

(2000) 03 MAD CK 0110
In the Madras High Court
Case No : A.S. No. 1281 of 1986

G. Ramanathan

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 30-03-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 299
Government of India Act, 1935 — Section 175
Madras Prohibition Act, 1937 — Section 18, 54, 56, 7

Citation : (2000) 2 CTC 458 : (2000) 2 LW 429

Hon'ble Judges : K. Raviraja Pandian, J

Bench : Single Bench

Advocate : Mr. R. Mohan, for the Appellant; Mr. Ravi, Assistant Government Pleader, for the Respondent

Judgement

1. The above appeal is preferred against the decree and judgment made in O.S.No.76 of 1983 on the file of the Additional Subordinate Judge, Tanjavur dismissing the relief prayed for by the appellants therein.

2. The plaintiffs are the appellants.

3. The case of the appellant as discussed in the plaint averments are briefly stated as follows:-

The appellant-plaintiff was the successful bidder for the sale of arrack in retail through arrack shop number 4, Thanjavur Taluk for the excise year 1983-84. The salient features of the tease are viz., that the monthly rental payable by the plaintiff-lessee to the defendant-lessor shall be Rs.96,000, that the plaintiff shall deposit with the lessor three months rental amount and that the lease shall be with reference to the arrack shop No.4 to be situated in Adakara Street, Tanjavur Town and municipal limits. After deposit, the three months rental, at the rate of Rs.96, 000 per mensem in July 1983 with the defendant-lessor, the plaintiff commenced their business at T.S.No.526, Adakara Street, Tanjavur on and from

29.7.1983. For the three days of sales in July 1983 viz., 29th, 30th and 31st, the plaintiff has remitted the proportionate rate to the Government. The business was carried on and maintained through August 1983 and was closed by 31.8.1982. The plaintiff is liable to pay rent for August 1983 and he has not carried on business from 1.9.1983 for which he cannot be made liable to the Government.

4. It is further averred by the appellant-plaintiff that during the conduct of his business in August 1983, the respondent Department has been totally non-cooperative in facilitating the appellant-plaintiff to thrive in their trade. On the other hand, the respondent-defendant had been encouraging and conniving and indirectly indulging in attempts to cripple the business of the appellant. The branch shop was run, unauthorisedly by the licensee of arrack shop No.5 within the territorial limits or serving area allotted to the appellant and similar was the conduct of the licensee of arrack shop No. 6 which resulted in very unhealthy competition and the appellant was not in a position to intend and take delivery of the full quota ear-marked for his shop and therefore his sale in the month of August 1983 resulted in poor sales without the appellant availing of full quota supply earmarked from the Government. The appellant-plaintiff approached the defendant authorities to close down illegal and unauthorised activities by the other licensees. By the middle of September 1983, the appellant-plaintiff was not having had any supply even from the beginning of the month and the Government also having stopped supply, the appellant makes successive approaches to the officials of the Excise Department, Revenue Department and also police department, but met with no response.

5. Even the representation to the Excise Commissioner for closure and removal of the unauthorised branch sale, ended with no result and on the other hand, the appellant received a communication dated 25.9.1983 from the licensing authority calling upon the plaintiff to pay their monthly rentals from August 1983 and in default that his lease would be cancelled, inspite of the fact that the respondent had stopped supply even much earlier viz., from 1.9.1983 onwards. The appellant's representation to the Collector of Tanjavur also met with the same result.

6. The appellant as a lessee is entitled to have assurance from the lessor for legitimate and peaceful business without prejudice or hindrance by any unauthorised and illegal competition within his territorial limit. In this case, the Government had been openly encouraging illegal and unauthorised sales through branches, close to the appellants shop or his territorial limits. The appellant was forced not only to incur loss but also closed down his shop being unable to resist unhealthy competition in the trade, done with the Connivance of the Government. In such circumstances, the Government has no jurisdiction whatsoever to demand rental for September and October 1983 and the respondent cannot resort to revenue recovery proceedings as communicated in the communication.

7. The appellant having closed the business from 1.9.1983 he, has become entitled to the refund of the monthly rentals, treating the contract of lease as rescinded on and from 1.9.1983 after appropriating one month rental towards the dues for August 1983. Besides refund, the appellant is, also entitled to for damages of Rs.10,000 and interest at 12% per annum on the entire amount arid hence the suit for direction, directing the respondent to pay the appellant a sum of Rs.2.06, 480 with further interest, treating contract of lease in favour of the appellant as rescinded as and from 1.9.1983 and for a perpetual prohibitory injunction restraining the respondent from making further collection.

8. On behalf of the respondent-defendant, it is averred in the Written statement that the suit is not maintainable either in law or on facts and the relief of injunction is barred u/s 56 (A) of the Tamil Nadu Prohibition Act, 1937. That it is incorrect to state that the sale of arrack shop No.4 commenced on 29.7.1983 and continued only till the end of August 1983 and that the shop was closed on and from 1.9.1983. The licence for the sale of arrack shop No.4, Tanjavur town was issued to the appellant on 28.7.1983 and he started selling arrack on and from the date of its licence. The appellant did not pay the rental for the months of August 1983 and September 1983 inspite. of several notices demanding the same. Consequently the Excise Inspector, Tanjavur had closed the shop and sealed on 6.10.1983. Therefore, the licence issued in favour of the appellant has been cancelled. It is incorrect to state that the respondent-defendant has not cooperated with the appellant in the peaceful conduct of his business and also the officers of the department, have encouraged the illegal and unauthorised sale of arrack within or just at the border of the territorial limits of the shop earmarked for the appellant. On the other hand, the appellant has been indulged in illegal, trade in Arrack in unlicensed branches and the same is borne out by, the fact that the Prohibition Enforcement Wing of the Police has registered cases against the appellant and action has been taken against the other licensees who have indulged in the illegal activities. The authorities have been discharging their duties to the best to crush illicit selling of arrack and helped the licensees in all the possible and legitimate manner. The appellant is liable to pay the kist/rental for the months during which he has run the shop and his licence having cancelled, the privilege of sale of arrack in arrack-shop No. 4 has to be brought for re-sale under Tamil Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981. The appellant is liable to make good the loss that may be sustained by the respondent Department in effecting resale and the loss is recoverable under the Revenue Recovery Act. The suit is abuse of process of law to prevent the respondents from proceeding against the appellant in accordance with law which is not maintainable. The suit, is liable to be dismissed as vexatious and speculative besides there being no cause of action for the suit.

9. The trial court on the basis of the above pleadings and on the basis of the oral and documentary evidence adduced by both sides rejected the claim of the appellant while answering the issue framed in that regard. I have heard the arguments advanced on both sides.

10. Before entering into the arena of factual discussion, in the light of the pleadings and the evidence, at the outset it is imperative to understand true nature of the transaction in order to decide the rights and obligations of the parties arising therefrom which are precisely the facts in issue to be decided in this appeal.

11. Tamil Nadu Prohibition Act, 1937 (Act No.X of 1937) came to be introduced for implementing the avowed policy of the State to introduce and extend the prohibition of the manufacture; sale and consumption of intoxicating liquors and drugs in the State of Tamil Nadu as the preamble reads the enactment though a penal legislation for the purpose of augmenting the revenue of the coffer of the State has incorporated provisions within, contemplating issuance of licences for regulating, manufacture, the sale, both wholesale and retail, import, export or transport of liquor for human consumption. In exercise of the powers conferred by Section 17 (B), 17 (C) and 18 (C) read with Section 54 of the Act, the Tamil Nadu Arrack (Retail Shop) Rules 1989 came to be introduced for the grant of exclusive privilege to transport and sell arrack by retail in different areas and for the inspection of and supervision of the operation relating to arrack shops.

12. Further, by virtue of the power conferred u/s 54 of the Act, the State also brought into being the Tamil Nadu Toddy and Arrack Shops (Disposal in auction) Rules, 1981 for grant of the privilege through the medium of auction. It is relevant here to elaborate in the above context the scope and extent of the rights to trade in liquor. Primarily the state is vested with the exclusive right in regard to the manufacture and sale of intoxicant viz., to trade in liquor and no citizen ever has the freedom to engage in trading in commodities which have deleterious and noxious effect on the social and healthy well-being of the society and as such no fundamental right inheres upon the citizen to claim as a matter of course, thereby carving out an exception to the fundamental right of frame of trade.

13. It is settled position in law, that it is open to the State to part with those rights for consideration and the amounts which are charged to the licensees who offer their bids, in auction sale of vends, are neither in the nature of taxes nor in the nature of excise duty and that the true nature of the charge which the Government receives in such cases is that it is a price which the state authorities as a consideration for parting with its privileges in favour of the licensees. The transfer of the privilege and the manner of receipt of consideration by the State therefore are governed by the Tamil Nadu Prohibition Act. 1937 and the rules framed thereunder, thereby leaving no discretion for the parties, to contract outside the rules made for that purpose. The authorities constituted under the above referred to rules for the purpose of administering and implementing the excise of the privilege of vending any liquor proceed to conduct the auction in accordance with the rules and conditions prescribed therefore and issue licence to the successful bidders subject to the terms and conditions required to be fulfilled and followed under the said Rules.

14. That being the true nature of the transaction, the contract between the Government and the licensee is not a contract pure and simply but a properly so called a statutory contract where the rights and obligations of the parties thereto are governed strictly in accordance with the provisions contained in the said rules.

15. Now, let us advert our attention towards ascertaining the rights and obligations enjoined upon the parties to the contract which owes its origin and existence to the statute and in the light of the facts and evidences obtaining in the present case. Both the parties admit as regards the fact that for the Excise year 1983-84, arrack shop No.4 located at Adakara street, Tanjavur was taken on action for a privilege fee of Rs.96, 000 per month and the said fact is also evidenced by Ex.B.2. As per the terms and conditions of auction as disclosed by Ex.B.I, the appellant made a deposit equivalent to three months rental and accordingly licence was granted with effect from 28.7.1983 on and from the said date, the appellant has been running the business and in the month of August 1983, indents being placed by the appellant for supply of Rs.23,040 bottles of arrack and after obtaining approval order from the Government, a copy of which is served on the representative of the appellant, and the acknowledgment is marked as Ex.A.26. It is the case of the appellant that from 1.9.1983 he was unable to run their business on account of the unhealthy competition that had set in due to the opening of branches by other licensees within the territorial limits of the appellant and also owing to inaction on the part of the officials of the Excise Department in checking the illegal activities. Hence, the appellant has chosen to prefer a claim for refund of the deposit of two months rental together with interest at the rate of 12% from 1.9.1983 to 11.11.1983 ie., from the date of deposit till the date of institution of the suit and a sum of Rs.10.000 towards damages for loss which in all amounting to Rs.2,06,480.

16. The two issues that immediately arise for determination in the present case are,

(1) Whether the appellant is entitled to claim refund of the deposit equivalent to two months rental, and

(2) Whether the appellant is entitled to claim damages towards loss as alleged by him.

17. A regards , the first point, there is no dispute about the fact that the appellant that the appellant has made a deposit of Rs. 2,88, 000 as a pre-condition for the grant of licence. It, is pertinent to refer to rules pertaining this aspect. Rule 14 of the Tamil Nadu Arrack (Retail Shop) Rules 1981 stipulates that the licensees should pay the amount of rental promptly before the 10th of each month. Sub-rule (2) states that all sums payable to Government by the licensee may be deducted from the amount of deposits and further no remission or abatement of the rental shall be allowed on any account whatsoever. Rule 20 of the said Rules which deals with the "Suspension or cancellation of 1 licence provides for suspension or cancellation of licence or forfeiture of the deposit

made under these rules, if the licensee or any person in his employment contravenes any of the provisions of the Act or the Rules, made thereunder or the conditions of the licence. Apart from the above referred rules. Rule 20 of the Tamil Nadu Arrack (Retail Shops) Rules, 1981 also has a bearing on the manner of dealing with the said deposit of certain contingencies. The said rules contemplates re-sale of shops for the reasons mentioned therein for the first part and the second part as it is relevant to the present case provides that where successful bidder discontinues the privilege during the period for which it, was granted or his privilege is cancelled, the shop shall be re-sold for the remainder of the period and the provisions of the sub-rule (1) to the afore-said rule shall apply mutatis mutandis to such re-sale. A conspectus of the above provision would clearly indicate that there is no provision conferring a right upon the appellant to claim refund of the deposit and till the circumstances narrated therein exist and the contingency are exhausted. In other words, the entitlement of the Government to retain the deposit until it is placed in a situation beyond any loss is absolute and till such time, the appellant will not be entitled to seek refund of any sum from the deposit and the suit would therefore become premature for the sole reason that the respondent has sealed the shop premises and the procedure for re-sale of the shop for the remainder of the period is to be followed. It is only thereafter determination of the loss if any to the respondent would arise and the consequent refund of deposit if at all anything remains after adjustment. As a matter of fact, it has been stated across the bar that after the closure of the shop held by the appellant, it was put to re-auction and the notional loss has been arrived at thereupon a demand has been raised against the appellant herein. However, the appellant filed a Civil Miscellaneous Petition in the present suit and obtained omnibus prayer restraining the respondent from taking any action, to recover any amount in respect of shop No.4.

18. It is significant to note that the statutory rule governing the parties do not provide for or enable the appellant who is the licensee to rescind the contract. The Rule do not envisage determination of the contract in any other mode except by vesting of power on the respondent Department to cancel or suspend the licence in the manner prescribed in the rules. In such circumstances and especially in the absence of any term or provision, in the rules enabling the invocation of such a right the relief sought for by the appellant on a nonexistent right is unjustified and improper.

19. However, it is the strong contention of the appellant that the licensees of the arrack shop Nos.5 and 6 are indulged in illegal, retail sale by opening branches within the territorial limits demarcated by the respondent for the business of the Appellant and the officers of the department had connived with and encouraged such illegal retail vending without resorting to discharge their duties in checking the contravention of the provisions of the Act and rules by the licensees in the neighbouring area. In support of the said plea, the appellant has filed several documents through Exs.A.2, A.4, A.9, B.6, A.15 and A.19, all being representations sent to the authorities administering the aforesaid Act and Rules.

The sum and substance as seen from the above mentioned documents is that the appellant has intimated the authorities about the vending of Arrack by the other licensees within the territorial limits of the appellant and seeking action for the contravention of the provisions of the Rules. Yet another purport of the said representation is that the appellant has suffered loss in his business on account of such illegal vending and therefore called upon to control and regulate the activities of other licensees.

20. On behalf of the respondent, it is their contention in their pleadings that effective steps were taken to check violations of the provisions of rules and that the number of cases registered against the persons who had committed breach of the provisions of the Act. In support of their plea, the respondent filed documents marked as Exs.B.7 to B.25 which evidence the cases registered in the month of August. 1983 and the respondent also examined their Officer as D.Ws. 1,2, 3 and 4. The witnesses examined on the side of the respondent have uniformly deposed that all the offenders against whom cases had been registered were third parties unconnected to the licensee of the arrack shop numbers 5 and 6. It is also deposed by P.W.4 that cases had been registered against the person who had purchased arrack from the appellants and indulged in illegal sales. The appellant on his part had also examined P.Ws.2 to 5 who have deposed that they have consumed arrack in the branches run by the licensees of arrack shop numbers 5 and 6. From the above, I am able to discern at the first instance that the officers of the Excise Department have been initiating action against the offenders in exercise of their power and discharge of their duties. However, the appellant would maintain his contention that the officials had connived with the other licensees and encouraged illegal vending of arrack thereby in effect acted against the business interest of the appellant, but I am unable to accept that stand in the absence of any conclusive evidence and more over, the appellant has failed to discharge the burden cast upon him. In this context, it is relevant to peruse Ex.B.5 which is the letter written by the appellant to the revenue department officials seeking permission to shift his business place owing to reduction in sale. Taking into consideration of the evidence led in regard to the registration of offence in the month of August 1983 there is no complaint or grievance expressed in Ex.B.5 regarding illegal vending of arrack. It is only when the business of the appellant terminated, the appellant started complaining of such illegal activities and attributing motive to the officers and imputing allegation against the manner of discharge of their duties.

21. Be that as it may, before proceeding to arrive at a finding as I am hesitant to do so, here, a significant legal question posed in the circumstances of the case is with regard to the entitlement of appellant to put forth a claim in the nature of tort as if a wrong has been committed against him and if so howfar the law comes to his rescue. As observed earlier, the right and obligation between the appellant and the respondent are governed by the statutory contract in the sense that the Act and the rules provide for the mode and the manner of performance of their respective duties and obligations.

22. It must not be overlooked that the right to trade in liquor is not a right available under a common law, but a special right created under the statute. More over, the Tamil Nadu Prohibition Act 1937 and the provisions contained therein are in reality springing from the policy of the State to introduce and extend the prohibition of manufacture, sale and consumption of intoxicating liquors in Tamil Nadu. Provisions have also been incorporated enabling the Government to grant an exclusive privilege of manufacture or selling as the case may be, within any local area and also to regulate the sale. In order to achieve the avowed object as the nomenclature of the Act itself denotes that the Act is substantially a penal statute intending to club activities of manufacture, and trafficking and consumption of liquor and to achieve the same, provide for cognizance for prosecution of offences. Chapters IV and V provide for appointment of officers and constitution of authorities to implement the object of the Act and for that purpose also, vests the authorities with wide power and duties for effective administration of the provisions of the Act. Thus, the obligation imposed by the statute upon the officers are only intended for the benefit of the public at large and not for the benefit of any individual or any particular class of persons. Evidently therefore the public duty cast upon the authorities, under the Act to prohibit the restricted activities as provided under the Act is directed to benefit the public and any breach of such statutory duty of such nature cannot constitute a private wrong, entitling the wronged person to claim damages in tort.

23. The secondary aspect of the matter is that the right or a privilege to trade in liquor being a right created under the statute, any interference with or infringement of such a right will not entitle the aggrieved person to seek redress except as and unless specifically provided in the statute itself and such person are barred from seeking the common law remedy. It can be held beyond doubt that the appellant could not at all claim refund of the deposit by alleging malfeasance to the conduct of the authorities constituted under the Act and by holding them responsible for the loss in the business of the appellant in respect of whom the authorities do not owe any exclusive duty and more so when legally not bound under the statutory contract to protect their commercial interest and guaranteeing the proceeds of the business of the appellant.

24. The inability of the State in tort requires to be approached in another vital prospective. The activities of the State done in its sovereign capacity ordinarily fall under the category of cases viz., those that are outside the sphere of local law and those that lie within and are done under a sanction of that law. The Supreme Court in a decision in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, observed in the following manner: In regard to the inability of the State, for tort committed by a public servant, the question to ask therefore was the tortuous act committed by public servant in discharge of statutory function which are referable to and attributed and based on delegation of sovereign power of the State to such public servant. If the answer is in the affirmative action for damages for loss caused by such tortuous act will not lie. On the other hand, if

the tortuous act has been done by a public servant in discharge of the duties assigned to him not by virtue of delegation of sovereign power an action for damages will lie. The act of public servant is in this category of cases an act of a servant who might have been employed by a private individual for the same purpose.

25. The question is under which category does the activity fall under for the purpose of determining the liability of the State for tortuous act committed by its servant. As mentioned earlier, the Tamil Nadu Prohibition Act 1937 which is an enactment restricting the activities in relation to intoxicants emanate from the duty of the sovereign to enforce prohibition of manufacture or traffic in and consumption of liquor and intoxicating drinks which is attributable to the sovereign function and can be lawfully exercised only by sovereign or by a person by virtue of delegation of sovereign power. The act though immediately appear, to be in approach flowing from the duties enjoined upon the welfare state, the primary object of the Act could not be lawfully implemented except by delegation of power to its own employees rather than if the act done through a private agency. It is this feature of the enactment that render the discharge of the duties of the purpose under the Act immuned from an action in tort. It may be relevant to refer here that Section 56 places an embargo upon a claim for damages in respect of any act, bona fide done or ordered to be done in pursuance of this act as against the Government or against any prohibition police or other officials. The Section as framed is in a positive manner and whereby only acts done or purported to be done in pursuance of their duty prescribed under the provisions of the Act and other acts bona fide done fall within the productive capsule of immunity. Conclusively, there is nothing implicit in the provision permitting the claim for damages on the ground of failure of the authorities to discharge their functions or on the ground of inaction. The present claim of the appellant apparently is one founded upon the later reason which does not statutorily or otherwise provide a cause of action for entertaining a claim against the respondent. However, the learned counsel for the appellant would place reliance on the decision in Har Prasad Choubey Vs. Union of India (UOI) and Another, in support of his claim for refund of the deposit. I find the decision cited deals with an ordinary contract executed for and on behalf of the Government by virtue of Section 175 of Government of India Act, 1935. The rights and liabilities of the parties to such contract are governed by the law of contract. The basis of the contract in that case is completely different from the nature of the contract in the present case in the sense the parties hereto have bound themselves under the statutory contract and does not require compliance of Section 175 of the Government of India Act now Article 299 of the Constitution of India. In view of the foregoing discussion, the appellant is bound to fail both on fact and in law. Consequently, the first relief prayed for by the appellant in the suit is misconceived and not maintainable. The dismissal of the said relief by the lower court does not suffer from impropriety and the same deserves to be approved.

26. In so far as the relief of perpetual prohibitory injunction sought for by the appellant to restrain the respondent from making other collection is concerned, the same is liable to be dismissed without much strain and consideration in as much as the appellant was granted exclusive privilege to vend liquor in retail subject to terms and conditions stipulated under the two sets of rules framed under the Act, particularly with regard to the powers vested upon the respondent to initiate action to recover any sum that may become liable on account of breach committed by the appellant as a licensee. It is the bounden statutory duty of the officers of the respondent to act and discharge their duties in consonance with the provisions enacted under the rules. In regard to the jurisdiction of the Civil Court to grant the said reliefs, Section 56 (A) and Section 56 (B) of the Tamil Nadu Prohibition Act, 1937 have placed restraint on the powers of the Civil Court to deal with the matters arising under the Act. Both the Sections read together there is an intend specific and expressed excluding the jurisdiction of the civil court or for that matter any court Section 56 (A) begins with the non-absentee clause seeking to override the provisions contained in the Civil Procedure Code, 1908 or any law for the time being in force and thereafter mandates that no permanent or temporary injunction or any interim order restraining any proceedings which is being or about to be taken for the recovery of any sum, fee or both levied in consideration of the grant of any exclusive or other privilege under the Act or the rules made thereunder or any fee including vend fee or any duty levied by or under the Act or the Rule made thereunder. The grant of any privilege u/s 17 (c) or licence u/s 17(B). Similar is the import of the Section following thereafter which oust the jurisdiction of civil court in respect of any matter which the Commissioner or other authority empowered by or under the Act has to determine and stipulate that no injunction shall be granted by any court in respect of any action taken or to be taken by such Commissioner, Officer or other authority in pursuance of any power conferred by under the Act. Admittedly, the shop premises of the appellant was sealed by the authorities of the respondent on 6.10.1983 and further action has also been contemplated as per the rules evidenced by Ex.B.29. The above mentioned provisions create an absolute bar on any court to grant the kind of relief sought for by the appellant. The absolute nature of the ouster of jurisdiction is also substantial by the existence of the statutory remedies provided under the Tamil Nadu Prohibition (Appeal and Revisions) Rules 1983. On this point, the learned counsel for the appellant relied upon a decision of the Supreme Court in the case of Lala Ram Swarup and others v. Shikar Chand and another 1966 (2) SCC 553. Though the decision turned upon the extent of the ouster clause contained in U.P (Temporary Control of Rent and Eviction) Act, 1947, principle has been enunciated by the Supreme Court, for ascertaining the scope and extent of the provision excluding jurisdiction of the civil court. The latest decision on this point in Mafatlal Industries Ltd. v. Union of India and others, 1998 (111) STC 467 wherein broad principles have been summarized. Having regard to the principle enunciated therein, I am of the view that the nature of the relief prayed for by the appellant is hit by the exclusionary clause contained under the Act and hence

the appellant is liable to fail on this issue.

27. For the foregoing reasons, the appeal fails and it is dismissed with costs.