

P. Bhima Reddy

Vs

State of Mysore & Others

Civil Appeal No. 2095 of 1968

(S. M. Sikri, R. S. Bachawat, K. S. Hegde JJ)

05.12.1968

JUDGMENT

BACHAWAT J. -

This appeal raises the question of the legality of the cancellation of the sale to the appellant of the exclusive privilege of retail vend of toddy and arrack for the year 1968-69 in a group of 1168 shops in Raichur and Gulbarga districts under the Mysore Excise Act, 1965 and the Mysore Excise (Disposal of Privileges of Retain Vend of Liquors) Rules, 1967. On May 10, 1968 the excise commissioner of Mysore published a notice stating that the exclusive privilege would be sold by tender-cum-auction by the divisional commissioner, Gulbarga on May 28 and inviting tenders by May 27. On May 27, the appellant made a tender offering Rs. 9,99,999/- towards the monthly rental of the shops and deposited the requisite earnest money amounting to Rs. 1,85,168/- as required by Rule 7(f). Respondent No. 4, K. V. Niranjana made a tender offering Rs. 9,69,999/- towards the monthly rental. The appellant was the only bidder present at the auction on May 28. His offer being the highest was accepted by the divisional Commissioner, Gulbarga, under Rule 17(1). The appellant deposited another sum of Rs. 81,4331/- which together with the earnest money made up one month's rent as required by Rule 17(f). On June 4, the divisional Commissioner, Gulbarga, confirmed the sale under Rule 17(1).

On June 6, the Deputy Commissioner, Gulbarga, issued a notice asking the appellant to make deposits according to Rule 19 immediately and to obtain licences from the concerned tahsil officers after completing other formalities. Under Rule 19(2) the appellant was required to deposit another one month's rent within 15 days from the date of the sale. By June 15, the appellant deposited in all Rs. 39,99,996/- amounting to 4 month's rent. By a letter (Ex. B-1) the appellant informed the Excise Commissioner that he had deposited 4 months' rent as required by circular No. EKE. 1. 1575 issued by the Excise Commissioner on December 12, 1967 and asked for permission to obtain licences from the deputy commissioners of Raichur and Gulbarga. On June 18/19 he applied to the Divisional Commissioner, Gulbarga, for the issue of licences. On June 19, the Divisional Commissioner, issued a notice to the appellant stating that as he had not submitted a solvency certificate of his property or the property of his sureties he was required to deposit the balance to make up six months' rent as required by Rule 19(3)(i) and to furnish security for six months rental or sureties as required by Rule 19(3)(ii) and (iii) by June 25, and that in default action would be taken under Rule 20 (2). A notice to the same effect was given orally on June 19, when he met the Divisional Commissioner at Bellary. On June 22, he presented a petition under Section 62 to the State Government asking for the issue of licences, as he had complied with the conditions of the circular. In view of the subsequent writ petition the State Government did not pass any orders on this petition. The notice dated June 19 was received by the appellant on June 23. On June 25, he

wrote to the divisional Commissioner stating that he had complied with the conditions of the rules read with the circular and was entitled to the licences, that he had reason to believe that necessary orders would be passed by the State Government on his petition under Section 62 and that if necessary, the terms for compliance with the requirements of Rule 19 be extended by two months. On the same date the Divisional Commissioner rejected the application for extension of time, and issued a notice to the appellant asking him to show cause before June 26, why in view of the non-compliance with the notices dated June 6 and 19, the sale should not be cancelled and the deposits already made should not be forfeited to the Government. The notice was served on his advocate on June 25 at 7.40 p.m. On June 26, the appellant submitted a petition to the Divisional Commissioner stating that he had complied with the terms of R. 19 and the circular, that abrupt cancellation of the sale would result in irreparable injury and that in any event the time to deposit the balance two months' rental be extended for a reasonable time. By an order dated June 26, (Ex. J), the Divisional Commissioner rejected the application for extension of time and cancelled the sale stating that (1) the appellant did not "at once" apply in writing for licences in accordance with Rule 19(1); (2) though he deposited two months' rent as required by Rule 19 (2), he did not file a statement of his immovable properties in accordance with Rule 19(1); and should therefore be considered as a person of doubtful solvency; (3) he was, therefore required to deposit another 2 months' rent under R. 19(3)(i) and to furnish securities for six months rental or surety under Rule 19(3)(ii) and (iii); (4) he failed to comply with Rule 19 in spite of notices dated June 6 and June 19; (5) the circular issued by the Excise Commissioner was opposed to Rule 19 and could not be acted upon; (6) that even under the circular he was required to give two months' collateral security in addition to 4 months' cash deposit if he was a person of doubtful solvency; and (7) that the sale conducting officer has no power to extend the time for compliance with the formalities.

On June 28, the appellant filed writ petition No. 1889 of 1968 against the State of Mysore and others in the High Court of Mysore for quashing the order dated June 26, (Ex. J.) and for the grant of licences to him to vend liquors in the combined groups of shops in Raichur and Gulbarga districts and for the other reliefs. The appellant submitted that (1) he had complied with the rules read with the circular; (2) he did not file any statement of his immovable properties under Rule 19(1) as he had immovable properties in Andhra Pradesh; (3) as there was no inquiry nor finding by any tehsildar that he was of doubtful solvency Rule 19(3) was not attracted; (4) the Divisional Commissioner, Gulbarga, was not competent to ask for deposits and security under Rule 19(3), nor was he competent to pass an order cancelling the sale and (5) Rule 19(3) was violative of Articles 14 and 19 of the Constitution.

On June 28, the High Court admitted the writ petition and directed the State Government to stay further proceedings and to issue licences to the appellant. Subsequently the High Court confirmed the stay order on condition that the appellant would deposit another two-months rent. The appellant deposited about Rs. 20,00,000/- in accordance with the order. On June 30, the divisional commissioner granted licences to him. On July 1, he commenced his business in all the 1168 shops. Thereafter he duly deposited about Rs. 30,00,000/- on account of rent for the months of July August and September. The State Government, the Excise Commissioner and the Divisional Commissioner filed separate affidavits disputing the appellant's contentions. The rival tenderer, K. V. Niranjan was added as respondent No. 4 in W.P. No. 1889 of 1968 on his own application under an order of the High Court dated July 7, K. V. Niranjan filed an affidavit stating that the appellant was a benamider for other persons and the acceptance of his tender was forbidden by Rule 12. K. V. Niranjan also filed W.P. No. 2088 of 1968 for quashing the orders of the divisional commissioner dated May 28, and June 4, where the appellant's tender was accepted and for a mandamus directing the acceptance of his next highest tender under Rule 17(4).

The two writ petitions were heard together and were dismissed by the High Court by a common judgment delivered on September 17.

The High Court held that (1) the appellant did not comply with the mandatory requirements of Rule 19; (2) Rule 19(3) was not ultra vires the rule-making power under Section 71 nor violative of Articles 14 and 19, and the appellant was estopped from challenging it; (3) the circular of the Excise Commissioner could not modify Rule 19; the appellant could not rely on the circular as he came to know of it long after the sale, nor had he complied with its terms by depositing the entire four months rent before June 12; (4) the appellant was a benamidar for other person or persons and in view of Rule 12 was incompetent to bid and (5) the order dated June 26 (Ex.J.) was valid. On these findings the High Court dismissed W.P. No. 1889 of 1968. With regard to W.P. No. 2085 of 1968 the High Court said that as the sale to the appellant had been cancelled by Ex. J. it was not necessary to set aside the order accepting and confirming his bid. The High Court held that under Rule 17(4) it was not obligatory on the officer conducting the sale to accept the next highest offer of respondent No. 4. The High Court, however, said "in the circumstances of the case, it is necessary to observe that the authorities concerned will consider the advisability of accepting the bid of the fourth respondent; subject to his complying with all the requirements of the Act and the Rules". With these observations the High Court dismissed W.P. No. 2085 of 1968.

By a telegram dated September 18, the Excise Commissioner instructed the Divisional Commissioner, Gulbarga, to direct the tahsildars of Raichur and Gulbarga to issue licences to respondent No. 4 on his complying with certain conditions. On the same date licences were issued to respondent No. 4. On September 19, the High Court dismissed an application for stay of operation of its order dated September 17, and on the same day granted to the appellant a certificate under Article 133(1)(b) of the Constitution. On September 25, the appellant filed a stay application in this Court. On September 27, the Court passed an order restraining the respondent from forfeiting the deposits made by the appellant.

It is convenient at this stage to refer to the relevant provisions of the Mysore Excise Act, 1955, and the Mysore Excise (Disposal of Privileges of Retail Vend of Liquors) Rules, 1967. Section 3(1) of the Act provides that the Excise Commissioner, "shall be the chief controlling authority in all matters connected with the administration of this Act". Section 15(1) provides that "no intoxicant shall be sold except under the authority and subject to the terms and conditions of a licence granted in that behalf". Under Section 15(2) a licence for sale can be granted (a) by the Deputy Commissioner if the sale is within a district or (b) by the excise commissioner if the sale is in more than one district. Section 17(1)(b) empowers the State Government to lease to any person, on such conditions and for such period as it thinks fit the exclusive or other right of selling by the wholesale or by retail any India liquors within any specified area. Contravention of the Act or any Rules made thereunder is punishable under Section 32. Section 71 empowers the State Government to make rules. Rule 3 of the Mysore Excise (Disposal of Privileges of Retail Vend of Liquors) Rules, 1967, provides that the right of retail vend of liquors shall be disposed of by tender or by auction or by tender-cum-auction. The auction is conducted by the deputy commissioner or the divisional commissioner under Rule 5 and the tender has to be made to them under Rule 7(i). The tenderer is required by Rule 7(f) to deposit as earnest money an amount equal to 1/4 of the shop rental of the previous year of the shop or groups of shops. The appellant complied with the requirement of Rule 7(f). Rule 10 requires an intending bidder or tenderer to furnish a certificate of his solvency or two sureties having similar certificates or bank guarantee or cash deposit to cover four times the earnest money fixed under Rule 7(f). It is not disputed that the appellant made sufficient cash deposits in compliance with Rule 10. Rule 12 reads : "Benami bids not allowed. No person except a power of

attorney holder shall be entitled to bid for another person". The sale to the appellant was not cancelled on the ground that he bid for another person. Rule 17 regulates the procedure at sales. Rule 17(1) empowers the officer conducting the auction to accept the highest offer. The acceptance is subject to the condition of confirmation by the Deputy Commissioner or by the Divisional Commissioner. The confirmation is effective unless revised by the Excise Commissioner or the Government. Rule 17(2) empowers the Excise Commissioner or the Government to revise the order of confirmation. Rule 17(4) provides that if the officer conducting the sale rejects the highest bid or offer, he may either accept the next highest bid or offer or re-sell the shop. Rule 17(5) requires the person whose bid is accepted to make a further deposit which together with the earnest money would make up one month's rent.

The appellant made the deposit required by Rule 17(5). His bid was accepted and was later confirmed by the Divisional Commissioner. Neither the Excise Commissioner nor the State Government passed any order under Rule 17(2) revising the decision confirming the acceptance of his bid. Rule 19 provides as follows :-

"19. Successful bidder to apply for licence : Every person to whom the right of retail vend of liquors is sold or whose tender in respect thereof has been accepted under these rules and who has made deposits as hereinbefore provided shall :-

"(1) at once apply in writing for licence for such shop confirmed in his name and within a week thereafter furnish to the Tahsildar the details of boundaries of the site selected by him for the location of the shop and a statement in the prescribed form annexed to the notification showing details of the immovable property possessed by him or in which he had an interest together with accurate and full details of encumbrances, if any, thereon;

(2) within 15 days from the date of sale he shall make such further deposit as with deposit already made under sub-rule (5) of Rule 17 shall make up 2 months khist of all the shops confirmed in his name unless such amount or larger amount has already been deposited by him;

(3) if on perusal of the statement of immovable, property furnished by the purchaser or on independent enquiry, it is found that the purchaser is of doubtful solvency :

(i) such purchaser shall make a deposit of 4 months rent besides the deposit of 2 months rent which he had already made if he has not submitted solvency certificate of his property or that of the property of his sureties;

(ii) he shall execute a mortgage of his immovable property in Mysore worth six months rentals of the shops, in favour of the Governor of Mysore for all moneys that may become due under the terms of the contract with a power of sale in favour of the Governor of Mysore to be exercised in default of payment thereof by the purchaser;
or

(iii) he shall get a surety or sureties who are residents of, and possess sufficient property in the Mysore State, to execute a security bond for the due payment of all money that may become due by him under the terms of the contract and to execute a mortgage deed of his or their immovable property in favour of the Governor of

Mysore to be exercised in default of payment thereof by the surety or sureties or by the purchaser.

(4) If the Tahsildar is not satisfied that the value of immovable property rendered by the purchaser as security is adequate, he may require such person to produce in addition to mortgaging his property, a surety or sureties to be approved by him. Such surety or sureties shall execute a security bond for the amount to cover the deficiency as determined by the Tehsildar mortgaging his or their property in favour of the Governor of Mysore. The sureties referred to above shall submit to the Tehsildar a statement in the form annexed to these rules showing details of their immovable property. The purchaser shall be bound to fulfil the aforesaid requirements, within fifteen days from the date of sale.

(5) The purchaser shall get the bond and the mortgage deed registered under the Indian Registration Act, 1908, at his expense.

(6) The purchaser or his surety shall produce an encumbrance certificate in cases where immovable property is mortgaged to the Governor of Mysore."

It is not alleged that the appellant did not furnish the details of the shop sites as required by Rule 19, sub-rule (1), within 15 days of the date of the confirmation of the sale. The appellant made a deposit of two months rent as required by Rule 19, sub-rule (2). The appellant did not furnish a statement of immovable properties under Rule 19, sub-rule (3). It is also alleged that he did not apply for licences at once as required by Rule 19, sub-rule (1). Rule 20(2) provides : "On failure to comply with the provisions of Rules 17 and 19 the deposits already made shall be forfeited and the right of retail vend of liquors to such shop or groups disposed of in such manner under these rules, as the Excise Commissioner may direct". No order was passed by the Excise Commissioner under Rule 20(2).

In our opinion, the provision of Rule 19, sub-rule (1), requiring the successful bidder to furnish, a statement of his properties to the Tahsildar and the provisions of Rule 19, sub-rules (3) and (4), do not apply where the shops in respect of which the right of retail vend is sold is situated in more than one tahsil. The opening part of Rule 19, sub-rule (1), requires the purchaser to furnish to "the tahsildar" the location of the shops and the boundaries of the shop sites. The expression "the tahsildar" is not defined but it is reasonable to think that the details regarding the shops should be furnished to the tahsildar within whose tahsil the shops are situated. If the shops are situated in more than one tahsil the details can be furnished to several tahsildars. But it is not possible to give effect to the last part of sub-rule (1) and the provisions of sub-rules (3) and (4) in cases where the shops are situated in more than one tahsil. The statement of immovable properties under the last part of sub-rule (1) can be furnished to only one tahsildar so that he can peruse the same and on such perusal or on independent inquiry ascertain under sub-rule (3) whether or not the purchaser is of doubtful solvency and satisfy himself under sub-rule (4) whether or not the value of the immovable properties tendered as security is adequate. Sub-rules (3) and (4) do not contemplate findings by more than one tahsildar nor do they provide any machinery for resolving the conflict of opinion, if any, between two or more tahsildars. In our opinion, the last part of sub-rule (1) and the provisions of sub-rules (3) and (4) do not apply where the shops are situated in two or more tahsil. The right of retail vend sold to the appellant is in respect of shops situated in 19 tahsils in the districts of Raichur and Gulbarga. Consequently, those provisions were not attracted to this sale and the appellant was not required to comply with those provisions.

The Divisional Commissioner, Gulbarga, could not record a finding under Rule 19, sub-rule (3), that the purchaser was of doubtful solvency. Even a Tahsildar could not record such a finding without making an independent inquiry where no statement regarding immovable properties was furnished under sub-rule (1). No independent inquiry under sub-rule (3) was made by any tahsildar. For this reason also the appellant cannot be regarded as a person of doubtful solvency and he was therefore not required to comply with the provisions of sub-rule (3). The appellant has so far deposited about Rs. 90,00,000/- and it is impossible to believe that he is a person of doubtful solvency.

The remaining charge is that the appellant did not "at once" apply for licences. Rule 20(2) provides for the forfeiture of the deposits on failure to comply with the provisions of Rule 19. Under the Mysore Excise Licences (General Conditions) Rules, 1967, a licensee is required to commence his business on July 1. The purpose of the Act and the Rules is achieved if the application for licence is made within sufficient time so as to enable the issue of licences before July 1. Having regard to the object of the Act and the Rules the expression "at once" in Rule 19, sub-rule (1) means within a reasonable time before July 1. It could not have been intended that the deposits would be forfeited where the purchaser applies for licence within a reasonable time. The appellant sufficiently complied with Rule 19, sub-rule (1) by applying under Ex. B, to the Excise Commissioner for permission to obtain licences and by applying to the Divisional Commissioner on June 18, for the issue of licences.

The Divisional Commissioner, Gulbarga, was not competent to pass the impugned order (Ex.J.), cancelling the sale. Only the Excise Commissioner or the State Government could under Rule 17 (2) revise his previous order confirming the sale and on such revision cancel the sale. The Divisional Commissioner, Gulbarga, was not authorised by Rule 17(2) to revise his own order or to cancel it. In his notice, dated June 19, the Divisional Commissioner, Gulbarga, stated that he would take action under Rule 20 (2). In his notice, dated June 25, he asked the appellant to show cause why the sale should not be cancelled and why the deposits already made should not be forfeited to the Government. But he did not pass any order forfeiting the deposits. Nor was he competent to pass any order under Rule 20(2). Only the Excise Commissioner could pass such an order.

It follows that the High Court was in error in holding that the appellant committed breaches of Rule 19. The finding of the Divisional Commissioner, Gulbarga, that the appellant committed such breaches is erroneous, nor was he competent to record the finding or to pass an order cancelling the sale.

In view of this conclusion it is not necessary to consider whether Rule 19, sub-rule (3) offends Articles 14 and 19 of the Constitution and we express no opinion on the question. We cannot agree with the proposition that the appellant is estopped from challenging the constitutionality and vires of the sub-rule. It is true that Rule 24 provides that the purchaser shall be bound by all the rules. But if Rule 19, sub-rule (3), offends Articles 14 and 19 it is non est. and there can be no question of the appellant being bound by a rule which does not exist. Though we express no opinion on the vires of the sub-rule, we must observe that Rule 19 is clumsily drafted, its import is not clear, its tight time schedule works hardship and its procedure is cumbersome. The Government should immediately consider, the question of re-drafting Rule 19. It may be noted that Mr. Narasaraju conceded that Rule 19 is not beyond the rule making powers of the State Government.

The appellant relied on the Circular No. EXE. 1.1575/67 (Ex. E), dated December 12, 1967. Exhibit E is a letter from the Excise Commissioner to the Deputy Commissioner, Bangalore, on the subject of securities to be furnished by the excise contractors. The latter stated that the procedure of Rule 19

was cumbersome and not clear, that several Deputy Commissioners sought clarifications on the subject and that the State Government had been moved to clarify and simplify the matter. The Excise Commissioner directed that pending receipt of the Government order the following procedure should be followed. In addition to obtaining two months' cash deposits, (1) two months cash security might be accepted and in the absence of cash security four months' collateral security might be insisted; (2) if the Deputy Commissioner/tahsildar was doubtful about the solvency of the contractor he could insist on six months' collateral security and (3) while accepting the collateral securities care should be taken to see that the contractors executed the necessary mortgage bond. Admittedly, similar instructions were issued to other Deputy Commissioners and were enforced in several districts. There is a dispute on the question whether the circular was sent to the districts of Gulbarga and Raichur. In so far as the circular attempted to modify Rule 19 it was ineffective. The Excise Commissioner, had no power to abrogate or modify a rule framed under Section 71. On behalf of the appellant it was argued that as the chief controlling authority the Excise Commissioner could frame regulations under Section 3, read with Rule 24 and could issue general instructions on the subject of taking security in cases not covered by Rule 19. We express no opinion on this question, as the Government has already withdrawn the circular. But we must observe that relying on this circular the appellant deposited two months' rent as required by the circular in addition to the two months' rent as required by Rule 19, sub-rule (2) and that such deposits were duly made within 15 days from the date of the sale. However, it is not necessary for the appellant to rely on the terms of the circular. He has complied with the provisions of Rule 19 and the sale in his favour cannot be cancelled.

On behalf of respondent No. 4 it is argued that the appellant brought the the right of retail vend as benamidar for some other person, that his benami bid was opposed to Rule 12 and could not be accepted and that as the sale of liquor by the real buyer without a licence in his favour was illegal in view of Sections 15 and 26, the appellant was not entitled to any relief in view of the decision in Venkata Subbayya v. Attar Sheikh Mastan. (AIR 1949 Mad 252) The onus is upon the respondent to prove that the appellant made a benami purchase. It appears that the appellant is a retired Inspector drawing a pension of Rs. 75/- per month. He is not an income-tax or a wealth tax assessee. He does not own any property in Mysore State. The appellant says that he owns immovable properties in Andhra Pradesh but he did not file the title deeds in respect of them. However, the appellant was in possession of a large amount of ready cash. Before June 25, he deposited about Rs. 40 lakhs and thereafter deposited about Rs. 50 lakhs. There can be no doubt that the appellant has the backing of powerful financiers. There is no specific charge that some named persons is the real purchaser. From the materials on the record it is not possible to record a finding that the appellant is a benamidar and that some other person is the real purchaser. The purchase is not illegal merely because the appellant obtained the necessary funds from some financiers. The Government never alleged that the appellant's bid was a benami bid and opposed to Rule 12. His bid was accepted and such acceptance was subsequently confirmed. Under Rule 17(1) the confirmation is effective until revised by the appropriate authority. It is neither alleged nor proved that some person other than the appellant had been managing the shops and selling liquor in contravention of Section 15. Respondent No. 4 has failed to establish contravention of either Rule 12 or Section 15. The High Court was in error in holding that the appellant's bid was opposed to Rule 12.

Having regard to the fact that the appellant had already deposited about Rs. 40 lakhs the Divisional Commissioner, Gulbarga, acted rather precipitately and harshly in cancelling the sale. For the reasons already given, the order of cancellation (Ex. J.) is in valid. The order must be set aside and a writ of mandamus must issue for the grant of licences to the appellant.

Some complication arises out of the fact that the licences have been granted to respondent No. 4 after the disposal of the writ petitions by the High Court. Licences cannot be given to both the appellant and respondent No. 4 for the retail vend of liquors in respect of the same groups of shops. In order to give effect to our order for the issue of licences in favour of the appellant it is necessary to give the further direction that the licences issued to respondent No. 4 should be cancelled. We can give this direction as respondent No. 4 is a party to this appeal.

While holding that Rule 17, sub-rule (4), did not compel the officer conducting the sale to accept the next highest offer of respondent No. 4 the High Court observed that the authorities concerned should consider the advisability of accepting his bid. This observation is not in accordance with law and has given rise to unnecessary complications. Rule 17(4) provides that "if the officer conducting the sale rejects the highest bid or offer, he may either accept the next highest bid or offer or re-sell and the shop". The sub-rule cannot be invoked if the officer conducting the sale has accepted the highest offer. In the present case, the officer accepted the appellant's highest offer and later confirmed it. The confirmation is still effective under Rule 17(1). If for some reason the confirmation is subsequently revised or set aside, the officer cannot act under Rule 17(4). In such a case there must be a fresh disposal of the right of retail vend of liquor in accordance with the rules. It follows that the bid of respondent No. 4 could not be accepted under Rule 17(4) after the disposal of the writ petitions on September 19.

It is rather surprising that the Government acted so hastily and issued licences to respondent No. 4 on or about September 18. It is not quite clear how licences in respect of 1, 168 shops could be issued on a single day. The effect of this precipitate action on the part of the Government was that the appellant could on the next day obtain a stay of the operation of the High Court's order. There is ground for suspecting that the Government was favouring respondent No. 4.

In the result the appeal is allowed with costs in this Court and in the High Court. The order passed by the High Court is set aside. Writ Petition No. 1889 of 1968 is allowed. The order, dated June 26, 1968 (Ex. J.), is set aside. Respondents 1 and 2 are directed to grant immediately licences to the appellant to vend liquors in the combined groups of shops in Raichur and Gulbarga districts for the remaining period of the year 1968-1969. Respondents 1 and 2 are also directed to cancel forthwith the licences issued to respondent No. 4 in respect of the aforesaid groups of shops.

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