State Bank of Haryana and Others

Vs

Jage Ram and Others

Civil Appeal No. 1507(N) of 1969

(O. Chinnappa Reddy, P. N. Shinghal JJ)

21.04.1980

JUDGEMENT

CHANDRACHUD, C.J. –

1. This is an appeal by certificate granted by the High Court of Punjab and Haryana under Article 133(l)(a) of the Constitution in regard to its Judgment dated March 12, 1968 in Civil Writ 1376 or 1967.

2. On March 16, 1967 the Excise and Taxation Commissioner, Haryana, appellant 2 herein, announced by publication of a notice that excise auctions for the financial year 1967-68 will be held on March 27, 1967. The terms and conditions in regard to the auction of retail vends of country spirits were set out in a pamphlet issued along with the notice. Those terms and conditions did not accord with the rules then prevailing but were evidently announced so as to comply with the requirement of the new rules which were being brought into force. The amended rules issued by the Excise and Taxation Commissioner (Financial Commissioner) were published in the Government Gazette dated March 31, 1967 and came into effect of April 1, 1967.

3. In the auction held on March 27, 1967 for the retail vend known as "Biswan Meel", Sonepat, respondents offered the highest bid for a quota of 62,100 proof litres for which they became liable, under condition 14(iii) of the auction, to pay an amount calculated at the rate of Rs. 17.60 per litre, that is to say, Rs. 10,92,960.00. On the bid being knocked in their favour, respondents deposited a sum of Rs. 45,527.50, being 1/24th of the total amount payable by them, by way of security for the due performance of the terms of the auction, as required by condition 15(i) of the auction and Rule 36(22-A) of the Punjab Liquor Licence Rules, 1956 as amended. They started operating the vend from April 1, 1967.

4. The successful bidder who is granted licence for retail sale of country liquor is required by condition 15(ii) of the auction read with Rule 36(23)(2), to pay the licence fee in 22 equal instalments, each instalment being payable before the 10th and 25th of every month, commencing on April 10. On the failure of the respondents to pay the instalments due for the periods ending with April 10 and 25, 1967, the Excise and Taxation Officer, Rohtak, gave them notices dated April 15 and 25, 1967 calling upon them to make good the shortfall of Rs. 33,827.20 and Rs. 5,898.80 respectively, before April 20 and April 30, 1967. Since the respondents did not pay the amount, the Deputy Excise and Taxation Commissioner, Headquarters, Haryana, gave them a notice calling upon them to show cause, within two days of the receipt of the notice, why their licence should not be cancelled under Section 36(c) of the Punjab Excise Act, for their failure to comply with the terms of the auction in the matter of payment of the two instalments. By their reply dated May 12, 1967, the

respondents stated that they were illiterate villagers, that the terms of auction were not explained to them, that the district of Rohtak was in the grip of a severe drought leading to fall in the sale of liquor, that April being a summer month, the consumption of liquor was less as compared with the consumption during winter months and that, there was in fact no default on their part as alleged in the notice sent to them. On May 17, 1967, the Collector and Deputy Excise and Taxation Commissioner, Haryana, passed an order, after hearing the respondents, cancelling their licence under Section 36(b) and (c) of the Punjab Excise Act with immediate effect and stating that the vend will be resold on May 23, 1967 at 10.00 a.m. in the office of the Excise and Taxation Officer, Rohtak, at the risk of the respondents.

5. On May 22, 1967 respondents filed a writ petition (900 of 1967) which was dismissed by the High Court of Punjab and Haryana on May 26, on the ground that it was premature.

6. In pursuance of the Order dated May 17, the "Biswan Meel" vend, Sonepat, was reauctioned on May 23, 1967, the highest bed received being of 15,000 litres, which in terms of money comes to Rs. 2,46,000.00. The difference between the amount which the respondents were liable to pay under their bid and the amount realised in the reauction comes to Rs. 7,41,577.40.

7. On July 11, 1967 respondents were served with a notice dated July 7 by which they were called upon to pay the aforesaid amount, failing which, they were warned, the amount was liable to be recovered as arrears of land revenue. On July 18, respondents filed the present writ petition in the High Court challenging the legality of the aforesaid notice. The High Court allowed the writ petition and quashed the order cancelling the respondents' licence and calling upon them to pay the difference between the amount payable by them under their bid and amount realised in the reauction of the vend. It has given to appellants a certificate to appeal to this Court under Article 133(l)(a) of the Constitution since the subject-matter in dispute was of the value of more than Rs. 20,000 at the time when the writ petition was filed, as also on the date of the proposed appeal.

8. It is no longer in dispute that the auction at which the respondents' bid was accepted is governed by the Punjab Liquor Licence Rules, 1956 as amended by the notification dated March 31, 1967 issued by the Excise and Taxation Commissioner, Haryana, which came into force on April 1, 1967. The amended rules, in so far as they are relevant for our purpose, read thus :

> 36. (1) Subject to such changes as the Financial Commissioner may make each year before the annual auctions the Collector shall, on the basis of the probable sales during the next licence year, determine, in the case of country liquor vends, the minimum quota of country liquor and the licence fee calculated thereon ... The minimum quota and the licence fee calculated thereon ..., for each vend shall be announced by the Presiding Officer at the time of auctions.
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> 36. (16) Bids in respect of country liquor vends shall be received in terms of quota of country spirit in proof litres to be lifted during the whole year, and the successful bidder shall be liable to pay licence fee calculated by multiplying the quota bid by Rs. 17.60. .....
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> 36. (22-A) A person to whom a country spirit shop has been sold shall deposit in a Government Treasury under head "licence fee on country spirit" subordinate to major head "X-State Excise Duties" by way of security an amount equivalent to one-twenty-fourth of the amount of the licence fee determined under clause (16) within a

> period of seven days of the date of auction and the aforesaid amount of security shall be refundable to him at the end of the year, unless the same or any part thereof is forfeited or adjusted against any amount of fee, duty or penalty due from him in respect of his licence. In the event of the amount of security deposit or any part thereof being forfeited or adjusted as aforesaid the deficiency shall be made good by him within seven days of the happening of such an event failing which the licence shall be liable to cancellation by the authority by which it was granted.
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> 36. (23)(2) A person to whom a country spirit shop is sold shall pay the amount or licence fee as calculated under clause (16) in 22 equal instalments, each instalment being payable on the 10th and 25th of each month starting from the month of April. In the event of failure to pay the instalment by the due date, his licence may be cancelled.
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> 36. (23)(3) Notwithstanding anything contained in sub-clause (2) -
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> (a) the licensee shall be entitled to deduct from the amount of the licence fee to be paid by him such amount of still-head duty as may have been actually paid by him on the quota of country spirit actually lifted by him not exceeding the amount of such duty payable in respect of the quota bid by him at the time of auction.
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> 36. (24) When a licence has been cancelled, the Collector or an officer not below the rank of Excise and Taxation officer authorised by him in this behalf may resell it by public auction or by private contract in accordance with the procedure laid down in this rule and any deficiency in the licence fee and all expenses of such resale or attempted resale shall be recoverable from the defaulting licensee in the manner laid down in Section 60 of the Punjab Excise Act, 1914. .....

9. The High Court has summarised correctly the position emerging out of these rules in these words :

> The auction is on the basis of the quota that has to be lifted for each particular shop. In order to convert it in terms of money, each proof litre bid is multiplied by Rs. 17.60 and that is how, the fee for a particular shop is fixed. The licensee is required to deposit one-twentyfourth of the amount so arrived at as security. He is then to lift the quota specified for each month in the Rules and if he fails to do so, the amount shortlifted in terms of the licence fee for that month is deducted from his security amount and he is required to make good the deficiency in the security. He may not sell even a litre of liquor; but whatever quota of liquor he has bid for, the money value of that quota by multiplying it by Rs. 17.60 per litre has to be paid by him. There is no escape from this.

10. One of the contentions raised before the High Court was that the licence fee charged to the respondents, for failure to pay which their licence was cancelled, was not fee properly so called but was "still-head" duty or excise duty; and the rule requiring the payment of such duty, even when no quota of liquor was actually lifted by the licensee, was unconstitutional for the reason that there can be no liability to pay still-head duty or excise duty unless the licensee takes or lifts the liquor. The High Court compared the Punjab Liquor Licence Rules of 1956 as they existed in 1966 and the Rules as amended in 1967 and came to the conclusion that, in substance, there was no difference in

the nature of payment which the licensee was liable to make under the two sets of rules : what he has to pay under both is still-head duty or excise duty.

11. In Bhajan Lal Saran Singh & Co. v. State of Punjab ((1967) Cur LJ 460 (DB)) : (Civil Writs 538 and 1991 of 1966), the High Court had struck down the relevant Rules of 1966 by holding that the levy, charge or recovery of any amount of still-head duty in respect of liquor which had not been actually lifted by the licensee was not justified and that the demand to that extent was liable to be quashed. In the instant case, since the liability under the 1967 Rules was of a similar nature as the liability under the 1966 Rules, the High Court followed the judgment in Bhajan Lal ((1967) Cur 460 (DB)), quashed the levy and set aside the order whereby the respondents' licence was cancelled and they were called upon to pay the difference between the amount which they had agreed to pay under the terms of their auction and the amount realised in the reauction of the vend.

12. The sheet-anchor of the respondents' arguments before us is that the decision of the High Court in Bhajan Lal ((1967) Cur LJ 460 (DB)) was affirmed by this Court in Civil Appeals 1642 and 1643 of 1968 (decided on August 21, 1972) and since, in the instant case, the High Court has merely followed the decision in Bhajan Lal ((1967) Cur LJ 460 (DB)), the State's appeal must fail. If the matter were to rest there, as assumed by the respondents' counsel Shri Tirath Singh Munjral, the contention would be unassailable because the position would then approximate to the application of a mathematical formula : Bhajan Lal ((1967) Cur LJ 460 (DB)) was affirmed by this Court : the judgment of the High Court in the instant case follows Bhajan Lal ((1967) Cur LJ 460 (DB)) : the judgment under appeal must therefore be upheld. But after the decision of the High Court in Bhajan Lal ((1967) Cur LJ 460 (DB)) was affirmed by this Court on August 21, 1972, the legal position has been further examined by a Constitution Bench of this Court in Har Shankar v. Dy. Excise and Taxation Commissioner ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121). The learned Solicitor-General places strong reliance on that decision and contends that the judgment of the High Court must, in the light of that decision, be overruled. We must proceed to consider the decision in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) straight away.

13. Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) was a case from Punjab and though the instant case is from Haryana, the liquor auctions in both the cases are governed by the Punjab Excise Act, 1 of 1914, and the Punjab Liquor Licence Rules, 1956, as amended from time to time. Har Shankar case ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) has an interesting relationship with the present proceedings because it was as a result of the decision of the Punjab and Haryana High Court in the instant case, which was rendered on March 12, 1968 that the Punjab Liquor Licence Rules were further amended on March 22 and the auction impugned in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) was held on March 23, 1968. The liability arising under the auction in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) was upheld by the High Court and this Court, not under the Rules which are relevant in the instant case, but under the Rules which were amended in order to the judgment of the High Court in the instant case. This, from the respondents' point of view, would apparently furnish an important consideration for distinguishing the decision in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121). But, as we will presently pointed out, the Solicitor-General relies upon that decision on an aspect which is altogether different and of fundamental importance.

14. In Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121), appellants' bid was accepted in an auction held on March 23, 1968 for the right to sell country liquor

at two vends in Ludhiana. The appellants paid the security deposit but were unable to meet their obligation under the conditions of auction and fell in arrears. When the State demanded the payment, threatened to cancel the licences granted to the appellants and declared its intention to resale the vends, the appellants filed writ petitions in High Court of Punjab and Haryana asking that the auction be quashed and the respondents be restrained from enforcing the obligation arising under its terms and conditions. The High Court having dismissed the writ petitions, the licensees filed an appeal to this Court by certificate.

15. What is important for our purpose in this appeal is that the State of Punjab, which was respondent to the appeal in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121), raised a preliminary objection to the maintainability of the writ petitions filed by the appellants and that objection was upheld by this Court. The preliminary objection was that such of the appellants who offered their bids in the auctions did so with a full knowledge of the terms and conditions attaching to the auctions and that they could not be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids. Holding that the preliminary objection was well founded, this Court observed : (SCC pp. 745-746, para 16)

Those interested in running the country liquor vends offered their bids voluntarily in the auction held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the government. The government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force. (page 263)

At page 266 (SCC p. 748) of the Report, the court further observed that the writ jurisdiction of High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred.

16. The writ petitions filed by the respondents in the High Court in the instant case are open precisely to the same objection which was upheld by this Court in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121). They entered into a contract with the State authorities with the full knowledge of conditions which they had to carry out in the conduct of their business, on which they had willingly and voluntarily embarked. The occurrence of a commercial difficulty, inconvenience or hardship in the performance of those conditions, like the sale of liquor

being less in summer than in winter, can provide no justification for not complying with the terms of the contract which they had accepted with open eyes. The respondents could not therefore invoke the writ jurisdiction of the High Court to avoid the contractual obligations incurred by them voluntarily. On this ground alone, the State is entitled to succeed in this appeal.

17. The judgment in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) was followed in Sham Lal v. State of Punjab (AIR 1976 SC 2045 : (1977) 1 SCC 336) wherein, appellants were the highest bidders in an auction for the sale of country liquor vends at various places in the State of Punjab. The appellants were called upon by the State to pay the amounts which they were liable to pay under the terms of the auction, whereupon they filed writ petitions in the High Court to challenge the demand. Relying upon the passage from Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) extracted above, the court held that the licensees could not be permitted to avoid the contractual obligations voluntarily incurred by them and that therefore the High Court was right in refusing to exercise its jurisdiction under Article 226 of the Constitution in their favour.

18. In view of these decisions, the preliminary objection raised by the learned Solicitor Central to the maintainability of the the writ petitions filed by the respondents has to be upheld. We hold accordingly that the High Court was in error in entertaining the writ petitions for the purpose of examining whether the respondents could avoid their contractual liability by challenging the Rules under which the bids offered by them were accepted and under which they became entitled to conduct their business. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

19. Learned counsel for the respondents has called our attention to the distinction, which this Court drew in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121), between the Rules which were impugned in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) on one hand, and those which were impugned in Bhajan Lal (1967 Cur LJ 460 (DB)) and in the instant case on the other. There is no doubt that such a distinction exists. In fact, the judgment of the Punjab and Haryana High Court which is impugned before us was specifically referred to at pages 281-82 (SCC pp. 761-62) of the Report in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) but was distinguished on the ground that the Rules in the two sets of cases were different. As we have already pointed out, the licensing Rules were amended on March 22, 1968 because of the judgment which the High Court gave in this case on March 12, 1968 and the auction in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) was held in pursuance of the amended Rules on March 23, 1968. But that, to our mind, is a separate matter altogether. Even if it be true that there is difference between the Rules involved in the present case and those which came up for examination in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121), the preliminary objection rests on an entirely different bias which would remain unaffected by the difference in the two sets of Rules. We must therefore affirm that, even assuming that there is a material difference in the Rules which are relevant for our purpose and the Rules which were impugned in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121), the writ petitions filed by the respondents are liable to fail on the narrow ground on which the preliminary objection of the State was upheld in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121).

20. Apart from the fact that the respondents' writ petitions are liable to fail on the ground stated

above, the State's appeal must succeeded on another ground canvassed by the learned Solicitor-General which was also urged and accepted in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121). It was observed in Har Shankar ((1975) 3 SCR 254, 263 : (1975) 1 SCC 737, 745-46 : AIR 1975 SC 1121) that the main focus of controversy on the merits of the matter related to the power of the government to levy and realise large licence fees either through the medium of auctions or on scales fixed under the Rules. After referring to the long history of liquor licensing and after considering the various provisions of the Punjab Excise Act, 1914 and the Rules framed thereunder, this Court held that since rights in regard to the manufacture and sale of intoxicants are vested in the State, it is open to it to part with those rights for consideration; that the amounts which are charged to the licensees who offer their bids in auction sales of vends are neither in the nature of a tax nor in the nature of excise duty; and that, the true nature of the charge which the government levies in such cases is that it is a price which the State charges as a consideration for parting with its privileges in favour of the licensee. Such a charge is a normal incident of a trading or business transaction. What the State could itself do in the exercise of its privilege, it authorises another to do by charging a price for parting with its privilege. A price can neither be a tax nor excise duty.

21. The High Court has recorded in its judgment a concession said to have been made by the learned Advocate General on behalf of the State of Haryana that "Rupees 17-60 is the still-head duty per proof litre". In the application dated May 2, 1968 filed by the State Government in the High Court for certificate to appeal to this Court, it was stated that in the interest of justice it was necessary that the points involved in the writ petition be decided by the Supreme Court since they affected "lacs of rupees as excise duty". This makes it plausible that the concession was made. But considering the tenor of the arguments advanced on behalf of the State Government in the High Court, it does not appear likely that any concession was made by the Advocate General regarding the nature of the charge. It is disputed before us that the Advocate General made any such concession and indeed even in the Memorandum of Appeal which was filed in this Court, it was stated specifically that the High Court was in error in saying that the Advocate General had made the particular concession and that, as a matter of fact,

it was vehemently argued by the Advocate General that the auction was only in terms of money which was to represent the amount of fee for the privilege of selling country liquor at a particular shop; only the amount of money was to be calculated by multiplying the number of proof litres bid by Rs. 17-60 p.

We might add that the concession, if any, made by the Advocate General in the High Court cannot affect the true legal position that the amount which the respondents became liable to pay under the terms of the auction is not excise or still-head duty but is a price which the government charged for parting with its privilege, during the currency of the period covered by the contract contract.

22. On this consideration also, apart from the validity of the preliminary objection, the respondents' writ petition is liable to fail. The amount which the respondents agreed to pay to the State Government under the terms of the auction is neither a fee properly so called which would require the existence of a quid pro quo, nor indeed is the amount in the nature of excise duty, which by reason of the constitutional constraints has to be primarily a duty on the production or manufacture of goods produced or manufactured within the country. The respondents cannot therefore complain that they are being asked to pay "excise duty" or "still-head duty" on quota of liquor not taken, lifted or purchased by them. The respondents agreed to pay a certain sum under the terms of the auction and the Rules only prescribe a convenient mode whereby their liability was spread over the entire

year by splitting it up into fortnightly installments. The Rules might as well have provided for payment of a lump sum and the very issuance of the licence could have been made to depend on the payment of such sum. If it could not be argued in that event that the lump sum payment represented excise duty, it cannot be so argued in the present event merely because the quota for which the respondents gave their bid is required to be multiplied by a certain figure per proof litre and further because the respondents were given the facility of paying the amount by instalments while lifting the quota from time to time. What the respondents agreed to pay was the price of a privilege which the State parted with in their favour. They cannot therefore avoid their liability by contending that the payment which they were called upon to make is truly in the nature of excise duty and that no such duty can be imposed on liquor not lifted or purchased by them.

23. In Panna Lal v. State of Rajasthan ((1976) 1 SCR 219 : (1975) 2 SCC 633 : AIR 1975 SC 2008) it was held by this Court that the licence fee stipulated to be paid by the licensees was the price or consideration or rental which the government charged them for parting with its privilege and that it was a normal incident of trading or business transaction. It is true that the court also said that no excise duty could be collected on undrawn liquor but it held that while enforcing the payment of the guaranteed sum or the stipulated sum mentioned in the licences, the government was not seeking to levy or recover excise duty on undrawn liquor. In the instant case too, what the government is trying to recover from the respondents is in essence the price of the privilege with which it has parted in their favour and not excise duty on undrawn liquor.

24. Strong reliance was placed by the respondents on the decisions of this Court in Bimal Chandra Banerjee v. State of Madhya Pradesh ((1971) 1 SCR 844 : (1970) 2 SCC 467 : AIR 1970 SC 517); State of Madhya Pradesh v. Firm Gappulal ((1976) 2 SCR 1041 : (1976) 1 SCC 791 : 1976 SCC (Tax) 71) and Excise Commissioner v. Ram Kumar ((1976) Supp SCR 532 : (1976) 3 SCC 540 : 1976 SCC (Tax) 360) in support of their contention that what they are called upon to pay by the government is excise duty. In Bimal Chandra Banerjee ((1971) 1 SCR 844 : (1970) 2 SCC 467 : AIR 1970 SC 517), it was held by this Court that the levy of excise duty on undrawn liquor was beyond the power of the State Government and that therefore the rule imposing the condition to that effect was invalid. That decision was followed in the Madhya Pradesh case ((1976) 2 SCR 1041 : (1976) 1 SCC 791 : 1976 SCC (Tax) 71) where also, the licensees were required to pay what was described as "Pratikar", which was nothing but excise duty on undrawn liquor. The same situation obtained in the U.P. case ((1976) Supp SCR 532 : (1976) 3 SCC 540 : 1976 SCC (Tax) 960) because, the real nature of the payment which the licensees were required to make there was excise duty on undrawn liquor.

25. These decisions cannot held the respondents because the true position, as stated earlier, is that the amount which the respondents are called upon to pay is not excise duty on undrawn liquor but is the price of a privilege for which they offered their bid at the auction of the vend which they wanted to conduct.

26. Thus the respondents must fail in their contention both on account of the objection to the maintainability of their writ petition and on merits concerning the nature of the payment which they are liable to make.

27. There is however one other point which cannot be overlooked and on which the respondents may possibly have a plausible case. It is urged by Shri Tirath Singh Munjral for the respondents that the reauction which was held on May 23, 1967 was not in accordance with the Rules and therefore, the respondents cannot be called upon to pay the difference between the amount which they had

agreed to pay and the amount which was fetched in the reauction of the vend. In paragraph 14 of the writ petition, it is averred that the respondents were never informed as to where and at what time the resale of the vend would be held on May 23, that no notice of the intended resale was given as required by Rule 36(3) of the Punjab Liquor Licence Rules, 1956, that in fact no other notice was published or affixed at any conspicuous public place notifying the proposed resale nor indeed was the resale announced even by the beat of drum. According to the respondents, no wide publicity was given to the reauction and even the residents of the adjoining villages who would have been interested in offering bids were not aware of the reauction. All that happened on May 23, according to the respondents, was that one Lal Chand, a leading licensee of Haryana, went to the office of the Excise Taxation Officer, Rohtak, and managed to have his bid accepted. These irregularities, it is contended, resulted in the starting consequence that whereas in the auction held on March 27, 1967 the highest bid, namely, of the respondents was for a quota of 62,100 proof litres equivalent to Rs. 10,92,960.00, in the reauction held on May 23, 1967 the highest bid was only for a quota of 15,000 proof litres equivalent to Rs. 2,46,400.00.

28. In the counter-affidavit dated August 16, 1967 filed by Shri Pritam Singh, Deputy Excise and Taxation Commissioner, the allegations made in paragraph 14 of the writ petition are denied by saying that the reauction held on May 23, 1967 "was duly published in accordance with Rules".

29. The High Court has rejected the contention of the respondents in this behalf. But it seems to us that its judgment on this aspect of the matter suffers, with respect, from a misunderstanding of the grievance of the respondents. Their main grievance that due publicity was not given to the reauction, as a result of which proper bids were not received, has been overlooked by the High Court and it merely dealt with the question whether the respondents themselves had notice of the reauction and whether the date of the reauction ought to have been fixed by the Financial Commissioner himself and by no other person. The High Court is right that the respondents did have notice of the reauction, as is clear from the Order dated May 17, 1976 passed by the Deputy Excise and Taxation Commissioner, Headquarters, Haryana, while cancelling the respondents' licence. It also appears clear that the date of the reauction need not be fixed by the Financial Commissioner himself. But there is no discussion whatsoever in the judgment of the High Court, on the question as to whether due publicity was given to the reauction as required by the Rules. In paragraph 14 of their rejoinder affidavit filed in the High Court on September 14, 1967, respondents had stated that it was incorrect that the reauction was duly published in accordance with the Rules. Along with their rejoinder, respondents filed affidavits of three Sarpanchas, three members of the Panchayat and a Lumberdar to show that no notice whatsoever was given of the reauction to the people in the vicinity of Biswan Meel village. The High Court has not even made a reference to these affidavits, while dealing with the particular point (namely, contention 2 before the High Court), which bears out what we have stated above that it really misdirected itself while examining the contention raised by the respondents in regard to the absence of due publicity for the reauction.

30. This makes it necessary to remand the matter to the High Court in order to enable it to record its findings on two outstanding questions : (1) whether it was necessary according to the Rules which were in force at the relevant time to give adequate publicity to the reauction and, (2) if so, whether such publicity was in fact given to the reauction. If the officers of the State have defaulted in carrying out their obligation, if any, in the matter of giving due publicity to the reauction, the consequence could be that the respondents may not be liable to pay the difference between the amount which they were liable to pay and the amount realised in the reaction.

31. In the result, except for the contention in regard to the two questions mentioned in the preceding

paragraph, the State must succeed. We shall, however, have to await the findings of the High Court on the two points mentioned above before passing the final order, which can only be done after the findings of the High Court are received. We direct the High Court to decide the aforesaid questions on the material as it stands on the record and on such further material as the parties may desire to adduce. The State, especially, may like to file a further affidavit in reply to the rejoinder affidavit of the respondents along with which the affidavits of three Sarpanchas, three members of certain Panchayats and of a Lumberdar were filed. The High Court will certify its findings to this Court within three months from today.

Miss. Santosh Mehta

Vs

Om Prakash and Others

Civil Appeal No. 1445 of 1979

(Krishan Iyer, J.)

02.04.1980.

JUDGMENT

KRISHAN IYER, J. –

1. A short but interesting point affecting the validity and propriety of an order under Section 15(7) of the Delhi Rent Control Act, 1958 (for short, the Act), has been raised by counsel for the appellant. The decision of this question is of importance and we regard it as necessary to clarify the position so that the error committed by the trial Judge may not be repeated.

2. Rent Control laws are basically designed to protect tenants because scarcity of accommodation is a nightmare for those who own none and, if evicted, will be helpless. Even so, the legislature has provided some grounds for eviction, and the Delhi law contains an extreme provision for striking out altogether the defence of the tenant which means that even if he has excellent pleas to negative the landlord's claim the court will not hear him. Obviously, this is a harsh extreme and having regard to the benign scheme of the legislation this drastic power is meant for use in grossly recalcitrant situations where a tenant is guilty of disregard in paying rent. That is why a discretion is vested, not a mandate imposed. Section 15(7) reads thus :

> If a tenant fails to make payment or deposit as required by this section, the Controller may order the defence against eviction to be struck out and proceed with the hearing of the application.

3. We must adopt a socially informed perspective while construing the provisions and then it will be plain that the Controller is armed with a facultative power. He may, or may not strike out the tenant's defence. A judicial discretion has built-in-self-restraint, has the scheme of the statute in mind, cannot ignore the conspectus of circumstances which are present in the case and has the brooding thought playing on the power that, in a court, striking out a party's defence is an

exceptional step, not a routine visitation of a punitive extreme following upon a mere failure to pay rent. First of all, there must be a failure to pay rent which, in the context, indicates willful failure, deliberate default or volitional non-performance. Secondly, the section provides no automatic weapon but prescribes a wise discretion, inscribes no mechanical consequence but invests a power to overcome intransigence. Thus, if a tenant fails or refuses to pay or deposit rent and the court discerns a mood of defiance or gross neglect, the tenant may forfeit his right to be heard in defence. The last resort cannot be converted into the first resort; a punitive direction of court cannot be used as a booby trap to get the tenant out. Once this teleological interpretation dawns, the mist of misconception about matter-of-course invocation of the power to strike out will vanish. Farewell to the realities of a given case is playing truant with the duty underlying the power.

4. There is no indication whatsoever in the Act to show that the exercise of the power of striking out of the defence under Section 15(7) was imperative whenever the tenant failed to deposit or pay any amount as required by Section 15. The provisions contained in Section 15(7) of the Act are directory and not mandatory. It cannot be disputed that Section 15(7) is a penal provision and gives to the Controller discretionary power in the matter of striking out of the defence, and that is appropriate cases, the Controller may refuse to visit upon the tenant the penalty of non-payment or non-deposit. The effect of striking out of the defence under Section 15(7) is that the tenant is deprived of the protection given by Section 14 and, therefore, the powers under Section 15(7) of the Act must be exercised with due circumspection.

5. It will be noted that Section 15(7) of the Act is not couched in mandatory language. It uses the word "may". The difference in the language of Section 15(7) with that of Section 13(5) of the repealed Act is significant and indicates that in the present Act there is a deliberate modification of law in favour of the tenant. In this connection, it would be pertinent to refer to the observations of the court in V. K. Verma v. Radhey Shyam (AIR 1964 SC 1970 : 1964 Cur LJ 106). In that case, the court compared Section 13(5) of the Delhi Rent Control Act, 1952 which laid down that on the failure of a tenant to deposit the arrears of rent within the prescribed time, "the court shall order the defence against ejectment to be struck out", with Section 15(7) of the Delhi Rent Control Act, 1958 which substitutes "may" and observed :

> The change of the words from "the court shall order the defence against ejectment to be struck out" to the words "the Controller may order the defence against eviction to be struck out" is clearly deliberate modification in law in favour of the tenant. Under the old Act the court had no option but to strike out the defence if the failure to pay or deposit the rent is proved; under the new Act the Controller who takes the place of the court has a discretion in the matter, so that in proper cases he may refuse to strike out the defence.

These observations leave no doubt that under Section 15(7) of the Act, it is in the liberal discretion of the Rent Controller whether or not to strike out the defence.

6. We stress the need for the court to be aware of the milieu before exercise of this extreme power because the present case in illustrative of its erroneous use.

7. The facts in this case cry for intervention, if one may say so. The appellant is a working woman who has to get to office and be there between 9.00 a.m. and 5.00 p.m. Naturally, she has a difficulty in appearing in court for every hearing and so she prudently engaged an advocate to appear on her behalf and take proper steps to protect her interests. It is common ground that all the arrears of rent

had been paid by her by cheque or in cash to her advocate. It also transpires that the amounts received by cheque or in cash by the advocate were not deposited in court or paid to the landlord. It is further seen that when the tenant found that the amounts were not paid to the landlord by her advocate, she made a complaint to the Bar Council of Delhi and the matter is pending inquiry. From these circumstances, we are inclined to conclude - indeed, that is the only reasonable conclusion in the circumstance - that the tenant has not failed to pay and in any case, the exercise of judicial discretion must persuade the court not to strike out the defence of the tenant but give her fresh opportunity to make deposit of the entire arrears due. In the present case the deposit has eventually been made in this Court when it directed such deposit to be made.

8. The tenant did all she could by paying to the advocate the sums regularly but the latter betrayed her and perhaps helped himself. To trust one's advocate is not to sin deliberately. She was innocent but her advocate was innocent. No party can be punished because her advocate behaved unprofessionally. The Rent Controller should have controlled himself by a plain look at the eloquent facts and not let down the helpless woman who in good faith believed in the basic ethic of a noble profession. She did not fail to pay or deposit and, in any view, no case for punitive exercise of discretion has been made out. The conclusion necessarily follows that the striking out of the defence was not legal and the appellant should have been given an opportunity to contest the claim of the landlord for her eviction. A sensitized judicial appreciation was mission not, unfortunately, the High Court did not closely look at this facet of the issue. On the other hand, the appeal was dismissed as not maintainable in view of Section 25-B.

9. An order striking out the defence is appealable under Section 38. So this order is appealable. The reliance on Section 25-B(8) to negative an appeal is inept because this is not an order under that special section but one under Section 15. Moreover, Section 25-B(10) preserves the procedure except to the extent contra-indicated in Section 25-B. Negation of a right of appeal follows from Section 25-B(8) only if the order for recovery is made "in accordance with the procedure specified in this section" (i.e. 25-B). Here the dispossession was not ordered under the special provision in Section 25-B but under Section 15. Nor can the theory of merger salvage the order because the legality of the eviction order depends on the legality of the order under Section 15(7). Once that order is found illegal what follows upon that cannot be sustained.

10. In the view we take of the effect of Section 15(7) we allow the appeal in exercise of our jurisdiction under Article 136 and direct the case to go back to the Rent Controller. Having regard to the fact that the landlord has not been able to make out his case of bona fide requirement for long because of the tendency of these proceedings, we direct the Rent Controller to dispose of the petition for eviction expeditiously and, as far as possible, within four months from today.

11. Any further arrears, if accrued, will be paid under the directions of the Rent Controller on or before a date fixed by him. The order for eviction passed in this case after striking out the defence must fail in view of our holding that the order striking out the defence itself is illegal. Necessarily, the orders of the Rent Controller and of the High Court must be and are hereby set aside. The parties will appear before the Rent Controller on April 16, 1980. There will be no order as to costs.

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