

# MADHYA PRADESH HIGH COURT

Shrimati Nanhibai

Vs.

Excise Commissioner

Misc. Petn. No. 88 of 1963  
(P.V. Dixit C.J. and S.P. Bhargava, J.)

12.04.1963

## JUDGMENT

**Dixit, C.J.**

1. The petitioner in this case prays for the issue of a writ of mandamus directing the opponents to treat the bid offered by her in the sum of Rs. 85,000/- at the auction sale of Gorakhpur liquor shop (located in Jabalpur) held on 27th February 1963 for the year commencing on 1st April 1963, as final and binding under the Madhya Pradesh Excise Act, 1915 (hereinafter referred to as the Act) and the rules there under. She has also sought a direction restraining the opponents from re-auctioning the liquor shop.

2. The facts are that the said shop is for the retail sale of country spirit. The auction of the privilege of selling country liquor at the shop was conducted by the Collector, Jabalpur, on 27th February 1963. The petitioner, who held the privilege of the sale of country liquor at the shop for the year ending on 31st March 1963 and was given a license for that purpose, offered a bid in the sum of Rs. 85,000/-. She was declared the highest bidder. The petitioner says that after the acceptance of her bid by the Collector she furnished the requisite security for due performance of the contract concluded by the acceptance of her bid at the auction. On 25th March 1963 the District Excise Officer, Jabalpur, informed the applicant by a letter that the bid of Rs. 85,000/- offered by her had not been accepted by the Excise Commissioner and that the shop would be put to "auction" again on 29th March 1963 at 12 noon. The next day after the receipt of this communication the applicant filed this petition under Articles 226 and 227 of the Constitution claiming redress for her grievances that the opponents were not justified in not treating the bid offered by her at the auction sale held on 27th February 1963 and accepted by the Collector as final and binding and in directing a re-sale of

the shop. On the admission of this petition, the applicant made a prayer for an interim direction restraining the opponents from holding the auction sale fixed for 29th March 1963, which was granted by us. The interim stay order made by us on 27th March, 1963 was, however, vacated by us after the conclusion of arguments at the final hearing of this matter.

3. The petitioner's case is that under the Act and the rules framed thereunder, the Collector is the sole competent authority who can in his discretion accept, reject or confirm any bid made at an auction; that Rule IV of the 'Rules of general application' framed under Section 62(2)(e), (f) and (b) of the Act expressly provides that the

"confirmation of any auction sale, whether held by the Collector himself or by any other officer, shall rest with the Collector, who may accept or reject any bid at his discretion without assigning any cause", that under the Act and the rules a bid accepted by the Collector does not require any confirmation by the Excise Commissioner; and that, therefore, the bid offered by her and accepted by the Collector should have been regarded as final and binding. The petitioner does not dispute that the conditions of the auction, which were notified, contained a term to the effect that the auction held by the Collector or by any other officer of any shop in respect of which a 'license fee' exceeding Rs. 30,000/- was obtained in the year 1962-63 or for which a bid exceeding that amount has been offered for the next year, that is, for 1963-64, would be "subject to the sanction of the Excise Commissioner". Her contention is that this condition is repugnant to Rule IV referred to earlier and is ultra vires the Act and the rules framed there under.

4. In reply, the argument of the learned Government Advocate appearing for the opponents was that under Section 18 of the Act it is the State Government that is authorized to grant leases for sale of country liquor; that under Section 7 the State Government was empowered to delegate to the Chief revenue authority or the Excise Commissioner all or any of its powers under the Act barring the power conferred by Section 62; that the State Government could also, under section 7, permit the delegation by the Excise Commissioner to the Collector of any power conferred or duties imposed upon the Excise Commissioner by of under the Act; that by virtue of notification No. 54-A/V-SR dated the 4th July 1959 (published in the Madhya Pradesh Gazette dated 31st July 1959) the Government delegated its powers under Section 18

of the Act to the Excise Commissioner and further empowered the Excise Commissioner to delegate these powers to Collectors; that on 9th November 1962 the Excise Commissioner issued a notification delegating to the Collectors his power under Section 18 with the reservation that all auctions that would be held for the year 1963-64 commencing from 1st April 1963 would be subject to the sanction of the Excise Commissioner if the bid offered in respect of a shop exceeded Rs. 30,000/- or if a shop fetched in the previous year a license fee exceeding that amount; that as the bid in respect of the Gorakhpur shop exceeded the limit of Rs. 30,000/-, the Collector could not confirm the bid offered by the petitioner; and that rule IV of the 'Rules of General Applications' permits the Collector to accept or reject those bids which are within the powers delegated to him by the Commissioner under Section 7 of the Act. Learned Government Advocate, therefore, maintained that the term included in the conditions of sale with regard to certain auction-sales being subject to the sanction of the Excise Commissioner was valid and the petitioner, who bid at the auction accepting those conditions, could not claim that her bid of Rs. 85,000/- did not require the sanction of the Excise Commissioner or that the acceptance of the bid by the Collector under Rule IV was sufficient to bring into existence a binding and concluded contract with regard to the grant of privilege of selling liquor at the Gorakhpur shop.

5. Before examining the tenability of the contentions advanced by both sides, it is necessary to refer to the material provisions of the Act, which consolidates and amends the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs in Madhya Pradesh. The object of the Act is to secure excise revenue by imposing duties on liquors and intoxicating drugs by different methods. It is also to control the import, export, transport, manufacture, sale and possession of intoxicating liquors and the trade in drinks and drugs and to obviate abuses which might arise from such trades. Section 2 gives definitions of various words and terms used in the Act. Section 4 empowers the Government to declare by notification what shall be deemed to be "country liquor" and "foreign liquor" for the purposes of the Act. Section 5 gives to the Government power to fix the limits of wholesale and retail sale of any intoxicant. Section 7 is concerned with the power of the State Government in respect of establishment and control of the Excise Department. The material portion of that section is as follows:

"7. The State Government may, by notification, for the whole or for any specified part of the State :

\* \* \* \*

(e) delegate to the Chief Revenue authority or the Excise Commissioner all or any of its powers under this Act, except the power conferred by Section 62 to make rules. \* \* \* \*

(g) permit the delegation by the Chief Revenue authority, the Excise Commissioner or the Collector to any person or class of persons specified in such notification of any powers conferred or duties imposed upon it or him by or under this Act, or exercised or discharged by it or him in respect of the excise revenue under any other Act for the time being in force."

Section 8 gives to the Government the authority to prohibit throughout the State or any specified area thereof the import, export, or transport of any intoxicant. Section 9 says that without the sanction of the Government no intoxicant shall be imported, exported or transported except on the payment of prescribed duty and on compliance with such conditions as the State Government may impose.

Sections 10, 11 and 12 deal with the requirements of a pass for import, export or transport, the authority competent to issue a pass, and the conditions in which a pass may be issued and a pass, granted by any authority in India may be deemed to be a pass for the purposes of the Act. Section 13 prohibits the manufacture or collection of intoxicants and excisable articles except under the authority and subject to the terms and conditions of a license granted in that behalf. Section 14 contains provisions for the establishment and licensing of distilleries and warehouses. The next section, that is Section 15, provides that without the sanction of the State Government no intoxicant shall be removed from any distillery, brewery, warehouse or other place of storage. By Section 16 the Government is given the power to prescribe the limit of quantity for possession of any intoxicant and it is laid down therein that no person shall have in his possession any quantity of any intoxicant in excess of the prescribed limit except under the authority, and in accordance with the terms and conditions of a license or a pass. Section 17 enacts that no intoxicant shall be sold except under the authority, and subject to the terms and conditions of, a license granted in that behalf.

Section 18, on the true interpretation and construction of which the decision in the present case turns, is as follows :

"18. (1) The State Government may lease to any person, on such conditions and for such period as it may think fit, the right

- (a) of manufacturing, or of supplying by wholesale, or of both, or
  - (b) of selling by wholesale or retail, or
  - (c) of manufacturing or of supplying by wholesale, or of both, and of selling by retail any country liquor intoxicating drug within any specified area.
- (2) The licensing authority may grant to a lessee under sub-section (1) a license in the terms of his lease; and when there is no condition in the lease which prohibits subletting, may, on the application of the lessee, grant a license to any sub-lessee approved by such authority."

Section 28 prescribes that every license, permit or pass granted under the Act shall be granted on payment of such fees, for such period, subject to such restrictions and conditions, in such form and containing such particulars as the State Government may direct either generally by rules made under Section 62 or in any particular instance. Sections 31, 32 and 33 are concerned with cancellation, suspension, withdrawal and surrender of licenses. Section 62 confers on the State Government the power to make rules for the purpose of carrying out the provisions of the Act.

6. These provisions are in substance no different from those of the Ajmer Excise Regulation. 1915, which came up for consideration before the Supreme Court in *Cooverjee v. Excise Commissioner, Ajmer*,<sup>1</sup> and on the basis of which the Supreme Court negated the contention that every person has a natural right to carry on trade in intoxicating liquors and the State has no right to regulate and control the manufacture, sale and possession of intoxicating liquors or to create a monopoly in them, by quoting with approval the following observations of Field, J., in *Crowley v. Christensen*.<sup>2</sup>

"The police power of the State is fully competent to regulate the business - to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only."

The principle that the State Government has exclusive right of manufacturing, selling or possessing intoxicants or any country liquor intoxicating drug runs through sections 13 to 18 of the Act. Section 13 prohibits the manufacture or collection of any intoxicant except under the authority and subject to the terms and conditions, of a license granted in that behalf. So also by Section 17 the sale of any intoxicant is similarly prohibited. These provisions no doubt imply that a license for the manufacture or sale of an intoxicant can be granted. But they themselves do not prescribe the conditions and procedure that must be followed before any license is issued or indicate the authority competent to issue the license. These matters are controlled by the rules framed under Section 62 of the Act. Learned counsel for the petitioner suggested that licenses are granted under Section 28. We do not agree. That section only means that a license, permit or a pass, if and when granted, shall be granted on payment of such fees and subject to such restrictions and conditions and shall be in such form as the Government may direct in the rules or orders, which of course must be consistent with the Act. The conditions which must be fulfilled and the procedure that must be complied with before any license can be granted are matters altogether different from the fees payable in respect of a license, its form and its conditions. The important condition that must be satisfied before any license 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. This is clear from Section 18, which embodies the principle that the supreme authority in relation to the manufacture or sale of an intoxicating drug is the State itself, and on its basis provides that the State Government may lease to any person on such conditions and for such period as it may think fit the right of manufacturing or of selling any country liquor intoxicating drug within any specified area. Sub-section (2) of Section 18, which lays down that a licensing authority may grant to a lessee under sub-section (1) a license in terms of the lease, only emphasizes the position that a person cannot manufacture or sell any intoxicating drug by merely obtaining the right from the Government of manufacturing or selling that drug. He must, in addition, obtain a license in that behalf. This is in consonance with Sections 13 and 17 of the Act which prohibit the manufacture or sale of any intoxicant except under the authority, and subject to the terms and conditions, of a license in that behalf. As the exclusive right of manufacturing or selling any intoxicating drug belongs to the Government the transfer of the right of manufacturing or selling any intoxicating drug within any specified area to a person is essential before he can manufacture or sell the

drug. The license itself passes no interest. It is only a permission given to a person to do an Act, namely, that of manufacturing or selling intoxicating drug which without such permission it would be unlawful for him to do having regard to the provisions of Sections 13 and 17 of the Act. The transfer of the right of the State of manufacturing and selling an intoxicating drug is thus a preliminary to the grant of a license for the purpose. 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 license to the person whose bid has been accepted. This is made very clear by the rules framed under Section 62 of the Act. Paragraph (4) of Rule III of 'Rules of General Application' speaks of a "bid for an excise privilege". Likewise Rule VI of 'General License Conditions' framed under Section 62(2)(g), (h) and (j), which deals with the transfer or sublease of a license, says :

"No privilege of supply or sale shall be sold, transferred or sub-leased....."

What is, therefore, sold at an auction is the lease of the Government's right of selling liquor. When a person acquires this right, he gets an excise privilege. Rule III of the "Rules of General Application" no doubt at the very beginning uses the expression "When licenses are put to auction the following provisions shall apply". But what is really meant is that when lease-rights are put to auction, the provisions contained in that rule shall apply. In determining whether a sale transaction under rule III is a sale of lease-right or sale of mere license in the sense of a sale of a permission to do something, the substance of the transaction must be considered more than the words. A deed granting to a person an exclusive permission for the sale of liquor or intoxicating drug within any specified area, for a specified period and on a certain consideration and embodying the conditions on which the bid of the grantee was accepted is in substance a lease of the right of sale of liquor coupled with the statutory permission which is required for the exercise of that right. The Rules framed under the Act dealing with the form, content, and the terms and conditions of a license unmistakably show that the document which is issued to a person as a license for the sale of liquor is not merely a paper containing the authority or permission which is required under Section 17 of the Act, but is a document passing to the grantee the Government's right of selling liquor within a specified area, for a specified period and

embodying the permission for the sale of liquor as required by section 17.

7. On behalf of the petitioner, Sri Dharmadhikari learned counsel, contended that section 18 in no way touched the disposal of licenses for the manufacture or sale of intoxicants by auction and only provided an alternative method for their disposal, namely, by the grant of a lease. We were reminded by the learned counsel of the settled principle that when two distinct words or terms are used in the same section, the ordinary rule of construction is that they do not mean identically the same thing. It was, therefore, urged that as a matter of principle when section 18 spoke of a grant of lease of the right of manufacturing or selling intoxicating drug or liquor, it could not be applied to licenses disposed of by auction. The rule of construction stated by the learned counsel is, no doubt, incontrovertible. But we do not think that it plays a useful part in the solution of the problem, namely, whether the grant of bare permission contemplated by sections 13 and 17 for the manufacture or sale of liquor or intoxicating drug without the assignment of the Government's interest in the right of manufacture or sale of those things is by itself sufficient under the Act to enable a person to manufacture or sale liquor or intoxicating drug. If the fundamental principle that supreme authority in relation to manufacture or sale of an intoxicating drug or liquor is under the scheme of the Act the State itself and that the sale of manufacture of an intoxicating drug or liquor is under the Act prohibited except under the Authority, and subject to the terms and conditions, of a license granted in that behalf, is accepted, as we feel it must be, then there can be no escape from the conclusion that the grant of a bare authority or permission contemplated by section 13 or section 17 is not sufficient to enable a person to manufacture or sell any intoxicating drug or liquor. Section 18 itself recognizes the distinction between the 'lease' of a right of manufacturing or selling liquor or an intoxicating drug within any specified area and a 'license' for that purpose.

This is obvious from sub-section (2) which says that the licensing authority may grant to a lessee under sub-section (1) a license in the terms of his lease. It is noteworthy that sub-section (2) of section 18 says that "a license in the terms of his lease may be granted to a lessee under sub-section (1), thus making it abundantly clear that the license that is given to a person under section 18 is more than a bare permission under section 13 or section 17 for manufacture or sale and is a lease of the right of manufacturing or selling liquor or intoxicating drug coupled with permission for that purpose. In our opinion the rules framed under section 62 of the Act prescribing the procedure to be followed in granting a license, the terms and conditions on and subject

to which it should be granted, and other matters in regard to licenses deal not merely with a grant of bare authority under section 13 or section 17 for manufacture or sale of intoxicating liquor but also contemplate an assignment of the right of the Government of manufacturing liquor or intoxicating drug when the permission is granted. They must, therefore, necessarily be read with section 18 of the Act, and so read they only carry out the provision of sub-section (2) of section 18 with regard to the grant of a license in terms of the lease".

8. It follows, therefore, that rule IV of the 'Rules of General Application' framed under section 62 (e), (f) and (b) must be read subject to the provisions of section 18. Under that rule, the Collector has no doubt the power to confirm any auction sale and to accept or reject any bid at his discretion without assigning any cause. But he can exercise this power in regard to sale of only those rights of the Government of manufacturing or selling any intoxicating drug which he can lease out under section 18 by virtue of the powers delegated to him under section 7 (g). Now, it is clear from the notification No. 54-A/V-SR dated the 4th July 1959 that the Government delegated its power under Section 18 of the Act to the Excise Commissioner and further empowered the Excise Commissioner to delegate these powers to the Collectors. It is also clear from another notification issued by the Excise Commissioner on 9th November 1962 that the Excise Commissioner delegated to the Collectors his power under section 18 with the qualification that all auctions that would be held for the year 1963-64 commencing from 1st April 1963 would be subject to the sanction of the Excise Commissioner if the bid offered in respect of a liquor shop exceeded Rs. 30,000/- or if the shop fetched in the previous year a license fee exceeding that amount. Learned counsel was not disposed to dispute the position that the Collector's power under section 18 was limited in the manner stated above by the notification issued by the Excise Commissioner on 9th November 1962. His contention that this limitation is repugnant to rule IV of the 'Rules of General Application' and ultra vires the Act cannot be accepted if, as we have endeavored to point out, the rules are subject to section 18 of the Act and provide not only for the grant of bare authority contemplated by sections 13 and 17 but also for the assignment of the Government's right of manufacturing or selling any intoxicating drug without which a mere permission to manufacture or sell liquor is utterly ineffective.

9. If rule IV is read in consonance with the limitation put by the notification dated 9th November 1962 issued by the Excise Commissioner with regard to conferment of

powers under section 18 on the Collectors, as it must be, then it is plain that the Collector has no power to confirm any auction sale where the bid exceeds Rs. 30,000/- . In the present case, the petitioner's bid was in the sum of Rs. 85,000/-. That being so, the Collector, Jabalpur was right in not confirming the auction sale and accepting the petitioner's bid as final and binding. The bid offered by the petitioner was subject to the "sanction" of the Excise Commissioner and that authority acted within its powers if it rejected the petitioner's bid and directed a fresh auction.

10. For the foregoing reasons, this petition is dismissed with costs of the opponents. Counsel's fee is fixed at Rs. 150/-. The outstanding amount of the security deposit after deduction of costs shall be refunded to the petitioner. The amount of costs shall be deposited in this Court by the petitioner on or before 12-5-63.

Petition dismissed.

Cases Referred.

1. AIR 1954 SC220 2
2. (1890) 34 Law-Ed 620: 137 US 86