real Issue: Privacy

4. As observed by this Hon'ble court, the writ petitions like the instant one, raises an important issue concerning the right to privacy. Whether the Fundamental Right to privacy of the neighbourhood is infringed by the Toddy shops, is the moot question that requires consideration of this Hon'ble.

Privacy Judgment

5. In a landmark judgment in *Justice K. S. Puttaswamy (Retd.) vs. Union of India*,² [Privacy judgment] a nine judge bench of the Supreme Court held that the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 and 21 of the Constitution of India. The observations made in the judgment, relevant for the present case, are reproduced below:

- Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

- Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;
- Privacy includes at its core **the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation**. Privacy also connotes a **right to be left alone**. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture.
- While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, **it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place**. Privacy attaches to the person since it is an essential facet of the dignity of the human being;
- An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and
- Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to

take all necessary measures to protect the privacy of the individual.

Toddy Business In Conflict With Peaceful Living Of Neighbours

6. Answer to the issue raised in this writ petition may be found in the judgment of the division bench of this Hon'ble Court in *Prasanth Babu M vs. Kannur Kalluchethu Vyavasaya Thozhilali Sahakarana Sangom*³, wherein it was opined that no toddy shop should be permitted in busy residential areas, because people are entitled to live in peace and toddy business stands in conflict with it.
7. It was further observed that the Rule needs amendment to 'liberate the people from the nuisance of the toddy shop near their houses'. *"If at all Government is keen to continue toddy shops as a necessary institution, they should construct and provide building in remote places away from residential areas. Further most of the local residents do not want the toddy shop and the same is clear from their agitation and resistance. considering public sentiments, it is for the Government to consider whether toddy shops are required everywhere or whether it could be prohibited at least in residential areas.."*, it was observed.
8. The Hon'ble court also found it strange that there is no bar under the rules in conducting toddy shops in thickly populated areas even though it is prohibited near the burial grounds where people go only for burial of dead bodies. The court further said: *"There cannot be any controversy that people cannot live in peace near any toddy shop because of the nuisance mainly the sound and smell emanating from it. The adverse effect and nuisance on account of the toddy shop involved in this case is reflected in the continuous*

strike and agitation by the local people including ladies and school children.”

9. But unfortunately, the legislature has not yet amended the Rule even after a decade of this ruling.

Statutory Prescriptions

10. As per Rule 7(2) of the 2002 Rules, no toddy shops shall be located within 400 meters and no FL-1 Shops shall be located within 200 meters from **an educational institution, temple, church, mosque, burial ground and Scheduled Caste/ Scheduled Tribe colonies**. In calculating the distance, the basis will be the shortest pathway/lane/street/road generally used by the public and the same shall be measured from gate to gate. As per the proviso to sub-rule (2) of Rule 7, if any educational institution, temple, church, mosque, burial ground or Scheduled Caste/Scheduled Tribe colonies come into existence subsequent to the grant of licence, it shall not disentitle such shops to continue.

11. The Sub-rule (3) of Rule 7 of the Disposal Rules provides that, it shall be competent to the Commissioner of Excise to order the transfer of shops from one site or locality to another site or locality or to alter the specified limits of any shops even during the currency of the contract or to order any shops 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.

Whether non inclusion of ‘residential areas’ hit by Equality doctrine?

12. A little out of context it may seem, but it is pertinent to mention here that, recently the Supreme Court upheld a judgment of Punjab and Haryana High Court which

extended the benefits of the Swatanarta Sainik Samman Pension Scheme to divorced daughters of freedom fighters. The scheme, for the purpose of grant of pension, originally included mother, father, widower/widow if he/she has not since remarried, unmarried daughters in the definition of family of deceased freedom fighter. A divorcee is not included in the list of eligible dependents, even though an unmarried daughter does find mention in this list. But, while directing inclusion of a divorcee daughter, the division bench of the High Court held that there would be no rationality to the reason that the unmarried daughter can be included in the list of eligible dependents and a divorced daughter would stand excluded.

13. The above judgment of the Hon'ble High Court is referred only for the purpose that the exclusion of equally placed persons can attract the rigor of equality doctrine and in such cases the Court may read down the same to include the excluded class of persons so that the rule need not be struck down.

14. Similarly, the purpose of 2002 Rules in restricting setting up of toddy shops near schools and religious places is only to see that the peaceful atmosphere around it is not disturbed by the activities in and outside the toddy shops. But then it is strange, as observed by this Hon'ble Court in *Prasanth Babu M* (Supra), that a rule which prohibits toddy shop near the burial grounds where the dead rest in peace, does not have a mention of 'residential areas', where people live, yearning for peace. Right to peaceful living, is not restricted to temples, mosques, churches, schools and burial grounds, but equally to residential areas.

15. Moreover, the Rule also places restrictions on setting up of toddy shops near Scheduled Caste/ Scheduled Tribe colonies. Colonies are basically residential areas. Therefore, it is clear that the legislature recognizes that the residential

areas need to be protected, but limits it to residential areas dominated by a particular class of people. It is indeed true that the Constitution allows the state to make special provisions for SC-STs. But the impact of toddy shops near residential areas is same as that near to SC-ST Colonies.

16. Another contradiction discernible is in proviso to sub-rule (2) of Rule 7, which provides that, if any educational institution, temple, church, mosque, burial ground or Scheduled Caste/Scheduled Tribe colonies come into existence subsequent to the grant of licence, it shall not disentitle such shops to continue. Does this mean that the schools and religious institutions if established near Toddy shops [subsequent to the grant of licence] have to face the nuisance without any protection?

Sanctity of a man's home

17. House is made of bricks, but the home is made of hearts, is a famous saying. The place where a person lives as a member of a family or household, is a home. The phrase 'sanctity of a man's home' was first used in *Kharak Singh vs State Of UP*⁴, though in the context of domiciliary visits by cops at night. It was observed therein that the sanctity of the home and the protection against unauthorized intrusion an integral element of "ordered liberty", comprised in 'personal liberty' guaranteed by Article 21.

18. Justice Subba Rao, in his famous dissent in *Kharak Singh* (Supra), (described as second greatest dissent in *Privacy judgment*) observed: *The right to personal liberty takes in not only **the right to be free from restrictions placed on his movements, but also free from encroachments on his private life.** It is true our Constitution does not expressly declare a right to privacy as*

4 AIR 1963 SC 1295

*a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; **it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty.***

Privacy of Neighbourhood

19. It is an admitted fact that liquor shops, as it exists today, creates a nuisance to its neighbourhood. A division bench of this Hon'ble Court, about four decades ago, in State of Kerala vs. Lukose ⁵, observed thus: "*Though under the rules vicinity to residential buildings is not by itself a criterion for fixing the location of a toddy shop it cannot be gainsaid that the presence of a toddy shop in the close proximity of one's residence is a nuisance to the occupants of the house.*"

20. Nuisance is an actionable tort. Section 268 of the Indian Penal Code, defines Public nuisance as "an act or illegal omission which causes any common injury, danger or annoyance, to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right." An individual can be punished under 290,291 IPC for causing public nuisance. But what if it is not an individual which is causing nuisance, but a business, in this case the business of toddy?

21. When the state allows a licensee to set up a toddy business in a residential area, it is establishing a source of public nuisance there. Such an act of state which causes a public nuisance, in my humble opinion, is an infringement of

⁵ ILR 1981 (2) Kerala 205

the collective right to privacy of the residents in the area. True that, like any other fundamental right, the privacy right is not absolute, but the restrictions on such a right should be reasonable.

22. **Re: Noise Pollution**⁶, the Supreme Court held that the right to live in freedom from noise pollution as a fundamental right is protected by Article 21 of the Constitution. Noise pollution is a public nuisance, though there are statutory regulations framed in that regard. Extrapolating this logic, the right to live in peace, the right to feel safe, etc are fundamental right.

23. Article 12 of the Universal Declaration of Human Rights, recognises the right to privacy: "Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Article 3 states that everyone has the right to life, liberty and security of person. As a party to this international covenant, the state is duty bound to ensure that there is no arbitrary interference in the lives of individuals due to setting up of toddy shops near their residences.

Prevention is better than cure

24. Though there is no Rule barring setting up of Toddy shop in a residential area, the Sub-rule (3) of Rule 7 of the Disposal Rules empowers the authority to order its closure in the interest of public peace or morality or on grounds of expediency. To elaborate the scope of this Rule, the rule does not prevent setting up of toddy shops in residential areas even though they can lead to a situation affecting public peace or morality, but it provides a 'cure' by empowering the competent authority to order closure of

6 AIR 2005 SC 3136

Toddy shops in such cases. Since prevention is better than cure, it is essential that the state should do a social impact study before allowing setting up of toddy shops in residential areas.

How does Toddy shops affect the residents of neighbourhood

25. From the enquiry I made with one such resident near a Toddy shop, I could gather that the following are the main nuisances faced by such residents.

- It is mainly pointed out that women and children who walk through the public roads near Toddy shops are the main sufferers. Owing to their intoxication, it is said that, the toddy drinkers, pass lewd comments on them and also use abusive language. Girls in those areas often face harassment and intimidation.
- The toddy shop has a bad influence on children growing up in the localities, making them gullible to addiction.
- The brawls in and outside the toddy shops often affect the peaceful atmosphere in the nearby homes.

Impact of on students

26. While ordering the removal of a TASMACH shop which is located near a school, a division bench of the Madras High Court held in *R.Gopinath vs. The District Collector*⁷: *We are able to visualise as to how much the students studying in the school would have been shivering all these 7 years, when they were passing through the said shop. We apprehend that the minds of many students at their young age might have even been spoiled by the very location of the shop. If the students stand just in front of the school, they can see the people drinking liquor in the shop, because it is so visible. Unmindful of the interest of the poor*

⁷ Order dated 27.08.2015 in W.P(MD)No.15257 of 2015

students, who are studying in the Government School, the officials have located the shop at such a shortest distance.”

27. It is important to note that the Rule 7(6) provides that a signboard ‘Alcohol Consumption is injurious to health’ should be displayed at the main entrance of toddy shop. In our neighbouring state, Tamil Nadu, the rule ⁸is that the signboard should sport this message: Liquor-ruins country, family and life.

28. In 2017, this Hon’ble Court in **My Hindusthan Paints vs. State of Kerala**⁹ had remarked thus: *The sinuous queues that are found of men (very rarely or never of women) in several parts of Kerala waiting for their turn to buy liquor, which spill over to the road, streets, lanes and other public areas is not merely a sight for the sore eyes but is also an affront on the collective dignity of the citizenry of the State. What is violated is not merely self respect of the persons in the queues but also the collective respect of the citizenry as a whole.*

29. This Hon’ble court took judicial notice of such long queues and that such queues spill over on to public roads and streets. The reason for this, according to the court, that the KSBC does not retail liquor through shops into which customers can walk into and wait, if required, but through counters which are created by barricading and grilling the entrance area of the licensed shops. This, the Hon’ble court said, effectively forces the customers to stand outside even on roads and streets on which such shops are situated, thus causing long queues and resultant pandemonium in public space including streets. The results of such queues are traffic snarls, brawls, disorder on public roads and streets.

Conclusion

⁸ Rule 10(5) of the Tamil Nadu Liquor Retail Vending (In Shops And Bars) Rules, 2003

⁹ 2017 (3) KLJ 375

A. Toddy shops near residential areas, as this Hon'ble court observed in *Prasanth Babu M* (Supra) affects people's right to live in peace, which is a facet of the Fundamental right to privacy: Right to be let alone.

B. Though in *Prasanth Babu M* (Supra), which is a judgment delivered in 2010, this Hon'ble Court made suggestions to the legislature, now post *Privacy judgment* scenario, this Hon'ble Court may direct the legislature to take into account the *privacy* factor of residents of neighbourhood before allowing the setting up of/shifting of toddy shops, and their continuance at a place. The state is competent to remedy the situation by doing social impact studies, and by modernizing toddy shops by minimizing the nuisance impact in its neighbourhood.

C. Right to privacy, a facet of fundamental right to life, of individuals is more precious than the business interest of Toddy licensees or the revenue garnered by the state.

This report is submitted as directed by this Hon'ble Court, which may kindly be accepted on file.

Dated this the 28th day of October 2019

ASHOK KINI M.

AMICUS CURIAE