
(1987) 06 KAR CK 0037

In the Karnataka High Court

Case No : Regular First Appeal No. 118 of 1975

Government of Karnataka

APPELLANT

Vs

M.R. Thammaiah

RESPONDENT

Date of Decision : 29-06-1987

Acts Referred:

Karnataka Excise Act, 1965 — Section 68, 69

Citation : (1987) ILR (Kar) 3538

Hon'ble Judges : P.P. Bopanna, J;K.A. Swami, J

Bench : Division Bench

Advocate : Chandrasekharaiah, for the Appellant; M.R. Janardhana and G. Balakrishna Shastry, for the Respondent

Final Decision : Allowed

Judgement

P.P. Bopanna, J.—This appeal by the State Government is directed against the judgment and decree of Civil Judge, Coorg, in O.S No.9 of 1971 dated 14-4-1975 decreeing the suit of the plaintiff for Rs. 2,21,451/-. Though the suit claim is for a very heavy amount, the facts of this case are quite simple and do not admit of much controversy.

2. The parties are referred here by the position assigned to them in the trial Court.

3. The 1st defendant, i.e., the State of Mysore, under the Notification dated 11-4-1969 published in Mysore Gazette Extraordinary of even date called for tenders for leasing the right of retail vending of liquors in Kodagu District. The terms and conditions of retail vending are found in the Gazette Notification Ex. P-9. The relevant Clause for the purpose of this case is Clause 18(b)(1). In pursuance of the said Notification, the plaintiff participated in the auction sale conducted by the 2nd defendant/Deputy Commissioner Of Kodagu who is also the District Excise Officer under the Karnataka Excise Act (hereinafter referred to as the "Act"). The auction was held on 19-5-1969 and the plaintiff became the

successful bidder to vend arrack in retail in the entire taluk of Somwarpet for the period commencing from 1-7-69 and ending with 30-6-1970. It is not in dispute that on the date the auction was held, the Excise Commissioner, Mysore, had sent a telegram as per Ex. D-2 to the 2nd defendant on the following terms :

"Arrack 30 UP to be sold in bottles of 750 ML in Coorg at Rupees Four and paise thirty five only inclusive of duty all cesses and sales tax but exclusive of octroi (stop) octroi to be paid by contractors letter follows-Excommr".

It is also not in dispute that, though the telegram specifically states "Letter Follows", no such letter followed. On the basis of this telegram, the 2nd defendant imposed a further stipulation modifying Clause 18(b) in Ex P-9 and thereby the plaintiff and others were called upon to bid for arrack 30 UP in bottles of 750 ML. at Rs. 4.35 per bottle. The controversy between the parties centres around this change in the Notification. According to the plaintiff, the telegram, Ext. D-2, did not impose any obligation on him to purchase arrack in bottles of 750 ML. at Rs. 4.35p But, on the other hand he was entitled to bulk supply of arrack for the purpose of retail vending in the entire taluk of Somwarpet at the rate of Rs 4/- per litre as stipulated in Clause 18(b)(1) of the Tender Notification. The specific case of the plaintiff is found in paras 3 to 5 of his plaint and this is what he states :

"In pursuance of the said notice the - plaintiff participated in the auction sale conducted by the second defendant on behalf of the 1st defendant on 19-5-1969 and became a successful bidder to vend arrack in retail in the whole of Somwarpet Taluk for the period commencing - from 1-7-1969 and ending with 30-6-1970. The plaintiff commenced the business on 1-7-1969 and continued the same till 30-6-1970. Right from the beginning the Government did not act according to the sale condition and the bulk supply of 30 Degree U.P. Arrack was not made to the plaintiff. Time and again the plaintiff requested the 2nd defendant to supply him bulk arrack as he is not able to sell the bottled arrack supplied by the Department As against Rs 4/ for bulk litre the Government collected Rs. 4-35 per bottle containing 750 ML, Thus for every bottle the Government collected Rs. 1-35 more than the rate agreed upon and advertised in the sale notice.

During the period between 1-7-1969 and 30-6-1970 the plaintiff purchased 1,63,260 bottles of Arrack and paid excess amount of Rs. 2,21,401/- to the Government. The said excess amount was collected from the plaintiff illegally and without the authority of Jaw. The plaintiff is entitled to get the refund of the same The Government is liable to pay future interest on the - amount on account of the breach of the condition on the part of the Government he sustained a loss of more than Rs. 3 lakhs.

Hence this suit against the Government to recover Rs. 2,21,451-00 as detailed below :

1.

Excess amount collected from
the plaintiff :

--

Rs. 2,21,401-08

2.

Notice Charges

--

Rs. 50-00

Total

--

Rs. 2,21,451-00".

4. The defendants in their written statement took the intention that the plaintiff was aware of the terms stipulated under Ex-D-2 when he participated in the auction on 19-5-1969. The Deputy Commissioner who is the 2nd defendant in the suit had given publicity of this fact in Kodagu District before the auction was conducted; that it was announced by the 2nd defendant in the auction hall before the auction commenced that in Kodagu District supply of arrack to the licensees would be made in sealed bottles of 750 ML of 30 degree UP at Rs. 4.35p. per bottle exclusive of octroi; that the plaintiff being one of the participants of the auction sale, he was aware of the fact that the supply of liquor in Kodagu was to be made only in sealed bottles of 750 ML. of 30 degree UP at a price of Rs. 4-35p. per bottle. The defendants relied on the proceedings as drawn up by the Deputy Commissioner of the auction held on 19-5-1969 which was produced before the trial Court and marked as Ex.D-I. Further the defendants took up the plea of estoppel on the ground that the plaintiff had never placed any indents for the supply of arrack in bulk; that the plaintiff had thus by his conduct consented to the supply of arrack in sealed bottles only in as much as he indented and paid for and took delivery of sealed bottles only during the period of lease; that he had indented for the supply of arrack in bottles of 750 ML. at Rs. 4-35p. per bottle and he never protested against the non-supply of arrack in bulk at Rs. 4/-per litre and that on account of his past conduct he was estopped from contending that he was entitled to the supply of arrack in bulk. The further contention of the defendants was that the suit was barred by limitation, since the provisions of Sections 68 and 69 of the Act were applicable to the facts of this case and the plaintiff having not filed the suit within 6 months from the date of the alleged breach of condition of the contract the suit was liable to be dismissed in limine.

5. On these pleadings the trial Court (the learned Civil Judge who had dealt with the case at an earlier stage) had framed the following 7 issues :-

1. Is the suit barred by virtue of Section 68 of the Mysore Excise Act, 1965 ?
2. Is the suit barred u/s 69 of the Mysore Excise Act, 1965 as alleged in para 9 of the written statement ?
3. Whether the suit notice is legal and proper ?
4. Whether the plaintiff is entitled to get arrack from the Government at the rate of Rs. 4/- per litre ?
5. Whether the plaintiff is estopped by his conduct from claiming the suit amount ?
6. Whether the plaintiff is entitled to claim the suit amount for the reasons alleged by him ?
7. To what reliefs if any are the parties entitled ?

The first two issues relate to plea of limitation under Sections 68 and 69 of the Act. The other issues relate to the merits of the suit claim.

6. The trial Judge held that the suit was well within time since in his view the provisions of Sections 68 and 69 of the Act were not applicable to the claim made by the plaintiff. He further held that Ex.D.2 did not have the effect of amending Ex.P.9, and Ex.D.2 was not published; that the plaintiff was entitled to get bulk arrack from the defendants at Rs. 4/-per litre and accordingly he made a decree as prayed for. The defendants have come up in appeal against the aforesaid judgment and decree of the trial Court.

7. Having regard to the contentions urged on both the sides and in the light of the findings recorded by the trial Court, the following points arise for consideration :

- 1) Whether the Trial Court is justified in law in holding that Section 69 of the Act is not applicable to the suit ?
- 2) Whether Article 24 of the Limitation Act, 1963 applies to the suit ?
- 3) Whether the terms of the Gazette Notification dated 11-4-1969 were amended by Ex. D. 2 and the plaintiff was aware of the amended terms before or at the time he participated and became a highest bidder in the auction held on 19-5-69 ?
- 4) Whether on facts and in law the plaintiff is entitled to the suit claim ?

POINTS 1 & 2:

8.1 These two points have to be considered together because if one of the points is answered in the affirmative, the other has necessarily to be answered in the negative. Hence both the points are considered together.

8.2 In our view the provisions of Section 69 of the Act have not been dealt with

by the trial Court in the manner it ought to have been considered, having regard to a decision of the Supreme Court on the interpretation of the similar provisions contained in Hyderabad Abkari Act in Attili Swami and Anr. -v.- the Attili Swamy and Another Vs. State of Hyderabad (Now Andhra Pradesh) and Another, . Issues 1 and 2 framed by the trial Court related to the plea of limitation and were based on the provisions of Sections 68 and 69 of the Act respectively. In our view, the proper Section to be applied is Section 69 of the Act. Section 69 of the Act reads as under :

"No suit shall be against the State Government or against an Excise Officer, other than a suit by the State Government, in respect of anything done or alleged to have done in pursuance of this Act, unless the suit is instituted within six months from the date of the act complained of."

This Section provides for a special period of limitation in order to institute a suit relating to any act done or alleged to have done in pursuance of the Act against an Excise Officer or against the State Government. The intention of the Legislature in providing a special period of limitation is quite obvious. The Excise Act is a regulatory Act which enables the State Government to collect revenue to augment its finances and as observed by the Supreme Court in State of Orissa and Others Vs. Harinarayan Jaiswal and Others,

"Even apart from the power conferred on the Government under Sections 22 and 29, we fail to see how the power retained by the Government under Clause (6) of its order dated January 6, 1971 can be considered as unconstitutional. As held by this Court in Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, one of the important purposes of selling the exclusive right to sell liquor in whole-sale or retail is to raise revenue. Excise revenue forms an important part of every State's revenue. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State".

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"The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale in question is but a mode of raising revenue. Assuming that the question of arbitrary or unguided power can arise in a case of this nature, it should not be forgotten that the power to accept or reject the highest bid is given to the highest authority in the State i.e., the Government which is expected to safeguard the finances of the State. Such a power cannot be considered as an arbitrary power."

That being the object of the Excise Act, the Legislature has advisedly prescribed a special period of limitation in order to ensure that the excise revenue is utilised for the purpose for which it is collected i.e., for the purpose of implementing the various welfare schemes of the State. In order to ensure that, State's revenues are not locked up or kept in suspense account for 3 years or for any period longer than that, a special period of limitation is provided. The shorter period of

limitation ensures that the claims against the State Government or the Excise Officer are not unnecessarily kept pending for unduly long period. That is why u/s 69 of the Act, a special period of limitation of six months is provided in order to overcome the general law of limitation which provides a period of 3 years in such suits.

9. The trial Court has held that the provisions of Section 69 of the Act are not applicable to the suit. The Trial Court has introduced a "sort of legal fiction" for the purpose of bringing the suit under Article 24 of the Limitation Act and on the basis of that legal fiction the Trial Court has come to the conclusion that the suit is well within time. On the applicability of Section 69, it has observed as follows :

"The purport of the Section is simple that the shelter under that can be taken only when a suit is filed against the Government or Excise Officer, in respect of anything done or alleged to have been done in pursuance of the act in question. That should fall within what has been done or alleged to have been done under the rules and notification. The provision does not attempt - anything more than that. Here is a case where the Excise Commissioner and defendant-2 did something not in pursuance of the Act. Because, they ignored the patent provisions of the rules governing the sale of right to vend liquor within the Coorg District. They collected something from the plaintiff which was not in accordance with either the notification under Clause 18B - of Ext. P. 9 or the terms, flowing therefrom. There has been something done beyond, the scope of provisions of Karnataka Excise Act and the Rules by defendant and the Excise Commissioner. The things could have been done in their own way without due regard to the provisions governing the contract of the plaintiff and defendants. Therefore, fundamentally Section 69 of the Act in question cannot be attracted. Even assuming that it can be attracted, as laid down by Calcutta High Court Supra (1903 ILR 30), in the light of specific provision in the Limitation Act, under Article 24, the period cannot be taken to run from the time fixed u/s 69 under the Excise Act."

10. In *Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others*, , the Supreme Court while dealing with Section 15 of the Limitation Act which provides for exclusion of the time covered by the operation of an order of the Court restraining the parties from filing the suit, observed in para 19 of its Judgment as follows :

"But in our opinion, there would be no justification for extending the application of Section ; 5 on the ground that the institution of the subsequent suit would be inconsistent with the spirit or substance of the order passed in the previous litigation. It is true that rules of limitation are to some extent arbitrary and may frequently lead to hardship, but there can be no doubt that in construing provisions of limitation, equitable considerations are immaterial and irrelevant and in applying them effect must be given to the strict grammatical meaning of the words used by them : AIR 1932 165 (Privy Council)

In our view, on a proper construction of Section 69 of the Act in the light of a

decision of the Supreme Court in Attili Swamy's case under the Hyderabad Abkari Act, there is no difficulty to come to the conclusion that the cause of action for the suit arose for the plaintiff in respect of the act done or alleged to have been done by the Excise Officer in pursuance of the Act.

11. We will now consider the case before us on this point. From the tenor of the issues framed by the trial Court, it proceeded on the basis that there was a contract between the parties in respect of retail vending of the liquor in Somwarpet Taluk as per the terms contained in Ex. P.9. This contract came into existence by the offer made by the defendants under the Act and acceptance of that offer by the plaintiff. That it is so, is not in dispute and it cannot also be disputed because the Deputy Commissioner for Excise under the provisions of the Act notified to sell the right of retail vend or liquor by public auction. The plaintiff participated in the auction and offered the highest bid which was accepted. Thus a concluded contract between the plaintiff and the State came into existence under and as per, the provisions of the Act. The terms and conditions of the contract are those contained in Ex. P.9 as amended by Ex. D.2. the cause of action for the suit arose for the plaintiff under and in pursuance of this contract only. The very case of the plaintiff is that the terms of Ex. P.9 have been contravened by the defendants. Therefore, we can safely reach the conclusion that the plaintiff complains of the acts done by the defendants under the Act in as much as the contract-breach of which is complained of by the plaintiff is itself an act of the parties. The decision of the Supreme Court in Attili Swami¹, in our view, is not only an authority for this proposition of law, but a binding precedent. The language of Section 69 of the Act is in pari materia with Sub-section (2) Section 41 of the Hyderabad Abkari Act. Section 41 of the Hyderabad Abkari Act reads as under ;

"41(1). No action for damages shall be entertained by a civil Court against Government or against any Abkari Officer for any act done or ordered to be done in good faith and in accordance with this Act.

(2) All actions against any Abkari Officer and all actions which may be lawfully brought against Government or against any Abkari Officer on account of any act or thing alleged to have been done in accordance with this Act, shall not be entertained after six months from the date of doing the act or thing.

(3) If, in a suit for compensation for damages it is proved that adequate compensation was being tendered before the institution of the suit, it shall be lawful for the Court in its judgment to disallow costs to the plaintiff and lay on him the costs of the defendant."

It was contended before the Supreme Court that in order to claim immunity from an action for damages for an act done or ordered to be done it must have been done not only in good faith but it must also have been done in accordance with the Hyderabad Abkari Act therefore it was indicative of the fact that the immunity conferred was in respect of tortious acts and not of breaches of

contract. The Supreme Court negated this contention and observed as follows :

"Whatever merit there may be in this submission in so far as it relates to the bar u/s 41(1) the submission has no force in relation to the bar u/s 41 (2). Section 41(2) is not confined to actions for damages as is the case u/s 41(1) but extends to "all actions " Good faith does not have to be established to plead the bar of limitation u/s 41(2) though it is necessary to claim immunity u/s 41(1). Again the act complained of in the action may even be an act alleged to have been done in accordance with the Act and not merely an act done in accordance with the Act as u/s 41(1). Having regard to the wide language employed in Section 41(2), we are unable to see any justification for confining that sub-section to actions for damages arising out of tortious acts only. In *Raghunandhan Reddy Vs. State of Hyderabad*, , *Jaganmohan Reddy and Chandrasekhara Sastry, JJ*, had occasion to construe Section 41 of the Hyderabad Abkari Act. There *Jaganmohan Reddy, J.* observed as follows (at p. 115).

"It would appear that Sub-section (1) bars suits for damages against Government or against Abkari Officers for acts done in good faith, while Sub-section (2) prescribes a period of limitation of six months for all actions which may be lawfully brought against Government or against Abkari Officers. Learned Advocate for the appellant, *Shri Raghuvir*, sought to contend that this is confined to suits for damages, but later recognised the force of the contention of the Learned Government Pleader that all suits which can be lawfully brought, whether for damages or otherwise, are governed by the limitation prescribed therein. There is in our view no difficulty in the applicability of this section to the present suit inasmuch as it arises, out of the action of the Excise Commissioner and the Excise Department in claiming loss incurred by the Government as a result of the purported breach of contract by the appellant."

"In the present case the plaintiffs themselves have mentioned in the plaint that the cause of action for the suit arose on 8th May, 1952, when the two shops were reaucted, on 30th September, 1952, when the period of the contract expired and on 30th July, 1952 when the Government gave a reply to their notice disclaiming all liability on the part of the Government for the loss alleged to have been occasioned to the plaintiffs. Whatever date is taken as the starting point the suit is clearly barred by limitation u/s 41(2)."

On the basis of this decision of the Supreme Court the learned Government Advocate has maintained that the suit is barred by time. However, learned Counsel for the plaintiff/respondent submits that the decision of the Supreme Court should be distinguished from the facts of this case. According to him, the cause of action was not based on any act purported to have done under the Act, but on the basis of the action of the Government which was wholly outside the Act and also outside the contract said to have been entered into by the plaintiff with the Government.

12.1. We have noticed earlier that the very claim of the plaintiff is based on

contract. He says that Clause 18(b) of the Tender Notification gives him a right to purchase arrack in bulk at Rs. 4/- per litre and he pleads that the right to purchase arrack in bulk has been taken away by the defendants under Ex.D.2, i.e., the telegram sent by the Excise Commissioner to the Deputy Commissioner. So, on the basis of the pleadings itself, the cause of action is based on the contract.

12.2. The case of the plaintiff before the trial Court was that the cause of action arose under the contract which had come into existence under the Act. At para 10 of the Judgment, the trial Court has observed as follows :

"At the outset, this part of the argument of the Learned Government pleader should be rejected, although it cannot be said that the suit contract is not governed by the provisions of Sale of Goods Act, as long as the right to vend liquor by virtue of a lease sold by public auction, is a moveable property u/s 3 sub-Clause 36 of the General Clauses Act, 1897 and "goods within the meaning of Section 2(7) of the Sale of Goods Act."

The trial Court in the very same paragraph of the Judgment has observed as follows :

"It is no doubt true that under the suit contract, there was sale of goods within the meaning of Section 4(1) of the Sale of Goods Act. There was a postponement of delivery of Goods, immediately on payment of price as required u/s 5".

Further, in the very same paragraph, it is observed as follows :

"The implication of the suit contract was never to allow the plaintiff to repudiate the contract to the inconvenience of the public and loss of exchequer to the State. It was also against public policy to allow the plaintiff to repudiate the contract. Therefore, it was a clear warranty. Under such circumstances, the plaintiff had no right to repudiate the suit contract for not supplying the bulk arrack, and on the other hand, his right was only to claim damages and not to reject the goods or to repudiate the contract. That is what the plaintiff did in this case. Therefore, the complaint of the defendants in their argument that the plaintiff did not repudiate the suit contract on the failure of the defendants to supply the bulk arrack, is a conduct telling upon the truth cannot be accepted and in fact it is totally repugnant, to the law."

12.3. From this observation by the learned trial Judge, it is clear that the parties proceeded on the basis that there was a contract between them and that contract could come into existence only under the Act and not outside the provisions of the Act. It is not the case of the plaintiff that the Government had some other power which was not conferred by the Act and therefore the learned Counsel for the plaintiff is not right in contending that the amount sought to be collected by the plaintiff from the defendants was on account of the illegal exaction which was outside the contract and was not covered by the provisions of the Act. In the circumstances, the plea of limitation was wrongly decided by the

trial Court. Since the suit was barred by time, it was liable to be dismissed.

12.4. In the view we take, it is unnecessary to deal with the application of Article 24 of the Limitation Act to the facts of this case since we have come to the conclusion that the suit is covered by the special provision of limitation prescribed u/s 69 of the Act. Further, on the facts and circumstances of the case, it is difficult for the plaintiff to make out that the suit is governed by Article 24 of the Limitation Act. It is on the basis of the contract entered by him with the State he claims the difference in the rate between the bulk supply at Rs. 4/- per litre and bottle supply at Rs. 4.35 per bottle. In our view, the pleadings in the plaint itself make it clear that the plaintiff complains of the acts done by the authorities under the Act and, Therefore it is not necessary for us to consider the difference if any in the meaning, scope and ambit of the words "purported to have done" and "alleged to have done under the Act." Though several decisions relating to period of limitation under the Sales Tax Act are cited, but we are of the view that these decisions are not be applicable to the case on hand as the same are not apposite to the provisions of Sections 69 of the Act.

13.1. Sri Janardhana, learned Counsel for the plaintiff has placed reliance on the following decisions of this Court in (1) N. Ayyanna Shetty & Sons v.- State of Mysore 1960 ML.J. 1073 (2) Municipal Council, Thirthahalli -v.- B. H- Abdulkhader 1965 (1) ML.J. 41 (3) D. Cawasji & Co. Mysore -v.- State of Mysore AIR 1969 Mys 23. In N. Ayyanna Shetty's case 1960 ML.J. 1073, Section 18 of the Madras General Sales Tax Act, 1939 came up for consideration. The said Section reads as follows :

"No suit shall be instituted against the State Government and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the State Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the Act complained of."

The Division Bench following a Full Bench decision of the Madras High Court in The Panchayat Board, Thiruvotiyur -v.- The Western India Matches Company ILR 1939 Mad 566 held that the Section only applied to suits for compensation or damages and it did not apply to a suit for refund of sales tax illegally collected. Therefore such suits were not governed by the rule of limitation prescribed therein and such suits were governed by Article 62 of the Limitation Act 1908 as applicable for a suit for money had and received.

13.2. In Municipal Council, Thirthahalli's case⁵, Learned Single Judge followed the decision in N. Ayyanna Shetty's case⁴ and held that Section 183 of Mysore Municipalities Act, 1951 which was similarly worded as that of Section 18 of the Madras General sates Tax Act, 1939, applied only to suits for damages or compensation and not to suits for recovery of taxes collected illegally and to such a case, Article 62 of the Limitation Act, 1908 was applicable.

13.3. D. Cawasji's case did not arise out of a suit. It was a petition under Article

226 of the Constitution challenging the validity of the levy of Education Cess. In this case, it was held as follows :

"112. In Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , the Supreme Court held that if it is established that payment, even though it be of a tax, has been made by the party labouring under a mistake of law, the party is entitled to recover the same, that the party receiving the same is bound to repay or return it and that no distinction can be made in respect of a tax liability and any other liability on a plain reading of Section 72 of the Indian Contract Act. We think, it does not admit of serious doubt that the petitioners have paid Education Cess on Arrack Shop Rent, Toddy Shop Rent or Beer Shop Rent, or Tree Tax and Tree Rent under a mistake of law that is under a mistaken impression that they were liable to pay Education Cess on these items. Hence they are entitled to recover the same subject to the law of limitation."

Thus in D. Cawasji's case, the provision similar to the one contained in Section 69 of the Act did not arise for consideration. The proposition laid down in the aforesaid para 112 of the decision is not helpful to the case on hand as such a situation does not arise here.

13.4. The correctness or applicability of the proposition laid down in the first two decisions on the question of limitation need not also be gone into in the instant case because the provision similar to the one contained in Section 69 of the Act as contained in Section 41(2) of the Hyderabad Abkari Act is interpreted by the Supreme Court in Attilli Swami's case¹ and it is held therein that there is no justification for confining the provision to actions for damages arising out of tortious acts only. The Supreme Court also approved the decision of the High Court of Andhra Pradesh in Raghunandhan Reddy Vs. State of Hyderabad, in which it was held that the provision prescribing the period of limitation of six months applied to all actions which may be lawfully brought against Government or against Abkari Officers. Thus there is no scope whatsoever for applying the aforesaid decision of this Court on which much reliance is placed by Learned Counsel for the plaintiff. In our considered view, the decision of the Supreme Court in Attilli Swami's case¹ concludes the point Hence we have no hesitation in holding that the suit is governed by Section 69 of the Act and not by Article 24 of the Indian Limitation Act, 1963. Points 1 and 2 are answered accordingly.

POINT NO 3:

14. Under this point, the question for consideration is whether Ex.P.9 the Gazette Notification specifying the terms of the contract which is the basis for the suit claim stood amended or was amended by the telegraphic communication Ex.D.2 before the actual auction was held. In ether words whether the auction was held in terms of Ex.P.9 as amended by Ex.D.2, There is a contemporaneous recording of the proceedings by the Deputy Commissioner as per Ex.D.1. The contents of the telegram are not disputed. The fact that the Excise Commissioner had sent a telegram in terms of Ex.D-2 amending the Notification Ex.P.9 is also not

disputed. But what was contended before the trial Court was that this telegram was not followed by a letter, therefore, it could not have been given effect to by the Deputy Commissioner. This contention found favour with the trial Court. It was further contended that the Deputy Commissioner did not read out the contents of Ex.D.2 before the auction commenced so as to enable the bidders including the plaintiff to know that there was material alteration in the terms of the contract in terms of Ex.D.2. According to the trial Court, Ex.D.2 i.e., the telegram could not have the effect of altering the terms of the Gazette Notification Ex.P. 9 since the terms of Ex.D.2 were not published in the Gazette. It was of the view that the earlier Notification Ex.P.9 had been published in the Gazette and any alteration of the terms as contained therein could have been done only by a further publication in the Gazette and not by means of a letter or a telegram. Secondly, it was of the view that the evidence of the Deputy Commissioner, i.e., D.W.I required corroboration ; therefore, in the absence of corroboration it was difficult to rely on his evidence for the purpose of coming to the conclusion that the plaintiff was made aware of the material alteration in the terms of the contract as per Ex.D.2.

15.1. In our view, the approach of the Trial Court in this regard is neither justified on the facts nor is sound in law. The very approach of the Trial Court that the evidence of the Deputy Commissioner examined as D.W. 1 required corroboration is itself not sound in law. It is not the opinion of the Trial Court that the evidence of D.W. 1 is either unreliable or inadequate. Law does not require that there should be corroboration of the evidence of an official witness on matters of official acts done by him in relation to which he does not stand as an accomplice. His position in the instant case is not different from any other defendant in any suit. There is a contemporaneous recording of the proceedings by the Deputy Commissioner (D.W.I) on the date the auction was held. It is spoken to by him and marked as Ex D.1. The proceedings drawn by the Deputy Commissioner as per Ex.D.I on the date of auction demonstrably prove that he had read the terms of Ex.D.2 before the auction commenced on 19-5-1969 and he had also brought to the notice of all the bidders who were present including the plaintiff that in Somwarpet, Coorg District, the retail sale of arrack would be by bottles and not bulk arrack at the rate of Rs. 4/-per litre. The relevant portion of Ex. D-I reads as under :

"Before the commencement of the sale, announcement based on the communication received from the Excise Commissioner that Arrack will be sold in bottles of 750 ml in Coorg District at an overall price of Rs. 4-35 octroi being extra to be paid by the contractors before taking the required stocks from Arrack Bonded Depots was made both in English and Kannada Further under the powers vested in the Deputy Commissioner vide Rule 10 of the Mysore Excise (Lease of Right of Retail Vend of Liquors) Rules 1969, I announced that the sale of Toddy shops will be taken in the order notified in Schedule first and then Arrack shops in the same order".

It is further seen from the said proceedings that the auction sale was well attended. Over 300 bidders including leading excise contractors of the State and neighbouring State Kerala participated in the auction. At the outset Sale Notification was read out both in English and Kannada and salient features of the sale were brought to the notice of the intending bidders.

15.2. In his evidence the Deputy Commissioner has stated as follows :

"I conducted the auction sale of arrack on 19-5-1969. I have drawn proceedings of auction - as per Ex. D-1. It bears my signature. Over 300 bidders participated in the auction sale. At the outset the sale Notification was readout, both in Kannada and English and the salient features of sale were brought to the notice of intending bidders. The printing mistakes and corrections were brought to the notice of bidders. Before I commenced the proceedings I had received a Telegram from the Excise Commissioner, Bangalore as per Ex.D-2. It instructed to sell arrack of 30 U.B. be sold in Coorg District in bottles of 750 Ml. each at Rs. 4-35p. only inclusive of duties. Before commencement of the sale I made an announcement based on the communication Ex. D-2 to intending bidders that arrack would be sold in bottles. This was announced both in English and Kannada. The plaintiff was present with other bidders when the announcement was made".

In para 3 of his deposition, he has stated as :

"As per Ex. P-9 Gazette Notification bulk arrack was mentioned to cover the entire-State. For Coorg District there was an amendment on the basis of telegram for specific case of Coorg".

This evidence was not seriously challenged in the cross-examination. Plaintiff in his examination in chief does not state that the Deputy Commissioner did not make the announcement at the time of the auction on 19-5-1969 and that he did not read the contents of Ex. D-2 before the auction commenced. His simple case is that he was only asked to follow the terms of Ex. P-9 and he had no knowledge at all of Ex. D-1. All the same, the Trial Court found that the evidence of the Deputy Commissioner required corroboration and in the absence of any such corroboration it could not be acted upon for recording a finding against the plaintiff. His observation that the evidence of the Deputy Commissioner needs corroboration itself amounts to a serious illegality in the appreciation of such evidence. The Evidence Act does not require corroboration of such evidence. It is well settled that corroboration under the Evidence Act is necessary in the case of the evidence of an approver or evidence of an accomplice. It is a rule of prudence and not a rule of law. The Deputy Commissioner was giving evidence on behalf of the State in the light of the duties performed by him as an authority under the Act and his evidence was also fully corroborated by the contemporaneous note made by him on the date of the auction. That note came into existence at an undisputed point of time. The proceedings drawn under Ex. D-1 was pursuant to Rule 15 of the Karnataka Excise (Lease of the Right of Retail

Vend of Liquors) Rules, 1969. That Rule reads as under :

"(1) Whenever the Deputy Commissioner or the Divisional Commissioner has accepted provisionally a tender, offer or bid, he shall forthwith submit to the State Government through the Excise Commissioner the records of the proceedings conducted by him for confirmation."

2) The State Government shall, on a consideration of the records under Sub-rule (1) and the interest of revenue pass an order confirming the disposal of the right to retail vend of liquor or refusing to confirm it. The order shall forthwith be communicated to the person concerned."

Ex. D-1 is the record maintained by the Deputy Commissioner under that Rule, It was on the basis of this, the auction sale in favour of the plaintiff was approved. It appears from the judgment of the trial Court that this rule was not brought to the notice of the Trial Court by the Learned Government Pleader who conducted the case and therefore the trial Court had no occasion to consider the effect of Ex. D. 2 on the terms of Ex. P. 9 on which the plaintiff had relied. In our view, it is not a mandatory requirement of law that while conducting the auction sale under the provisions of the Act and the Rules, the State Government or the Excise Commissioner as the case may be, cannot vary the terms thereof by any other manner except by another Gazette Notification. A Notification containing terms similar to Ex. D. 2 was very much in force in Coorg District in the year 1967. Ex. P. 22 is the Gazette Notification dated 30th of October 1967 which was made applicable to Kodagu District. Under Clause 20 of that Notification it was stipulated that arrack would be supplied only in sealed bottles of 750 ml for sale in the shops in Kodagu District. Therefore, the telegram Ex, D. 2 only followed the earlier Rule applicable to Coorg District and that is the reason the Excise Commissioner had taken the necessary precaution of sending a telegram in terms of Ex. D. 2 just a day before the auction commenced on 19-5-1969. The proceedings of the Deputy Commissioner as recorded in Ex. D.1 coupled with his oral evidence which was not seriously challenged in his cross-examination conclusively establish that the plaintiff was fully aware of the amendment to the terms of Ex. P. 9 in terms of Ex. D. 2 before and at the time he offered his bid. He being the highest bidder on that day with the full knowledge of the terms of Ex. P. 9 as amended by Ex. D. 2. it is not open to him to contend that there was an illegal levy by the Government by compelling him to buy arrack in bottles at the rate of Rs. 4.35 per bottle.

15.3. In addition to this, the plaintiff's own conduct lends full support to the view that he had agreed to the terms of the amended contract. At all times, during the relevant period he had only indented for bottled arrack of 750 ml. at Rs. 4.35 per bottle and he had never indented for bulk supply at the rate of Rs. 4/- per litre. It is seen from Ex. D. 5 dated 19th January 1970 that the Government in their Order No. HD 61 EPL 69 dated 12-1-70 had given the approval for supply of arrack in bulk along with bottled arrack to Coorg District. The Deputy Commissioner was accordingly informed "to take action to permit the selling of

arrack in bulk of 35? U P arrack in a taluk as a unit only if the contractors make a request for the supply". From this Government Order, it is clear that the Government had relaxed the terms of Ex P 9 as amended by Ex D 2 and had permitted the retail vendors to sell arrack in bulk of 35? U P in Coorg District. Even then the plaintiff did not choose to indent for the bulk supply. Even in his letter dated 19th July 1969 and 4-9-1969 he does not challenge the right of the defendants to alter the terms of the contract. What all he says is that he was incurring heavy loss and therefore the supply if made in bulk would make good the loss sustained to some extent. This conduct of the plaintiff also shows that the plaintiff was fully aware of the terms of the amended Notification and by this conduct he accepted the same when he became the highest bidder. The only grievance was that since he was suffering losses the Government could have mitigated or made good the loss by supplying arrack in bulk. Unfortunately for him he never indented for bulk supply. A perusal of the correspondence entered into between the plaintiff and defendants 1 and 2 would disclose that the plaintiff had never made a grievance of the alterations in the terms of the contract. He also never laid the foundation on a legal basis for a case for the recovery of the alleged illegal imposition by the authorities. He only indented for bottled arrack (750 ml) at the rate of Rs. 4.35 per bottle ; he was supplied with the same and therefore, he could not have any grievance on the alleged ground that there was an illegal imposition of the higher rate by the non-supply of bulk arrack. In our view on the facts and circumstances of the case, the plaintiff had not been able to make out a statable, if not acceptable cause of action against the defendants. In fact as the pleadings and the evidence disclose the plaintiff has had no cause of action against the defendants.

17. The trial Court gravely erred in rejecting the evidence of D.W. 1 on this point and also the documentary evidence namely Ex. D. I and D. 2. These are all official acts and there is a presumption attached to the accuracy of the contents of such documents as the same came into existence in the performance and discharge of official acts and duties. The trial Court has grossly erred in its appreciation of evidence. By way of illustration, the following observations made by it in its judgment may be noticed :

"It must be noticed that with concern all the legal requirements are completely ignored in the present case by the concerned officers. Had they taken the matter seriously, there was no reason to land in the litigation of the present nature. This observation is made in the context of disposing of the question whether at all the officers of such a responsible position would have dealt with the matter by mere telegram Ex. D. 2 purported to have been issued by the Excise Commissioner of mere announcement said to have been made by defendant-2 at the time of auction sale."

As regards the announcement of Ex. D 2, at the time of auction sale, it is only the sworn testimony of defendant-2 which is available on record. According to his own admission, he was assisted by the Headquarters Assistant to the Excise

Commissioner to conduct the auction sale. This officer is not examined in this case to corroborate the sworn testimony of defendant-2. Apart from all these, the defendant-2 has miserably failed to prove that either Ex. D. 2 could have been considered at the time of auction sale for any purpose much less was brought to the notice of the bidders that it is formed part of Ex. P. 9. In this regard, the Court with its great restraint comment is inevitable upon the conduct of defendant-2 that he has not acted with seriousness or with the knowledge of the fully implications of an auction sale of arrack, toddy etc. involving the financial interest of the State arising from such a transaction."

The trial Court expected or required the evidence of the subordinate officer the Headquarters Assistant to corroborate the evidence of D.W.I who was his immediate superior. In the circumstances, the plea of corroboration which was sustained by the trial Court on behalf of the plaintiff has seriously prejudiced the case of the defendants. Though it was suggested by the learned Counsel for the plaintiff that the plaintiff's evidence was equally trustworthy we must observe that the plaintiff was an interested party to the suit, whereas D.W.1. a senior officer of the State Government had no personal interest or personal stake in the matter. He had given evidence about the acts performed by him at an undisputed point of time and therefore as between the plaintiff and D.W.1 we must certainly give more credence to the evidence of D.W.1.

18. For the reasons stated above, both the parts of point No. 3 are answered in the affirmative.

POINT NO. 4

19. As a result of our findings on points 1 to 3, point No. 4 has to be answered in the negative. The suit claim having regard to state of pleadings and the evidence on record and on the established and undisputed facts of the case, we are clearly of the opinion that the claim was wholly misconceived. We are at a loss to know as to how the trial Judge could decree the suit. Point No. 4 is accordingly answered in the negative.

20. For the foregoing reasons, this appeal has to succeed. It is accordingly allowed. The judgment and decree of the trial Court are set aside and the suit filed by the plaintiff is dismissed with costs throughout.

We find from the Order Sheet that the plaintiff (now deceased) was permitted to Withdraw a sum of Rs. 1,40,000/-after furnishing security. Now that the defendants have succeeded in the suit, we hope that necessary steps would be taken to recover the amount from the legal representatives of the plaintiff who are brought on record, otherwise the interest of the State would be seriously prejudiced if such recovery proceedings are not initiated against them.

21. After we pronounced the Judgment, the learned Counsel for the plaintiff made an oral prayer for Certificate to appeal to the Supreme Court. In our view, the limitation point is held against the plaintiff on the basis of the Judgment of

the Supreme Court in Attili Swami and anr. -v.- The State of Hyderabad (Now Andhra Pradesh) and anr.1. The finding on point No. 3 is based on the appreciation of the evidence on record and that finding by itself is sufficient to dismiss the suit. In our view, the case involves no substantial question of law of general importance which needs to be decided by the Supreme Court. Therefore, we decline to grant the certificate prayed for.