(1988) 12 AHC CK 0058

In the Allahabad High Court

Case No : Writ Petition No. 2469 of 1983

Ashok Kumar and Others	APPELLANT
Vs	
State of Uttar Pradesh and Others	RESPONDENT

Date of Decision : 23-12-1988

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 10
Uttar Pradesh Excise Act, 1910 — Section 24, 31

Citation : AIR 1989 All 109 : (1989) AWC 531

Hon'ble Judges : S.S. Ahmad, J;S.C. Mathur, J;Brijesh Kumar, J

Bench : Full Bench

Advocate : Pradeep Kant and R.K. Srivastava, for the Appellant; Chief Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mathur, J.—Doubting correctness of the decision of a Division Bench of this Court in Prem Jeet Singh v. Excise Commissioner 1983 UPTC 783 another Division Bench before which the instant petition came up for orders directed the petition to be laid before Hon''ble the Chief Justice for constituting a larger Bench for deciding this case. The doubt was expressed on the basis of the decision of their Lordships of the Supreme Court in State of Orissa and Others Vs. Harinarayan Jaiswal and Others, . The doubt stands confirmed as the judgment of this Court in Prem Jeet Singh''s case has been set aside in appeal by their Lordships whose judgment is reported in Excise Commissioner Uttar Pradesh Allahabad and Others Vs. Prem Jeet Singh Gujral and Others, . Since the entire petition has been referred to this Bench and the learned Counsel for the petitioner has raised certain points which require decision, a few facts, about which there is no dispute between the parties, may be stated.

2. The dispute in the petition pertains to sale by public auction of the exclusive privilege of selling country liquor and Bhang in the 29 specified shops in

Pratapgarh district of Uttar Pradesh for the period from 1st April 1983 to 31st March, 1984. The auction was held on 17th March, 1983 for the year 1983-84. Some of the shops were clubbed together in groups while others were kept separate. The five petitioners along with others participated in the auction. Each petitioner gave his separate bid for an individual shop or group of shops (which) was the highest and was accepted by the Collector. Admittedly, this acceptance was provisional and was subject to confirmation by the Excise Commissioner, U.P. As required by the Rules each petitioner deposited 1/6th amount of his bid. Pending confirmation of the acceptance, the local Excise Authorities permitted the petitioners to lift the stock of country-liquor and Bhang and they started doing business from the shops for which they had offered their bids. The Excise Commissioner through his order dated 19th April, 1983, Annexure 3, did not confirm the petitioner''s bids and directed the Collector to re-auction the shops and as an interim measure to settle the shops on daily basis. He was of the opinion that the bids offered by the petitioners were inadequate. The petitioners were informed of the Excise Commissioner''s order through notice dated 22nd April, 1983, issued by the District Excise Officer, Pratapgarh, Annexure2. In pursuance of the directions contained in the Excise Commissioner''s order the District Excise Officer made settlement of the shops on daily basis and fixed 11th May, 1983 for holding the re-auction. The instant petition was filed in this Court on 10th May, 1983 along with an application for grant of interim relief. The petition was directed to be put up the next day i.e. 11th May, 1983.

3. On 11th May, 1983 when the petition came up before a Division Bench comprising U. G. Srivastava and K. N. Goyal, JJ. the learned counsel for the petitioners cited the decision of a Division Bench in Prem Jeet Singh''s case 1983 UPTC 783 (supra) in support of his plea that even though the acceptance of petitioners'' bids by the Collector was provisional, they were entitled to maintain the writ petition. The Division Bench, as observed earlier, doubted the correctness of the judgment as in its view it was not in conformity with the judgment of their Lordships in State of Orissa and Others Vs. Harinarayan Jaiswal and Others, . The Division Bench accordingly, by its order of the same date, directed the papers to be laid before Hon''ble the Chief Justice for constituting a larger Bench to decide the entire case. This is how this case has come before this Bench. On the petitioners'' application for interim relief the Division Bench passed the following order : --

"Counter-affidavit may be filed within ten days. Rejoinder-affidavit it may be filed within three days thereafter. List it thereafter before a learned single Judge. In the meantime arrangement on the basis of daily licence fee as ordered by the Excise Commissioner on 17th April, 1983 will continue and the five shops shall not be re-auctioned."

The order-sheet shows that the application for interim relief was thereafter not listed before a learned single Judge and, therefore, no occasion arose to vacate the same. Accordingly the interim order continued.

4. It appears from the order of the Excise Commissioner that for the purposes of excise contract the district had been divided into sectors (kshettras). There is reference to three sectors in the order. The dispute in the present petition pertains to Sector III. In his impugned order the Excise Commissioner has mentioned that as compared to last year the bids received in Sectors I and II had registered an increase while the bids received for the shops in question in Sector III show substantial decline. He has mentioned the bids received last year and in the year in question. In the last year the bid was Rs. 22,91,000/- and in the year in question it was Rs. 11,64,000/-. The difference in the two bids was Rs. 11,26,900/- which worked out to be 49%. The Collector had informed the Excise Commissioner that the low bidding was on account of the terrorism spread by some local inhabitants of the sector.

5. The petitioners have not disputed the factum of the low bidding in the year in question. In fact this is confirmed by the statement contained in paragraph 28 of the writ petition where the petitioners have mentioned the bids of various shops received in the years 1981-82, 1982-83 and 1983-84. From this statement it appears that bids received in the year 1981-82 were the lowest. They rose substantially in the year 1982-83. Again they went down substantially in the year 1983-84. On this basis the petitioners'' learned counsel submits that for coming to a correct conclusion the Excise Commissioner should not have confined his attention only to the bids received in the year 1982-83 but should have also considered the bids received in the earlier years. Thus the argument is that the order is based on irrelevant considerations or non-consideration of relevant factors.

6. Even if we were to hold that the matter is justiciable and the petitioners have the right to approach this Court, we cannot hold that the order of the Excise Commissioner suffers from any infirmity. First of all we may point out that the order is not based merely on the factors that the bids in respect of the shops in question were higher in the previous year. This factor has been taken into account along with the factor that in the other two sectors the bids have not suffered depreciation. A further factor taken into account is that the depreciation is very high, as high as 49%. Yet another factor taken into account is that according to the report of the Collector, terrorism had been spread by the inhabitants of the sector which prevented fair bidding. From this report terrorism becomes the main factor for the depreciation. All these are potent factors which could be taken into account for determining whether the bids received in a particular year are adequate or inadequate.

7. The difference in the bids received in the years 1981-82 and 1982-83 is also very substantial as will appear from the following chart prepared on the basis of the figures disclosed in paragraph 28 the writ petition.

Name of the shop

1981-82

1982-83

1. Alapur

Rs. 30,000.00

Rs. 69,500.00

2. Peakganj

Rs. 35,500.00

Rs, 84,200.00

3. Lala Bazar

Rs. 32,500.00

Rs. 73,500.00

4. Sangramgarh

Rs. 81,000.00

Rs. 1,84,000.00

5. Lawana Bhawaniganj

Rs. 22,500.00

Rs. 46,000.00

The above figures disclose that the bids increased by more than double. This shows that the trend was towards increase in the price. Instead of showing even marginal increase the bids in the year 1983-84 slumped by 49%. The slump is substantial. This abnormal slump alone was sufficient to come to the conclusion that the bids were not adequate. Added to this factor was the factor that the slump was confined only to one sector. Accordingly even if we were to hold that the matter is justiciable and the petitioners have the right to maintain petition under Article 226, we do not find any arbitrariness or any other infirmity in the order of the Excise Commissioner. In fact we are of the opinion that the order is most just and proper.

8. Now we may advert to the legal question which necessitated reference to the Full Bench.

9. The argument of the learned counsel for the State is that no concluded contract came into existence by the provisional acceptance of the petitioners'' bid by the Collector and, therefore, the petitioners have no locus standi to maintain writ petition. It was also submitted that the contract was in respect of an intoxicating substance and the privilege of settling contract for selling such substance vests exclusively in the State and, therefore, the petitioners cannot maintain petition under Article 226 of the Constitution.

10. Admittedly the grant of privilege in question is governed by statutory provision contained in the U.P. Excise Act and the U.P. Excise Manual. Under Paragraph 373(2) of the Manual the Collector accepts the bid provisionally and the final acceptance is to be made by the Excise Commissioner. In other words the acceptance of bid by the Collector is subject to the approval of the Excise Commissioner. There is no dispute in this regard between the parties. In State of Orissa and Others Vs. Harinarayan Jaiswal and Others, , their Lordships of the Supreme Court have observed as follows : --

".......... As held by this Court in Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, , one of the important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of every State''s revenue. The Government is the guardian of the finances of the State. Hence quite naturally, the Legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. .... Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted ... .By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or right belonging to the Government nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights. The High Court was wholly wrong in thinking that purpose of Sections 22 and 29 of the Act was not to raise revenue. Raising revenue as held by this Court in Cooverjee B. Bharucha''s case (supra) was one of the important purposes of such provisions. The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale in question is but a mode of raising revenue. Assuming that the question of arbitrary or unguided power can arise in a case of this nature, it should not be forgotten that the power to accept or reject the highest bid is given to the highest authority in the State i.e. the Government which is expected to safeguard the finances of the State. Such a power cannot be considered as an arbitrary power. If that power is exercised for any collateral purposes, the exercise of the power will be struck down. It may also be remembered that herein we are not dealing with a delegated power but with a power conferred by the Legislature.

The High Court erroneously thought that the Government was bound to satisfy the Court that there was collusion between the bidders. The High Court was not sitting on appeal against the order made by the Government. The inference of the Government that there was a collusion among the bidders may be right or wrong. But that was not open to judicial review so long as it is not proved that it was a make believe one. The real opinion formed by the Government : was that the price fetched was not adequate. That conclusion is taken on the basis of Government expectations. The conclusion reached by the Government does not affect any one''s rights. Hence, in our opinion, the High Court misapplied the ratio of the decision of this Court in The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, and Rohtas Industries Vs. S.D. Agarwal and Others, .

11. In Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, it was held that for determining reasonable restrictions within the meaning of Article 19(6) of the Constitution on the right given under Article 19(1)(g), regard must be had to the nature of the business and the condition prevailing in a particular trade and that there is no inherent right in a citizen to sell intoxicating liquors by retail. Approving reference has been made to this case by their Lordships in State of Orissa and Others Vs. Harinarayan Jaiswal and Others, .

12. Like the case on hand, the above cases were also of contract in respect of intoxicating substances. Therefore, the proposition of law laid down in these cases will be fully applicable to the case on hand. One of the propositions laid down is that in the matter of determining adequacy of price, Article 14 is not attracted The petitioner''s challenge in the present case is based on Article 14 although the said Article has not been specifically mentioned in the petition. The impugned action is described to be arbitrary. It is not alleged to be violative of any provision of the Act or the Excise Manual It follows from this that the only legal provision that is being relied upon by the petitioner is Article 14. On the basis of this Article, decision on the adequacy of price or bid offered in respect of privilege to sell intoxicating substances, which privilege belongs to the State exclusively, cannot be challenged For this reason also the petition will have to fail.

13. Prem Jeet Singh''s 1983 UPTC 783 was also directed against the order of the Excise Commissioner refusing to accord approval of the highest bid and directing re-auction of the privilege. Defence raised in the present petition was raised in that petition also. But the Bench rejected the defence observing "rejection of highest bid entails civil consequences" and, therefore, ''''action of Commissioner cannot be defended on feudalistic concept of the will of the Commissioner". Rejection of the highest bid by the Commissioner was held to be justiciable. Holding the rejection to be arbitrary, the Bench allowed the writ petition and quashed the order of the Commissioner and directed that the recommendation of the Collector accepting the bid provisionally shall be accepted. In holding that the matter was justiciable and the Court could interfere where it found the rejection

of the highest bid as arbitrary, the Bench relied upon several decisions of the Supreme Court. However, none of the decisions except one pertains to the grant of licence or contract in respect of intoxicants. Intoxicants form a category of their own and contracts in respect of them also fall in a distinct class. The law applicable to other classes of contracts cannot be applied to contracts in respect of intoxicants. Government, enters into contract for sale of intoxicants with a view to raise revenue. Therefore, reliance placed by the Division Bench or cases which did not relate to intoxicants was misconceived. In respect of intoxicants specific law laid down by their Lordships is contained in the decisions referred to hereinabove. In the face of these decisions, the general law propounded by their Lordships under Article 14 will not be applicable. Unfortunately the attention of the Division Bench does not appear to have been invited to either of t he two decisions mentioned above. There is no reference to the said decisions in the judgment of the Division Bench. As already observed, the judgment of this Court has already been upset by their Lordships. The auction in that case was held under the same provisions under which the present auction was held. The proposition laid down by their Lordships will therefore, be fully applicable to the present case. It has been observed by their Lordships in paragraphs 6 and 7 of the report as follows Excise Commissioner Uttar Pradesh Allahabad and Others Vs. Prem Jeet Singh Gujral and Others, :--

"A perusal of the above extracted provisions of the U.P. Excise Act and the U. P. Excise Manual clearly establish that it is the State Government or the Excise Commissioner acting on behalf of the State Government that has to accept the amount offered us consideration for the grant of the exclusive privilege to sell liquor and that the bid can only be considered as finally accepted if it is sanctioned by the Excise Commissioner, subject again to the decision of the Government in appeal or revision. There can be no final acceptance of the bid by the officer conducting the auction. It can at best he provisional. Adequate price is the principal factor to be considered in the sanctioning of a bid by the Excise Commissioner. Rule (11) and (12) of Paragraph 374 contain guidelines for the guidance of the Excise Commissioner. But they are certainly not intended to create any right in the bidders. In the light of these provisions of the Act and the Manual, let us consider whether there was any justification for the High Court interfering in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution.

7. It appears that in the year 1982-83, twenty three country liquor shops were grouped together and auctioned. Out of these twenty-three shops, eight were excluded from this group for the current year (1983-84) and included in some other group. Nine other shops were however added to the fifteen shops making a total of twenty four. Comparing the bid obtained in the year 1982-83 with the hid obtained in the year 1981-82 and adopting a formula which made allowance for proportionate rise or fall over previous year''s actual licence fee the Excise Department arrived at the figures Rs. 1,18,13,329 as the notional value for which the twenty-four shops could be considered to have been auctioned during

the year 1982-83. On that basis, the Excise Commissioner arrived at the conclusion that the current year''s bid was only 0.7 per cent higher than last year''s licence fee and this compared most unfavourably with the percentage of general increase in the other areas in the State and with the percentage of increase generally in the previous years. According to the respondents, the figure should have been Rs. 1,18,13,329 as the notional value for which the twenty-four shops could be considered to have been auctioned during the year 1982-83. On that basis, the Excise Commissioner arrived at the conclusion that the current year''s bid was only 0.7 per cent higher than last, year''s licence fee and this compared most unfavourably with the percentage of general increase in the other areas in the Stare and with the percentage of increase generally in the previous years. According to the respondents, the figure should have been Rs. 1,01,89,524 "and not Rs. 1,18,13,529. Had this figure been adopted the increase would be seen to be substantial. This figure was arrived at by adopting a formula based on the unaccepted bids for individual shops in the previous year. Both the methods of calculation have been described in the SLP in some detail. We do not think it necessary to probe deeper into the rival methods of computation. It is not the function of this Court. Even assuming that there is some merit in the method of computation of notional value suggested by the respondents it was a matter entirety for the Excise Commissioner to adopt the formula which he thought was more reasonable, if is not as if the formula adopted by the Excise Commissioner is so utterly unreasonable that if has necessarily to be thrown out of hand. It is not a slap-dash, speculative formula based on any unintelligible hypothesis or on facts drawn from imaginary sources. It is as good and fair a formula as that thought of by the respondents. If the Excise Commissioner chose to adopt one formula instead of another, it is not for the Court to substitute its judgment in a proceeding under Article 226 of the Constitution and say that the other formula would have been better or should have been preferred. It is not the function of the Court at all. After all it is to the Government and the Excise Commissioner that the Legislature has entrusted the task of protecting the revenue and it was in the interests of the revenue that the Excise Commissioner was acting. There was no whisper of mala fides and it was not suggested that the Excise Commissioner was only pretending to protect the revenue. We are of the view that the High Court was in error in quashing the order of the Excise Commissioner."

14. If we apply the above observations to the facts of the present case we find that the petitioners have no case at all. To borrow their Lordships expression the basis adopted. by the Excise Commissioner for coming to the conclusion that the bids were not adequate is not "slap-dash, speculative formula based on any unintelligible hypothesis or on facts drawn from imaginary sources." As in Excise Commissioner Uttar Pradesh Allahabad and Others Vs. Prem Jeet Singh Gujral and Others, there is no whisper in the case on hand also of mala fides and it is not suggested that the Excise Commissioner was only pretending to protect the revenue. In paragraph 27 of the writ petition only a vague and half-hearted

attempt has been made to plead mala fides. It is stated in the said paragraph that the petitioners learnt that after the bids of the petitioners were accepted and they were permitted to run their shops, a few interested persons approached the Excise Commissioner and assured him to give higher bids and keeping in mind the said assurance the Excise Commissioner upset the entire auction. It is significant that the name of not a single interested individual, has been mentioned. The deponent of the affidavit filed in support of the petitioner has also not disclosed his source of information. The allegations contained in paragraph 27 are wholly insufficient to support the plea of mala fides if it can be said to be contained at all in the said paragraph. Accordingly, the decision of the Excise Commissioner cannot be interfered with.

15. In paragraph 16 of the writ petition it has been stated that, the provision made in paragraph 373 of the Excise Manual clearly indicates that the adequacy of the bid is to be adjudged at the time of auction and not subsequently. This contention runs counter to the specific provision contained in Clause (2) of Paragraph 373 which has been reproduced in paragraph 14 of the writ, petition and runs as follows : --

"(2) The final acceptance of the bid is subject to the sanction of the Excise Commissioner, which in its turn is subject to the decision by the Government in appeal or revision, if any."

The sanction of the Excise Commissioner will naturally be some time subsequent to the acceptance of the bid by the Collector. Accordingly, the contention of the petitioner that adequacy of the bid cannot be adjudged subsequently cannot be accepted.

16. We have observed hereinabove that out of the several decisions of the Supreme Court referred to by the Division Bench of this Court only one relates to grant of licence to do business in intoxicants. We may briefly refer to this case also. This is Lakhanlal and Others Vs. The State of Orissa and Others, . In paragraph 24 of the report their Lordships have indeed observed that:

"So long as these powers are not used in an unreasonable or mala fide manner, their exercise cannot be questioned."

But from these observations it cannot be made out that their Lordships intended to lay down that it was open to the High Court to substitute its judgment in place of the judgment of the Excise Commissioner on the question of adequacy of the bid. The observations of their Lordships will have to be read along with the proposition of law laid down in paragraphs 22, 23 and 24. In paragraph 22 their Lordships have held that bid is an offer of a price and its acceptance by Collector is subject to approval by the State Government and until the bid is accepted, a binding obligation does not come into existence. In paragraph 23 it is observed that an auction for grant of licence to sell liquor" is not an ordinary auction where binding contract could be deemed to be concluded at the fall of hammer, creating mutually enforceable obligations. Those were only so-called auctions adopted as means for ascertaining the highest offer for the exclusive privileges which the Government alone could grant for carrying on the trade or business considered noxious, under the law, and which, because of its special character, could be regulated in any way, or even prohibited altogether, by the Government". In paragraph 24 their Lordships have referred with approval to State of Orissa and Others Vs. Harinarayan Jaiswal and Others, . The proposition of law laid down in Hari Narayan Jaiswal''s case has already been indicated hereinabove. The judgment of their Lordships in Lakhan Lal''s case, therefore does not detract from the proposition of law laid down in the decisions referred to hereinabove. In view of the said decisions, including the decision in Lakhanlal and Others Vs. The State of Orissa and Others, and the decision in Excise Commissioner Uttar Pradesh Allahabad and Others Vs. Prem Jeet Singh Gujral and Others, , it has to be held that no right had been created in favour of the petitioners by the provisional acceptance of the bids by the Collector and the Excise Commissioner''s decision is not vulnerable.

17. This is so far as the justifiability of the decision on adequacy of the bid is concerned We may now come to the plea of locus standi.

18. As already noticed the plea of the learned Standing Counsel is that until a concluded contract comes into existence, a mere bidder has no right to maintain writ petition under Article 226 of the Constitution. He relies upon the emphasised portion in the judgment of their Lordships in State of Orissa and Others Vs. Harinarayan Jaiswal and Others, where it has been observed : --

"There is no concluded contract..........By giving bids, the bidders had not acquired any vested right."

19. The learned counsel for the petitioner has cited a number of authorities to controvert the plea of the learned Standing Counsel. On the basis of these authorities he has submitted that a petition under Article 226 can be maintained even where no concluded contract has come into existence. He points out that the principle of promissory estoppel has been accepted by the Courts in respect of contractual matters and is applied mostly to cases where a concluded contract has not come into existence. It is not necessary !o refer to the decisions cited by the learned counsel because even in the case of Hari Narayan Jaiswal their Lordship have not stated that no petition under Article 226 will lie until a concluded contract comes into existence. After observing that the power to accept or reject the highest bid is given to the highest authority which is expected to safeguard the finances of the State, their Lordships observed in the extracted portion thus : --

"Such a power cannot be considered as an arbitrary power. If that power is exercised for any collateral purposes, the exercise of the power will be struck down."

Thus when a bid is not accepted for the collateral purpose of diverting the contract to a particular person, and not for the purpose of obtaining the best possible price, the action may be struck down, because the action will be mala fide. In that case also there would be no concluded contract and yet petition will be maintainable. Thus it cannot be laid down as a broad proposition of law that no petition Under Article 226 will lie if no concluded contract has come into existence. The maintainability of the petition will depend upon the nature of the challenge raised.

20. As observed earlier, there are statutory provisions regarding grant of privilege of selling intoxicants. These statutory provisions, specially those which are of mandatory character, will have to be complied with. If some statutory provision which covers a stage i earlier to the conclusion of the contract is breached, a petition under Article 226 may be maintainable to compel the authorities to conform to the statutory requirements.

21. For the above reasons we do not accept the broad proposition propounded by the learned counsel for the State but on the facts of he present case we do hold that the petition is not maintainable as it does not raise a justiciable grievance.

22. Accordingly, the petition fails and is hereby dismissed but without any order as to costs.