

(1981) 09 DEL CK 0017

In the Delhi High Court

Case No : Letter Patent Appeal No. 100 of 1981

Central Distillery and Breweries Ltd.

APPELLANT

Vs

The Commissioner of Excise and Others

RESPONDENT

Date of Decision : 14-09-1981

Acts Referred:

Citation : (1981) 20 DLT 469 : (1982) ILR Delhi 205(1)

Hon'ble Judges : Rajinder Sachar, J;M.L. Jain, J

Bench : Division Bench

Advocate : L.M. Sanghvi, J.S. Arora, Subhash Vidyalkar, Maehswar Dayal and K.C. Mittal, for the Appellant;

Judgement

Sachar, J.

(1) This appeal is directed against the order of learned single Judge by which he dismissed the writ petition which had challenged the order of the Collector of Excise as well as of the Commissioner of Excise by which the later had ordered the blacklisting of the appellant for a period of 3 years.

(2) The terms and conditions for grant of license for country liquor in the Union Territory of Delhi is governed by Punjab Excise Act read with Delhi Liquor license Rules, 1976 (to be called 1976 Rules). Rule 32 of the 1976 Rules provides for procedure in case the license is decided to be granted by tender. Sub-rule (2) of Rule 32 of 1976 Rules provides that no tender shall be considered unless the earnest money as prescribed by the Excise Commissioner has been deposited in a Government Treasury or in State Bank of India in favor of the Excise Commissioner or Bank Draft or cash in currency notes is/are attached to each tender. In pursuance of this statutory power the Commissioner for Excise issued terms and conditions for grant of CLW-I and L-9 license for the year 1979-80. Condition No. 2 provided that tenders are to be submitted separately for each size of country liquor bottles i.e. 750 ml., 375 ml. and 180 ml. Condition No. 31 - lays down that no tender shall be considered unless it is accompanied by a

bearer draft of Rs. 50,000.00 . Condition 27 provides that successful tenderer shall be required to deposit immediately after the decision has been communicated to him a sum of Rs. 2,00,000.00 in cash or government promissory notes for the due fulfillment of terms and conditions of license during 1979-80. Clause 35 provided that terms and conditions are in addition to the terms and conditions governing the grant of license under the Punjab Excise Act. Breach of any of the conditions mentioned above and in the provisions of Punjab Excise Act and the Rules will render a license granted to the licensee liable to cancellation in addition to the penalties including the blacklisting of the distillery for a period of 5 years. Rule 33(40) of 1976 Rules provides that licensee, tenderer..... may be blacklisted by the Collector for violation of the provisions of Punjab Excise Act and the Rules framed there under..... or for any other reason which may be considered detrimental to the interest of the State or public health.

(3) THE appellant tendered for obtaining license in form CLW-1 and L-9. In the tendered he tendered for all the three sizes of bottles notwithstanding Condition 2 of terms and Conditions which requires the tender to be submitted separately for each size of country liquor bottles. However, by his letter of 1-4-1979 the Commissioner accepted his tender only with regard to the country liquor bottles of the size of 180 ml. In pursuance to the country liquor bottles of the size of 180 ml. In Pursuance Rs. 2 lakhs security and also paid the license fee.

(4) Sometime a month later it appears that the Administration was willing to consider and accept the rates given by the appellant with regard to 375 ml. size of bottle for the year 1979-80 with the condition that it deposits an additional security of Rs. 2 lakhs. The appellants however, wanted this condition to be waived so as to enable them to take up the supply. To this the Commissioner of Excise was not willing because on 4-5-1979 he wrote a letter to the appellant that the Administration was pleased to accept the offer with regard to 375 ml. size of liquor bottle subject to the condition that the appellant deposits a separate security for the supply of country liquor in 375 ml. bottles in addition to the security deposit for the contract for 180 ml. bottles. The appellant still persisted and asked for the waiving of this additional security to enable them to supply the same and informed the Commissioner on 5-5-1979 regarding this. Apparently there is nothing on record to indicate as to what transpired in between till a show cause notice was issued by the Collector Excise on 15-11-1979 calling upon the appellant to explain as to why they should not be blacklisted under Rule 33(40) of 1976 Rules as they had omitted to comply with the terms and conditions especially with condition 27 and 29. The appellant showed cause but failed before the Collector who passed an order of blacklisting the appellant for a period of 5 years. which was reduced by the Commissioner to 3 years. The appellant met with no better success before the learned single Judge, and has now come up in appeal.

(5) It is apparent that before an order of blacklisting can be passed under Rule

33(40) the conditions precedent mentioned therein must exist. Nothing was pointed out to show that there was any violation of the Punjab Excise Act or the Rules so as to incur the order of blacklisting. The only reason for which the Collector and the Commissioner penalised the appellant and which has been upheld by the learned single Judge was that as the appellant was told on 4-5-1979 that the administration was willing to accept the tender for the supply of bottles of 375 ml. the refusal to deposit the security in terms of condition No. 27 amounted to violation of the terms and conditions framed under 1976 rules, thus permitting an order of blacklisting to be passed.

(6) Now condition No. 27 postulates that there is a successful tenderer which means that tender has been accepted and a concluded contract has come into existence because it is only thereafter that such a tenderer is expected to deposit the security. So far as the security for the license for the bottles of the size of 180 ml. is concerned admittedly the same was done in pursuance of the acceptance given on 1-4-1979. So no fault can be found on this score. But the authorities find fault with the appellant on account of tender with regard to bottles of 375 ml. In our view, in this approach the learned single Judge fell in serious fallacy in assuming that the letter of 4-5-1979 which offered to accept the tender also with regard to bottles of 375 ml. was a concluded contract notwithstanding that it was specifically made subject to the condition that the appellant shall deposit the separate security for contract for supply of liquor in 375 ml. bottles issued. It is impossible to read the letter of 4-5-1979 as an acceptance of tender because this was only an offer made to the appellant which was subject to their depositing the security. Until the security was deposited the concluded contract could not come into existence. It is not controverted that condition No. 27 has to be fulfilled subsequent to the acceptance of tender. That necessarily means that there should be a tender in terms of the rules and conditions which alone could be accepted by the Commissioner of Excise. Condition No. 2 provides that tenders were to be submitted separately for each size of country liquor bottles. It is common case that appellant did not give separate tenders for each size of bottle. He only gave one tender for all three sizes of bottles i.e. for 750 ml., 375 ml., and 180 ml. Now the department cannot have it all its way. Either if it is to be taken that the tenders are to be submitted separately for each size of country liquor bottles then the tender submitted by the appellant could not be considered for all the three sizes of bottles because Rule 31 provides that no tender shall be considered unless it is accompanied by a bearer draft of Rs. 50,000.00. Admittedly in the present case only one deposit of Rs. 50,000.00 was made. The department could consider it an invalid tender and could have refused to entertain it. It did not do that. In *State of Madhya Pradesh and Another Vs. Firm Gobardhan Dass Kailash Nath*, it was held that where an initial deposit was not made and there was no power to waive such a condition the purported acceptance was not valid and there was no concluded contract and Therefore no action could be taken against the tenderer on the ground of violation of any condition of action, and no amount could be recovered as arrears

of land revenue, on such a ground. Of course it could have considered it either a deposit for the tender for one size of bottles namely 180 ml. (for which acceptance was given) or for all the three sizes of bottles as mentioned in condition No. 2. If it is to be taken as one tender for bottles of size of 180 ml. for which acceptance was given on 1-4-1979 then a deposit of Rs. 50,000.00 under Rule 31 would be appropriate towards this tender and undoubtedly Rs. 2 lakhs as security having been deposited in terms of condition No. 27, there was no violation of the terms and conditions or the Act. Assuming that though as the Commissioner held that the tender should have been submitted separately but yet a grace was shown to the appellant by waiving condition No. 3 and by considering his tender which mentioned all the three sizes of bottles, then it must inevitably mean that the draft of Rs. 50,000.00 in terms of condition No. 31 would be valid for all the three sizes of bottles. Thus if condition 31 is said to be complied with notwithstanding that there was one tender form and one deposit of Rs. 50,000.00 inevitably condition No. 27 must also stand satisfied by the appellant having deposited Rs. 2 lakhs which must then be for all the three sizes of bottles. I am not suggesting that if having made a relaxation the department wanted to accept the appellants' tender also for 375 ml. size of bottles but subject to the condition of another Rs. 2 lakhs deposit being made it could not so demand. All that I am saying is that the offer with regard to 375 ml. size of bottles could not ripen into a concluded contract unless the appellant accepted the condition and deposited Rs. 2 lakhs. If, as in the instant case no deposit was made, there arose no question of violation of condition No. 27, for the simple reason that the condition precedent of being a successful tenderer was non-existent there being no concluded contract. It is evident that if there are to be separate tenders for 180 ml. and 375 ml. sizes of bottles there being no separate tender for 375 ml. the question of appellant being a successful tenderer for the same could not arise. On the other hand if the tender is to be taken to be one for both 180 and 375 ml. sizes then there was no default because one security deposit of Rs. 2 lakhs had been made by the appellant. In either case it could not be said that there was any violation of any condition of the Rules or the terms and conditions, prescribed by the Commissioner.

(7) Mr. Maheshwar Dayal, the learned counsel for the respondent has sought to urge that the mere fact that the letter of 4th of May mentioned that the tender was being accepted subject to the condition of deposit of separate security did not mean that the tender was not accepted fully and a concluded contract had not come into existence because according to the Condition 27 security deposit is a condition subsequent and he has referred to AIR 1962 Sc 278 *Jawahar Lal Barman v. The Union of India*. In my view that case is of no help to him. In that case while noticing that Section 7 of Contract Act requires that the acceptance of the contract must be absolute and unqualified and it cannot be conditional, yet on the interpretation of the contents of the letter conveying acceptance subject to the deposit of security, it still was held that it amounted to a concluded contract because that very letter stated that "the contract is concluded by the

acceptance and a formal acceptance of tender will follow". That case was obviously decided on its own facts. In the present case in view of the stand taken by the appellant stating even on 3-5-1979 that they were willing to accept the tender for the supply of 375 ml. size of bottles but could only do so if the condition for deposit of security of Rs 2 lakhs was waived. In the context of the Commissioner's offer to the appellant to accept the tender subject to the condition to deposit Rs. 2 lakhs it could only mean that there was no concluded contract and the whole thing was at an inchoate stage. It is thus clear that there was no concluded contract with respect to size of 350 ml. of country liquor bottles, and the question of breach of condition No. 36 or Rule 33(40) of 1976 Rules could not arise.

(8) Mr. Maheshwar Dayal had also sought to support the learned single Judge's judgment on the ground that no writ petition was competent because questions raised related to contractual obligations. The learned Judge has held that as clause 35 of the terms and conditions for grant of CLW-1 and L-9 licenses provide that breach of any of the conditions mentioned and the provisions of Act and the Rules will render the license granted to a license liable to cancellation in addition to the penalties including blacklisting of distillery for a period of 5 years; the blacklisting was a condition of the contract. Thus it was a contractual obligation and no writ petition was maintainable to enforce such obligation. In our view and we say so with respect, in this aspect, the learned Judge has fallen into an obvious error.

(9) The show cause by the Collector of Excise clearly mentioned and called upon the appellant to explain why it should not be blacklisted in exercise of the powers under sub-rule (40) of Rule 33 of the Delhi Liquor license Rules 1976. The Collector, it is apparent, was not seeking to exercise any power other than the statutory power derived from Rule, 33(40) of 1976 Rules. The mere fact that the power to blacklist which is provided in the Rules was also mentioned as one of the conditions for the grant of a license does not mean that this condition of blacklisting does not derive its source from the statutory rules and that it is only a contractual obligation. It is well settled that where the action of a public authority invested with statutory powers is challenged, the writ petition is maintainable even if the right to relief arises out of an alleged breach of contract. See *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, .

(10) As a matter of fact the Collector in the impugned order of 23-1-1980 has specifically stated that the order of blacklisting is being passed under Rule 33(40) of , Rules. To equate the order of blacklisting as a mere contractual act is to miss the real significance of this kind of order. In matters where State agencies are concerned though the government can enter into a contract but still the right of a citizen to claim equal treatment cannot be negated. Blacklisting creates a barrier between the person blacklisted and the government in the matter of transactions. The blacklists are "instruments of coercion". See *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, . The

impugned order of the Commissioner by which blacklisting order was to remain in force for 3 years would mean debarring the appellant from holding any excise license for the period 1979-80 onwards and also for applying for any excise license for a further period of 3 years. That such a penalty should be allowed to be imposed by the State without authority of law and the affected party should be held to be without remedy by being denied its right to invoke the jurisdiction of the court under Article 226 of the Constitution is an argument so unacceptable that it has to be stated only to be rejected. In passing it may be noted that in Govardhan Dass's case (supra.) the recovery which was sought to be made by the State was allegedly for the breach of contract committed by the party, and yet the Supreme Court quashed the order on the finding that as no contract had come into existence proceedings for recovery were illegal and deserved to be quashed.

(11) In the present case the order of blacklisting was made in pursuance of Rule 33(40) of 1976 Rules. As we do not find that there was any violation of the Act and the Rules the authorities had no jurisdiction to invoke the said Rule. We thus find that the action to the authorities was, without authority of law. We would in the circumstances allow the appeal, set aside the order of the learned single Judge and issue appropriate writ and quash the impugned orders of the Collector dated 23-1-1980 as well as the Commissioner dated 10-3-1980. The appellant would have his costs. September 4, 1981 sd/- Judge M. L. Jain, J. I agree that the appeal should be accepted with costs and the impugned order of blacklisting of the appellants be cancelled. I, however, wish to add some more reasons.

(12) The Commissioner of Excise invited on March 3, 1979 tenders for grant of license for supply of ordinary spiced caramel coloured country liquor in bottles of 750 ml., 375 ml., and 180 ml., for 1979-1980, largely in accordance with the procedure laid down in Rule 32 of the Delhi Liquor license Rules, 1976 (herein the Rules), One of the conditions of the tender, namely, condition No. 27 was that a successful tenderer shall be required to deposit a sum of Rs. two lacs as security for due fulfillment of the terms and conditions of the license. This condition is imposed in virtue of sub-section (2) of section 34 of the Punjab Excise Act, 1914 (herein the Act). The other relevant condition No. 35 was that a breach of any conditions of the tender will inter alias render a licensee liable to be blacklisted for a period of five years in accordance with law. The appellants gave one tender for all the three types of bottles. Their tender was accepted on 1-4-1979 in the first instance for sale of bottles of the size of 180 ml. and they deposited the requisite security. Later on, on the advice of the administration the appellants agreed on 3-5-1979 to take license for bottles of 375 ml. as well and the Lt. Governor accepted their offer provided a separate security was deposited. The appellants requested the Commissioner on 5-5-1979 to waive this condition. It appears that neither side gave up its position and in spite of repeated reminders, the appellants failed to deposit the security and take the license for wholesale vend and bonded warehouse. On 15-11-1979 the Collector of Excise issued a notice under sub-rule (40) of Rule 33 of the Rules to the appellants to

show cause why they should not be blacklisted.

(13) The Collector then by his order of 23-10-1980, directed blacklisting of the appellants for five years. He held that there has been a breach on the part of the appellants of the terms and conditions prescribed for the purposes of section 34 of the Act. He also added as follows :

"While on the one hand, it may not be justified to argue that loss of revenue caused by non-performance of the respondent distillery is not detrimental to the interest of public health inasmuch as the policy of weaning the liquor consuming public from the drinking habit by introduction of size of bottles smaller than 750 ml. in the interest of public health could not be given full effect to."

(14) On appeal, the Excise Commissioner upheld the order of blacklisting but reduced the period from five years to three years. He also was of the view that the appellant having made a tender sought to back out of it by declining to take a license. He further said:

"When the Delhi Administration desired to supply country liquor to the public of Delhi in 375 ml. bottles during 1979-80, in accordance with its excise policy, any sabotage of this intention of the State was definitely detrimental to the interests of the State and to public health (public health for the reasons mentioned in the Collector's order). The appellants made it difficult for the States to implement its policy, and they did so by resiling from their own commitment."

(15) The appellants filed a writ petition against these orders but the learned single Judge by his order dated May 29, 1981 dismissed the petition holding that blacklisting was in consequence of a contractual obligation under clause 35 of the tender and no writ is maintainable for determining contractual obligations, particularly in liquor contracts; and that it was for the department to decide whether inaction of the petitioner was detrimental to the public interest or not. The Commissioner, according to the learned Judge, had correctly interpreted the contract and had explained the detriment to public interest. There was no error of law. There was, Therefore, no reason to interfere with the Commissioner's findings. Hence, this appeal.

(16) I agree with the learned Judge that no writ should be issued to enforce contractual obligations" specially those concerning liquor; vide *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , *Sham Lal and Others Vs. State of Punjab*, , and *State of Punjab v. Balbir*, . But what is involved here is not so much the enforcement of a contract. What is under challenge here is blacklisting claimed to have been directed according to rules. Right of a citizen to equal treatment is involved : *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal* and *Another*,

(17) According to Rule 33(40) of the Rules, a tenderer or licensee may be blacklisted for (1) any violation of the provisions of the Act or the Rules, (2) malpractices or (3) any other reason whatsoever which is considered

detrimental to the interest of the State or public health. So, no blacklisting can be allowed if the case is not covered by any one of these categories. The learned counsel for the respondents contended that in view of *Jawahar Lal Burman Vs. Union of India (UOI)*, , the contract was complete the day the Lt. Governor's acceptance was conveyed to the appellants". The condition of security was a condition subsequent and not a condition precedent to the contract. The appellants have, Therefore, violated section 34 of the Act and the rules 32 and 33 of the Rules by not carrying out the terms of the contract. The submission is erroneous. The aforesaid section 34(2) of the Act provides for the power to demand security for observance of the terms of the license. It in itself does not cast a duty upon the tenderer. So, there is no breach of a provision of the Act by the appellants. Rule 33 lays down the general conditions of a license. But no license was not issued to the appellants and, Therefore, no question of a breach of the license does then arise. It is thus, not possible nor just to hold that the appellants have violated the Act or the Rules because they violated the conditions of a tender or a contract prescribed by the powers given there under. Sub-rule (1) of rule 32 rather provides the consequences where the successful tenderer refuses to accept the license which does not mention blacklisting. No malpractice has been alleged. It looks unreasonable to say that the appellants by refusing to take out a license, had made it difficult for the State to implement or had sabotaged its excise policy of weaning the public from drinking habit by introduction of bottles of a size smaller than 750 ml. Mr. Maheshwar Dayal also made a feeble attempt to urge that the action of the tenderer caused loss of revenue and was, Therefore, detrimental to the interest of the State. There is no finding how much loss has approximately occurred to the State and in what manner and unless we accept the ipse dixit of the Collector and the Commissioner, it is further difficult to understand how the sale of liquor in 375 ml. bottles can be conducive to the policy of prohibition. Moreover, no such ground was mentioned in the notice and the appellants had no opportunity to meet it effectively. It was introduced for the first time by the Collector in his order.

(18) I am, Therefore, satisfied that no case for blacklisting has at all been made out in terms of the relevant rule.