

(1959) 04 KL CK 0003

In the High Court Of Kerala

Case No : O.P. No's. 269 and 270 of 1959

Chandy Pillai and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 09-04-1959

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Travancore Abkari Act, 1073 — Section 14, 26

Citation : AIR 1960 Ker 164

Hon'ble Judges : Sankaran, C.J;Raman Nayar, J

Bench : Division Bench

Advocate : K. Velayudhan Nair and V. Subromanian Moothathu, for the Appellant; C.M. Kuruvilla, Government Pleader for Respondent 1 to 3; K.K. Mathew and George Vadakkal for Respondent 4, for the Respondent

Judgement

Raman Nayar, J.—On 9-2-1959, the Second Member of the Board of Revenue (who is the 3rd respondent in each of these cases, the 1st being the State of Kerala, the 2nd the Board of Revenue, and the 4th. a private party) sold by public auction the right of vending arrack in the eight arrack shops, and: toddy in the 31 toddy shops, of the Thodupuzha Taluk for the year ending 31-3-1960. This was in pursuance of two notifications (one for the arrack shops marked as Ext. PI in O.P. 269, and the other for the toddy shops marked as Ext. P1 in O.P. 270) issued by the State Government and published in the Gazette of 23-1-1959 and in two subsequent issues.

As required by the notifications the sale was held shop by shop, and the seven petitioners in O. P. 269 were the successful bidders for the eight arrack shops, while the 15 petitioners in O. P. 270 were the successful bidders for the 31 toddy shops. The aggregate price fetched by the arrack shops was Rs. 1,04,900/- and by the toddy shops was Rs. 4,60,500/-. The bid list, Ext. R4, giving particulars of the price fetched by each shop, the name and address of the purchaser and the amount deposited by him, was prepared on the spot and signed by the purchaser against the shop concerned and at the end by the Second Member under the

endorsement. "The above shops were sold in public auction today by me."

2. On 14-2-1959 two disappointed bidders, E. M. Joseph and E. D. Pappachen by name, presented petitions in person to the Revenue Minister at her Munnar Camp, Joseph who is the 4th respondent in O. P. 269 in respect of the arrack shops, and Pappachen the 4th respondent in O. P. 270 in respect of the toddy shops. (The petitions have been marked as Ext. RI in each case). Joseph prayed that all the eight arrack shops be given to him and he offered to pay Rs. 5,000/- more than the aggregate sum fetched in the auction.

Pappachen made a similar prayer in respect of the toddy shops and his offer was a sum of Rs. 60,000/- over and above the total price of the previous year, which works out to about Rs. 36,000-- more than the aggregate price fetched in the auction. The Minister endorsed a common order in respect of both the petitions in the following terms : "Discussed with the Member 1, Re-auction" of toddy and arrack shops in Thodupuzha Taluk will be ordered on condition, the petitioners deposit the excess amount they promise over the rental already obtained in auction. The parties may be informed".

3. In pursuance of the Minister's endorsement formal orders were issued by the Government to the Board of Revenue by Ext. R2 dated 27-2-1959 directing a re-auction on the condition specified by the Minister. Ext. R2 was in the same terms as the Minister's endorsement, and no attempt was made to specify what purpose the deposits were to serve, . (under the rules a successful bidder has to deposit at least 10 per cent of the bid amount to hold him to his bid) or how the petitioners before the Minister were to be held to their offers.

These petitioners, Joseph and Pappachen, having complied with the condition, the Government issued the notification, Ext. P3 dated 13-3-59, in the Gazette of the 17th March proclaiming that the arrack and toddy shops in question would be re-auctioned on the 25th March, subject to the conditions mentioned in the original notifications published in the Gazette of the 23rd January. Before that, on the 2nd March, the successful bidders had been informed in writing by the Excise Inspector, Thodupuzha. that the shops would be re-auctioned and that the date of the re-auction would be published soon.

On the 5th March the successful bidders came forward with the present petitions under Article 226 of the Constitution (O. P. 269 in regard to the arrack shops and O. P. 270 in regard to the toddy shops) praying for a writ of certiorari or other appropriate writ or order quashing the order of the State Government cancelling the auction of the 9th February and for a writ of mandamus or other appropriate writ or order directing the Board of Revenue to confirm, that auction. (By an order of this Court dated 25-3-1959, it was held that there should have been a separate petition in respect of each shop, but the petitions were treated as consolidated petitions on the requisite court fee being paid).

4. It is the case of the petitioners that the Gazette Notifications Ext. P1 (of the 23rd January) embody statutory rules having the force of law, that under those

rules, it was for the Board of Revenue either to confirm the sales or reject them, that Government had no power whatsoever in the matter and that its order Ext. R2 dated 27-2-1959 directing a re-auction was entirely without jurisdiction and therefore liable to be quashed.

The respondents, on the other hand, contend that the notifications are mere administrative orders and that even if they are to be regarded as statutory rules Government has the right to pass such orders as it deems fit at any stage subject, of course, to any contractual liability it might have incurred which in these cases it had not, the bids by the petitioners being mere offers which had to be accepted by or on behalf of the Government before they could ripen into contracts. Even if the order passed by the Government were wrong it is a mere administrative order not subject to judicial review, in any case not at the instance of the petitioners whose rights have in no way been infringed.

5. The first and the most important question to consider is whether the notifications Ext. PI are rules having the force of law. They are statedly issued in virtue of the powers conferred by Section 26 of the Travancore Abkari Act (IV of 1073) which section empowers the Government to frame rules for the several purposes specified in Clause (a) to (n) thereof and (by Clause (o)) also generally to carry out the provisions of the Act.

The notifications were made and issued in the manner prescribed by Section 65 for the making of rules (there was the publication in three successive issues of the Gazette required for rules of a penal nature) so that there can be no doubt that the intention was that they should be rules made under the Act. And Section 65 says that all rules made in accordance with its provisions shall have the force of law and be read as part of the Act.

6. It is nevertheless argued that the reference to Section 26 made in the notifications is a mistake, and that, in truth, the notifications are mere administrative orders in pursuance of Section 14 of the Act which states that the Government "may grant to any person or persons, on such conditions and for such period as may seem fit, the exclusive or other privilege... of selling by retail... any country liquor... within any local area". The privilege of selling liquor is, so to speak, the sole property of the Government which the Government may grant to such persons and on such conditions as it pleases.

The notifications in question only set forth the mode in which the Government proposed to sell the privilege in the areas mentioned therein for the year 1959-60 and are, properly speaking, not rules made for carrying out any of the provisions of the Act. Until a contract is actually concluded the Government is free to alter the mode as it pleases. Even if the notifications are to be regarded as statutory rules, the Government's power u/s 14 remains unaffected, and if the notifications purport to curtail that power they are to that extent inconsistent with the section and therefore bad.

7. Before considering these arguments, it might be as well to see what the

notifications say. Both the notifications are, in more or less identical terms and we shall refer to the notification marked as Ext. PI in O. P. 269. The notification begins by saying that it is issued by the Government in virtue of the powers conferred on it by Section 26 of the Travancore Ahkari Act and it goes on to direct that the arrack shops in the several taluks mentioned therein will be sold on the various specified dates by a member of the Board of Revenue or by an officer authorised by the Board in that behalf.

Then it says that the auction sale will be held subject to the conditions set forth thereunder and this is followed by a set of rules under the heading, "General conditions of sale" and by another set of rules under the heading, "Conditions applicable to licences for the privilege of vending jaggery arrack in independent shops". Rule 5 of these rules authorises the officer conducting the auction to refuse to accept the bid of any person for valid reasons, and Rule 8 requires him to prepare a sale list showing against each item put up to auction, the name of the person declared by him to be the auction-purchaser and the amount of his bid.

This sale list is to be signed by the officer as also by the persons declared to be the auction-purchasers. (Ext. R3 is the sale list in the instant cases). Rule 9 speaks of the officer rejecting or accepting bids, and Rules 10 and 14 provide for deposits to be made by the auction-purchaser on the date of the sale and after confirmation thereof, and, along with Rule 15, provide for a re-sale at his risk in the event of default. Rules 12 and 13 are the rules with which we are most concerned. Rule 12 runs as follows : --

"No sale shall be deemed final as against the Government unless confirmed by the Board of Revenue who shall be at liberty to accept or reject any bid without assigning any reason. In any case in which the Board of Revenue has accepted a bid and such acceptance has been conveyed to the auction-purchaser the Board of Revenue may without assigning any reason revoke the sanction before the installation of the auction-purchaser in the business of the shop."

And Rule 13 thus :--

"Every confirmation of the sale shall be communicated to the auction-purchaser in writing as soon as possible".

Rules 19 to 66 come under the general heading, "Conditions applicable to licences", and lay down the manner in which the shops are to be run by the successful purchasers. They enjoin duties on the licensees and provide for penalties in the event of infraction.

8. Thus we find that the notifications lay down that the privilege of selling arrack and toddy for the period and in the areas specified shall be sold by public auction and that they further lay down the manner in which and the conditions subject to which, the sale shall be held, as also the manner in which and the conditions subject to which, the purchasers shall conduct their business. Penalties are

provided for infraction, and surely the rules embodied in the notifications are, as they purport to be, rules made u/s 26 of the Act.

They are rules for carrying out the provisions of Section 14 of [he Act in that they prescribe tbe manner in which the Government is to grant the privilege of selling arrack and toddy, and the conditions subject to which the grant is to be made. They are not mere administrative orders made u/s 14. That the practice is for the Government to limit tbe operation of the rules to one year and to re-issue them from year to year does not detract from their character as rules made under the Act and having the force of law,

9. In T. O. G. V. T. C. Section Ltd. v. State of Kerala 1958 Ker LT 521, it was remarked by one of us that a notification granting the privilege of selling toddy in the shops of the Trichur. Taluk to a certain co-operative society was a mere administrative order made u/s 16 of tbe Cochin Abkari Act, (corresponding to Section 14 of the Travancore Act) even though tbe rule-making power in Section 29 of that Act was also cited in the notification.

That notification is not before us but it would appear from the judgment that it did not make any rules whatsoever (at any rate so far as the grant ot the privilege was concerned) but was merely an Order granting the privilege to the particular co-operative society. It would further appear that Section 16 of the Cochin Act was also cited in the notification and that the reference to Section 29 was not intended to apply to the grant. That observation is therefore no authority for the position that the notifications we are now considering are mere administrative orders u/s 14 of the Travancore Act.

10. Once the rides are rules properly made under the Act, they have the force of law and by reason of Section 65 of the Act. have to be read as part thereof. The general or absolute power given to the Government u/s 14 can be exercised only in accordance with these rules so long as they are in force and have not been varied or annulled. (And in this, connection we might observe that the notification, Ext. P3, does not vary or annul Ext. PL - it does not even purport to be a statutory notification).

The rules qualify Section 14 but are by no means inconsistent with the section. And the answer to the argument that they abridge the plenary power given by the section is that the abridgement is made in the manner expressly provided by the Act itself. It is not a mere accident that the rule-making power is conferred on the very authority on whom the absolute power u/s 14 is conferred and not on an inferior authority. And it is quite usual for statutes to confer powers in general terms and leave these powers to be regulated by subordinate legislation in the shape of rules. The validity of such subordinate legislation has never been assailed on tbe score that it runs counter, to the generality of the power conferred by the statute itself.

11. Under the rules in Ext. P1 it would appear that the sale is actually effected by the auction subject, however, to the condition that it will not bind the

Government until it is confirmed by the Board. But it is also possible to take the view that the selling officer only records the bid and that it is for the Board of Revenue either to accept or reject the bid under Rule 12. Only on such acceptance and consequent confirmation is the sale concluded. But whatever the position, what is to be noted is, that after the auction has been held the rules give the Board alone the power to reject a bid, or to accept it and confirm the sale. The rules give the Government no power whatsoever in this regard.

The Board, we are told by learned counsel appearing for it, has not yet acted under Rule 12 and has not passed any order either rejecting the bids made by the petitioners, or accepting them and confirming the sales in their favour. That being so, no question of a resale has yet arisen, and it follows that the order of the Government directing a resale which is, in effect, an order rejecting the bids of the petitioners, is without jurisdiction, and therefore of no avail.

As laid down in *K.N. Guruswamy Vs. The State of Mysore and Others*, with reference to the rules made under the corresponding Mysore Act the provisions" of which are very similar (and Section 16 of which in particular is practically in the same terms as our Section 16), once rules are made under the Act they bind State and subject alike. Thereafter the licensing of liquor can only be done in certain specified ways and such discretion as is left to the authorities is strictly controlled by Statute and Rule. The only authority, that can under the rules we are now considering decline to confirm the sale in favour of the petitioners, is the Board, find the Government has no such power.

12. The power conferred on the Board by the rules is not to be confused with a delegation of the power of the Government u/s 16 in which latter case it could be argued that the delegation does not denude the Government of its powers and that the Government could still act in respect of any matter in which the Board has not acted. It is a power conferred on the Board in its own right by valid subordinate legislation, and so long as that legislation is in force cannot be exercised by anyone else.

13. The petitioners being the successful bidders obviously have a vital interest in the subject matter of the sales even if there is no concluded contract in their favour, and they have the right to demand that their bids should be dealt with in accordance with the rules which have the force of law. The order of the Government denies them this right and is therefore violative of Article 14 of the Constitution. That being so, it follows that the order is liable to be quashed in exercise of our powers under Article 226 of the Constitution. The Supreme Court case just referred to is very much in point. In fact, it goes some what further, for, in that case the auction sale was cancelled by an authority who had the necessary power of revision under the rules.

Therefore the cancellation was regarded as valid. and the bid of the auction-purchaser (who was the petitioner there) having been rejected by competent authority, he had no further rights in respect of the auction and his position is

not to be compared with the position of the present petitioners whose bids are still awaiting confirmation by the competent authority. Nevertheless it was held that he had sufficient interest to maintain a petition for a writ to set aside a subsequent grant of the liquor-contract otherwise than in accordance with the rules.

14. Under the rules we were now considering, the Government has no powers of revision whatsoever. We may point out that the general powers of revision given to the Government by Section 9 of the old Travancore-Cochin Board of Revenue Act IX of 1950 in respect of any case pending before, or disposed of by, the Board does not exist in the current Act, namely, the Kerala Board of Revenue Act VII of 1957.

The reasons for the enactment appended to the latter Act show that the change was deliberate and that it was thought the Government need not have such wide powers of revision, and that the power of revision in respect of any statutory functions of the Board should be left to be provided for by the statute concerned. The statute here concerned, namely, the Travancore Abkari Act, confers no such power on the Government.

15. By reason of rules made u/s 5 of the Kerala Board of Revenue Act VII of 1957, the Second Member of the Board of Revenue can exercise the powers of the Board, in respect of the Travancore Abkari Act and in respect of Abkari revenue. This seems to be the basis of the petitioners' case that the very declaration by the Second Member in the sale list that they were the auction-purchasers amounted to a confirmation of the sales in their favour by the Board under Rule 12 of the Rules. But it seems to us quite apparent that, in holding the auction, the Second Member was functioning only as the selling officer appointed by Government, and was not functioning as the Board of Revenue.

The petitioners themselves were quite aware of this when they brought their petitions, for, in paragraph 7 of the affidavit filed in support of each petition, there is the statement that the Second Member, who personally conducted the auction, was satisfied that the auction could be confirmed in the names of the auction-purchasers and that the auction list was taken by the Second Member for formal orders on his return to headquarters. The affidavit clearly shows that there was no confirmation then; and the case that there was a confirmation is obviously an afterthought.

16. Under Rule 12, it is for the Board to confirm or reject an auction sale in the exercise of its discretion. We are not impressed with the argument that this vests a naked and arbitrary power with the Board. The Board has, it is true not yet acted under Rule 12; but neither has it declined to act. No mandamus can therefore be issued against the Board, much less one requiring it to confirm the sales which is what the petitioners want.

17. We have been told that the Board is awaiting the disposal of these petitions to pass orders under Rule 12; and "now that these petitions have been disposed

of, we have no doubt that the Board will proceed to do so.

18. The order of the Government directing a re-auction of the arrack and toddy shops being with out jurisdiction and in violation of the fundamental rights of the petitioners is quashed. The prayer of the petitioners for a writ of mandamus against the Board is rejected. Since the petitioners have in sub stance succeeded, they will get their costs from the respondents.