
(1996) 10 BOM CK 0059
In the Bombay High Court
Case No : Writ Petition No. 2458 of 1986

Hari Shanker Ramaswarup Jaiswal

APPELLANT

Vs

Commissioner of Prohibition and Excise and Others

RESPONDENT

Date of Decision : 05-10-1996

Acts Referred:

Citation : (1996) 98 BOMLR 878

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Judgement

V.S. Sirpurkar, J.—The petitioner herein challenges the recovery proceedings against him ordered by the Collector, Bhandara/respondent No. 2, and sought to be recovered by the respondent No. 3/Naib Tahsildar, Gondia.

2. The following factual panorama will highlight the controversy involved. Toddy shops are auctioned in Bhandara district. One such auction was to be held for a Toddy Shop No. 2 at Gondia for the period 1st September, 1982 to 31st August, 1983. This auction was to be held on 17.8.1982 at Bhandara at 3. O'clock. A notice therefore was issued, which included all the conditions of auction. Condition Nos. 3, 12 and 13 as also 14 are the relevant conditions. Condition No. 3, which is in consonance with Rule 5 of the Maharashtra Toddy Shops (Grant of Licences by Auction or Tender) Order, 1968 (hereinafter referred to as: "the Order" for the sake of brevity), was that every person wishing to bid in the auction must satisfy the Collector about his solvency and he must have a solvency certificate which he must produce before the Collector. If he does not have a solvency certificate, then he must have at least inform the Collector before the bid commences that he would be able to pay on the spot, in cash, the whole amount of bid, or at least furnish security equivalent to such bid amount in the form of Government Promissory Notes, National Saving Certificate, Post Office Cash Certificates or Bank Guarantee. Condition No. 12 corresponds to Rule 13 of the Order and suggests that a person, whose bid is accepted shall at once, or on the next working day, pay to the officer duly authorised by the Collector in

this behalf or any Government Treasury or Sub-treasury, one-fourth amount of the bid or tender. It is further pointed out in that condition that if such one-fourth amount of the bid is not paid as per the condition, the whole amount would be adjusted and recovered in six monthly installments, and the licence would not be granted to such a person. Rule 13 of the Order further provides that it would not be necessary for a person to pay this one-fourth amount, if he is prepared to pay whole amount in cash, or furnishes a security equivalent to the amount in the form of Government Promissory Notes, National Saving Certificates, Post Office Cash Certificates or Bank Gurantees, etc. In addition to this, such person, whose bid is accepted and who has paid one-fourth of the bid amount or has paid the security, has to execute a bond in the prescribed form, unless of course he has paid whole amount already. Condition No. 13 in the notice corresponds to Rule 16 of the Order and suggests that every successful bidder shall pay the balance of the bid or tender amount in six equal monthly installments obviously if he has not paid the whole amount earlier. The rule, also fixes the time for the payment of such installments. Sub-rule (2) of Rule 16 is not relevant for the purposes of present controversy. The form clearly suggests that it is in terms of Rule 16. Rule 14 of the said order provides that if such person fails to pay one-fourth amount of the accepted bid as provided in Clause 13, the licence shall be immediately reauctioned, and if the amount realised at the second or subsequent auction is less than the first, the defaulting bidder shall have to pay the difference, and if the amount of such difference is not paid by the defaulter, it shall be recovered from him. Rule 14A of the Order provides that if a person fails to pay the one-fourth amount of the accepted tender, the Collector may cancel the acceptance of his tender and accept the next highest tender, and in that event the earnest money deposited by the defaulting tender shall stand forfeited to the Governor of Maharashtra and the defaulting tenderer shall be liable for any loss sustained by the State Government in accepting the next highest tender.

3. The petitioner submits that his auction bid for Rs. 91,000/- was accepted in respect of the above shop and he, on that day, paid Rs. 22,750/ which is a one-fourth of the total bid. The case of the petitioner further is that thereafter he expected the further procedure as per Clauses 15 and 16 to be followed and he was always prepared to enter into an agreement in terms of Clause 15 and also execute a bond in terms of Rule 13 of the Rules, but to his utter dismay, this was not done. Instead, he was asked to give an undertaking on the same day that the surety and further solvency certificates should be produced on 18.8.1982. He contends that he got the solvency certificate on 19.8.1982 and submitted the same before the concerned authorities and, therefore, since he had already paid the one-fourth amount, he was expecting that he would get the said licence and he would also be asked to enter into agreement; but to his utter dismay, he had received a communication dated 24.8.1982 and 26.8.1982 stating that since he had not deposited the cash of Rs. 68250/- on 18.8.1882, the toddy shop of Gondia would be reauctioned on 17.9.1982. The petitioner submits that he filed an appeal before the Commissioner, Prohibition and Excise, challenging the re-

auction of the toddy-shop and also sought the stay of that order. However, it seems that no stay was granted to him. It seems that the petitioner approached this Court by way of Writ Petition No. 1926/84 against the order refusing the stay and the stay order was granted by this Court for some limited time. However, it seems that this petition was withdrawn on 20.12.1982 probably because the order of the Commissioner itself came to be passed on 7.10.1982 dismissing the appeal filed by the petitioner. Thereafter, the petitioner did not do anything though there was a recovery notice already sent to him. The petitioner disputes the receipt of this notice. The petitioner then filed a Writ Petition, bearing No. 993 of 1986 as he received a recovery notice dated 15.5.1986. In this petition, the petitioner explained as to why he was keeping quiet between 1982 to 1986. It is needless to mention that during this period, the recovery proceedings were not pursued by the Department and it was only in the month of May, 1986 that a notice was sent to the petitioner for the recovery of the amount. In Writ Petition No.993 of 1986, the petitioner made a limited prayer of quashing the recovery proceedings started on the file of Naib Tahsildar Gondia and also staying the further proceedings of recovery. This petition was withdrawn on 26.11.1986 and the following order was passed:

Coram : Puranik and Loney, JJ. Dated : 26.11.1986

Allowed to withdraw. Hamdast allowed.

After this, the present petition came to be filed on 8.12.1986, almost within eight days of the withdrawal of Writ Petition No. 993 of 1986.

4. In the instant writ petition, the petitioner made a fresh prayer for quashing of the orders passed by the Collector by which the Collector had ordered the reauction of the shop. The petitioner also challenged the appellate order dated 7.10.1982 passed by the Commissioner Prohibition and Central Excise. The petitioner further alleged that the decision of the Collector to order reauction was itself an incorrect order, as the petitioner had already paid one-fourth of the amount of the auction bid and under the Rules the petitioner could not have been asked to pay the whole amount on the next day or he could not even have been asked to furnish security for the rest of the amount and the rest of the amount could not have been recovered from him. The Court record shows that this petition was entertained by the same Bench consisting of the Honourable Shri Justice S.W. Puranik and Honourable Shri Justice G.G. Loney.

5. Mrs. Naik, learned Counsel appearing on behalf of the petitioner, firstly invites the attention of the Court to the aforementioned Rules and Order and submits that there was no question of asking any undertaking or recovering the rest of the money of the same day, or as the case may be, on the next day; once the petitioner had fully complied with Rule 13. She submits that under that rule, the only requirement was the payment of one-fourth, amount of the bid and once that amount was paid, the only formality that was required to be complied with by the petitioner was executing the bond in the appended form, by which bond

the petitioner would have shown his volition to pay the balance of the bid amount in the manner provided for by Clause 16 of the Order. The learned Counsel further contends that instead of doing this, a fanciful action was restored to by the Collector and a personal bond was got executed by the Collector from the petitioner, wherein it was got written that at the time of auction, the petitioner had not shown any solvency and though he had paid Rs. 22,750/- which was the one-fourth amount the bid, on 17.8.1982, the rest of the amount of Rs. 68,250/- would be paid by him on 18.8.1982 and if he failed to pay the said amount, the amount of Rs. 22,750/- would be confiscated to the Government and he would not be entitled to the licence of toddy shop No. 2, and the remaining amount could be recovered from the property of the petitioner or his legal representatives. The learned Counsel points out that such a bond was neither contemplated by the Rules, nor had any justification also in effect.

6. Shri Jugalkishore Gilda, learned Government Pleader, appearing on behalf of the respondents, however, opposes and counters these contentions, by relying on Rule 5 that it was incumbent upon the petitioner under that rule to convince the Collector about his capacity to take part in the auction. He submits that in the present case there is a non-compliance of Rule 5 by the petitioner. He further submits that once the bond was given in writing by the petitioner, the petitioner loses all his right, and if the petitioner has failed to honour his commitment, which he had given on 17.8.1982, then the Collector was fully justified in ordering a re-auction of the shop. He points out the relevant Rules 14 and 14A, that if there is some shortfall in the re-auction, then the Collector was fully justified in recovering the said shortfall from the petitioner. But before opposing this, Shri Gilda submits that all these questions were already concluded in Writ Petition No. 1926 of 1982 and more particularly in Writ Petition No. 993 of 1986 which was unconditionally withdrawn by the petitioner without reserving a liberty to file a fresh petition in that behalf. Shri Gilda submits that the questions involved in Writ Petition No. 993 of 1986 and the present petition are identical and, therefore, such unconditional withdrawal by the petitioner would disentitle him from pursuing the present petition.

7. Question, therefore, is as to whether the auction on the part of the Collector was right in law and whether the Collector could have ordered a re-auction of the shop and then proceed to recover the shortfall from the petitioner, as also whether in the wake of earlier withdrawals, the present petition can be entertained.

7A. As regards Writ Petition No. 1926 of 1982, the said writ petition was clearly against the refusal of stay by the Commissioner. In that writ petition the High Court had granted the stay of the re-auction of the shop till the decision of the appeal by the Commissioner. Therefore, that petition became in fructuous as soon as the Commissioner passed an Order on 7.10.1982. In Writ Petition No. 993 of 1986, the petitioner had averred that after the decision of the appeal by the Commissioner on 7.10.1982, the toddy shop was reaucted for Rs.

69,000/- (in fact, it should have been for Rs. 22,000/-) to somebody else. It was further contended that because of the illegal order of the respondent No. 3 the Superintendent, Prohibition & Excise, Bhandara, the auction for Rs. 91,000/- in favour of the petitioner was cancelled causing the loss to the Government. The figure stated in para 11 of that writ petition was of course incorrect as, in fact, the shop was auctioned for Rs. 22,000/- and the Government suffered the loss of Rs 69,000/- and not vice versa, as has been stated in that paragraph. The petitioner then proceeds to submit that the recovery proceedings had been started by the Naib Tahsildar, Gondia, In the grounds also, the petitioner contends that he had already submitted the solvency certificate and he was allowed to bid and there was a perfect compliance of Rule 5 of the Order. It is further suggested that the so-called undertaking was also not required at all. In ground No. 3, it is stated that the one-fourth amount was already paid and the rest of the amount could be recovered only in six equal monthly installments and, therefore, the Collector had no authority in law to obtain an undertaking, as he did. It was further contended that the Commissioner had not applied his mind to the matter and had erred in not appreciating that the principles of natural justice were not followed prior to reauction. It was also pointed out that the learned Commissioner did not at all consider the grounds raised by the petitioner that the Collector, having accepted one-fourth amount of the bid, the bid had become final and reauction could not be done. In para 13, it was stated that the petitioner had received a notice of recovery of Rs. 22000/- with interest. It was pointed out that the responsibility to challenge the order of the Commissioner was that of one Kasturchand, but since the relations between the petitioner and the said Kasturchand had been strained, he himself did not file an appeal and believed in the representation made to him by the said Kasturchand that the said appeal (probably the petitioner meant revision) was pending. In the prayer clause, all that the petitioner claimed was quashing of the recovery proceedings and the refund of Rs. 22,750/- with interest. It is very significant to note that in this writ petition, the order of the Commissioner, though assailed in the grounds, there is no prayer for quashing of the same.

8. Along with that petition, the only-annexures, which were filed, were the order of respondent No. 3/Superintendent, Prohibition and Excise, Bhandara, dated 23.8.1982, and the order of the Commissioner, Prohibition & Central Excise, dated 7.10.1982. As has already been pointed out, after Writ Petition No. 993 of 1986 was withdrawn on 26.11.1996, the present petition came to be filed within eight days, wherein by a specific prayer, the said order dated 7.10.1982 was also assailed. The petitioner also challenged the order dated 24.8.1982 passed by the Collector, whereby a re-auction was ordered. The petitioner further challenged a notice dated 11.11.86 which was given during the pendency of Writ Petition No. 993 of 1986. It would, therefore, be clear that on the earlier petition, though substantially the order passed by the Commissioner was challenged, there was no prayer made to that effect. Further, it was during the pendency of this writ petition that a fresh notice for the ascertained sum of Rs. 46,150/ came to be

given. When the Writ Petition No.993 of 1986 was filed, there was no such notice for ascertained sum of Rs. 46,150/- given to the petitioner; at least there is no reference to any such notice in the petition and, indeed, there could not have been because earlier admittedly no such notice was given for an ascertained sum. It is probably, therefore, that only the proceedings before the Naib Tahsildar were challenged in Writ Petition No. 993 of 1986. In the whole body of the petition also, there does not appear to be any reference to a specific notice for an ascertained sum of Rs. 46,150/. It was probably, therefore, that Writ Petition No. 993 of 1986 was withdrawn by the petitioner and a fresh petition, firstly challenging the order of the Commissioner and, secondly, challenging the notice for recovery of the ascertained sum of Rs. 46,150/- was filed by the petitioner: not only was it filed but it was entertained also by the same Bench which had permitted the earlier withdrawal and a stay was granted. The objection raised by Shri Gilda, therefore, that the subject matter and the questions and the points involved were common in both the petitions is, therefore, not right. After Writ Petition No. 993 of 1986, as has already been pointed out, a fresh cause of action had arisen on account of a notice dated 11.11.1986 and prior to that there was no notice at all sent to the petitioner for recovery of the ascertained sum. That apart probably the petitioner was permitted to change the prayer clause and include a challenge to the order passed by the Commissioner which challenge was not there in Writ Petition No. 993 of 1986. Under the circumstances stated above, it would be difficult to hold that firstly Writ Petition No. 993 of 1986 was unconditionally withdrawn and secondly, that such unconditional withdrawal would bar the petitioner from canvassing the present petition. After all, it is seen from the record that while withdrawing Writ Petition No. 993 of 1986, it was specifically circulated for withdrawal before the Bench. Not only that but a Hamdast order was also obtained. Thirdly, it was the same Bench which entertained the next petition, whereupon a notice was ordered and in spite of these circumstances having been pointed out by the State Government, the matter was admitted. All these circumstances would go to show that on the ground of res judicata, the challenge of the petitioner cannot be stifled. That leaves me to consider the merits of the matter.

9. Here, the petitioner is on much stronger pedestal. It has already been pointed out by reference to the various rules, including Rules 13, 14, 14A, 15 and 16, that Rule 5 operates only prior to the auction. It does not have any application to what happens after the auction. A plain reading of Rule 5 suggests that an officer holding auction has to be satisfied about the capacity of the bidder to take part in the bid so that he is convinced that false bidding is avoided. Once a bidder crosses that stage and is allowed to take part in the bid, the operation of Rule 5 is over. Heading of the rule and the specific language thereof bring out this position unquestionably. The contention that Rule 5 was breached by petitioner by not furnishing solvency certificates is incorrect, apart from the fact that such breach is inconsequential for the further course.

10. Then comes Rule 13 into operation; it is the most important and the relevant rule. The rule suggests that once the bid is accepted, the bidder will have to pay one-fourth of the amount at once, or on the next working day. If the bidder does not wish to pay that one-fourth amount, then either he has to pay the whole cash or he has to give the security. The use of the word "unless" after the first clause specifically suggests that the bidder can even avoid to pay one-fourth amount also, provided he furnishes a proper security to the satisfaction in the forms prescribed in the rule. The specific language of the rule further suggests that in addition to this, i.e., paying the one-fourth amount or furnishing the security therefor, the bidder has to execute a bond in the appended form. It is trite that if the bidder has already paid the whole amount, then he would not be required to execute a bond. The said bond is necessary to ensure the compliance with Rule 16, whereby the bidder is given six monthly installments to pay the remainder of the amount, or the whole bid amount where he has given security and has not paid one-fourth of the amount. This in short is the mechanism provided by Rule 13. Rule 13A provides for deposit which is a security deposit and we are not concerned in this case with that. It is Rule 14 which suggests that if the bidder fails to pay one-fourth of the amount of the accepted bid, then the licence shall be immediately re-auctioned. Probably, the authorities are taking recourse to this rule. For operation of this rule, it is sine qua non that the bidder must have defaulted to pay one-fourth amount. Here, it is an admitted position that the bidder, on the same day, had paid Rs. 22,750/- which was exactly the one-fourth of the total bid. Therefore, operation of Rule 14 was completely outside the scope. Rule 14A provides for forfeiture. There also the pre condition in the failure on the part of the bidder to pay one-fourth of the amount of the bid. Therefore, there is no question of even the forfeiture. One, therefore, fails to understand as to under which provision the Department proceeded to obtain the under-taking from the petitioner/bidder, which the Department is now seeking to rely upon. Shri Gilda very heavily relies on that undertaking. The so-called undertaking does not, in any manner, conform to any of the rules. There was, therefore, no justification in law whatsoever in taking that undertaking. If the undertaking was without any justification in law, the insistence of the Department on such undertaking would be totally uncalled for and that cannot be used as a defence.

11. In short, here was a case where a bidder had actually paid one-fourth amount in keeping with the rules as also the auction notice. All that was required to be done was to ask the bidder to execute a bond. That was not done and there was no explanation for not doing so. Instead, the bidder was asked to pay the full sum of Rs. 68,000/- approximately on the next day. One fails to follow as to how the Department made such a fanciful demand. That apart, completely ignoring the spirit of Rule 16, which permitted that remaining amount to be paid in six equal monthly installments, no notice whatsoever was given by the Department to recover that money. Instead, the Department in a huff went on to order a re-auction. It is quite another matter that the said re-auction was stayed

by this Court. Unfortunately, all this situation has been completely missed by the Commissioner, who dismissed the proceeding before him mechanically. That order is, therefore, erroneous. It is a trite law that once the High Court choose to entertain the writ petition and admits the same, then the defence of laches cannot be raised by other side. Though, therefore, writ petition No. 993 of 1986 as also the present writ petition were presented almost after a four years of the passing of the order of the Commissioner, it will have to be deemed that the Court entertaining this petition and admitting the same had ignored the laches. Therefore, even that argument is not possible to be made against the petitioner. Further where there is patent injustice, as in the present case, the technical plea of laches or res judicata etc., would not be allowed to defeat the petitioner's case. It has already been shown that plea of res judicata was even otherwise not available to respondents.

12. In short, on merits, the petitioner had a perfect case which was completely ignored by the Department for the reasons best known to the said authorities. It is therefore obvious that in issuing the notice for recovery of Rs. 46,150/- a patent injunction has been perpetrated against the petitioner, whereas the Department should have granted him the licence, the Department has not only chosen to recover the amount of Rs. 46,150/- from the petitioner, but in the present return, even an interest at the rate of 18.50% has been claimed against him. The Court is surprised at this demand. It is really not known as to under which provision of law the said interest is being claimed. This is not a commercial transaction so as to invite a commercial rate of interest. After all, this is a matter between a State Department and a private citizen. Such demand of interest should, therefore, have been desisted. Rs. 1,15,181/- plus Rs. 7,956.00 have been claimed as an interest. The Court expresses its surprise at this demand in the return.

13. That apart, further no authority has exactly arrived at this figure. There is no opportunity given to the petitioner to be heard. The petitioner has not even been noticed for the purposes of hearing and ascertaining whether, in fact, he was liable to pay all this amount, and this shows a shocking casualness on the part of the Department. The Court only hopes that such shocking casualness is avoided in future.

14. In the result, the petition must succeed. The impugned order of the Commissioner is set aside. The notice of demand for Rs. 46,150/- and the proceedings initiated therefore are quashed. The demand of the petitioner for refund of Rs. 22,750/- will have to be accepted. The State Government shall refund this amount to the petitioner within two months from today. It shall be, however, open to the petitioner to claim before the concerned authority the interest on this amount and, for that purpose, the authority shall hear the petitioner. The petitioner is directed to attend the Court of the Naib Tahsildar, Gondia, on 5th November, 1996. The rule is made absolute in these terms, with costs.

15. At this stage, Shri Gilda, learned Government Pleader, prays for the stay of this order. In the circumstances stated above, the request of the learned Government Pleader cannot be acceded to. It is rejected. The certified copy of this judgment be supplied to him as early as possible.