
(1976) 05 RAJ CK 0009
In the Rajasthan High Court
Case No : Civil Writ Petition No. 1271 of 1975

Bhanwarlal	Vs	APPELLANT
The State of Rajasthan and Others		RESPONDENT

Date of Decision : 14-05-1976

Acts Referred:

Contract Act, 1872 — Section 5, 6
Rajasthan Excise Rules, 1956 — Rule 67I, 67KK, 74(5), 93

Citation : AIR 1976 Raj 215 : (1976) RLW 338 : (1976) 9 WLN 277

Hon'ble Judges : Rajindar Sachar, J

Bench : Single Bench

Advocate : H.M. Parekh and N.M. Lodha, for the Appellant; H.N. Calla, Dy. Govt. Advocate, for the Respondent

Judgement

Rajindar Sachar, J.—This is a petition under Article 226 of the Constitution of India praying for quashing the impugned order (Ex. 7) of respondent No. 2 dated 13th March, 1975, by which it had been ordered that the earnest money which had been deposited by the petitioners be forfeited and also declaring the petitioners to be disqualified for a period of three years from obtaining any licence under the Rajasthan Excise Act and the Rules.

2. Licence for the retail sale of country liquor in the State is governed by the Rajasthan Excise Act, 1950, (hereinafter to be referred as "the Act") and the Rajasthan Excise Rules, 1956 as amended (hereinafter to be called as "the Rules").

3. By notification of 30th March, 1972, the State Government in exercise of its powers u/s 41 of the Act made certain amendments to the Rules. Rule 67-I provides that licence for exclusive privilege of selling by retail country liquor at a shop may be granted amongst others by inviting sealed tenders. Rule 67-KK lays down the procedure for invitation of sealed tenders. Sub-rule (3), amongst others, provides that the tender shall be submitted in the form to be obtained from the office of any District Excise Officers or Excise Commissioner. Sub-rule

(5) which provided that tenders shall be for individual shops and not for group of shops was however later on amended on 4th March, 1974, so that it now provides that subject to the written sanction of the Excise Commissioner, licence under this rule may be granted in respect of group of shops.

Sub-rule (9) of Rule 67-KK provides that acceptance of tender shall be communicated to the successful tenderer in the form laid down by the Excise Commissioner and the tenderer shall be required to furnish due security in cash within the time indicated in this communication. Sub-rule (10) lays down that if the required security is not furnished within the time indicated acceptance of the tender may be revoked by the Excise Commissioner and the earnest money deposited by the tenderer with the tender shall in the event of such revocation be forfeited to the State.

4. Section 41 of the Act empowers the State Government to make rules for the purpose of carrying out the provisions of the Act. Rule 93 gives power to the Excise Commissioner to prescribe form for any licence, permit, permission or pass to be issued under these rules or for any application or statement to be submitted under these rules. In pursuance of the said power tender form (copy is Ex. R/1) was prescribed for obtaining the purpose of a licence for vend of country liquor for 1975-76.

5. In terms of the Rules the Excise Commissioner Rajasthan issued a notice for inviting tenders by tender notice dated 16th January, 1975 and detailed instructions were issued for this tender notice and detailed conditions of the notice were published in Ex. 1.

6. In pursuance of the said notice the petitioner submitted his tender on form R/1 for the retail sale of country liquor for the group shops of Jodhpur City for Rs. 61,01,117/-. The petitioner had along with the tender deposited the earnest money of Rs. 1,02,000/- as required by the rules.

7. On 12th February, 1975, the petitioners sent a telegram to the Excise Commissioner pointing out that though their tender was the highest the same had not been accepted and pointing out that it was learnt that the Department was contemplating the auction of individual shops and stating that if the auction was not restrained their tender submitted already should be deemed to be cancelled, withdrawn and rejected. It appears that the Department put up for auction individual shops for Jodhpur on 23rd February, 1975, but as no tender in that respect was forthcoming nothing came out of it. The petitioner, however, again sent a telegram on 28th February, 1975, to the Excise Commissioner stating that their tender stood withdrawn and asking for the refund of the money.

In the meanwhile, however, the respondent No. 2 by his letter dated 1st March, 1975 (Ex. 7) informed the petitioners that their tender had been accepted and requiring them to deposit a part of the security amount within five days and the balance of the security amount by 15th March, 1975. The petitioners not having deposited the security amount, the respondent No. 2 informed them by the

impugned order dated 13th March, 1975. (Ex. 7) that as they had not deposited the security amount as required by rules, the earnest money deposited by them has been forfeited and that further they were under Rule 74 (5) being declared disqualified for a period of three years to obtain any licence under the Rajasthan Excise Rules. This led the petitioner to file the present writ petition.

8. The first contention of Mr. Parekh, the learned counsel for the petitioners is that as the tender which was submitted by the petitioners had been withdrawn earlier to the acceptance of the same by respondent No. 2 on 1st March, 1975, and thus there was no concluded contract the question of forfeiture of the earnest money cannot arise. He invokes to his aid Sections 5 and 6 of the Contract Act to support his argument that the tender which is equivalent to offer could be withdrawn by the petitioners before its acceptance by the respondent No. 2. This argument of Mr. Parekh proceeds on the fallacious assumption as if there was nothing in law binding the petitioners not to withdraw the offer submitted by them.

Now by Clause 5 (d) of the Tender Form the petitioners had clearly bound themselves and stated clearly that they had no right to withdraw the tender and that in case they do so the earnest money deposited by them could be forfeited. Similarly, Clause 5 (k) also binds the tenderer that if the petitioners do not deposit the security amount after the tender had been accepted the Excise Authorities would have the right to cancel the acceptance of the tender and forfeit the earnest money. Similarly, Clause 12 (k) of Ex. 1 also makes the tenderer liable for forfeiture of the earnest money if he does not remain bound by his tender. Thus the petitioners were bound by the statutory condition that if they default in terms of their undertaking given in the tender they would be liable to have their deposit of earnest amount forfeited. There is an obvious rationale behind this compulsion on the tenderer not to withdraw his offer. The revenue earned by the vend of the country liquor is quite a substantial part of the State Budget, and it is naturally interested in dealing with it in a definite known manner.

If the argument of Mr. Parekh was to be accepted that anybody can give a tender and before acceptance of it withdraw the same without attracting any penalty it may lead to an administrative confusion inasmuch as the State would not be certain of any tenders being genuine. The whole procedure of tender and acceptance is provided by these statutory rules and conditions and the petitioners having given their tender subject to those conditions is bound by them. It is true that there was an attempt by the Excise Authorities to auction the individual shops though nothing came out of it. There is some justification for the grievance made by Mr. Parekh on behalf of the petitioners that this action of the Excise Department in purporting to auction the individual shops when it had earlier invited tenders for group of shops was neither fair to the petitioners, nor was it based on any rational explanation.

I also personally find it a little odd that the Department should have attempted

to auction individual shops without at least first deciding whether to accept or reject the tender submitted by the petitioners. Mr. Parekh says that this action of the respondent No. 2 shows utter disregard to the interest of the petitioners who had given the highest tender. That may be so, but unfortunately that will not help the petitioners because in law the tender had not been rejected. Though therefore the action of the Excise Department at the same time to auction the individual shops may be somewhat queer the petitioner cannot get out of their legal liability which they had undertaken when they submitted their tender.

9. Mr. Parekh referred me to a judgment of this Court in Civil Misc. Writ No. 647/75, Chandulal v. State of Rajasthan, decided on 18-2-1976 (Raj). In that case the writ petitioner who had given a tender on 18th March, 1974, had withdrawn the same by 24th March, 1974, while provisional acceptance of tender was made on 30th March, 1974. The Excise Commissioner had directed the forfeiture of security amount on failure of writ petitioner to enter into agreement. The defence of the State that it was entitled to forfeit it by virtue of condition No. 5 ?d? was repelled by the learned Judge because it was found at the time of arguments that there was no such condition No. 5 ?d? in the tender form prevalent at the time the tender form in question was submitted by the petitioner. It was on this premise that Lodha, J., held that in the absence of any such condition the parties rights will be governed by the law of contract and as the writ petitioner had withdrawn his offer six days before the acceptance of tender there was no concluded contract and the earnest money could not be forfeited. That case is therefore clearly distinguishable.

10. In Somasundaram Pillai Vs. The Provincial Government of Madras, the auction for giving licence in respect of four arrack shops was held under conditions of sale framed by the Board of Revenue. One of the conditions provided that if the bidder committed a breach of this condition he would be liable to make good any loss suffered by the Government. The plaintiff who had given bid for four shops but his bid for two shops was refused by the Collector, the competent authority though it had been provisionally accepted by the Sub-Collector but who had no power to accept a bid. Thereafter the plaintiff informed the Collector that he was withdrawing his bid. Thereafter fresh auction took place and auction being of a less amount the Government forfeited the earnest money, and plaintiff filed a suit for refund. The learned Judge proceeded on the basis that the rules drawn up by the Board had no statutory force and, therefore, they could not be binding in law. It was further held that in an enforceable contract there must be an offer and an unconditional acceptance and the provisional acceptance by the Sub-Collector was of no consequence and, therefore, could not bind the plaintiff and that as before the acceptance by the Collector the plaintiff had withdrawn his offer he was entitled to do so he could not be liable. It is, however, relevant to note that the learned Judges nevertheless while observing that the appellant was entitled to withdraw his offer as there was no consideration to support his implied acceptance of the condition that once a bid had been made it could not be withdrawn nevertheless observed: "If the

conditions of sale had statutory force, the position would of course be different but they had not statutory force,"

11. Similarly, in *Raghunandhan Reddy Vs. State of Hyderabad*, after consideration of the relevant rules the Bench held that though the Deputy Excise Commissioner had power to accept the bid, but that bid is not final till after the expiry of one month during which period the Excise Commissioner had power of revocation and, therefore, it followed that the acceptance is not final till after the Excise Commissioner had approved it and as the plaintiff had withdrawn his offer before the approval by the Excise Commissioner, there was no concluded contract and, therefore, the State was not justified in refusing to refund the amount deposited by the bidder at the auction. Their Lordships also held that Clause (10) which permitted the Excise Commissioner to suspend or revoke the auction within one month of the auction was not a statutory condition. It was for this reason that the learned Judges held that as the offer was withdrawn earlier to the acceptance by the Excise Commissioner that there would be no concluded contract and no amount could be forfeited.

12. Similarly, in *Abdul Rahim Khan Vs. Union of India (UOI) and Others*, all that was held was that where a bid at an auction is subject to its being accepted it is open to the party who has given bid at the auction to withdraw the same before the acceptance is given and revoke the bid and in such a case he would not be bound by the contract. This part of the argument of Mr. Parekh therefore fails.

13. The next contention of Mr. Parekh is that there has in fact been no definite acceptance by the respondent No. 2 and on that ground also it cannot be said that the petitioner has failed to perform his part of the contract. He refers me to Annexure 8 dated 1st March, 1975, wherein the petitioners have been informed that their tender had been accepted along with certain conditions mentioned therein. Mr. Parekh stresses that in the said acceptance letter the word ^vLFkkbZ* has been used which, according to him, signifies that it is a provisional acceptance and, therefore, it cannot be said to be a definite acceptance because as held in *Jawahar Lal Burman Vs. Union of India (UOI)*, u/s 7 of the Contract Act acceptance of the offer must be absolute and unqualified and it cannot be conditional. Now in the reply filed by the State it is stated that though the word ^vLFkkbZ* has been used yet the petitioners' tender was accepted with no reservation or condition and that the petitioners cannot go back thereafter and ask for the return of the earnest money. Of course, the mention of the word ^vLFkkbZ* seems a little inapposite, but a reading of the said letter makes it quite clear that the acceptance of the tender is unconditional. Mr. Parekh makes much of the fact that conditions mentioned in the acceptance note of 1st March, 1975, are conditions precedent to the acceptance of tender and, therefore, until those conditions are fulfilled it could not be said that there was unqualified acceptance.

A reference however to those conditions would show that condition No. 1 which required the tenderer to deposit the security is the same Condition No. 5 ?[k? of

Ex. R/1 and which could only be complied with after the tender had been accepted. The other Condition No. 3 in Ex. 8 is the same as Condition No. 15 in Ex. P-1 which required that if the tenderer owed any arrears to the Excise Department his tender would not be eligible. All that this means is that if at any time it is so found it will amount to a breach of contract on the part of the tenderer. It is certainly not a condition precedent so as to have kept the acceptance in abeyance. The other Condition No. 4 in Ex. 8 that the tenderer is bound by the Act and the Rules is obviously no condition precedent because the very submission of the tender is subject to compliance with the Act and the Rules. Mr. Parekh is, therefore, not right in contending that the conditions mentioned in Ex. 8 are in the nature of condition precedent and the acceptance of the Excise Commissioner was only provisional and not absolute. All that those conditions in Ex. 8 meant were that if it were subsequently found that the tenderer had any arrears to the Department it will amount to a breach of the contract by the tenderer which might entitle the Department later on to rescind the contract, but this cannot mean that when the Excise Commissioner sent his acceptance on 1st March, 1975, it had not bound itself unconditionally to the tender.

14. In view of the above, grievance of the petitioners that the earnest money had been forfeited illegally has no merit and must be rejected.

15. The second part of the impugned order Ex. 7 by which the Excise Authorities purporting to act under Rule 74 (5) have debarred for a period of three years the petitioners from obtaining any licence from the Excise Authorities is not supported by the counsel for the State. In view of the authority of the Supreme Court reported as *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, the Deputy Government Advocate concedes that the petitioners could not be debarred from obtaining licence under the Excise Act for a period of three years without having been given a hearing. Admittedly no opportunity was given to the petitioners before passing this part of the impugned order. In this view of the matter I would quash only that part of the order in Ex. 7 in so far as it declares that the petitioners are disqualified to obtain any licence from the Excise Department for a period of three years. I may however make it clear that it is open to the respondent No. 2 if it is so advised to proceed according to law against the petitioners under Rule 74 (5), but only after giving them a proper opportunity of hearing.

16. In the result the petition is, therefore, disposed of as above. In the circumstances of there being a divided success there will be no order as to costs.