

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 3<sup>RD</sup> DAY OF JANUARY 2022 / 13TH Pousha, 1943

WA NO. 389 OF 2020

AGAINST THE JUDGMENT DATED 14.04.2020 IN WP(C) 29704/2015

OF HIGH COURT OF KERALA

APPELLANTS/RESPONDENTS 4,5 & 6:

- 1 S.K.PAVITHRAN  
AGED 52 YEARS, PRAVEENA COTTAGE, KUDAVECHOOOR  
KARA, VAIKOM, KOTTAYAM-686141.
- 2 K.P.SHAJI,  
KOLLERIL VEEDU, UDAYANAPURAM P.O., VAIKOM,  
KOTTAYAM-686143.
- 3 K.G.RAJU,  
KARUKELELIL VEEDU, PADINJAREKARA P.O., VAIKOM,  
KOTTAYAM-686146.  
BY ADVS.  
T.A.SHAJI (SR.)  
S.ABHILASH VISHNU  
ATHUL SHAJI  
NIKHIL SUNNY MOOKEN  
ANWIN JOHN ANTONY

RESPONDENTS/PETITIONER & RESPONDENTS 1 TO 3 & ADDITIONAL

RESPONDENT NO.7:

- 1 LAISY SANTHOSH  
VRINDAVANAM, IRUMPOOZHICKARA, UDAYANAPURAM P.O.,  
VAIKOM, KOTTAYAM-686143.
- 2 THE EXCISE COMMISSIONER,  
EXCISE COMMISSIONERATE, NANDAVANAM,  
THIRUVANANTHAPURAM-695033.

- 3 THE DEPUTY EXCISE COMMISSIONER,  
EXCISE DIVISION OFFICE, KOTTAYAM-686001.
- 4 THE EXCISE CIRCLE INSPECTOR,  
VAIKOM, KOTTAYAM-686141.
- 5 THE STATE OF KERALA,  
REPRESENTED BY THE CHIEF SECRETARY TO  
GOVERNMENT, HEALTH AND FAMILY WELFARE (FW)  
DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM,  
PIN-695001.

ADDL.R6 KALLU SHAP LICENSEES ASSOCIATION  
REG.NO.EKM/TC/354/2016  
MUNJAPPILLY BUILDINGS, PROVIDENCE ROAD,  
KOCHI - 682018, REPRESENTED BY ITS SECRETARY  
AJITH BABU V.K, AGED 56 YEARS, S/O.KOOPAN,  
SECRETARY RESIDING AT ACHOOS, MOWANCHERY P.O,  
KANNUR DISTRICT

IS IMPEADED AS ADDL.R6 AS PER ORDER DATED  
03.01.2022 IN I.A.NO.1 OF 2021 IN  
W.A.NO.389/2020

BY ADVS.

DR.K.P.SATHEESAN (SR.)  
SRI.P.MOHANDAS (ERNAKULAM)  
SRI.S.VIBHEESHANAN  
SRI.K.SUDHINKUMAR  
NIREESH MATHEW  
C.C.THOMAS (SR.)  
SR.GP.T.K.VIPIN DAS  
DR.THUSHARA JAMES (AMICUS CURIAE)

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON  
03.01.2022, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 3<sup>RD</sup> DAY OF JANUARY 2022 / 13TH POUSHA, 1943

WA NO. 391 OF 2020

AGAINST THE JUDGMENT DATED 14.04.2020 IN WP(C) 2213/2018

OF HIGH COURT OF KERALA

APPELLANTS/PETITIONERS IN THE WPC:

- 1 K.P.SHAJI,  
AGED 52 YEARS, KOLLERI VEEDU, UDAYANAPURAM P.O.,  
VAIKOM, KOTTAYAM-686143.
- 2 K.G. RAJU,  
KARUKELELIL VEEDU, PADINJAREKARA P.O., VAIKOM,  
KOTTAYAM-686146.
- 3 S.K. PAVITHRAN,  
PRAVEENA COTTAGE, KUDAVECHOOOR KARA, VAIKOM,  
KOTTAYAM-686141.  
BY ADVS.  
T.A.SHAJI (SR.)  
ATHUL SHAJI  
S.ABHILASH VISHNU  
NIKHIL SUNNY MOOKEN  
ANWIN JOHN ANTONY

RESPONDENTS/RESPONDENTS 1-5 IN THE WPC:

- 1 STATE OF KERALA,  
REPRESENTED BY THE SECRETARY TO GOVERNMENT,  
TAXES DEPARTMENT, SECRETARIAT,  
THIRUVANANTHAPURAM, PIN-695001.

- 2 THE EXCISE COMMISSIONER,  
COMMISSIONERATE OF EXCISE, NANDAVANAM, VIKAS  
BHAVAN P.O., THIRUVANANTHAPURAM, PIN-695033.
- 3 THE DEPUTY EXCISE COMMISSIONER,  
EXCISE DIVISION OFFICE, CIVIL STATION, KOTTAYAM,  
PIN-686001.
- 4 THE EXCISE CIRCLE INSPECTOR,  
EXCISE CIRCLE OFFICE, VAIKOM, KOTTAYAM DISTRICT,  
PIN-686141.
- 5 LAISY SANTHOSH,  
VRINDAVANAM, IRUMPOOZHICKARA, UDAYANAPURAM P.O.,  
VAIKOM, KOTTAYAM, PIN-686143.

ADDL.R6 KALLU SHAP LICENSEES ASSOCIATION  
REG.NO.EKM/TC/354/2016  
MUNJAPPILLY BUILDINGS, PROVIDENCE ROAD,  
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AJITH BABU V.K, AGED 56 YEARS, S/O.KOOPAN,  
SECRETARY RESIDING AT ACHOOS, MOWANCHERY P.O,  
KANNUR DISTRICT

IS IMPEADED AS ADDL.R6 AS PER ORDER DATED  
03.01.2022 IN I.A.NO.1 OF 2021 IN  
W.A.NO.391/2020

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DR.K.P.SATHEESAN (SR.)

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SRI.K.SUDHINKUMAR

NIREESH MATHEW

C.C.THOMAS (SR.)

SR.GP.T.K.VIPIN DAS

DR.THUSHARA JAMES (AMICUS CURIAE)

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON  
03.01.2022, ALONG WITH WA.389/2020, THE COURT ON THE SAME  
DAY DELIVERED THE FOLLOWING:

**C.R.**

**P.B.SURESH KUMAR & C.S.SUDHA, JJ.**

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**Writ Appeal Nos.389 & 391 of 2020**

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**Dated this the 3<sup>rd</sup> day of January, 2022.**

**JUDGMENT**

**P.B.Suresh Kumar, J.**

These appeals are directed against the common judgment dated 14.02.2020 in W.P.(C) Nos.29704 of 2015 and 2213 of 2018. The appellants in the appeals are respondents 4 to 6 in W.P.(C) No.29704 of 2015 and petitioners in W.P.(C) No.2213 of 2018. Parties and documents are referred to in this judgment for convenience, as they appear in W.P.(C) No.29704 of 2015.

2. The petitioner is a person residing at Vaikom in a residential property owned by her. A toddy shop under the

Vaikom Excise Range is located in the property adjacent to the residential property of the petitioner. Respondents 4 to 6 are the licencees of the said toddy shop. According to the petitioner, since the functioning of the toddy shop has been causing nuisance to her and family, she preferred a complaint to the first respondent, the Excise Commissioner, seeking orders to change its location. Though it was found that the toddy shop has been functioning in the same location and premises right from 1994-95 in accordance with the Rules framed under the Abkari Act and that the petitioner is a person who started residing in the adjacent property after the establishment of the toddy shop, the first respondent, as per Ext.P7 order, directed respondents 4 to 6 to relocate the toddy shop, invoking Rule 7(3) of the Kerala Abkari Shops Disposal Rules, 2002 (the Rules), holding that its functioning is causing inconvenience to the petitioner. Respondents 4 to 6 challenged Ext.P7 order in revision before the Government mainly on the ground that a suitable alternative place is not available in the locality within the permissible limits and in terms of Ext.P12

order, the Government modified Ext.P7 order permitting respondents 4 to 6 to continue the toddy shop at the same location and premises until they get a suitable alternative place for relocation. W.P.(C) No.29704 of 2015 was one filed challenging Ext.P12 order to the extent it permits respondents 4 to 6 to continue the toddy shop at its present location and premises until they get a suitable alternative place for relocating the same, and W.P.(C) No.2213 of 2018 was filed by respondents 4 to 6 challenging Exts.P7 and P12 orders.

3. The writ petitions were heard along with a few other similar writ petitions challenging the location of toddy shops referred to therein. The learned Single Judge took the view that the underlying concern in all the writ petitions is the infringement of right to privacy of the petitioners and held that location of a toddy shop in a residential area would be in derogation of the right of the individuals to have respect for their private and family life. The learned Single Judge thereafter laid down the criteria for deciding the question as to whether location of a particular shop would infringe the privacy rights of

individual/individuals who were raising objections/complaints against its location and then decided the writ petitions applying the said criteria, having regard to the facts involved.

4. As far as the writ petitions from which these appeals arise, having found that the toddy shop is located in the property adjacent to the residential property of the petitioner and having taken note of the fact that the first respondent himself has found in Ext.P7 order that the functioning of the toddy shop is causing inconvenience to the petitioner, the learned Single Judge held that the location of the toddy shop is infringing the privacy rights of the petitioner. One of the contentions raised by respondents 4 to 6 in the writ petition was that the residential property of the petitioner was one acquired by her while the toddy shop was being run in the adjacent property and she is therefore estopped from raising any objection against the location of the toddy shop. As regards the said contention, the learned Single Judge held, placing reliance on the decision of the Apex Court in **Olga Tellis and others v. Bombay Municipal Corporation and others**, AIR

1986 SC 180, that the right to privacy of the petitioner being a fundamental right, the same can be subjected only to constitutional limitations and a claim for enforcement cannot be defended based on a plea of estoppel. In the light of the said findings, the learned Single Judge allowed W.P.(C) No.29704 of 2015 restraining respondents 4 to 6 from operating the toddy shop and dismissed W.P.(C) No.2213 of 2018. Respondents 4 to 6 are aggrieved by the said decisions in the writ petitions and hence, these appeals.

5. Heard Sri.Anwin John Antony, the learned counsel for respondents 4 to 6, Dr.(Adv.)K.P.Satheesan, the learned Senior Counsel for the petitioner and Dr.(Adv.)Thushara James, the learned *amicus curiae* appointed in the matter.

6. The learned counsel for respondents 4 to 6 contended that the trade carried on by respondents 4 to 6, that too with the licence of the competent authority under the Rules framed under the Abkari Act being a lawful activity, it cannot be said that the same would infringe the right to privacy of any one, especially when they have a constitutional right to carry on

the said activity in the light of the licence obtained by them. It was also submitted by the learned counsel that the nuisance which the petitioner is complaining of, is the nuisance allegedly caused by the general public and there must not therefore, be any action against the licensees on account of the alleged nuisance. It was also argued by the learned counsel that insofar as respondents 4 to 6 have been running the toddy shop in the same location and premises throughout the time when the petitioner has purchased the adjacent land, constructed her residential building therein and started residing therein, she is estopped from raising any objection against the lawful conduct of the toddy shop.

7. Per contra, the learned Senior Counsel for the petitioner supported the impugned judgment pointing out that during 1994-95 when the toddy shop was established in the present location and premises, there was hardly anyone residing in its vicinity, but in course of time, the location has become a thickly populated residential area and it is in the aforesaid background that complaints happened to be lodged

against the location of the toddy shop. It was also pointed out by the learned counsel that the petitioner was constrained to approach this Court since the competent authorities after having found that the toddy shop is liable to be relocated, did not prescribe a time limit for the same. It was submitted by the learned counsel that the functioning of a toddy shop in a thickly populated residential area would certainly infringe the right to privacy of the persons residing in its vicinity which is a fundamental right falling within the facet of Article 21 of the Constitution. To bring home the point that the functioning of the toddy shop would infringe the right to privacy of the petitioner and others, the learned counsel relied on the decision of the Larger Bench of the Apex Court in **K.S.Puttaswamy and another v. Union of India and others**, (2017) 10 SCC 1. The learned counsel has read over to the Court paragraphs 126, 264, 272, 297 to 299, 316, 344, 350, 499, 536, 604, 605 and 650 in the said judgment to reinforce the said contention. For the said purpose, the learned counsel also relied on the order dated 27.10.2021 passed by the Apex Court in W.P.(Crl.) No.314

of 2021. Placing reliance on the decisions of the Apex Court in **Khoday Distilleries Ltd. and others v. State of Karnataka and others**, (1995) 1 SCC 574 and **Nashirwar and others v. State of Madhya Pradesh and others**, (1975) 1 SCC 29, the learned counsel for the petitioner submitted that the fundamental right guaranteed under Article 19(1)(g) of the Constitution does not extend to trade in liquor which is *res extra commercium*, and restrictions which are not permissible with other trades can certainly be imposed on trade in liquor. It was also submitted by the learned counsel placing reliance on the decision of the Apex Court in **Krishnan Kakkanth v. Government of Kerala and others**, (1997) 9 SCC 495 that reasonableness of a restriction is to be determined in an objective manner, and from the standpoint of the interests of the general public and not from the standpoint of the interests of the persons upon whom restrictions are imposed. It was asserted by the learned counsel for the petitioner that the trade in liquor being *res extra commercium*, respondents 4 to 6 do not have any fundamental right to carry on their activity and

the statutory right of respondents 4 to 6 to carry on trade in liquor has to give way to the fundamental right to privacy available to the petitioner. It was also submitted by the learned counsel, placing reliance on the decision of the Apex Court in **Sharda v. Dharmpal**, (2003) 4 SCC 493 that even assuming that respondents 4 to 6 have a fundamental right under Article 19(1)(g) of the Constitution on the strength of the licence obtained by them, the right to privacy of the petitioner being part of the right to life guaranteed to the petitioner under Article 21, the same would prevail over the rights of respondents 4 to 6, for the fundamental right of the petitioner advances public morality and public interest. It was also argued by the learned counsel that even assuming that the right to privacy of the petitioner and others is not infringed on account of the functioning of the toddy shop, insofar as it is found by the competent authority in Ext.P7 order that the shop is one liable to be relocated under Rule 7(3) of the Rules and insofar as the said decision of the competent authority has not been interfered with in revision by the Government, the

decision of the Government in permitting respondents 4 to 6 to run the toddy shop until they find an alternative location and premises is arbitrary. In reply to the argument advanced by the learned counsel for respondents 4 to 6 that the petitioner is estopped from raising objections against the conduct of the toddy shop, the learned counsel submitted that there cannot be any estoppel or waiver of fundamental rights guaranteed to the citizens. The learned counsel placed reliance on the decision of the Apex Court in **Olga Tellis** in support of the said proposition.

8. Though the learned Senior Government Pleader supported Ext.P7 order of the Excise Commissioner and Ext.P12 order of the Government modifying Ext.P7 order, it was argued that the Government has strong reservations against the finding rendered by the learned Single Judge that location of a toddy shop in a residential area would be in derogation of the right of individuals to respect their private and family life. The learned Government Pleader also argued that the trade of respondents 4 to 6 being a lawful activity undertaken on the strength of the licence issued under a regulatory statute, in the

absence of a challenge to the statutory provision in terms of which the licence is issued, one cannot be heard to contend that the activity infringes any of the fundamental rights guaranteed to the petitioner. It was also argued by the learned Government Pleader, that insofar as the learned Judge has also rejected the contention of the licensees that the petitioner who took a conscious decision to reside in the vicinity of the toddy shop is not entitled to raise objections against the functioning of the toddy shop, if the proposition that the functioning of a toddy shop in the vicinity of a residential house would be in derogation of the right to privacy of the inhabitant therein is upheld, the position would be that no toddy shop could function in the State for there is hardly any area in the State where there is no residential house and even if any such area exists, there is no assurance that no one would reside in its vicinity.

9. On a query from the court as to why the Government has not preferred an appeal against the impugned judgment if the Government was aggrieved by the same, the learned Government Pleader submitted that steps are being

taken by the Government to challenge the impugned judgment in appeal.

10. The learned *amicus curiae*, after a scholarly research, made elaborate submissions on the various concepts namely, “*res extra commercium*”, “right to privacy”, “reasonable expectation of privacy”, “waiver”, “horizontal application of fundamental rights” etc. referred to and relied on, in the impugned judgment by the learned Single Judge to arrive at the conclusion that the location of a toddy shop in a residential area would be in derogation of the privacy rights of inhabitants of the locality. She has also elaborately referred to the various foreign judgments relied on by the learned single Judge in the impugned judgment.

11. As regards the concept of right to privacy, the learned *amicus curiae* has referred to the various stages of the development of the right to privacy, right from the period of Aristotle. She has referred to the 1890 essay by **Samuel Warren** and **Louis Brandeis** titled “**Right to Privacy**” and the 1960 essay of **William Prosser** titled “**Privacy**”. She has

also made submissions as to the development of the right to privacy through US Courts by referring, among others to **Griswold v. State of Connecticut**, 381 U.S. 479 (1965) and **Roe v. Wade**, 410 U.S. 113 (1973). She has also made submissions as to the development of the right to privacy through the European Courts by referring, among others, to **Bernstein of Leigh v. Skyviews & General Ltd.**, [1978] QB 479 and **Halford v. United Kingdom**, (1997) 24 EHRR 523). She has also referred to the various international covenants dealing with “individual privacy” such as the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966 and the Convention for the Protection of Human Rights and Fundamental Freedoms, 1953 (ECHR) which highlight the importance of privacy and explains it as a “protection from interference”. She has also referred to the various judgments of the Apex Court, wherein the concept of right to privacy was dealt with, including the judgment in **M.P.Sharma v. Satish Chandra** (AIR 1954 SC 300), the dissenting opinion in **Kharak Singh v. State of Uttar**

**Pradesh** (AIR 1963 SC 1295) and the judgment in **R.Rajagopal and another v. State of T.N. and others**, (1994) 6 SCC 632. The learned *amicus curiae* has also dealt with elaborately the decision of the Apex Court in **K.S.Puttaswamy** overruling **M.P.Sharma** and **Kharak Singh** holding that the right to privacy is a fundamental right under Article 21 of the Constitution. Specific reference was made by the learned *amicus curiae* to paragraphs 292, 399 to 405, 423, 424, 426 and 560 of the judgment of the Apex Court in the said case. The essence of the submissions made by the learned *amicus curiae* as regards the concept of right to privacy was that though right to privacy is a facet of Article 21, despite not being an enumerated or enlisted right, it permeates every other right and it is a mutable concept, being a relational right. According to the learned *amicus curiae*, the cultural ethos, morality, public perceptions, laws, customs, attitudes, technological developments, family values and almost any and every aspect of life and law can affect what privacy holds at a relevant point in time. It was submitted by the learned *amicus*

*curiae* that the test to be applied to determine as to whether one holds an enforceable right of privacy is to ascertain whether the right bearer's privacy is interfered with. It was argued by the learned *amicus curiae* that while applying the test aforesaid, regard must also be given to the bundle of rights, if any, already crystallised in others. It was pointed out that if crystallised rights exist in favour of others, by way of a procedure established by the State, such rights cannot be displaced, in the name of privacy. In such a context, the person who claims privacy, is subjected to the reasonable restrictions through which State has already crystallised rights of others, submitted the *amicus curiae*. In short, the submission made by the *amicus curiae* was that a right bearer cannot unsettle established rights, much less hold a reasonable expectation of asserting his right over and above the rights of others. The learned *amicus curiae* concluded her argument pointing out that privacy is the state of being with oneself and one's possessions to the exclusion of others, the constitutional status accorded to it by raising it to the level of fundamental rights is

not for its casual invocation, but for its responsible enforcement. It was also pointed by the learned *amicus curiae* that in a world where Google compulsorily reminds us of what we crave to forget, privacy may be hard to achieve. But legal systems across the world, align to protect this right, for it is the core, the compass and the cradle for any human development. According to her, the vigour and vitality of this constitutional right, that permeates every other right, should not be misused, else it will destroy the very fulcrum of the Constitution.

12. As regards the concept of reasonable expectation of privacy, it was pointed out by the learned *amicus curiae* that the concept was first conceived in the US in **Katz v. United states**, 389 U.S.347 (1967) and a two-prong test was laid down in the said case to ascertain whether the right bearer has a “reasonable expectation of privacy”, namely, the person must show a “subjective” expectation that his activities would be private and that the person must also show that his subjective expectation of privacy is one which society considers “reasonable”. It was pointed out by the learned

*amicus curiae* that the question whether a reasonable expectation of privacy exists is a matter determined on a case by case basis, and is fact-specific.

13. The learned *amicus curiae* has also submitted that the various foreign judgments relied on by the learned Judge in the impugned judgment cannot have any relevance in the context of the right to privacy found in favour of the petitioner. It was pointed out by the learned *amicus curiae* that those are judgments dealing with Article 8 of the ECHR which recognises reasonable restrictions. According to the learned *amicus curiae*, it was highly inappropriate to make a comparison between Article 8 of ECHR and Article 21 of the Indian Constitution, for Article 21 as interpreted by Courts carries within it, a wider right to privacy when compared to the right to privacy guaranteed by Article 8 of ECHR for private and family life, home and correspondence. It was also argued by the learned *amicus curiae* that the concepts like public morality and social morality have nothing to do with the concept of privacy and the learned Judge ought not have introduced those

concepts into the concept of privacy. The learned *amicus curiae* has also submitted that the Constitution does not grant the power of impact assessment to Courts under Article 226 and the impact assessment of the privacy rights made by the learned Single Judge was highly inappropriate. The learned *amicus curiae* has also submitted that privacy is to be distinguished from expressions like public order, peace and tranquillity. It was pointed out that due to disruption of public order, peace and tranquillity, if a person grieves over violation of his privacy, then the State assumes a different role, and must step in to protect the right to privacy as the guarantor of fundamental rights. But, according to the learned *amicus curiae*, cases of this nature must be viewed as cases involving public order, peace and tranquility, calling for State's powers and duty to establish law and order, and not as cases involving right to privacy.

14. It is seen that although the learned Single Judge referred to the concept of *res extra commercium* to find that the licensees of the toddy shop are enjoying only a

privilege to vend toddy and the State is accountable and responsible to the people as to the conduct of toddy shops, the learned Judge did not rest the judgment on the said principle. Instead, the judgment is rested on the finding that the location of a toddy shop in a residential area would be in derogation of the right of the inhabitants in that area to have respect for their private and family life, namely, their right to privacy. In order to arrive at the said finding, the learned Judge referred to the observations made by this Court and Bombay High Court in a few earlier judgments that the rules in place need to be amended to ensure that toddy shops are not allowed in busy residential areas; that liquor shops shall not cause any inconvenience or threat to public peace to the residents in the locality; that the Government ought to respect the wishes and fundamental rights of the people while granting liquor licence etc. The learned Judge has also referred to for the said purpose a few passages from the recent judgment of the Apex court in **K.S.Puttaswamy**. The learned Judge thereafter referred to a few judgments of the European Court of Human Rights dealing

with the interpretation of Article 8 of the ECHR providing that everyone has the right to respect for their private and family life. The learned Judge then proceeded to hold that Article 8 of the ECHR shall be read into Article 21 of our Constitution to amplify the right to life in a sense to protect the privacy. It is on a cumulative reference to the aforesaid materials that the learned Judge came to the conclusion that establishment of toddy shops in a residential area would be in derogation of the rights of the inhabitants therein to have respect for their private and family life. It is relevant to note that the petitioner in the writ petition had no case that her right to privacy is affected in any manner on account of functioning of the toddy shop. Instead, the case set out by the petitioner was only that the toddy shop is one to be relocated within a time frame in terms of Rules 7(3) of the Rules. The first and foremost question to be adjudicated therefore is as to whether the existence of a toddy shop in the proximity of a residential building would be in derogation of the right to privacy of the person residing therein.

15. In order to adjudicate the question aforesaid, it

is necessary to understand the scope of the right to privacy of an individual. The materials relied on by the Apex Court in **K.S.Puttaswamy** reveal that the concept of privacy originated from the distinction made by the Greek philosopher Aristotle between the public sphere of political affairs and the personal sphere of human life. A “right to be let alone” was however developed as part of the right to life much later by **Samuel D. Warren** and **Louis D. Brandeis** in their article “**the Right to Privacy**” published in the year 1890. According to the said authors, solitude and privacy are necessary and essential for an individual to lead his life in communities. It is about seventy years thereafter, that **William L. Prosser** in his essay published in the year 1960 titled “**Privacy**” attempted to define the right to privacy, among others, as a protection from intrusion upon a person's seclusion or solitude or private affairs. Right to privacy of an individual is considered as a natural and inseparable right, which inheres in every human being to protect the innate dignity and autonomy of man. In **K.S.Puttaswamy**, privacy was held to be not only as an

intrinsic element of right to life and personal liberty under Article 21 of the Constitution but also as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution.

16. The question as to what privacy postulates has been attempted to be answered by the Apex Court in **K.S.Puttaswamy**. Paragraphs 297 to 299, 322, 323, 325 and 326 of the judgment in the said case rendered by Dr.D.Y. Chandrachud, J. dealing with the essential nature of the right to privacy read thus:

**"Essential nature of privacy**

297. What, then, does privacy postulate?. Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality.

The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

**298.** Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a

constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how

freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy : this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental

rights and protects for the individual a zone of choice and self-determination.

**299.** Privacy represents the core of the human personality and recognises the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. This state of flux which represents a constant evolution of individual personhood in the relationship with the rest of society provides the rationale for reserving to the individual a zone of repose. The lives which individuals lead as members of society engender a reasonable expectation of privacy. The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desires to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone. The notion that there must exist a reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other, the exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who

possesses a plot of land may decide to build upon it subject to zoning regulations. If the building bye-laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by regulations designed to protect the interests of the community in planned spaces. Hence while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation."

x x x x x

**322.** Privacy is the constitutional core of human dignity. Privacy has both a normative and 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.

**323.** 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.

x x x x

**325.** Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the threefold 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.

**326.** 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.

Paragraphs 399, 402, 403 and 405 of the judgment in **K.S.Puttaswamy** rendered by S.A.Bobde, J., dealing with the content of the right to privacy read thus:

**The content of the right to privacy**

**399.** It might be broadly necessary to determine the nature and content of privacy in order to consider the extent of its constitutional protection. As in the case of “life” under Article 21, a precise definition of the term “privacy” may not be possible. This difficulty need not detain us. Definitional and boundary-setting challenges are not unique to the rights guaranteed in Article 21. This feature is integral to many core rights, such as the right to equality. Evidently, the expansive character of any right central to constitutional democracies like ours has nowhere stood in the way of recognising a right and treating it as fundamental where there are strong constitutional grounds on which to do so.

x x x x

**402.** “Privacy” is “[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions”. The right to be in this condition has been described as “the right to be let alone” . What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way. These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.

**403.** Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place. Privacy has a deep affinity with seclusion (of our physical persons and things) as well as such ideas as repose, solitude, confidentiality and secrecy (in our communications), and intimacy. But this is not to suggest that solitude is always essential to privacy. It is in this sense of an individual's liberty to do things privately that a group of individuals, however large, is entitled to seclude itself from others and be private. In fact, a conglomeration of individuals in a space to which the rights of admission are reserved—as in a hotel or a cinema hall—must be regarded as private. Nor is the right to privacy lost when a person moves about in public. The law requires a specific authorisation for search of a person even where there is suspicion. Privacy must also mean the effective guarantee of a zone of internal freedom in which to think. The disconcerting effect of having another peer over one's shoulder while reading or writing explains why individuals would choose to retain their privacy even in public. It is important to be able to keep one's work without publishing it in a condition which may be described as private. The vigour and vitality of the various expressive freedoms guaranteed by the Constitution depends on the existence of a corresponding guarantee of cognitive freedom.

x x x x

**405.** Privacy, that is to say, the condition arrived at after excluding other persons, is a basic prerequisite for exercising the liberty and the freedom to perform that activity. The inability to create a condition of selective seclusion virtually denies an individual the freedom to exercise that particular liberty or freedom necessary to do that activity.

As evident from the extracted excerpts, privacy is the constitutional core of human dignity. It postulates a private space for an individual to make choices and to take decisions concerning matters intimate and personal to human life for manifestation of his dignity. It safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his life. The very basis of the right to privacy is the freedom to exercise the personal choices. It is on account of this reason that it is stated that the right to privacy permeates every other right guaranteed under Part III of the Constitution. While the legitimate expectation of privacy may vary from intimate zone to private zone and from private zone to public zone, privacy is not lost or surrendered merely because the

individual is in a public space. The right to privacy has multiple facets and it varies from person to person, dependent on their approach to society and concern for privacy. One should however have a reasonable expectation of the privacy and its extent is based, not on the subjective expectation of the individual, but on an objective principle which defines a reasonable expectation having regard to the rights of others to lead orderly lives. Privacy has both positive and negative contents. 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 individuals. As noted, insofar as individuals live and work in communities, the right to privacy, like other rights falling under the umbrella of Article 21, is not an absolute right and it is subject to the rights of others to lead orderly lives. Likewise, privacy violations must be real and existing, not imaginary or anticipated. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on

fundamental rights. In the context of Article 21, an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. Similarly, the law must also be valid with reference to the encroachment on life and personal liberty under Article 21. Again, an invasion of life or personal liberty must meet the threefold 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.

17. Although divergent views were expressed in **K.S.Puttaswamy** as to the application of the test of reasonable expectation of privacy for ascertaining whether a privacy claim is constitutionally enforceable, in **K.S.Puttaswamy and another (Aadhaar) v. Union of India and another**, (2019) 1 SCC 1, the Apex Court clarified that the test of reasonable expectation of privacy has been approved in **K.S.Puttaswamy**. In addition, it was also held in **K.S.Puttaswamy (Aadhaar)** that the test of reasonable

expectation of privacy would not only ensure that the individual has a protected zone of privacy, but also that the exercise of individual choices is subject to the right of others to lead orderly lives. It was also held in the said case that all matters pertaining to individuals do not qualify as being an inherent part of right to privacy and that only those matters over which there would be a reasonable expectation of privacy are protected under Article 21, indicating clearly that breach of privacy rights can be claimed only when claimant on the facts of a particular case and circumstances has “reasonable expectation of privacy”. The relevant portions of paragraphs 341.2, 511.1 and 638 to 640 of the judgment of the Apex Court in **K.S. Puttaswamy (Aadhaar)** read thus:

341.2. The *Puttaswamy* judgment refers to the expert group report and identifies nine privacy principles pertaining to notice, choice and consent, collection limitation, purpose limitation, access and correction, non-disclosure of information, security of data, openness or proportionality as to the scale, scope and sensitivity to the data collected and accountability. At the same time, privacy is a subset of liberty. All liberties may not be exercised in privacy. It lies across the

spectrum of protected freedoms. Further, the notion of reasonable expectation of privacy has both subjective and objective elements. At a subjective level it means “an individual desires to be left alone”. On an objective plain privacy is defined by those constitutional values which shape the content of the protected zone where the individual “ought to be left alone”. Further, the notion of reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other “the exercise of individual choices is subject to the right of others to lead orderly lives”. The extent of the zone of privacy would, therefore, depend upon both the subjective expectation and the objective principle which defines a reasonable expectation.

x x x x

**511.1.** After detailed discussion, it is held that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21. This can be discerned from the reading of paras 341 to 346 of the judgment.

x x x x

**638.** It is well settled that breach of privacy right can be claimed only when claimant on the facts of the particular case and circumstances have “reasonable expectation of privacy”.

In the Court of Appeal in *R. (Wood) v. Commr. of Police of the Metropolis*, the following was held :

“ x x x x x x

24. As for the second — a “reasonable expectation of privacy” — I have already cited para 51 of *Von Hannover* [*Von Hannover v. Germany*, (2004) 40 EHRR 1] , with its reference to that very phrase, and also to a “legitimate expectation” of protection. One may compare a passage in Lord Nicholls' opinion in *Campbell* [*Campbell v. MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : 2004 UKHL 22 (HL)] at para 21 : (AC p. 466 E)

‘21. Accordingly, in deciding what was the ambit of an individual's “private life” in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.’

In the same case Lord Hope said at para 99 : (AC p. 484 H)

‘99. ... The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.’

In *Murray v. Express Newspapers Plc* [*Murray v. Express Newspapers Plc.*, 2009 Ch 481 : (2008) 3 WLR 1360 (CA)] . Sir Anthony Clarke MR referred to both of these

passages, and stated : (Ch pp. 502 F-G, H & 503 A, paras 35-36)

'35. ... [S]o far as the relevant principles to be derived from *Campbell* [*Campbell v. MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : 2004 UKHL 22 (HL)] are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. ...

36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.'"

**639.** The reasonable expectation of privacy test was also noticed and approved in the privacy judgment, Dr D.Y. Chandrachud, J. has referred to the judgment of the US Supreme Court in *Katz v. United States* [*Katz v. United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 389 US 347 (1967)] . The following has been observed by this Court in *K.S. Puttaswamy* [*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1] in para 185 : (SCC p. 441)

“185. ... The majority adopted the “reasonable expectation of privacy” test as formulated by Harlan, J. in *Katz* [*Katz v. United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 389 US 347 (1967)] and held as follows : (*Maryland case* [*Smith v. Maryland*, 1979 SCC OnLine US SC 128 : 61 L Ed 2d 220 : 442 US 735 (1979)] , SCC OnLine US SC paras 7-8)

‘7. ... [The] inquiry, as Harlan, J. aptly noted in his *Katz* [*Katz v. United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 389 US 347 (1967)] concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has “exhibited an actual (subjective) expectation of privacy” ... whether ... the individual has shown that “he seeks to preserve [something] as private”. ... The second question is whether the individual's subjective expectation of privacy is “one that society is prepared to recognize as “reasonable” ” ... whether ... the individual's expectation, viewed objectively, is “justifiable” under the circumstances. ...

8. ... Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his “property” was invaded or that police intruded into a “constitutionally protected area”.’

Thus the Court held that the petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not “legitimate”. However, the judgment also noted the limitations of the *Katz* [*Katz v.*

*United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 389 US 347 (1967)] test : (*Maryland case [Smith v. Maryland*, 1979 SCC OnLine US SC 128 : 61 L Ed 2d 220 : 442 US 735 (1979)] , SCC OnLine US SC para 7 footnote 5)

*'Situations can be imagined, of course, in which Katz [Katz v. United States, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 389 US 347 (1967)] two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. ... In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognised Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.'*"

(emphasis in original)

**640.** After noticing several judgments of the US Supreme Court, D.Y. Chandrachud, J. in *K.S. Puttaswamy [K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1]* has noted that the reasonable expectation of privacy test has been relied on by various other jurisdictions while developing the right to privacy. In para 195, the following has been held : (SCC p. 449)

*"195. The development of the jurisprudence on the right to privacy in the United States of America shows that even though there is no explicit mention of the word "privacy" in the Constitution, the courts of the country have not only recognised the right to privacy under various amendments to the Constitution but also*

progressively extended the ambit of protection under the right to privacy. In its early years, the focus was on property and protection of physical spaces that would be considered private such as an individual's home. This "trespass doctrine" became irrelevant when it was held that what is protected under the right to privacy is "people, not places". The "reasonable expectation of privacy" test has been relied on subsequently by various other jurisdictions while developing the right to privacy."

As discernible from the extracted excerpts, before coming to the conclusion as to whether a privacy claim is actionable, it is obligatory for the Court to consider (1) whether the individual, by his conduct, has "exhibited an actual expectation of privacy", (2) whether the individual has shown that "he seeks to preserve something as private", (3) whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as "reasonable" and (4) whether the individual's expectation, viewed objectively, is "justifiable" under the circumstances. Having thus understood the scope of right to privacy protected in terms of Article 21 of the

Constitution, let us consider the question whether the existence of a toddy shop in the proximity of a residential building would be in derogation of the right to privacy of the person residing therein.

18. In order to consider the question as to whether the facts of the case disclose a case of privacy enforceable under Article 21 of the Constitution, it is necessary to examine the correctness of the proposition laid down by the learned Single Judge that existence of a toddy shop near a residential premise would be in derogation of the right to privacy of the inhabitants therein. The fact that toddy shops are run in the State in accordance with the provisions contained in the Rules framed under the Abkari Act is not in dispute. The petitioners in the writ petitions have no case that the existence of toddy shops in a residential area would be in derogation of their right to privacy. Also, there was no challenge in any of the writ petitions against the statutory provision which permits establishment of toddy shops in residential areas. As such, even assuming that the conduct of toddy shops is adversely affecting

the privacy rights of the inhabitants in the locality, insofar as the right to privacy is not an absolute one, but only a right available to individual subject to the rights of others to lead orderly lives, in the absence of a finding in the impugned judgment that the statutory provision which permits establishment of toddy shops in residential areas is unconstitutional in any manner inasmuch as it does not satisfy the requirement of “procedure established by law” as contained in Article 21 of the Constitution, the learned Single Judge has erred in holding that the existence of a toddy shop in a residential area would be derogation of the right to privacy of the people in the locality, for without such a finding, conduct of a toddy shop in a residential area is a permissible activity in terms of statutory provision. Although the learned Single Judge has found that violation of the right to privacy is liable to be read into Rule 7(3) of the Rules as a ground to order relocation of a shop, for the said provision confers power on the Commissioner of Excise to order transfer of shops or to close the shops in the interest of public peace, morality or grounds of

expediency, such a finding was not rendered in the context of Rule 7(2) of the Rules permitting establishment of toddy shops in residential areas as well. Be that as it may, according to us, the said finding cannot be understood as a finding that the statutory provision is unconstitutional. The reason being that the role of the High Court exercising power under Article 226 of the Constitution is only to examine whether the statute or the statutory provision, as the case may be, conforms to the constitutional provisions, and not to undertake an exercise to make a statute or statutory provision conforming to the constitutional provisions, if it is not otherwise. The proposition aforesaid has been reiterated by the Apex Court in **Union of India and others v. Ind-Swift Laboratories Ltd.**, (2011) 4 SCC 635, in the following words:

“This Court has repeatedly laid down that in the grab of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation.”

The finding of the learned Single Judge that the existence of

toddy shop in a residential area would be in derogation of the right to privacy of inhabitants in the area is therefore liable to be set aside on that sole ground.

19. Now, we will examine whether there is any factual basis for the learned Single Judge in holding that the existence of a toddy shop in a residential area would be in derogation of the right to privacy of the inhabitants of the locality. Among the cases dealt with by the learned Judge, in W.P.(C) No.29704 of 2015 from which W.A.No.389 of 2020 arises, the grievance voiced was only that persons who are coming to the toddy shop are causing nuisance to the petitioner. In W.P.(C) No.41459 of 2018, the grievance voiced however was that food is being served in the toddy shop without obtaining licence from the local authority. In W.P.(C) No.20809 of 2019, the grievance voiced, however, was concerning the possible nuisance on account of discharge of waste from a proposed toddy shop and the grievance voiced in W.P.(C) No.25901 of 2018 concerns the decision of the competent authority to relocate an existing toddy shop near to

a residential colony. In the report filed by one among the Amici Curiae appointed in the matter by the Single Judge, a few ill effects of toddy shops in residential area were indicated. The relevant portion of the report reads thus:

- “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 area 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 shop often affect the peaceful atmosphere in the nearby homes.”

It is seen that it is placing reliance on the said observations and a few judgments of the European Court of Human Rights (ECtHR) that the learned Single Judge has rendered a finding that the existence of a toddy shop in the vicinity of a residential house would be in derogation of the right to privacy of the inhabitants therein. As noted, privacy postulates, in essence, a

private space for an individual to make choices and to take decisions concerning matters intimate and personal to his life for manifestation of his dignity and to safeguard his individual autonomy. The right to privacy varies from person to person, dependent on his approach to the society and concern for privacy. The life an individual leads as a member of a society gives rise to a reasonable expectation of privacy. The right to privacy will not extend beyond that reasonable expectation and even that right is to be exercised subject to the rights of others to lead orderly lives. In other words, the right to privacy of an individual is not dependent on the avocation and activities of others around him and it is only when an individual is not able to make choices or take decisions concerning matters intimate and personal to him as a human being for manifestation of his dignity, it could be said that the right to privacy of that person is infringed. There is no finding by the learned Single Judge in the impugned judgment as to how the privacy of the inhabitants around a toddy shop is infringed on account of the functioning of the toddy shop. The observations made by the

*amicus curiae* appointed in the writ petitions as referred to above would only indicate, at the most, that the conduct of a toddy shop may cause nuisance or breach of public peace or raise moral concerns. Nuisance, breach of peace, moral concerns etc. have nothing to do with privacy, though disruption of public order, peace and tranquillity may at times lead to infringement of privacy rights. But, disruption of public order, peace and tranquillity cannot be understood as synonymous to breach of privacy rights. According to us, the general concerns expressed by the *amicus curiae* in the writ petitions are all taken care of in the Rules inasmuch as the Rules empowers the authorities concerned to relocate a toddy shop in the interest of public peace or morality or on grounds of expediency. When the Rules take care of the concerns aforesaid, it was unnecessary for the learned Single Judge to address the issue of violation of privacy rights that may arise in the event of the breach of the Rules, for the basic issue concerns only nuisance or breach of public peace or morality. A perusal of the impugned judgment reveals that the view taken

by the learned Single Judge is that anything and everything that affects the peaceful residence of a person would affect its privacy rights. We are unable to agree. If privacy rights enforceable under the Constitution are expanded to this level, we are afraid that there would be utter chaos as regards the rights of others including the right to livelihood, for in the social set up of our country, there are umpteen avocations and activities which people may pursue for their livelihood near the place of residence of others and a very wide definition of privacy rights protected under the Constitution as made by the learned Single Judge would give rise to conflicts as to the permissible and non-permissible activities near a residential house. As observed by the Apex Court in paragraph 423 of the judgment in **K.S.Puttaswamy**, right to privacy is a relational right insofar as it is always connected on the actions which are sought to be secured from interference to the acts of associating with others. Further, as noted, right to privacy varies from person to person and country to country, dependent on the socio-economic background, the approach to society and

concern for privacy. In other words, right to privacy to be preserved and protected in one country may not be the right to privacy to be preserved and protected in another country. In the said view of the matter, according to us, the judgments of the ECtHR cannot have any relevance in the context of deciding the scope of privacy of an individual in the context of the Indian society. That apart, it is seen that the very scope of the jurisdiction of the ECtHR is to determine whether the laws in the countries over which it has jurisdiction provides an adequate remedy in a specific case in which it considered whether there has been an invasion of privacy contrary to Article 8 of the ECHR which provides that everyone has right to respect for his private and family life, home and correspondence and whether the restriction, if any, imposed is justifiable. In the circumstances, the reliance placed by the learned Single Judge on the judgments of the ECtHR is misplaced. We are therefore inclined to hold that there was no factual basis for the learned Single Judge to hold that the existence of a toddy shop in a residential area would be in derogation of the right to privacy of

the inhabitants of the locality.

20. Let us now examine the question as to whether the facts of the writ petitions from which these writ appeals arise disclose a case of privacy enforceable in terms of Article 21 of the Constitution. As noted, the toddy shop is functioning in the property adjacent to the residential property of the petitioner and the grievance of the petitioner in the writ petition was that the conduct of the toddy shop causes nuisance to her and her family. It is not disputed by the petitioner that the toddy shop is functioning in the same locality and premises right from the year 1994. The petitioner has purchased the land adjacent to the toddy shop only much later, in the year 2005. It is still after about five years, that the petitioner constructed the residential building therein. It is still after a few years thereafter that the petitioner chose to reside in the building. Even assuming that nuisance is caused to the petitioner on account of the functioning of the toddy shop and that the said nuisance amounts to breach of privacy rights of the petitioner, the question to be examined is whether such rights are protected

under Article 21 of the Constitution. As noted, before holding that a privacy claim is actionable, it is obligatory for the Court to consider whether the individual, by his conduct, has exhibited an actual expectation of privacy and sought to preserve the same. Likewise, before holding a privacy claim actionable, it is also necessary for the Court to consider whether the individual's subjective expectation of privacy is one that the society is prepared to recognize as reasonable and justifiable under the circumstances. According to us, the conduct of the petitioner in purchasing a land lying adjacent to a toddy shop for construction of a residential building, the conduct of the petitioner in taking an informed decision after a considerable time to construct a building therein for her residence, the conduct of the petitioner in residing in that building a few years thereafter while the toddy shop was being run uninterruptedly in the adjacent land do not lead to an inference that the petitioner, by her conduct, has exhibited an actual expectation of the alleged privacy and sought to preserve the same. Even if it is assumed that the petitioner has

exhibited an actual expectation of the alleged privacy, we do not think that on the facts of this case, the society would recognize the expectation of privacy in a case of this nature as reasonable and justifiable under the circumstances. In other words, a case of privacy protected under Article 21 of the Constitution is not made out in the writ petitions.

21. The surviving question is as to the sustainability of Ext.P7 order of the first respondent and Ext.P12 order of the Government. As noted, the first respondent directed respondents 4 to 6 to relocate the toddy shop, invoking Rule 7(3) of the Rules, holding that its functioning is causing inconvenience to the petitioner. In terms of Ext.P7 order, the first respondent has also directed the concerned Excise official to enforce the same in a time bound manner. In the light of the provisions contained in Rule 7(3) of the Rules and the finding rendered in Ext.P7 order that the functioning of the toddy shop is affecting the peaceful residence of the petitioner and members of her family, the first respondent cannot be found fault with for having taken the view that the toddy shop is one

which is liable to be relocated. It is seen that it is having regard to the fact that respondents 4 to 6 were running the shop in the same premises and location from the year 1994 and the fact that the petitioner is a person who has constructed a residential house in the property adjacent to the toddy shop while the toddy shop was being run in that premises without interruption and also the fact that it is not easy to find out an unobjectionable site to relocate the toddy shop, the Government modified Ext.P7 order permitting respondents 4 to 6 to run the toddy shop in the same premises and location until they find a suitable place for relocation. We do not find any infirmity in the decision of the Government as well.

22. It is relevant to note that though Rule 7(3) of the Rules confers power on the first respondent not only to relocate a toddy shop, but also to close it down on the grounds mentioned therein, the first respondent has chosen not to exercise the power to close down the shop on the complaint of the petitioner. In other words, even according to the first respondent, the shop is not one to be closed down. As noted,

the specific case put forward by respondents 4 to 6 in the revision petition preferred by them challenging Ext.P7 order before the Government is that there is no unobjectionable premises available within the boundaries of the shop for the purpose of relocation. The petitioner also does not have a case that there are other places within the boundaries of the shop where it could be relocated. In a case of this nature, if it is not easy to find an unobjectionable premises within the limits of the boundary of the toddy shop, and if this Court directs time bound implementation of Exts.P7 and P12 orders, respondents 4 to 6 would be constrained to close down the shop which is not intended by the competent authority in terms of Ext.P7 order. The petitioner is therefore not entitled to a time bound implementation of Exts.P7 and P12 orders.

23. Coming to the challenge to Ext.P7 order made by respondents 4 to 6, the trade for which licence is granted to them being subject to Rule 7(3) of the Rules, insofar as it is found by the competent authority that a ground for relocation of the toddy shop exists, this Court may not be justified in

interfering with the factual conclusion arrived at by the competent authority in this regard, especially when they derive the right to run the shop in terms of the Rules.

24. In the result, the impugned judgment is set aside and the writ petitions, viz, W.P.(C) Nos.29704 of 2015 and 2213 of 2018 are dismissed. It is, however, made clear that this judgment will not stand in the way of the petitioner moving the first respondent for follow up action for enforcement of Ext.P7 order.

Before parting, we also place on record our boundless appreciation for the able assistance given by the learned *amicus curiae* Dr.(Adv.)Thushara James, for rendering this judgment.

Sd/-

**P.B.SURESH KUMAR, JUDGE.**

Sd/-

**C.S.SUDHA, JUDGE.**