(2013) 02 RAJ CK 0142

In the Rajasthan High Court

Case No : Civil Writ Petition No. 2856 of 2001

Krishna Lal and Party APPELLANT

Vs

State of Rajasthan and Others RESPONDENT

Date of Decision : 13-02-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Rajasthan Excise Act, 1950 — Section 31, 33, 41, 41(2), 42

Citation : (2013) 3 CDR 1165 : (2013) 2 WLN 22

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : K.K. Sharma, with Mr. Rahul Choudhary, for the Appellant; R.B. Mathur with Mr. Nikhil Simlote, Counsel, for the Respondent

Judgement

Mohammad Rafiq, J.—This writ petition has been filed by petitioner Krishna Lal and Party, inter-alia, with following prayer:--

(i) by a writ of certiorari or any other appropriate writ, order or direction in the nature thereof the notification dated 6.2.1991 issued by the Excise Commissioner, and as publish in the Rajasthan Gazette dated 7.2.1991, prescribing the forms of licence for retail sale of country liquor, retail and wholesale of IMFL and Beer to the extent it demands cash security and more specifically, condition No. 25 of the licence for retail sale of country liquor; condition No. 28 for retail sale of IMFL and condition No. 26 for retail sale of Beer, may be declared ultra vires Sec. 31 of the Act as well as Article 14 of the Constitution of India and the same may be quashed;

(ii) by an appropriate writ, order or direction, the action of the respondents in not providing payment of interest on the cash security furnished by the petitioner may kindly be declared to be arbitrary, unreasonable and the respondents may be directed to make payment of interest on cash security collected by the respondents from the petitioner at the same rate realized by the respondents u/S 30A of the Act;

While the prayer contained in clause (i) supra has, due to lapse of time, has become redundant and, therefore, the learned counsel for the parties have prayed that it may not be necessary to decide the writ petition in respect of prayer clause (i). Learned counsel for the parties have addressed the Court only in so far as prayer contained in clause (ii) is concerned. The matter is accordingly considered and decided by this judgment.

2. Facts of the case shorn of unnecessary details are that petitioner was granted licence of the exclusive privilege for the wholesale and retail sale of Indian made foreign liquor and beer and retail sale of country liquor for Jaipur city Group of Shops, for the years 1991-1992 and 1992-1993. Aforesaid license was granted to the petitioner after their participation in the process of tender pursuant to tender auction notice dated 06.02.1991 issued by the Excise Commissioner. Petitioner submitted his tender for Jaipur City group and offered the highest bid. Petitioner was awarded contract for retail sale of country liquor and it accordingly started business from 01.04.1991. For the first year, petitioner agreed to pay to the Government a sum of Rs. 37 crore for exclusive privilege amount with further undertaking, however, since the licence was for two years, the petitioner, for the second year, agreed to pay aforesaid amount along with increase by 15%. Condition No. 10 of the tender, copy of which is on record, provided that tenderer would be required to enclose with the tender a certificate duly attested with regard to his financial capacity and the said certificate should be of a minimum value of at least 12.5% of the total tender amount. Under condition No. 12(Ka) of the tender notice, another condition has been put that the tenderer along with his tender would be required to deposit earnest money in cash as notified in the tender notice in Column No. 6. Condition No. 13(Ka) provided that in case the tender is accepted, the successful tenderer would be required to deposit in cash an amount by way of security, equivalent to 12.5% of the exclusive privilege amount for the year 1991-1992 in relation to country liquor, IMFL and Beer, within a period of three days from the date the list of successful candidates is notified. The earnest money deposited by the tenderer would be adjusted against the amount of security and balance security should be deposited by the tenderer by 20.03.199,1. Condition No. 13(Kha) provided that on the tender being accepted, the tenderer will have to deposit 1/3rd of the amount of exclusive privilege for wholesale licence of IMFL for the year 1991-1992 as security by 20.03.1991 and earnest money would be adjusted therein. Condition No. 13(Ga) provided for ensuring due payment of the monthly installments of the exclusive privilege amount and that the tenderer will also have to furnish, apart from the security amount, one or more than one, solvent sureties for the amount equivalent to residual monthly installments for wholesale of IMFL and in case of country liquor, IMFL and Beer retail sale, the solvent surety would be equal to the amount of security, which would be required to be furnished by 20.03.1991. According to the petitioner, the petitioner has already submitted cash security to the tune of Rs. 4,65,76,045/- and submitted solvency bonds to the tune of Rs. 4,62,50,000/- and solvent sureties to the tune of Rs. 4,70,97,720/-. For the year

1992-93, the total amount of petitioner''s security, solvencies and sureties is Rs. 16,09,12,322/-, out of which the petitioner deposited cash security to the tune of Rs. 5,35,62,452/-. The amount so deposited by the petitioner in cash with the respondent department remained with them for the entire period of more than two years but the respondents have not paid any interest whatsoever to the petitioner for retaining such a huge amount for this long period. On the other hand, the petitioner licensee was required to pay, according to Sec. 30-A of the Rajasthan Excise Act, 1950, (herein, ''the Act of 1950'') interest to the State in case any amount is due, at the rate of 1 1/2% per month for the first three months and at the rate of 2% per month after three months. There is absolutely no justification for not paying interest to the petitioner on the cash security furnished by him as licensee.

3. Shri K.K. Sharma, learned senior counsel for petitioner, has submitted that under Sec. 30-A of the Act of 1950 in case there was any default in payment of exclusive privilege amount, the respondents have used the amount of cash security lying deposited with them against such default and the petitioner licensee would be required to refurnish replenish the cash security to the extent of short fall. It is contended that the power of the Excise Commissioner to prescribe restrictions or conditions, on which any license could be granted, is circumscribed by the matters enumerated in clause (e) of Sec. 42 of the Act of 1950 and are not general. Moreover, the power of the State Government is overriding and the power has been granted only to the State Government under the Act to frame Rules in this regard. The Excise Commissioner cannot prescribe the conditions in the form of conditions of licence requiring the licensee to deposit the cash security. Such powers vest only in the State Government under Sec. 42 of the Act of 1950. It is only the State Government, which can, under Sec. 41 of the Act of 1950, make Rules laying down the condition of deposit of cash security. The Excise Commissioner does not have any such power.

4. Shri K.K. Sharma, learned senior counsel for petitioner, argued that Rule 93 of the Rajasthan Excise Rules, 1956, only empowers the Commissioner to prescribe the forms for any licence, permit, permission etc., but in exercise of that power, the Commissioner certainly cannot call upon the licensee to deposit cash security. It is therefore prayed that the writ petition be allowed and respondents be directed to pay interest to the petitioner at the same rate at which it charged interest from petitioner as per provisions of Sec. 30-A of the Act of 1950.

5. Per contra, Shri R.B. Mathur, learned counsel for the respondents, submitted that the petitioner participated in the tender process with open eyes having fully known that if the petitioner is granted exclusive privilege license they shall have to deposit the cash security. It is argued that charging interest by the State Government under Sec. 30-A of the Act of 1950 on delayed payment by licensee, can have no parallel comparison with the deposit of cash security by the licensee. Besides, this was a clear condition in the notice-inviting-tender, which the petitioner voluntary accepted having been granted contract. The petitioner could

not subsequently take u-turn and challenge the condition. Petitioner has already completed two years period of contract and challenged the condition of award of contract without permissible in law. The Excise Commissioner in Notification dated 06.02.1991 prescribed various forms for licence wherein it has also included the condition of deposit of cash security.

6. Shri R.B. Mathur, learned counsel for respondents, submitted that according to Rule 72 of the Rajasthan Excise Rules, 1956, it is the Excise Commissioner who has power to grant licenses. Section 93 has empowered him to prescribe forms for any license, permit, permission or pass to be issued under the Rules of 1956. Learned counsel for the respondent submitted that Sec. 42 of the Act of 1950 empowers the Excise Commissioner to make rules, subject to previous sanction of the State Government, on the topics enumerated therein including prescribing the restrictions and conditions on which any licence, permit, permission or pass may be granted. What the Excise Commissioner could prescribe by Rules, he could also do by executive orders in the form of tender conditions and in the license forms.

7. Shri R.B. Mathur, learned counsel for the respondents, referred to Rule 60 contained in Chapter VII of the Rules of 1956, which prescribes the license process for auction and submitted that the Rule 61(2) has provided that subject to such terms and conditions, as may be laid down by the Excise Commissioner, the Presiding Officer shall call bids to be offered regarding the annual fee to be paid for the licence concerned. Similarly, Rule 66 of the Rules of 1956 provides that Excise Commissioner may at his discretion direct the adoption in a particular case of a method other than auction for the grant of a licence. It is thus clear that the Excise Commissioner has wide power to lay down the requirement of cash security as one of the conditions.

8. Shri R.B. Mathur, learned counsel for respondent cited a judgment of the Supreme Court in State of Rajasthan and Others Vs. Anil Kumar Sunil Kumar and Party and Another, on the point of estoppel, to argue that petitioner, having consciously participated in the auction, is estopped from challenging such condition.

9. Having heard learned counsel for the parties and perused the material on record, I have given my anxious consideration to rival submissions.

10. Contention that the Excise Commissioner would have no power to require the parties, participating in the tender process and having been granted license, to deposit cash security, has to be considered in the light of not just one provision of the Act of 1950 or the Rule of 1956, but it is to be adjudicated by examining the whole scheme of the Act and the Rules. Section 31 of the Act of 1950 provides that every licence, permit or pass granted under the Act, shall be granted by such authority on payment of such fees, if any, subject to such restrictions and on such conditions in such form and containing such particulars and for such period, as the State Government may prescribe by rules either

generally or for any class of licenses, permits or passes or as the State Government may direct for any particular licence, permit or pass. Section 33 however further provides that any authority granting licence under the Excise Act may require the grantee to execute a counter part agreement in conformity with the tenor of his licence and to give such security for the performance of such agreement or to make such deposit in lieu of security, as such authority may think fit. Section 41(2) has empowered the State Government to make rules for the purpose of carrying out the provisions of said Act or other law for the time being in force relating to excise revenue. Clause (a) of sub-sec. (2) of Sec. 41 provides that the State Government may make rules regulating the delegation of any powers by the Excise Commissioner. Clause (b) thereof provides that the State Government may make rules prescribing the powers and duties of Officers of the Excise Department. Section 42 empowers the Excise Commissioner subject to previous sanction of the State Government to make rules inter-alia on various subjects including prescribing the restrictions under and the conditions on which any licence, permit or pass may be granted. When these provisions are analyzed in the light of various other Rules of 1956, it is in this context that Rule 61(2) of the Rules of 1956 assumes significance, which inter-alia provides that subject to such terms and conditions as may be laid down by the Excise Commissioner, the presiding officer shall call bids to be offered regarding the annual fee to be paid for the licence concerned. Rule 66 even empowers the Excise Commissioner to adopt any other method in a particular case than auction for the grant of such licence. Rule 73 of the Rules of 1956 empowers the Excise Commissioner to prescribe forms for any licence, permit or pass to be issued under these Rules.

11. A conjoint reading of all these provisions thus makes it clear that the Excise Commissioner has requisite competence to lay down the condition of deposit of cash security as one of the conditions of tender and merely because the State Government has not specifically used the word ''cash security'' in the scheme of the Rules, does not restrict wide powers conferred upon the Excise Commissioner under Rule 60(2) of the Rules of 1956 to lay down such terms and conditions subject to which the District Excise Officer or any other Officer authorized by him to preside the auction proceedings and the auction shall be subject to such terms and conditions as may be laid down by the Excise Commissioner, and it should be read to mean any other terms and conditions than the one requiring deposit of cash security. There is neither any logic nor warrant to place such an interpretation to the aforesaid Rules, particularly when Rule 66 has conferred much wider power on the Excise Commissioner to decide in his discretion to adopt in a particular case a different method than the auction for grant of license. Rule 93 empowers the Excise Commissioner to prescribe forms for any license, permit, permission, or pass to be issued under these Rules and, therefore, the notification dated 06.02.1991 issued by the Excise Commissioner prescribing various forms including, one which contains condition of deposit of cash security, cannot be said to be without jurisdiction or competence. Petitioner cannot demand and be paid interest on the deposit of cash security on the

analogy of Sec. 30-A of the Act of 1950, which has altogether different purpose. Section 30-A provides that if the amount of any duty, fee or other demand due against any person under this Act or the Rules made thereunder is not paid till the due date as prescribed, the licensee shall be liable to pay on the amount due simple interest at the prescribed rate from the day next following the date on which the payment of such duty fee or demand became due. The cash security has been demanded by the respondents purposely to ensure security of the revenue of the State, which is explained from the fact that if and when the licensee, like the petitioner, would default in making payment of exclusive privilege amount payable every month, the same would be liable to be adjusted against the amount of cash security and the licensee would be required to good the shortfall of the cash security. The petitioner was fully aware of this condition when participated in the tender process. Having secured the exclusive privilege license to operate the business, the petitioner would be estopped from questioning validity of aforesaid condition.

12. In the State of Orissa and others Vs. Narain Prasad and others, etc. etc., it was held by the Supreme Court that a person after securing a contract taking into account its terms, cannot later be allowed to assail validity of those terms or Rules constituting the terms of the contract by invoking the extra ordinary jurisdiction of the High Court under Article 226 of the Constitution of India. In view of the aforesaid discussion, I do not find any merit in the writ petition and therefore the same is dismissed.