

Doongaji And Co. (I)

Vs

State of Madhya Pradesh and Others

Civil Appeal No. 5483 of 1983

(N.M. Kasliwal, K. Ramaswamy JJ)

09.08.1991

JUDGMENT

K. RAMASWAMY, J. –

1. This appeal by special leave arises against the judgment of the Division Bench of the Madhya Pradesh High Court, Indore bench dismissing M.P. No. 169 of 1982 dated October 7, 1982. The appellant, a partnership firm filed the writ petition seeking writ of mandamus and other direction to remove Rajdhani Distilleries Corporation, respondent 7 in the writ petition in the High Court and respondent 6 in this appeal for short 'respondent' or his 'servants' or 'agents' and to deliver vacant and peaceful possession of Ujjain Distillery and warehouses attached to it and the plant and machinery mentioned in the schedule Annexure P-3 to the writ petition. It also sought for mandamus or other order to have the valuation of the plant and machinery in Annexure P-3 assessed or direction to return the goods or things described in Annexure P-7 or on its failure to pay a sum of Rs 8,48,179.28 and a mandamus directing the State Government to terminate the licence granted on August 25, 1981 to the respondent and to issue licence to the appellant under Section 13 of the M.P. Excise Act, 1915, for short 'the Act', etc. Thus this appeal.

2. The material facts, to dispose of the point arose in this appeal, lie in a short compass as stated hereunder :

In the State of Madhya Pradesh nine distilleries for the manufacture of spirit were established and one of which was situated at Ujjain. The appellant and its predecessors continuously had licence under Section 13 and 14 of the Act in From D-2 to distill rectified spirit or denatured spirit or liquor and D-1 licence for wholesale supply of countrymade liquor in the distillery to retail vendors in the area attached to the distillery. The licence was for a period of 5 years, the last licence of which was for the period from April 1, 1977 to March 31, 1981. The normal procedure in vogue was to call for tenders and the lowest was being accepted, though sometimes highest was also preferred. Next licensing period commenced from April 1, 1981 to March 31, 1986 and the respondent became the successful tender which the appellant impugned in Misc. Petition No. 701 of 1981 and obtained stay of dispossession from the distillery and the attached warehouses. The interim stay was later vacated and the petition was dismissed on August 20, 1981. We may also mention here that the writ petition was also dismissed and the special leave petition was dismissed by this Court. Thus grant of licence to the respondent under D-1 and D-2 licences became final. On August 21, 1981 the officer-in-charge of the distillery wrote a letter to the appellant calling upon them to be present on August 22, 1981 to deliver the distillery,

plant, machinery, etc. to the respondent. The appellant neither received it nor cooperated to deliver possession of the distillery, etc. to the respondent. Instead it locked the distillery and went away. In the meanwhile the Excise Department also put their locks on the distillery etc. On August 27, 1981 the District Excise Officer again called upon the appellant to be present on August 28, 1981 to deliver possession of the distillery, etc. to the respondent. But the appellant remained absent. Consequently possession was taken of the distillery and warehouses, after taking inventory of stock in hand in the presence of witnesses and the same were handed over to the respondent on August 28, 1981. The appellant sent a letter on February 23, 1982 valuing the goods taken possession of at Rs 8,36,989.61. On August 8, 1982 the appellant demanded redelivery of the distillery, plant and machinery and warehouses and the value of the stock-in-trade or to pay the amount. On March 16, 1982 the appellant filed the writ petition in the High Court but was dismissed.

3. The appellant contended in the High Court that it had been in exclusive possession of the distillery, plant and machinery at Ujjain and the attached warehouses and dispossession was unlawful and that, therefore, the appellant was entitled to restitution of the plant and machinery and also to the grant of licence after cancellation of the licence granted to the respondent. The High Court found that the appellant had no exclusive possession which always remained with the Excise Department. The appellant worked out the contract of manufacturing rectified spirit or spirit (countrymade liquor) in the distillery and wholesale supply to the retail vendors within the area attached to the distillery. Due to non-cooperation of the appellant possession was taken and delivered to the incoming licensee, the respondent, as per rules and the appellant was not entitled to restitution. The other findings are not necessary as they are not pressed before this Court. The appellant had given up the reliefs of valuation of the plant and machinery and stock-in-trade. During the pendency of the appeal on an application made by the appellant this Court directed the State to make over payment of a sum of Rs 10 lakhs deposited by the respondent with the State Government and also further directed the respondent to deposit a sum of Rs 5 lakhs in the Registry of this Court and directed the Registry to keep that amount in fixed deposit to earn interest thereon subject to adjustment at the final hearing.

4. Despite issuance of several notices by the department, the appellants did not cooperate in the estimate of the value of the plant and machinery of the distillery and warehouses. The Committee appointed in terms of the conditions of the licence, fixed a sum of Rs 10,53,016.45 as total value payable to the appellant. Since a sum of Rs 10 lakhs had already been paid, the appellant is still entitled to the balance amount of Rs 53,016.45.

5. Sri R.F. Nariman, learned counsel for the appellant, in his thorough and analytical arguments based on record made a shift in the stand and now contended that on a reading of several clauses in the licence Ex P-2, in particular, clause 50 enjoins the State to fix the valuation of all materials like buildings, still, machinery, etc. belonging to the appellant as an outgoing licensee; should be purchased by the respondent before the expiry of the contract and commencement of the succeeding contract of the respondent; the committee appointed by the Excise Department in this behalf should estimate fair valuation and payment thereto be made to the appellant before taking over possession and handing over the plant and machinery of the distillery and the attached warehouses to the respondents as a condition precedent to dispossess the appellant and start the operation of the contract by the respondent which admittedly were not done. This is in contravention of the mandatory conditions of the licence and the rules. The appellant, therefore, is entitled to restitution of the plant and machinery of the distillery and the attached warehouses illegally taken possession

of by the respondent and that State. In support thereof he placed strong reliance in *Godhra Electricity Co. Ltd. v. State of Gujarat* [(1975) 1 SCC 199 : (1975) 2 SCR 42]. He also referred to us in support of his contention various documents. In our view it is not necessary to delve deep into them. Sri Ganpule and Sri Tarkunde, the learned senior counsel for the State and the respondent, contended that the appellant was requested to be present for delivery of the plant and machinery in the distillery and warehouses to the respondent and due to its non-cooperation possession was taken. Even for the assessment of the valuation, before the expiry of the contract, the appellant was given several notices requesting it to furnish the evidence of the value of the plant and machinery, stock-in-trade, etc., and due to its non-cooperation, the valuation could not be made. Prior valuation and payment are not condition precedent to work out the licence. The appellant has no right to the restitution after the expiry of the licence. Sri Tarkunde, in particular, emphasised that the restitution prayed for became infructuous on account of the subsequent events, namely, pursuant to December 1984 government policy the respondents established their distillery at Ujjain at their own expenses.

6. The second period of licence also expired in 1991. There was further change in the policy of the government, namely each district was made a supply area under a separate licence for two years. Under these circumstances the appellant is not entitled to any reliefs. It is also further contended that the conditions in the licence in Ex. P-2 marked in the High Court should be read harmoniously. It is clear that prior fixation of the valuation and the payment of the price is not a conditions precedent. The ratio in *Godhra Electricity Co. Ltd. case* [(1975) 1 SCC 199 : (1975) 2 SCR 42] is inapplicable to the facts of this case.

7. The sole question is whether fixation of the price of the plants and machinery at Ujjain and the attached warehouses and stock-in-trade and payment thereof to the appellant is a condition precedent to take possession and delivery thereof to the respondent on August 28, 1981. At the outset we may make it clear that, though Sri Nariman contended that the grant of licence of the respondent was in gross violation of the conditions of the tender as the respondent did not comply with any of the mandatory conditions stipulated therein and the delivery of the possession of the distillery in pursuance of the illegal contract is without jurisdiction, we decline to go into this question, though prima facie may be plausible to be countenanced, for the reasons that the grant of licence for the period of 1981 of 1986 to the respondent became final and expired by efflux of time. It was also contended by Sri Nariman that the valuation made at Rs 10,53,016.45 was not proper and contrary to the tender's conditions which stipulated deposit of a minimum of Rs 19 lakhs by the respondent as a conditions to grant licence, and that, therefore, the appellant is entitled to valuation of at least Rs 19 lakhs. We decline to go into the question also since the relief of valuation was given up in the High Court. It is also clear from the record that the appellant had not cooperated in estimating the value and the committee of designated officers, namely the Additional Collector, the District Excise Officer, Assistant Commissioner of Excise and Accounts Officers was compelled to go into the question and made an assessment of the value on January 5, 1984. That valuation was also not questioned in the writ petition.

8. To find whether it is a condition precedent to fix the valuation of the plants and machinery of the distillery and the warehouses and the stock-in-trade and payment thereof before taking over possession and handing over the same to the incoming licensee, the material clause 50 to be looked into reads thus :

"50. All the materials like buildings, still, machinery, drums, wood fuel, coal, mahua, bottling machinery, bottles, spices, red sealing wax, coalter, pilfer proof seals, crown corks, along with alu capsules, etc. belonging to the outgoing licensee purchased for

the use of distillery and warehouses attached thereto, shall be valued before the expiry of the old contract and the commencement of the new one by a committee appointed by the Excise Department in this behalf. The committee aforesaid shall be appointed by the Excise Commissioner under the previous sanction of the Government (Separate Revenue Department) and it shall consist of five members, namely (1) Collector or Additional Collector-convenor, (2) Assistant Commissioner of Excise of the Division - Concerned member (3) Executive Engineer - Technical member, (4) Accounts Officer of the Excise Department - Member, and (5) Representative of the licensee - Member. If the representative of the licensee remains absent in the committee at the appointed time, the remaining four members shall begin their work in this absence and no objection of the licensee in this respect shall be heard. The valuation made and agreed upon by the committee shall be sectioned by the Excise Commissioner with such necessary changes as he deems fit and in case of difference of opinion amongst the members, the Excise Commissioner shall pass orders relating to disputed valuation. The orders of the Excise Commissioner shall be final and finding upon the licensee.

Note : The valuation of sanctioned plant at the warehouses may be done by a committee consisting of some of the members of the aboveresferred committee, subject to the orders of the Excise Commissioner, which shall be final and binding on the licensee."

9. Prima facie, if the clause by itself is read in isolation, it would indicate that prior fixation of the value and payment is a condition precedent. But in our view all the conditions of the licence, policy of the Act and Rules of the possession, manufacture, supply, sale and distribution of the rectified spirit or denatured spirit or liquor from the stage of manufacture in distillery till retail sale to the consumer be viewed as an integrated whole and the human behaviour of the outgoing licensee also has to be kept in view. Any other view would disrupt smooth transition from the outgoing to the incoming licensee; hamper the continuity of supply and sale of intoxicants and cause colossal loss of public revenue. So let us consider the relevant propositions from this background.

10. Section 13 of the Act requires a licensee to manufacture intoxicants :

- (a) Licence is required for manufacture, etc. of intoxicants;
- (b) No intoxicant shall be manufactured or collected...
- (f) No person shall induce, keep in his possession any material... for the purpose of manufacture of intoxicants, other than tari, except under the authority and subject to the terms and conditions of the licence granted in that behalf.

11. Section 14 provides that :

- (a) establish a distillery in which spirit may be manufactured under licence granted under Section 13 on such conditions as the government may impose....
- (c) license on such conditions as the State Government may impose for the construction and working of the distillery and brewery;
- (d) establish or license warehouses wherein any intoxicant may be deposited and kept

without payment of duty, subject to payment of such fee as the State Government may direct....

12. Section 17 provides inter alia that no intoxicant shall be sold except under the authority subject to the terms and conditions of license granted in that behalf.

13. Thus it is clear that establishment of a distillery or a warehouse; manufacture of intoxicants, spirit (countrymade liquor), the possession and distribution and sale thereof are regulated under the Act.

14. The government in exercise of its power under Section 62 of the Act made rules regulating the control of distilleries and warehouses by officers of the Excise Department, especially appointed by the Excise Commissioner for that purpose. Therefore, any licensee, under the Act and the Rules, be it incoming or outgoing, should have D-2 and D-1 licences for establishment of distillery and warehouses, possession of raw materials, manufacture of liquor of rectified spirit or denatured spirit and supply to the retail vendors of the area attached to the distillery. Any infraction is an offence.

15. It is settled law by several decisions of this Court that there is no fundamental right to citizen to carry on trade or business in liquor. The State under its regulatory power, has power to prohibit absolutely and form of activity in relation to an intoxicant, its manufacture, possession, import and export. No one can claim, as against the State, the right to carry on trade or business in any intoxicants, nor the State be compelled to part with its exclusive right or privilege of manufacture, sale, storage of liquor. Further when the State has decided to part with such right or privilege to the others, then State can regulate consistent with the principles of equality enshrined under Article 14 and any infraction in this behalf at its pleasure are arbitrary violating Article 14. Therefore, the exclusive right or privilege of manufacture, storage, sale, import and export of the liquor through any agency other than the State would be subject to rigour of Article 14. Vide *Har Shankar v. Dy. Excise & Taxation Commissioner* [(1975) 1 SCC 737 : (1975) 3 SCR 254] and *State of M.P. v. Nandlal Jaiswal* [(1986) 4 SCC 566 : (1987) 1 SCR 1].

16. When the State was dealing with the grant of the privilege of establishing or manufacturing intoxicants, rectified spirit or denatured spirit, spirit (countrymade liquor) in a distillery owned or regulated by it, and invited tenders in this regard it should conform to the rigour of Article 14 of the Constitution. Admittedly, the license of the appellants expired on March 31, 1981 and thereafter it had no right to manufacture and store at distillery in Ujjain and distribution as wholesaler of the countrymade liquor from the attached warehouses to the retail vendors within that area granted to the respondent. But for the stay granted by the High Court the operation of the respondent's licence was to begin on April 1, 1981. The outgoing licensee, the appellants, had to hand it over to the respondent on that date. The conditions in the licence P-2 postulate mutual rights and obligations between the outgoing licensee to sell and the incoming licensee to purchase the plant the machinery of the distillery, stock-in-trade and also the machinery in the warehouse including the apparatus, etc. enumerated in the conditions either at the price fixed or agreed directly between the parties or fixed by the committee of the designated officers. In case of any difference in the valuation between the member, the Commissioner of the Excise or the State Government would fix the valuation, which was made final. The committee designated was to be constituted with prior approval of the government as per condition 50 to evaluate the plant and machinery of the distillery and some of them of the warehouses. Outgoing licensee also is entitled to be represented in the committee. On his non-cooperation the rest of the four members of the committee are empowered to determine the value.

17. Clause 23(iii) provides that any dispute relating to valuation of the sanctioned plant shall be referred to the State Government and the decision of the State Government shall be final and binding on the parties to the dispute. Clause 2 thereof refers that the licensee shall make over the said distillery and warehouses buildings on the termination of the licence in as good conditions as they were at the commencement hereof excluding reasonable wear and tear. Clause 36(4) provides that any dispute relating to the sale of spirit or plant by the licensee or the valuation of the plant shall be referred to the State Government and the decision of the State Government shall be final and binding. Clause 39(1) in particular, mentions that at the commencement of the term of this license, the licensee shall buy all sanctioned plant at the Ujjain distillery including spare parts, furniture, motor trucks and fittings at a price to be fixed by the State Government. Licensee shall pay the price thereof within 30 days of the communication. Similarly, clauses 41, 42(1) and clause 44 provide that the incoming licensee shall take on lease all other building structures attached to the distillery at Ujjain on such conditions and terms as per Public Works Department Manual Vol. II within a period of one month of the intimation of the acceptance of the tender. Then comes clause 50 quoted hereinabove. The incoming licensee shall make payment within 30 days from the date of communication of the value.

18. Therefore, the courts should adopt realism, pragmatism, practicality and the purpose envisaged under the Act and the rules in constructing the relevant clauses in the licence. The purpose of the Act and the rules made therein is to regulate the manufacture, distribution, sale of the intoxicants, rectified spirit or denatured spirit, liquor, sale to consumers within the State of Madhya Pradesh. It is an ongoing process conducted through the licensing system, an exclusive privilege of the State through the licences granted under Forms D-1 and D-2 in this behalf. The duration of the licence is fixed one. On expiry of the licence the outgoing licensee shall be bound to hand over the distillery, plant and machinery therein, and warehouse attached thereto, the stock-in-trade and other apparatus and goods used or the manufacture, storage and distribution. The outgoing contractor is entitled to continue his business activity till the last date of the licence, namely March 31, of the ending year. The succeeding licensee would take over the business from the outgoing licensee on April 1 of the year of licence. Thus there should be no hiatus between taking over and handing over the manufacture, possession, storage of the wholesale business of the spirit (countrymade liquor) or rectified spirit. Under these circumstances it will well nigh be impossible to assess the valuation of the entire stock-in-trade or plant and machinery in the distillery or the warehouses till the last date. In addition the cooperation of the outgoing licensee is also necessary and expected as he would be in possession of the records of the previous purchases of the materials, or plant or machinery if any new additions are made etc. Unless they are made available, it is not possible to assess the value after giving due rebate or depreciation, etc. to the incoming licensee. The human nature and conduct would be such that the outgoing licensee, being the unsuccessful tenderer, would not cooperate in handing over possession of the distillery and stock-in-trade and would approach the High Court under Article 226 of the Constitution as was done in this case. The incoming licensee has time of 30 days in case of stock-in-trade or three months in the case of plant and machinery from the date of communication to him to pay the value to the outgoing licensee. Keeping those circumstances at the back of our mind we decline to adopt lexicographic strict construction of clause 50 which would thwart continuity; create hiatus in smooth operation of manufacture, storage, distribution and sales of the intoxicants. Moreover, after the assessment is made and in case of any difference of opinion in the valuation or the outgoing licensee claims higher value the final arbiter would be in some cases like stock-in-trade, the Commissioner of Excise and in case of plant and machinery or warehouses the State Government. After the decision of the Commissioner or the State Government, it shall be communicated to the succeeding licensee, who has been given maximum period of three months to

make payment to the outgoing licensee. In the light of the scheme of valuation of the plant and machinery of the distillery, or the apparatus in the warehouses and the stock-in-trade, we hold that strict construction would lead to innumerable complications and loss of public revenue. We are inclined to hold that before the expiry of the licence, if the outgoing licensee cooperates, the value can be fixed with consensus, payment should also be made within the time stipulated. In all other cases it could be done even after the expiry of the stipulated period. In that perspective we have no hesitation to hold that prior valuation of plant and machinery in the distillery, stock-in-trade therein or the value of the machinery in the warehouses and stock of the liquor stored therein and payment thereof before taking possession and handing them over to the incoming licensee is neither mandatory, nor a conditions precedent. Therefore, taking over possession from the appellant on August 28, 1981 and handing over the plant and machinery, etc. to the respondent is not illegal.

19. Undoubtedly this Court, in Godhra Electricity case [(1975) 1 SCC 199 : (1975) 2 SCR 42] held that it is mandatory that a person who is deprived of his property, before is taking over, the value should be estimated and the payment made or else it is illegal. But the ratio would be considered in the light of setting therein. The licence granted under Section 6 of the Indian Electricity Act, 1910 as amended in 1959 to produce electrical energy was acquired by the Electricity Board. Section 6(6) provides that where a notice exercising the option of purchasing the undertaking has been served upon the licensee, the licensee shall deliver the undertaking to the State Electricity Board on expiry of the relevant period referred to in Section 6(1). In that case the constitutional validity of Section 6(6) was questioned which did not provide for payment before taking over of the undertaking offending Article 19(1)(f) and (g) and Article 14 of the Constitution. While considering the constitutional validity of Section 6(6) this Court held that valuation and payment is a condition precedent since the Act did not envisage any payment of interest subsequent thereto. Accordingly this Court directed redelivery for the undertaking to the licensee subject to following the procedure as per law laid down therein. In this case admittedly the conditions of licence are not questioned, but expressly given up in the High Court. Even before us the validity of the valuation has not been questioned. It cannot cut the branch on which the appellant sits to assail the constitutional validity of the conditions of the licence. Accordingly we have no hesitation to hold that the appellant is not entitled to the restitution of the plant and machinery of the distillery at Ujjain and the attached warehouses.

20. The appellant though claimed that the value of the plant and machinery was too low, contrary to the specification in this behalf in tender condition and though we decline to go into the question, the appellant appeared to have smarted under apprehension that it had to face the plea of acquiescence, if it were to cooperate earlier. So it is open to the appellant to make a representation to the government and any officer not below a Secretary preferable of the concerned department would go into the matter and decide the value as per the material on record. It is open to the appellant to place all its material. It is also open to the respondent to place its material and the authority would consider after giving an opportunity of hearing through counsel, if asked for, and decide the value accordingly. As regard deposit now made in the Registry of this Court, the Registry is directed to make payment of a sum of Rs 53,016.45 and interest accrued thereon to the appellant and the balance amount and the interest accrued on the residual to the respondent and the respondent's liability would be subject to the decision by the Secretary as indicated in the judgment. The appeal is accordingly allowed to the above extent and since the appellant substantially filed there would be no order as to costs.

</html