

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

FRIDAY, THE 14TH DAY OF FEBRUARY 2020 / 25TH MAGHA, 1941

WP(C).No.25901 OF 2018(K)

PETITIONER:

VILASINI
AGED 42 YEARS
D/O CHAMI, KALLIVALAPPIL HOUSE, VALLOOR AMAYOOR PO,
PATTAMBI, PALAKKAD DISTRICT.

BY ADVS.
SRI.P.JAYARAM
SRI.A.HAROON RASHEED

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY THE SECRETARY, DEPARTMENT OF
EXCISE, GOVERNMENT SECRETARIAT, THIRUVANATHAPURAM-
695001.
- 2 DEPUTY COMMISSIONER OF EXCISE
PALAKKAD-678001.
- 3 THE CIRCLE INSPECTOR OF EXCISE
OTTAPALAM-679502.
- 4 THE DISTRICT COLLECTOR
PALAKKAD-678001.
- 5 C.K CHANDRAN
S/O KANNAN, CHENGODE HOUSE, KODALLOOR, PARALI, PALAKKAD
DISTRICT-678612.
- *ADDL. ALL KERALA TODDY SHOP LICENCEE ASSOCIATION
R6 REPRESENTED BY ITS SECRETARY AJITH BABU V.K.,
MOONJAPPILLY BUILDING, PROVIDENCE ROAD,
KOCHI - 682 01.

*ADDITIONAL R6 IS IMPEADED AS PER ORDER IN I.A.NO.2
OF 2019 DATED 10.12.2019.

R1, R5 - SRI.M.C.JOHN
R1-R4 - SMT.MABLE C KURIAN, GOVERNMENT PLEADER
R6 BY ADVS. SRI.SEBASTIAN PAUL
SMT.LIZAMMA AUGUSTINE
SMT.VARADA SURENDRAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 10.12.2019,
ALONG WITH WP(C).29704/2015(K), WP(C).2213/2018(B),
WP(C).41459/2018(F) AND WP(C).20809/2019(A), THE COURT ON 14.02.2020
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

FRIDAY, THE 14TH DAY OF FEBRUARY 2020 / 25TH MAGHA, 1941

WP(C).No.29704 OF 2015

PETITIONER:

LAISY SANTHOSH
VRINDAVANAM, IRUMPOOZHICKARA, UDAYANAPURAM. P.O,
VAIKOM, KOTTAYAM-686143.

BY ADVS.
DR.K.P.SATHEESAN (SR.)
SRI.ANOOP.V.NAIR
SRI.P.MOHANDAS (ERNAKULAM)
SRI.K.SUDHINKUMAR
SRI.S.VIBHEESHANAN

RESPONDENTS:

- 1 THE EXCISE COMMISSIONER
EXCISE COMMISSIONERATE, NANDAVANAM,
THIRUVANANTHAPURAM-695033.
 - 2 THE DEPUTY EXCISE COMMISSIONER
EXCISE DIVISION OFFICE, KOTTAYAM-686001.
 - 3 THE EXCISE CIRCLE INSPECTOR
VAIKOM, KOTTAYAM-686141.
 - 4 S.K.PAVITHRAN
PAVEENA COTTAGE, KUDAVECHOOOR KARA, VAIKOM,
KOTTAYAM-686141.
 - 5 K.P.SHAJI
KOLLERIL VEEDU, UDAYANAPURAM. P.O, VAIKOM,
KOTTAYAM-686143.
 - 6 K.G.RAJU
KARUKELELIL VEEDU, PADINJAREKARA. P.O, VAIKOM,
KOTTAYAM-686146.
- *ADDL. THE STATE OF KERALA
R7 REPRESENTED BY THE CHIEF SECRETARY
(*ADDL R7 IS SUO MOTU IMPLEADED AS PER ORDER DATED
15.11.2016.)

R1 SRI.BIMAL K NATH SRGPS
SRI.MABLE C KURIAN
R1, R4 BY ADV. SRI.ALEXANDER GEORGE
SRI.S.P.ARAVINDAKSHAN PILLAY

SRI.S.A.ANAND
SMT.L.ANNAPOORNA
SRI.K.A.BALAN
SRI.PETER JOSE CHRISTO
SRI.V.VARGHESE
SRI.SHEEJA CS
SRI.HARISH K P

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10.12.2019, ALONG WITH WP(C).2213/2018(B), WP(C).25901/2018(K),
WP(C).41459/2018(F) AND WP(C).20809/2019(A),THE COURT ON 14.02.2020
DELIVERED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

FRIDAY, THE 14TH DAY OF FEBRUARY 2020 / 25TH MAGHA, 1941

WP(C).No.2213 OF 2018

PETITIONERS:

- 1 K.P.SHAJI,
AGED 52 YEARS,
KOLLERIL VEEDU, UDAYANAPURAM P.O.,
VADAKKEMURI, VAIKOM - 686 143.
- 2 K.G.RAJU,
KARUKELIL VEEDU, PADINJAREKKARA P.O.,
VAIKOM - 686 146.
- 3 S.K.PAVITHRAN,
PRAVEENA COTTAGE, KUDAVECHOOOR P.O.,
VECHOOOR, VAIKOM.

BY ADVS.

SRI.S.P.ARAVINDAKSHAN PILLAY

SRI.S.A.ANAND

SMT.L.AMMU PILLAI

SMT.L.ANNAPOORNA

SMT.B.ANANJANA

SRI.K.A.BALAN

SRI.PETER JOSE CHRISTO

SMT.K.N.REMYA

SMT.N.SANTHA

SRI.V.VARGHESE

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM, PIN -
695 001.
- 2 THE EXCISE COMMISSIONER
COMMISSIONERATE OF EXCISE, NANDAVANAM, VIKAS BHAVAN
P.O., THIRUVANANTHAPURAM, PIN.695 033.
- 3 THE DEPUTY EXCISE COMMISSIONER,
EXCISE DIVISION OFFICE, CIVIL STATION, KOTTAYAM, PIN-686
001.
- 4 THE EXCISE CIRCLE INSEPECTOR
EXCISE CIRCLE OFFICE, VAIKOM, KOTTAYAM DISTRICT,
PIN -686 141.

5

LAISY SANTHOSH
VRINDAVANAM, IRUMPOOZHICKARA, UDAYANAPURAM P.O.,
VAIKOM, KOTTAYAM, PIN - 686 143.

R1 - R4 BY GOVERNMENT PLEADER SRI.BIMAL K NATH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10.12.2019, ALONG WITH WP(C).29704/2015(K), WP(C).25901/2018(K),
WP(C).41459/2018(F) AND WP(C).20809/2019(A) THE COURT ON 14.02.2020
DELIVERED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

FRIDAY, THE 14TH DAY OF FEBRUARY 2020 / 25TH MAGHA, 1941

WP(C).No.41459 OF 2018(F)

PETITIONER:

K.T. XAVIER,
AGED 63 YEARS,
S/O. THOMAS, TRUSTEE, NATIONAL JANE JEEVAN FOUNDATION,
DR. O.K. MADHAVIAMMA ROAD, AYYAPPANKAVU, ERNAKULAM -
682018.

BY ADVS.

SRI.PRAVEEN K. JOY
SMT.M.R.ESHRATH BAI

RESPONDENTS:

- 1 STATE OF KERALA
REP. BY SECRETARY, EXCISE DEPARTMENT, SECRETARIAT,
TRIVANDRUM - 695001.
- 2 EXCISE COMMISSIONER,
EXCISE DEPARTMENT, TRIVANDRUM - 695001.
- 3 ADDITIONAL EXCISE COMMISSIONER,
ADMINISTRATION, EXCISE DEPARTMENT,
TRIVANDRUM - 695001.
- 4 JOINT EXCISE COMMISSIONER,
OFFICE OF EXCISE COMMISSIONER, KATHRIKADAVU JUNCTION,
ERNAKULAM - 682018.
- 5 JOINT EXCISE COMMISSIONER,
OFFICE OF THE EXCISE COMMISSIONER, THADAMPATTUTHAZHAM,
KOZHIKODE - 673020.

*ADDITIONAL R6 TO R9 IMPEADED

ADDL.R6 THE SECRETARY,
LOCAL SELF GOVERNMENT (URBAN) DEPARTMENT, SECRETARIAT,
TRIVANDRUM-695001.

ADDL.R7 THE SECRETARY,
LOCAL SELF GOVERNMENT (RURAL) DEPARTMENT, SECRETARIAT,
TRIVANDRUM-695001.

ADDL.R8 THE DIRECTOR,
DIRECTORATE OF PANCHAYATH, PMG JUNCTION,
TRIVANDRUM - 695033.

ADDL.R9 THE DIRECTOR,
URBAN AFFAIRS, DEPARTMENT OF URBAN AFFAIRS, TRIVANDRUM-
695033.

ADDL.R6 TO R9 ARE IMPEADED AS PER ORDER DATED
11/11/2019 IN I.A.NO.3/2019.

R1-R5 BY GOVERNMENT PLEADER BIMAL K NATH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10.12.2019, ALONG WITH WP(C).29704/2015(K), WP(C).2213/2018(B),
WP(C).25901/2018(K) AND WP(C).20809/2019(A), THE COURT ON 14.02.2020
DELIVERED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

FRIDAY, THE 14TH DAY OF FEBRUARY 2020 / 25TH MAGHA, 1941

WP(C).No.20809 OF 2019(A)

PETITIONER:

M/S.THEEKROY TOWN RESIDENTS ASSOCIATION,
THEEKROY P.O., REG.NO.K.127/12, REPRESENTED BY ITS
PRESIDENT HARI MANNUMADAM, AGED 58, S/O.VASU, MANNUMADAM
HOUSE, THEEKROY KARA, THEEKROY VILLAGE, KOTTOOR P.O.,-
686580.

BY ADVS.

SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.N.RAJESH

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY PRINCIPAL SECRETARY, DEPARTMENT OF HOME
AFFAIRS, SECRETARIAT,
THIRUVANANTHAPURAM-695001.
- 2 DEPUTY EXCISE COMMISSIONER,
KOTTAYAM, CIVIL STATION, KOTTAYAM-686001.
- 3 EXCISE CIRCLE INSPECTOR,
PALA EXCISE RANGE, PALA P.O., -686575, KOTTAYAM.
- 4 THEEKROY GRAMA PANCHAYAT,
REP. BY ITS SECRETARY, THEEKROY P.O.,-686580, KOTTAYAM.
- 5 A.P.MOHANDAS,
AGED 50 YEARS
S/O.PONNAPPAN, ALAPPATTUKUNNEL HOUSE, THEEKROY VILLAGE,
THEEKROY P.O., -686580, KOTTAYAM.
- 6 PERSIN P. VIDYADHARAN,
AGED 42 YEARS
S/O.VIDYADHARAN, PUTHENPARAMBIL HOUSE, PUNCHAVAYAL
DESOM, ERUMELI NORTH VILLAGE, KANJIRAPPILLY TALUK,
PUNCHAVAYAL P.O., -686513, KOTTAYAM.

7 MR.P.T.JOSEPH,
S/o THOMAS,
AGED 58 YEARS
S/O.THOMAS, POTHANAPRAKUNNEL HOUSE,
THEEKKOY VILLAGE, THEEKKOY P.O., -686580,
KOTTAYAM.

R3 BY ADV.SRI.BIMAL K NATH (SENIOR GOVERNMENT
PLEADER)

R4 BY ADV. SRI.JUSTIN JACOB, SC, TEEKOY GRAMA
PANCHAYAT, KOTTAYAM

R4 BY ADV. SRI.K.S.ARUN KUMAR

R5-R7 BY ADV. SRI.P.BABU KUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10.12.2019, ALONG WITH WP(C).29704/2015(K), WP(C).2213/2018(B),
WP(C).25901/2018(K)AND WP(C).41459/2018(F), THE COURT ON 14.02.2020
DELIVERED THE FOLLOWING:



JUDGMENT

[W.P.(C) Nos.25901/2018, 29704/2015,
2213/2018, 41459/2018, 20809/2019]

Dated this the 14th day of February 2020

Toddy is considered as a natural alcohol and health drink. To an average tourist, Kerala is famous for toddy, but, the operation of toddy shops does not bring cheer to the residents in the neighbourhood of such toddy shops. The State of Kerala is known to be a consumer State and its exponential growth in lifestyle has thrown up many challenges on the social front. Toddy shops run in the primitive style have become an eyesore to its neighbours. In social life, anything that is lopsided or degenerated in quality is decried in different forms. These writ petitions resemble a cause for those values cared and nurtured by Keralites. The issue of privacy was not raised as the main issue in these writ petitions. These writ petitions filed for different reliefs in varied grounds, urge the common

concern in regard to the pain and suffering faced by each one of them on account of the location of toddy shops near to their houses. This Court, realising that this is related more to the privacy of those individuals, decided to proceed with the issues raised in these writ petitions on a broader parameter to assimilate the concern within the frame of the right to privacy. To further the Court's enquiry, this Court appointed two lawyers of this Court as *amici curiae*. Sri. R.T.Pradeep, a seasoned lawyer of this Court and a young lawyer Sri.Ashok Kini were appointed as *amici curiae*. Their contribution to deciding this case is immense. This Court at the outset, records its appreciation to these lawyers in enlightening the Court on various aspects related to this issue.

2. Before dealing with the issue of privacy, it is appropriate to refer to the facts of each case.

2.i. W.P.(C) No.29704/2015

The petitioner-Laisy Santhosh is a resident of Vaikom Village. She complains about the location of a toddy shop called 'Irumpoozhikkara toddy shop' in Vaikom Excise Range.

According to her, the distance between her house and the toddy shop is only three metres. The petitioner states that the persons who are coming to the toddy shop cause nuisance to her. She raised various complaints. She also had approached this Court in W.P.(C) No.6559/2014. This court on 30.09.2014 disposed the said writ petition directing the Excise Commissioner to consider the representation of the petitioner after hearing the petitioner and respondents 5 to 7. The Excise Commissioner passed Ext.P7 order dated 05.02.2015 on the representation. The Excise Commissioner was satisfied that nuisance is being generated and ordered shifting of the toddy shop to another location. The Excise commissioner had also observed in the order that the toddy shop is being run since more than 20 years and Laisy Santhosh had started living in the area only five years ago. Perhaps while deciding such a dispute in a civil court complaining of a civil wrong, subsequent residence after the generation of nuisance would have an impact on the relief sought. However, this has to be examined in the perspective of declaring right to privacy as a fundamental right.

Therefore, this Court has to deal with the issue separately in the latter part of this judgment. Laisy Santhosh approached this Court for implementation of the decision of the Excise Commissioner in a time-bound manner.

2.ii. W.P.(C) No.2213/2018

This writ petition was filed by the licensees of the toddy shop challenging the order of shifting issued by the Excise Commissioner consequent upon a complaint made by Laisy Santhosh, the petitioner in W.P.(C) No.29704/2015.

2.iii. W.P.(C) No.41459/2018

This writ petition was filed by Sri.K.T.Xavier, a Trustee of the Public Trust, National Jane Jeevan Foundation. His main grievance is that food is being served in a toddy shop without obtaining a licence from the Local Authority and without obtaining any GST registration.

2.iv. W.P.(C) No.20809/2019

This writ petition was filed by M/s.Theekkoy Town Residents' Association challenging the shifting of a toddy shop to a building near to the residence of the members of the Association. The petitioner apprehends the discharge of

wastewater and food waste from the toddy shop capable of causing a nuisance to the members of the petitioner's Association. The petitioner objected to the location of toddy shops within the thickly populated residential area.

2.v. W.P.(C) No.25901/2018

This writ petition was filed by Vilasini, a resident of Parakkad Colony in Pattambi Municipality. The petitioner challenges the shifting of a toddy shop to a thickly populated area known as Parakkad Colony. The petitioner alleges that the proposed new location of the toddy shop is a building only 10 metres away from the colony. The petitioner also points out the location of an 'anganwadi' near to the proposed location of the toddy shop.

3. As referable to the pleadings, the underlying concern in all these writ petitions is the protection of privacy of the persons who have challenged the location of such toddy shops. The issue, therefore, in all these writ petitions will have to be considered together by way of common judgment.

4. The sale of liquor is *res extra commercium*. The privilege to conduct any liquor business, which includes the sale of toddy, is left to the discretion of the State. The licensor, the State, is having control over the conduct of toddy shops. The licensee, therefore, derives the privilege to conduct toddy business from State policy. Thus, the State is accountable and responsible to the people as to the conduct of toddy shops. Thus, the State is bound to address any implication on the rights of others who are affected by the conduct of toddy shops. Further, constitutional jurisprudence also acknowledges the horizontal application of fundamental rights as against private actors. [M.C.Mehta v. Union of India and Others [1987 (4) SC 463)].

5. The State also has realized the importance of protecting the privacy of the public on account of the conduct of toddy business. Accordingly, pursuant to the interim order passed by this court in W.P.(C) No.25901/2018, the Excise Commissioner on 14.11.2019 issued a circular fixing general guidelines to protect the privacy of neighbours. The guidelines also mandate hygienic and clean

environment in and around the toddy shop. The English translation of the relevant points in the Circular issued by the Excise Commissioner pursuant to the direction of this Court in W.P.(C).No.25901/2018, are as follows:

“ To ensure that the privacy of the public is not at stake due to the presence of toddy shops, the following guidelines are issued as per Rule 9(12) of the Abkari Shops Disposal Rules, 2002, and the same has to be adhered to by the toddy shops.

- All toddy shops should be functional in sturdy strong buildings. To prevent inconvenience to the people residing in the proximity of toddy shops, the interior of toddy shops should be shielded from outside view.*

- There should be a separate clean tidy space in toddy shops for the purpose of storing toddy.*

- Toddy shops and premises should be maintained clean and tidy throughout; toddy to be distributed should be stored in clean utensils; and, toddy should be distributed in clean utensils.*

- The licensees should set up outlets to drain wastewater and set up provisions for waste disposal.*

- The licensees should take necessary steps for day-to-day disposal of wastes from toddy shops.*

- All toddy shops should have a minimum of one clean, tidy and safe washroom. The washrooms should not be situated next to the roadside which the main entrance of the toddy shop is facing. The washrooms should be fit for use at all times and availability of water must be ensured.*

-8:-

- *There should be chairs and tables according to the necessity for the consumers at toddy shops.*
- *All toddy shops should be set up in such ways to ensure enough light and air passage. During paucity of light, there should be provision for light in the path leading to the toddy shop.*
- *If food items are to be served in the toddy shop, the license from the food safety department must be obtained.*
- *The Excise Officer during inspection of toddy shop must ensure that the above-mentioned rules are complied with and note down necessary instructions in the (inspection) report.*
- *If the extremely untidy environment or the inconvenience at toddy shop is brought to notice, it would be deemed as a violation of Rule 9(12) of the Kerala Abkari Shops Disposal Rules and strict action will be initiated.”*

6. In this matter, the All Kerala Toddy Shop Licencees' Association also got impleaded as an additional sixth respondent in W.P.(C) No.25901/2018. They have suggested that the circular issued by the Excise Commissioner on 14.11.2019, can be accepted as preliminary steps for renovation and modernization of toddy shops. It is important to note that the Association also is in full agreement with the report of *amicus curiae* to the extent that the fundamental right to privacy has to be protected in all events and circumstances.

7. The amicus curiae, R.T.Pradeep had suggested positive measures to overcome the issue related to privacy. According to him, instead of having a negative approach to challenging the conduct of toddy shops, the best way is to modernize the toddy shops in its appearance as well as in facilities. He also mentioned that the youngsters are not interested in drinking toddy on account of the unhygienic circumstances that surround it. According to him, toddy being a natural drink, toddy shops must provide all facilities which could attract tourists. The *amicus curiae*, R.T. Pradeep, suggested the following recommendations for modernization:

“i. The Toddy Board envisaged in Abkari Policy of the year 2017-2018 shall be constituted and brought into force within such time fixed by this Hon'ble Court.

ii. The Toddy Board shall be conferred with the power, authority and obligation of procurement, collection and distribution of toddy to ensure the sale of pure toddy in toddy shops.

iii. The toddy tappers shall be placed under the Toddy Board from whom toddy collected on a daily basis through its established collection centres under which cluster of toddy shops according to manageable limits are to be placed under.

iv. The Toddy Board shall take coconut trees/palmyra palm/choondappana for tapping which would provide an income to distress coconut farmers.

v. Those underwent training for extracting Neera from coconut trees who are now unemployed due to non-production of Neera shall be given preference in engaging new toddy tappers.

vi. The payment of salary and other statutory contributions of toddy tappers shall be the responsibility of the Toddy Board.

vii. The Toddy Board shall ensure fixity of tenure and pay packet for toddy workers to attract unemployed youth of the State. The women, as well as transgenders, shall be given due representation in engaging new toddy workers.

viii. Training shall be imparted for toddy tapping and mechanization of toddy tapping to have hassle-free tapping shall be resorted to.

ix. The Toddy Board shall have a mobile testing laboratory with statutory backing attached to each collection centre with routine checking on a daily basis on each toddy shop to ensure adulteration free toddy and quality food.

x. The toddy after reaching the pinnacle of fermentation by crossing intoxicating strength of 8.1% of alcohol being unfit for consumption shall be collected back from the toddy shops by the Toddy Board and value-added products shall be produced from such unconsumed toddy.

xi. The toddy shops shall be classified based on amenities, places and architectural specifications.

xii. The architectural specifications of toddy shops blending tradition and modernity for the purpose of

classification shall ensure eco friendly and low-cost construction without burdening the licensee.

xiii. The architectural specifications shall provide natural lighting and drawing the nature into the building which shall be a cynosure to the eye.

xiv. The toddy shops irrespective of classification shall have separate toddy parlour and restaurant with separate toilet facilities for gents and ladies as well as for physically handicapped persons. It shall have adequate facilities for parking of vehicles, disposal of food waste and sewage drains.

xv. The toddy shops shall serve authentic traditional food subserving the quality prescribed. The food items shall be catalogued by prescribing quality. The mobile testing laboratory shall be conferred with the authority to ensure the standard of food.

xvi. The workers of toddy shop shall comprise of cook and suppliers. They shall be provided with a uniform. The payment of salary and statutory contributions of toddy shop workers shall be the obligation of the licensee. Women, as well as transgenders, shall be given due representation in engaging toddy shop workers.

xvii. The toddy shop shall maintain sufficient setback from the public road as well as from the rear and the back portion to protect the privacy of the people residing in the neighbourhood.”

8. The *amicus curiae* also referred to the report of Justice M. Ramachandran Commission to point out the fact that the toddy industry is dying in the State. The recommendations of the *amicus curiae*, R.T.Pradeep are very

appealing in as much as that the State has to address those recommendations in a perspective way to promote toddy to obviate any kind of adverse or negative impact on the conduct of toddy shops in the State. As rightly pointed out by him, if the architectural appearance of the toddy shops is made commensurate with the Kerala style of architecture, it would not only promote the consumption of toddy but also would attract foreign as well as domestic tourism. This would also enable to overcome any kind of challenge being made against the conduct of toddy shops on grounds of privacy, nuisance, etc.

9. The *amicus curiae*, Ashok Kini M. filed two reports. In the first report, dated 30.10.2019, after referring to sub-rule (3) of Rule 7 of the Kerala Abkari Shops Disposal Rules, 2002, the *amicus curiae* states that it is open for the Commissioner of Excise to order shifting of the shops in the interest of public peace or morality or on any grounds of experience.

10. The *amicus curiae*, Ashok Kini M. referring to the judgment in **Justice K.S.Puttuswamy (retired) v. Union of**

India [2017 (10) SCC 1] submitted that there is no difficulty in ordering the closure of toddy shops if the same is being run in conflict with the tranquillity of the neighbourhood. He also submitted that Rule 7 (2) of the Rules prohibiting the location of toddy shops within four hundred metres from educational institutions, temple, church, etc., must be read on to include residential areas as well, as there are no intelligible criteria to exclude such area. The *amicus curiae* also made an attempt to get details about the adverse effects of having toddy shops in the neighbourhood of the residential area by conducting an enquiry. Following are the ill-effects reported by the *amicus curiae*:-

“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.”

11. The *amicus curiae* also placed reliance on various judgments of the Apex Court and this Court which shall be adverted to in the latter part of this judgment. In the supplementary report dated 14.11.2019, the *amicus curiae* points out to the various rules existing in other States regarding the residents right to object. He particularly referred to Rule 48 of the Bihar Excise Rules, 1919, Assam Excise Rules, 1945 and 2016 and submitted that the Kerala Rule is silent in regard to the right of the residents in the neighbourhood to object the location of toddy shops.

12. Before entering upon the question on the issue of privacy, it is appropriate to refer to some of the judgments relied upon by the *amicus curiae*, Ashok Kini M. as well as other judgments cited at the Bar by the learned counsel for the writ petitioners. In **Prasanth Babu M. v. Kannur Kalluchethu Vyavasaya Thozhilali Sahakarana Sangom [2010 (4) KLT 508]**, a Division Bench of this Court opined that no toddy shops should be permitted in busy residential areas, and the Rule needs an amendment to liberate the people from the nuisance of toddy shops near their houses. A learned

Single Judge of this Court in **Ganapathy Iyer and Others v. State of Kerala and others [2018(2) KHC 698]**, in paragraph 29 observed that if any FL-I shop is causing threat to public peace and morality and also inconvenience to the residents in the locality, such shop is liable for closure.

13. In **My Hindusthan paints v. State of Kerala [2017 (3) KLJ 375]**, this court deprecated people standing in the queue to buy liquor by observing that this is an affront on the collective dignity of the citizenry of the State.

14. Bombay High Court in **Shailaja Rajendra Badwaik v. Hon'ble Minister, Department of State Excise [2013 (7) ALLMR 227]** opined that the Government ought to respect the wishes of the citizens and take care of the fundamental rights of the citizens and residents before exercising power to grant liquor licence. The *amicus curiae*, Ashok Kini M. points out that Maharashtra Rules, like Kerala Rules, do not restrict opening of liquor shops in residential areas.

15. The *amicus curiae*, Shri Ashok Kini M. referred to the Division Bench judgment of the Patna High Court in **Basant Yadav v. State of Bihar [AIR 2003 Pat 95]**. The

Division Bench of Patna High Court with reference to Rule 48 of Bihar Excise Rules opined that location of liquor shop is a subject to which citizen can object. For a citizen to seek regulation so that there is a semblance of civility in society and to avoid disruption of peace and tranquillity of the area where he lives, is the theme of the law. Of course, as seen from Rule 48 as then stood, the public has the right to object to the setting up of liquor shop if it causes annoyance and disturbance to public tranquillity.

16. The task of the constitutional court while determining the issue related to privacy falls on factual criteria to classify the action complained. This task essentially is a fact finding. The challenge to privacy may arise in different forms and different contexts. Privacy being an issue primarily focussed on the guarantee to personal life and personal liberty of individuals concerned to protect freedom as well as dignity, the Court has to assimilate values, interest, and ethos that would subserve the normative aspiration of a human. It may be appropriate

to refer some of the observations of the Hon'ble Supreme Court in **Puttusamy's case** supra which are as follows:

. 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 recognized and guaranteed by the fundamental rights contained in Part III.

. Privacy is the constitutional core of human dignity. Privacy has both a normative and a descriptive function. At a normative level, privacy subserves 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 recognises 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 recognises 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.

. 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.

The standards for assessment of violation of fundamental rights and human rights are more or less the same. The human rights jurisprudence focuses on rights of human available collectively and derivation of such rights individually to human. This co-relation of group or collective rights and derivative individual rights, distinguish the breach between fundamental right and civil wrong. If the rights cannot be claimed as a collective right or common to all, any such wrong on an individual would be short of protected right as a fundamental right. Thus, violation of privacy must have an immutable character available to the group or collective.

17. In a challenge based on infringement of privacy, the first task upon the constitutional court is to classify the nature of the action complained. On the classification

of such action, the Court has to find out whether such action complained is sufficient to harm the citizen from enjoying his life with dignity or amenities which he was enjoying before the action complained.

18. The Court cannot lay exhaustive standards or norms for evaluation of infringement of privacy rights, but certainly the Court can lay down rules that would require to enunciate such assessment. There are judgments of the European Court of Human Rights ('ECtHR' for short) as guiding factors. This can have a bearing in Indian context as well, as the human rights jurisprudence is having universal application. There is no difficulty in incorporating human rights jurisprudence developed in Europe or elsewhere while amplifying fundamental right garbed in the form of human right subject to any limitation placed under the Constitution. As the values of human rights in the organic process evolve principles for governance in Constitutional democracy, it lays down foundation for the fundamental rights through declaration under the written Constitution.

19. ECtHR in its judgment in the case of **Moreno Gomez v. Spain (Application No.4143/02)** dated 16.2.2005 had considered the alleged human right violation of an applicant before the Court. The case brought before that Court reveals that it was a case where a local authority allowed licences for Bar, Pubs and discotheques in the vicinity of the applicant's home; making it impossible for her to live in that area and also to sleep in that house. The Court referred to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Rome, 4.XI.1950*) [hereinafter, European Convention on Human Rights], which reads thus:

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

• There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the well-being of the country, for the protection of health or morals, or the protection of the rights and freedoms of others.”

It would be appropriate to refer certain assessments made by ECtHR therein, which reads thus:.

“B. The Court's assessment

53) ... *The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home (see Hatton and Others v. the United Kingdom [GC] (No. 36022/97, ECHR 2003-VIII),) ...*

55) ... *Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves ...”*

20. ECtHR in **Lopez Ostra v. Spain (Application No.16798/90)** dated **9.12.1994** had to consider human rights violation on account of severe environmental pollution. This was a case complaining malfunction of a plant for treatment of liquid and solid waste. ECtHR, after adverting to the nature of nuisance caused, observed that the State should succeed in striking a fair balance between the interest of town economic well-being - that of waste treatment plant - and the applicant's effective enjoyment of

her right to respect for her home and her private and family life. This judgment will give a clear insight as to the responsibility of the State in maintaining a balance between individual interest and State interest. In a matter arising out of licence given to establish toddy shops, responsibility is cast upon the Government to maintain those balances. Often, it is overlooking those balances, the licenses have been given.

21. In the case of **Guerra and Others v. Italy** [Application No.116/1996/735/932], ECtHR opined that the direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable. In the case of **Hatton and Others v. The United Kingdom** of the very same Court, it was observed that there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8. In the case of **Powell and Rayner v. United Kingdom** [Application No.9310/81], ECtHR considered noise pollution originated from Heathrow Airport

London. The applicants living within the contour area of the airport complained that noise exposure affected the right conferred under Article 8 of the European Convention on Human Rights. The Court opined that a fair balance has to be struck between the competing interest of the individual and the community as a whole. In the case of **Cuenca Zarzoso v. Spain [Application No.23383/12]**, at para.51, the Court commented upon the measures taken by the local authority to regulate noise level in an area. The Court said that mere declaration of the neighbourhood as an acoustically saturated zone would not be sufficient. There must be a real action to protect the rights in an effective manner. In the case of **Dees v. Hungary [Application No.2345/06]**, the applicant complained that noise, vibration, pollution and odour caused by the heavy traffic nearby rendered his home virtually uninhabitable and also alleged that the Hungarian authorities failed to take measures to remedy the situation. The Court relying upon **Moreno Gomez's** case (supra) observed that Article 8 would come into play not only when there is direct interference by the public

authority but also in circumstances where authorities fail to take action to put a stop to third parties' breaches of the rights relied upon by the applicant. This approach is more parallel to the horizontal application of fundamental rights against private parties action. In case of **Fadeyeva v. Russia [Application No.55723/00]**, the applicant alleged that concentration of toxic elements and noise levels in the sanitary security zone exceeded the maximum permissible limits established by the Russian legislation and therefore, sought resettlement of residents outside the zone. The Court observed that State is required to take positive measures and, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure "respect for private life", and if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means.

22. The State being the protector and guardian of fundamental rights is not only obliged to take positive measures as against breach of fundamental rights in any of

its action which may result in denial or infringement of rights of the citizen, it is bound to take same measures when similar infringement arises as the result of private actions as well. The sale or vending of liquor is a controlled activity of the State. No toddy shop can be established without a licence issued by the State Government. Article 8 of European Convention on Human Rights must be read into Article 21 of the Constitution of India to amplify right to life in a sense to protect the privacy. There is no embargo in our Constitution in recognizing human rights protected under Article 8 of the the European Convention on Human Rights to have protection to respect for private and family life and his home. Therefore, no toddy shops can be established in a residential area in derogation of the rights of the individual to have respect for his private and family life and home.

23. Having extrapolated the privacy rights in human rights jurisprudence, the task of this Court is to elucidate the impact assessment of privacy rights. The privacy rights are contextually relevant upon the values in a social

structure to recognize as a distinct and irreducible right. It must be able to strike a balance between the legally recognized rights of an individual and the larger interest or collective interest of the social structure. Privacy rights cannot be recognized to promote the individual interest to deny the rights of others. Therefore, it must seek to promote public morality and social morality of the given social structure. The ethos of the individual may vary even to the extent of derogation of social morality or public morality. Privacy rights are not to support such individual ethos. Privacy rights are basic rights derived from the ultimate values declared in the Constitution. It must be broad enough to encapsulate individual identity or dignity on a larger frame of constitutional morality. Location of toddy shop in any residential area may invite conflicts of interest in varied forms. Toddy shop in the neighbourhood of a luxurious mansions may be disliked by rich men, who are living there. It may look like a rotten apple spoiling the bunch. That cannot be the criteria for the assessment of violation of privacy rights. ECtHR adopted

assessment based on a 'threshold severity test'. This test refers to the minimum level of severity of the action complained. That means to say, in the context of a breach of privacy, it must have a direct immediate consequence to the applicants' right to respect for their homes. The gravity and severity of nuisance of the complained action is the benchmark for assessment of violation of privacy rights protected as fundamental rights. Anything short of such severity can be treated only as a civil wrong. In **Fadeyeva's** case (*supra*), ECtHR referred to "the assessment of a noise pollution and said that the assessment of that minimum is relative and depends on all the circumstances: the nuisance's intensity and duration, its physical or mental effects, the general context, and whether the detriment complained of was negligible in comparison to the environmental hazards inherent to life in a modern city." Similarly, in **Galev and Others v. Bulgaria (Dec.) [Application No.18324/04]**, the same court opined that the alleged nuisances must be sufficiently serious to affect adversely the applicants' enjoyment of the amenities of

their homes and the quality of their private and family lives.

24. In the light of the discussions as above, it is appropriate to lay down the test of assessment on the impact of privacy rights. These tests are not exhaustive, however, it would form part of the assessment in any given circumstances when there is an alleged breach of privacy on account of the location of a toddy shop in a residential area.

24.i. No toddy shop shall be located in a residential area infringing the right of privacy of the individual to have respect for his private and family life, his home and his correspondence as referred in Article 8 of European Convention on Human Rights.

24.ii. Threshold severity test assessment has to be followed for assessing the breach of privacy right.

24.iii. Threshold severity test refers to the minimum level of severity of the action complained. This has to be referred to the proximity of the toddy shops with a

residential building or buildings, and by adverting to such other factors which would deny the individual the right to live with dignity in the residential building. The assessment must also refer to the denial of amenities like, noise, emissions, odours and any other forms of interference for the quite enjoyment of one's home that he would be entitled to, on account of such location of toddy shops.

24.iv. The assessment test also implies a negative test to assess the surroundings. This test postulates an outcome in the absence of location of toddy shop in a residential area, what could have been the amenities one would be able to enjoy. If this negative test brings an affirmative result, then it has to be assumed that the action would affect the privacy right of the individual on locating toddy shop in the neighbourhood. An affirmative result must indicate that the individual is able to lead a normal life with the amenities that would be otherwise available to him. If the answer is negative, it has to be assumed that no privacy right is affected.

24.v. The test need not be based on any empirical data of a particular area. Even if one individual is affected, that would be sufficient to hold a breach of privacy right. However, that test must be on indicators that would subserve group interest or collective interest of the social structure.

25. The breach of privacy rights as referred in aforementioned paragraphs essentially require a fact finding. The constitutional court has the limitation of its own in entering into fact finding. The Kerala Abkari Shops Disposal Rules, 2002 confers power on the Commissioner of Excise to order transfer of shops or to close the shops in public peace or morality or on grounds of expediency (See Rule 7(3)]. Therefore, there may not be any difficulty for the Excise Commissioner to entertain any complaint alleging infringement of privacy rights. The above provision itself would take care of the issue relatable to the privacy. Apart from that, an individual concern also can approach the Human Rights Commission to redress their grievances.

26. In light of the discussions as above, each cases have to be dealt with separately based on the facts therein.

26.1. W.P.(C).Nos.29704/2015 & 2213/2018: In these cases, the Excise Commissioner, on finding that the location of toddy shop is only one and a half meter distance from the residential building ordered shifting of toddy shop. This order was passed invoking Rule 7(3) of the Kerala Abkari Shops Disposal Rules, 2002. The licensee filed W.P.(C).No.2213/2018 challenging the order. The case of the licensee is that the residential building was put much long after the establishment of toddy shop and, therefore, the owner of the residential building is estopped from challenging the location of the toddy shop. Further, it is contended that there is no complaint from any other neighbouring residential owners, except by the petitioner. The licensee placed reliance on a report of the Excise Inspector Vaikom dated 8.12.2015. This report states that except Laisy Santhosh, the writ petitioner in W.P.(C).No.29704/2015, no other persons in the neighbourhood have raised any complaint. This report also states that the

licensee has agreed to shift the toddy shop to another building. The point to be considered is by applying minimum levels severity test, the privacy rights of the neighbouring owner have been affected or not. The Excise Commissioner relied upon the report of the Deputy Excise Commissioner, Kottayam. That report states that the presence of the toddy shop has affected the privacy rights of the residents. There were written complaints made by the petitioner in W.P. (C).No.29704/2015, Laisy Santhosh along with others. These complaints indicate that there are instances of ruckus and fight by drunkards in front of the house and the drunkards using abusive language against the passers-by. There is a clear finding by the Excise Commissioner that the quiet enjoyment of the house of Laisy Santhosh is affected. That would be sufficient to hold breach of privacy as well as to affirm the justification of the order passed by the Excise Commissioner under Rule 7(3). The scope of judicial review is limited. This Court cannot reverse the finding on facts unless those finding of facts are without any evidence or conduct of any inquiry. There is no estoppel against

fundamental rights. The construction of the residential building after the establishment of toddy shops in the neighbourhood cannot result in the denial of fundamental rights. The claim of fundamental rights can only be subjected to constitutional limitation alone. No other limitation would apply. This is not a case based on civil wrong where it would have been possible to defend a challenge based on the conduct of parties. Such a position is not available when a claim is raised on fundamental rights. The fundamental rights cannot be bartered away [See **Nar Singh Pal v. Union of India and others (2000) 3 SCC 588**]. In **Olga Tellis & Ors vs Bombay Municipal Corporation [AIR 1986 SC 180]** it was held by the Apex Court that the plea of estoppel is closely connected with the plea of waiver and there cannot be any waiver of fundamental rights. Thus, in light of the discussion, licensee of toddy shop No.34 Irumpoozhikkara toddy shop in Vaikom Excise Range must be restrained from operating toddy shop in the building VI/607 of Udayanapuram Grama Panchayat.

26.ii. W.P.(C).Nos.25901/2018 & 20809/2019: As there is no fact finding on the issue of privacy rights, the petitioners' grievance can be directed to be considered by the Excise Commissioner in light of the above discussions after giving an opportunity of hearing to the petitioners and the licensees.

26.iii. W.P.(C).No.41459/2018: This writ petition was filed to stop serving of food at a toddy shop without GST billing and licence from the local authority. In the light of the Circular issued by the Excise Commissioner on 14.11.2019, the issue is resolved. The Circular insists for obtaining licence to serve food in the toddy shop.

27. Privacy rights demand freedom from interference. It refers to freedom from external restraints. Therefore, privacy rights are the aspects of negative liberty. Negative liberty thus available to a class must be assured by the State in all circumstances. The Court, therefore, has to mould the relief through these individual writ petitions as a relief available to a class.

28. The State is bound to take positive steps to prevent infringement of rights of citizens on account of granting licence to toddy shops. The State cannot ignore these aspects related to privacy rights of persons, who are living in the neighbourhood of a toddy shop. Therefore, in all circumstances, the privacy impact assessment must be made by the State before grant or renewal of licence. Failure to carryout this positive obligation on the part of the State would result in the breach of constitutional duty.

29. Accordingly, the following directions are issued:

i. The licensee of toddy shop No.34 Irumpoozhikkara toddy shop in Vaikom Excise Range is restrained from operating toddy shop in the building VI/607 of Udayanapuram Grama Panchayat. W.P.(C).No.29704/2015 is, therefore, allowed and W.P.(C).No.2213/2018 is, accordingly, dismissed.

ii. No new licence or renewal shall be granted to toddy shops in a residential area without assessing privacy rights impact.

iii. The Circular dated 14.11.2019 shall be followed by all licensees of toddy shops. On breach of directions in the Circular, action shall be initiated by the Excise Department to cancel or revoke the licence.

iv. The report of *amicus curiae*, R.T.Pradeep shall be considered by the Government and the Excise Department for modernization of toddy shops in the State.

v. The individual complaints of the writ petitioners in W.P.(C).Nos.25901/2018 and 20809/2019 shall be considered by the Excise Commissioner within a period of two months in the light of the discussions and directions in this judgment.

vi. W.P.(C).No.41459/2018 is disposed in the light of the Circular dated 14.11.2019.

Sd/-

A.MUHAMED MUSTAQUE

In/ms

JUDGE

