

State of Haryana and Others

Vs

Lal Chand and Others

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Vs

Ramkishan Pritam Singh and Co.

Civil Appeals Nos. 154 (N) and 155 (N) of 1971

(D. A. Desai, A. P. Sen, V. B. Eradi JJ)

02.05.1984

JUDGMENT

A. P. SEN, J. -

1. These appeals on certificate are directed against the judgment and orders of the Punjab High Court dated November 19, 1969 allowing the writ petitions filed by the respondents and quashing the impugned notices of demand for recovery of the difference between the amount which they had agreed to pay under the terms of auction of a liquor vend and the amount realized on re-auction of the vend, as also the defaulted instalments of the licence fee payable in respect of a liquor vend issued under Section 60 of the Punjab Excise Act 1914 ('Act' for short).

2. Put very shortly, the essential facts are these. On March 11, 1969, the Deputy Excise and Taxation Commissioner, Hissar held an auction for granting the right to sell country liquor for Mandi Dabwali for the year 1969-70 at the Collectorate. At the commencement of the auction, the Deputy Excise and Taxation Commissioner had read out the auction announcements and conditions of auction as required under Rule 36 (4) of the Punjab Liquor Licence Rules, 1956 ('Rules' for short). The respondents Messrs Lal Chand Bal Raj etc. offered the highest bid of Rs. 10,11,000 and their bid was provisionally accepted by the Deputy Excise and Taxation Commissioner and they were declared to be the highest bidder as requires under Rule 36 (2) of the Rules. Subsequently, the bid was accepted by the Excise and Taxation Commissioner exercising the powers of the Financial Commissioner on March 21, 1969 as required under Rs. 50,550 as security amount as required under Rule 36 (22-A) and thereby contravened condition No. 15 (i) of

3. Although in the show-cause notice, the respondents were intimated that in case they desired to be heard in person, they should appear before the Deputy Excise and Taxation Commissioner at Chandigarh on April 14, 1969, but non of them turned upon that date. On the same day, the Deputy Excise and Taxation Commissioner rejected the representation of the respondents and directed resale of the licence for retail vend of the country liquor shop at Mandi Dabwali for the year 1969-70 under Rule 36 (23) of the Rules. The respondents have purposely kept back the reply that they received from the Deputy Excise and Taxation Commissioner conveying the licence for retail vend of country liquor shop at Mandi Dabwali would be re-auctioned on April 23, 1969 at the

Collectorate, Hissar. By his letter dated April 15, 1969 addressed to all the Excise and Taxation Officers in the State, the Deputy Excise and Taxation Commissioner forwarded the notice of reauction asking them to give wide publicity to the notice along with the

4. The High Court following its decision in Kanhiya Lal case held that the State Government had no authority to demand the amounts for failure of which the vends were put to reauction on the ground that the licence fee levied was in the nature of excise duty. Recently, this Court has in State of Haryana v. Jage Ram reversed the decision of the High Court in Kanhiya Lal case and held that the amounts which the State Government had charged to the respondents were neither in the nature of a tax nor in the nature of an excise duty but were in the nature of a price which the State Government were entitled to charge as consideration for parting with its privilege in favour of the licensees. That being so, the appeals must succeed on this short ground alone. Normally, this would have entailed remitting the writ petitions to the High Court for a decision on merits but looking to the fact that no useful purpose would be served in remitting the matter to the High Court and heard the parties on merits.

5. Apart from the question of validity of the charge which is common to both the appeals, the questions raised in the two appeals are distinct and separate and they will have to be dealt with separately.

6. It is convenient at this stage to set out the relevant statutory provisions. Section 27 of the Act empowers the State Government to 'lease' on such conditions and for such period as it may deem fit the right of selling by wholesale or retail any country liquor or intoxicating drug within any specified local area. On said lease being granted the Collector, under sub-section (2) thereof, has to grant to the lessee a licence in form of a lease. Section 34 of the Act provides inter alia that (1) Every licence granted under the Act shall be subject to payment of such fees, if any, as the Financial Commissioner may direct; and (2) The authority granting such licence may require the licensee to give such security for the observance of the terms of his licence, or to make such deposits by way of security, as he may think fit. Section 58 (1) of the Act confers power on the State Government, by notification, to make rules for the purpose of carrying out the provisions of the Act. In particular and without prejudice

60. (1) Recovery of dues. - The following moneys namely :

(a) all excise revenue :

##(b) * * *##

(c) all amounts due to the Government by any person on account of any contract relating to the excise revenue;

may be recovered from the person primarily liable to pay the same, or from his surety (if any), by distress and sale of his movable property or by any other process for the recovery of arrears of land revenue due from land holders or from farmers of land or their sureties.

7. The Punjab Liquor Licence Rules, 1956 framed by the Financial Commissioner in exercise of his powers under Section 59 of the Act make detailed provisions regulating the manner in which a licence for the retail vend of country liquor shall be granted by public auction, and the conditions to which it shall be subject. Rule 36 (22-A) of the Rules provides that a person to whom a country liquor shop has been sold shall deposit by way of security an amount equivalent to one- twenty-

fourth of the amount of licence fee determined under Rule 36(16) within a period of seven days of the date of auction. Rule 36(23) (2) provides that a person to whom country liquor shop is sold shall pay the amount of licence fee so calculated in 22 equal instalments, each instalments being payable on the tenth and twenty-sixth 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. Rule 36 (23-A) interdicts that if any person whose bid has been accepted

8. In *Har Shanker v. Deputy Excise and Taxation Commissioner*, this Court held that the writ jurisdiction of the High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purposes of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. Chandrachud, J. (as he then was) interpreting the provisions of the Punjab Excise Act, 1914 and of the Punjab Liquor Licence Rules, 1956 said : (SCC pp. 745- 46 para 16)

The announcement of conditions governing the auctions was 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 the 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 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 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.

To the same effect are the decisions of this Court in *State of Haryana v. Jage Ram and the State of Punjab v. Dial Chand Gian Chand & Co.* laying down that persons who offer their bids at an auction to vend country liquor with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Article 226 of the Constitution.

9. The observations in *Har Shanker* case did not touch upon the question whether such a contract must be in compliance with Article 299(1) of the Constitution. The question whether the process of licensing by public auction of liquor vend involves a contract at all or is merely the grant of a privilege and the bidding at a public auction is with a view merely to fix the price for the purchase of the privilege, has been engaging the attention of the High Court of M. P. The Madhya Pradesh High Court held that the state Government has the exclusive privilege of manufacturing, selling and possessing intoxicants which it has power to lease for consideration under Section 18 of the M. P. Excise Act, 1915 and that every action of 'excise contract for sale of intoxicants is a leasing of the Government's right of selling intoxicants. P. V. Dixit, C.J. speaking for the Court made following observations on this point which are pertinent :

The principle that the state Government has exclusive right of manufacturing, selling or possessing intoxicants or any country liquor intoxicating drug runs through Section 13 to 18 of the Act.

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The important condition that must be satisfied before any licence can be granted to a person for manufacture or sale of any country liquor intoxicating drug is that the person must first obtain the privilege or the right of manufacturing or selling the intoxicating drug.

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In every auction sale of a liquor shop at which liquor is sold in wholesale or retail, there is a sale of the lease of the Government's right of selling country liquor intoxicating drug. On the acceptance of a bid of a person at an auction sale a contract for the demise of the Government's interest is brought into existence and this is followed by the grant of a licence to the person whose bid has been accepted.

These observations of the learned Chief Justice have since been approved of by a Full Bench of the High Court in *Ram Rata Gupta v. State of M. P.* See also : *Ajodhya Prasad Shaw v. State of Orissa* and *M/s. Shree Krishna Gyanoday Sugar Ltd. V. state of Bihar*. We approve of the view expressed by the High Court in these cases that when the State Government in exercise of its powers under a provision similar to Section 22 of the Act grants the exclusive privilege of manufacturing, or supplying or selling any intoxicant like liquor to any person on certain conditions, there comes into existence a contract made in exercise of its statutory powers and such a contract does not amount to a contract made by the State in exercise of the executive powers.

10. There is a distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. Under Article 299(1), three conditions have to be satisfied before a bidding contract by the Union for the State in exercise of the executive power comes into existence : (1) The contract must be expressed to be made by the President or the Governor, as the case may be. (2) It must be executed in writing. And (3) The execution thereof should be by such person and in such manner as the President or the Governor may direct or authorize. There can be no doubt that a contract which has to be executed in accordance with Article 299(1), is nullified and becomes void if the contract is not executed in conformity with provisions of Article 299(1) and there is no question of estoppel or ratification in such cases. Nor can there be any implied contract between the Government and another person : *State of M. P. v. Rattan Lal* and *State of M. P. v. Firm Gobardhan Dass Kailash N*

11. It is well settled that Article 299(1) applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract made in exercise of statutory power. Article 299(1) has no application to a case where a particular statutory authority as distinguished from the Union or the State enters into a contract which is statutory which has been entered into by or on behalf of the Union or the State in exercise of its executive powers., In respect of forest contracts which were dealt with by this Court in *K. P. Chowdhary, Mulamchand. Rattan Lal* and *Firm Gobardhan Dass* cases, there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed there under for entering into a formal deed between the forest contractor and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Article 299(1), whereas under the Punjab excise Act, 1914, like some other State Excise Acts, once the bid offered by a person at

12. We are clearly of the opinion that in the case of a statutory contract like the one under the Excise

act, the requirements of Article 299(1) cannot be invoked. In *A. Damodaran v. State of Kerala*, the Court interpreting Section 60 of the Punjab Excise Act, 1914 held that even if no formal deed had been executed as required under Article 299(1), still the liability for payment of the balance of the licence amount due could be enforced by taking recourse to Section 28 of the Act. The Kerala High Court rejected the contention of the appellants by holding that the liability to satisfy the dues arising out of a bid was enforceable under Section 28 quite apart from any contractual liability and this view was upheld by this Court on the ground that the word 'grantee' in Section 28 has a wide connotation to mean a person who had been granted the privilege by acceptance of his bid. It was further held that the statutory duties and liabilities arising on acceptance of the bid at a public auction of a liquor contract m

13. In *State of U. P. v. Kishori Lal Minocha* there was re-auction of a liquor vend on the highest bidder's failure to deposit one-sixth of the bid amount as security deposit and the question was whether the State was entitled to recover in a suit the deficiency on re-auction. The decision in *Minocha* case is clearly distinguishable for two reasons : first, there was nothing to show that the bid had been accepted by the Excise Commissioner under rule 359(2) of the U. P. Excise manual. Further, Rules 357 under which the excise authorities put the vend to re-auction had not been published in the Official Gazette as required by Section 77 of the U. P. Excise Act, 1910 and thus had no statutory force. No such question arises in these cases as the liability that is sought to be enforced against the respondents by the impugned notices of demand is a statutory liability in terms of condition No. 15(1) of the Condition of Auction read with Rule 36(23) of the Rules and the amount is recoverable from them in the manner laid

14. The short question that falls for determination in these appeals is whether the State Government was entitled to release the difference which the respondents had agreed to pay under the terms of auction of a liquor vend and the amount realized on re-auction of the vend, as also the defaulted instalment of the licence fee payable in respect of a liquor vend. The first of these questions arises in Civil Appeal No. 154 (N) of 1971 while the second in Civil Appeal No. 155(N) of 1971. We will deal with them in that order.

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15. There is no substance in the contention that the respondents were not served with a notice under Rule 36(3) of the rules. The date of re-auction was fixed by the Excise and taxation Commissioner under Rule 36(2). On April 14, 1969, the Deputy Excise and Taxation Commissioner rejected the representation made by the respondents and directed resale of the licence for retail vend of country liquor shop, Mandi Dabwali for the year 1969-70. It is accepted before us that the Deputy Excise and taxation Commissioner had conveyed to the respondents that their representation had been rejected and that the licence for retail vend for Mandi Dabwali shop would be re-auctioned on April 23, 1969, at the Collectorate, Hissar. The respondents have withheld the document and an adverse inference must necessarily be drawn against them. It is quite obvious that the respondents were duly given notice of re-auction as required under Rule 36(3). It is evident from the return filed by the State Government that copies of circular let

16. Equally futile is the contention that the respondents had withdrawn their bid and therefore they could not be mulcted for the difference between the amount which they were liable to pay and the amount realized resale of the vend. This is not a case of the type reported in *Union of India v. M/s Bhim Sen Walaiti Ram* which laid down the well-settled principle that an offer can always be withdrawn before it is finally accepted and that a conditional acceptance is not an acceptance in law.

In Bhim Sen Walaiti Ram case, the Court held that the contract of sale was not complete till the bid was confirmed by the Chief Commissioner and till such confirmation the person whose bid had been provisionally accepted was entitled to withdraw his bid and that when the bid was withdrawn before the confirmation of the Chief Commissioner, the bidder was not liable for damages on account of any breach of contract or for the shortfall on the resale. It was observed : (SCC p. 149, para 4)

It is not disputed that the Chief Commissioner has disapproved the bid offered by the respondent. If the Chief Commissioner had granted sanction under Clause 33 of Ex. D-23 the auction sale in favour of the respondent would have been a completed transaction and he would have been liable for any shortfall on the resale. As the essential prerequisites of a completed sale are missing in this case there is no liability imposed on the respondent for payment of the deficiency in the price.

It is urged on the strength of these observations that the respondents were entitled to withdraw their bid by deciding to make the security deposit. The contention cannot be accepted. For one thing, this was not a case where there was mere conditional acceptance of the highest bid of the respondents by the Deputy Excise and Taxation Commissioner at the time of the auction on March 11, 1969, but their bid was also accepted by the Excise and Taxation Commissioner on March 21, 1969 as required under Rule 36(22--A).

17. The respondents could not unilaterally by their letter dated April 12, 1969 rescind the contract on the pretext that the State Government of Punjab had opened a new liquor shop at village Killianwali across the state border which was contrary to condition No. 13 (iii) of the conditions of auction read with Rule 37 (8-B) of the Rules. Even though this may have been in breach of the inter State agreement between the State Government of Punjab and Haryana, the opening of such a liquor vend the State Government of Punjab at village Killianwali could not justify the respondent in not making the security deposit of Rs. 50,550. It appears from the return filed by the State Government that although condition No. 13 (iii) had been read out before the auction began as required under Rule 36(4), there was no mention that there was an inter-State agreement between the two state Government of Punjab would not open a liquor vend within a radius of three miles from the State border. Nor would this amount to a breach of

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18. At an auction for the licence of retail vend for Butana in the Rohtak district for the financial year 1968-69 held by the Deputy Excise and Taxation commissioner on March 11, 1968 at the Collectorate, Rohtak, the respondents Messrs Ram Kishan Pritam Singh & Co. offered the highest bid of Rs. 1,40,000. The Deputy Excise and taxation Commissioner accepted their bid at the conclusion of the auction. On the same day, the respondents deposited Rs. 5811 equivalent to one-twentieth of the licence fee representing the security amount and started operating the said licence w. e. f. April 1, 1968. It appears that they drew their supplies by making applications to the excise and Taxation Officer, Rohtak for the issuance of challans for deposits of still-head duty in the treasury, and after crediting into the treasury a sum equivalent to the excise duty payable on the strength of permits issued by him. Admittedly, the respondents worked the contract throughout the period without making any payment of Rs. 1,40,000 to

19. Upon these facts, the Excise and Taxation Commissioner would have been justified in cancelling the licence in terms of Rule 36 (23) (2) of the Rules which is in these terms :

A person to whom a country spirit shop is sold shall pay the annual licence fee in 23 equal instalments, each instalment being payable on the tenth and twenty-sixth 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.

20. There was a fundamental breach of an essential condition by the respondents. In a commercial contract of this nature, for the performance of which a definite time has been fixed and the contract specifies the mode of payment i.e. specifies the dates on which the instalments of the licence fee are to be paid, time is of the essence of the contract. Rule 36(23) (1) of the Rules specifically makes time of the essence. It therefore follows that payment of the instalments on the due date was a condition prerequisite to the performance of the contract, and that the failure of the respondents to make such payment relieved the State Government of their obligations. The Excise and Taxation Commissioner would therefore have been justified if he had cancelled the licence under Rule 36 (23) and put the liquor vend to reauction for the remaining period of the financial year. instead of taking this drastic step of cancellation of contract, the Deputy Excise and Taxation Commissioner served the respondents with the im

21. The result therefore is that the appeals succeed and are allow with costs throughout. The judgment and orders of the High Court dated November 11, 1969 quashing the impugned notices of demand served on the respondents are set aside and the writ petitions filed by the respondents are dismissed.

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