(1997) 09 MAD CK 0110

In the Madras High Court

Case No : Writ Petition No. 12661 of 1993

N. Velappan Nair APPELLANT

Vs

The Commissioner of Prohibition and Excise and Others RESPONDENT

Date of Decision : 04-09-1997

Acts Referred:

Tamil Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981 — Rule 2, 21, 5

Citation : (1997) 3 CTC 693

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : G.S. Thamby, for Isaac Mohanlal, for the Appellant; K. Balasubramanian, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

P. Sathasivam, J.—Aggrieved against the proceedings of the Commissioner of Prohibition and Excise (first respondent) dated 6.5.93, the

petitioner has filed the above writ petition to quash the said order on various grounds.

2. The case of the petitioner is briefly stated hereunder:- The petitioner was granted Licence to run 9 arrack shops and 5 toddy shops in

Vilavancode Taluk for the Excise year 1982-83. Due to rivalry in trade, he was not able to carry on business properly and failed to remit monthly

kist for the month of November, 1982. In the meanwhile, the third respondent sent a notice askin; him why the licence should not be cancelled and

re-auction fixed. After knowing this, he filed O.S.No. 605 of 1982 before the District Munsi Kuzshithurai for an injunction. By order dated 29-11-

1982 of the Distric Munsif he secured an interim in junction order. Subsequently the said order was dismissed on 8.1.1983. Thereafter, without conducting any action the third respondent sent a notice on 6.9.1983 directing the petitioner to remit a sum of Rs. 4,07,500. He filed W.P.No.

9151 of 1983 before this Court challenging the said notice. By Order dated 11.9.1991 in W.P.No. 9151 of 1983 this Court has quashed the said

demand and permitted the respondents from working out their remedy and rights against the petitioners, if any in accordance with law. Against the

said order, the Government filed appeal in W.P.No. 56 of 1992. The Bench in the said writ appeal have once again quashed the impugned

demand, however, directed the Commissioner of Excise and Prohibition, Madras, to conduct a fresh enquiry with regard to the claim made by the

respondents and directed him to consider and dispose of after giving proper opportunity to the petitioner. The Commissioner, Prohibition and

Excise, by the impugned order dated 6.5.93 after holding that the petitioner is liable to pay the loss to the Government and directed the third

respondent to take appropriate steps to recover Rs. 4,07,500 under the provisions of Revenue Recovery Act. According to the petitioner, the

order of the first respondent is contrary to Rules and against the principles of natural justice.

3. On behalf of the respondent, the second respondent filed a counter-affidavit disputing various averments made by the petitioner. When the third

respondent issued a notice to the petitioner to pay the kist arrears, he filed W.P.No. 9151 of 1983 before this Court. In this said writ petition this

Court has directed the respondents to proceed against the petitioner for damages only by way of separate proceedings. The respondents filed

W.A.No. 66 of 1992 against the order in W.P.No. 9151 of 1983. The Bench has remitted the matter to the Commissioner of Prohibition and

Excise for fresh disposal after giving notice to the petitioner. The first respondent, after giving adequate opportunity to the petitioner after holding

that since the respondents 2 and 3 had tried on several times for re-auction of the shops and no tangible bids offered, the shops could not be re-

sold, relying on Rule 21 of the Tamil Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981 directed the petitioner to pay the entire

demand made by the third respondent. It is submitted in the counter affidavit that the shops taken by the respondents 2 and 3 were in accordance

with Rule 21 of the Rules and their claim is fully justified and prayed for dismissal of the writ petition.

4. In the light of the above pleadings, I have heard Mr. G.S. Thambi, learned counsel for the petitioner Mr. K. Balasubramanian, learned

Government Advocate for respondents.

5. There is no dispute that the writ petitioner was the ex-owner of 9 arrack shops and 8 toddy shops in Vilavancode taluk for the year 1982-83.

Since there was no default in payment of kist arrears for the months of November and December, 1982, the third respondent sent a notice

directing the petitioner to path the entire arrears immediately under Revenue Recovery Act against which he filed a writ petition namely

W.P.No.9151 of 1983 before this Court. By Order dated 11.9.91 this Court has allowed the writ petition and quashed the impugned notice.

However, the learned Judge of this Court made it clear that the order of this Court shall not stand in the way of the respondents working out their

remedy and rights against the petitioner, if any, in accordance with law. Aggrieved by the said order, the respondents preferred W.A.No.56 of

1992. The Division Bench while quashing the impugned demand therein directed the Commissioner, Prohibition and Excise (first respondent

herein) to conduct fresh enquiry and pass a appropriate order after giving adequate opportunity to the petitioner. In pursuance of the said order,

the Commissioner sent notice to the petitioner and the petitioner also participated in the enquiry. Ultimately the first respondent by the impugned

order accepted the case of the respondents 2 and 3 and directed them to recover the amount from the petitioner in accordance with law. Mr. G.S.

Thambi, learned counsel for the petitioner mainly contended that the respondents have not conducted re-auction as per rules 5 and 21 of the Tamil

Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981 (hereinafter referred to as ""the Rules""). Relying on the said Rules he also

contended that in the absence of compliance of the said Rules, the entire proceedings including the direction of the third respondent to pay the

amount as per the notice of demand cannot be sustained. On the other hand, the learned Government Advocate relying on Rule 21 of the Rules

submitted that the action of the respondents were in accordance with the provisions of the Rules and the first respondent after giving adequate

opportunity to the petitioner passed the impugned order, hence he prayed for dismissal of the writ petition.

6. I have carefully considered the rival submissions.

7. Since the controversy is very limited as per the argument of the learned counsel for the petitioner namely, that respondents have not followed the

provisions under Rules 5 and 21 of the Rules, I am not discussing the earlier litigation between the parties. It is true that the petitioner committed

default in payment of kist. Thereafter, according to the respondents, third respondent conducted re-auction on various dates. It is the case of the

respondents that because of the influence of the petitioner, no bidders were forth-coming, hence the second respondent has ordered for closure of

the shop. In view of Explanation to Rule 21 of the Rules, according to the respondents, their action is fully justified and the petitioner has to pay the

entire amount as claimed in the notice.

8. Now in order to appreciate the contention of the learned counsel for the petitioner, let me consider the relevant rules. Rule 5 deals with notice of

auction. It funs as follows:-

5. Notes of auction:- Where it is proposed to grant the privilege of retail sale of liquor, a notice of the auction to be conducted shall be published

by the Collector ten days in advance of the date of auction in the District Gazette, and in such other manner as the Collector may deem fit.

Rule 5 contemplates that when it is proposed to grant the privilege of retail sale of liquor, a notice of the auction to be conducted shall be published

by the Collector 10 days in advance of the date of auction in the District Gazette and in such other manner as the Collector may deem fit. As per

the said Rule, if the Collector may deem to conduct auction to grant the privilege of retail sale of liquor, the notice of the proposed auction shall be

published by him 10 days in advance of the date of auction in the District Gazette. Apart from the Gazette publication, it is open to the District

Collector to publish auction notice in such other manner as he may deem fit. It is the grievance of the petitioner that the Collector has not notified

the re-sale in the District Gazette as per Rule 5. Notification in the District Gazette ten days in advance of the date of auction is a mandatory one. If

the Collector so desires to conduct auction in such other manner, he can do so in addition of the notification in the District Gazette. Hence

notification in the District Gazette is a mandatory as per Rule 5. On conducting proper re-sale, if there is any less arising from the re-sale, undoubtedly as per Rule 21, the petitioner has to pay the same to the respondents and failing compliance, it is open to the respondents to recover

the amount as if it were arrear of land revenue. No doubt, Explanation to Rule 21 says that

for the purpose of this rule, disposal otherwise than by resale, includes closure.

In the counter-affidavit in para 5 it is explained as follows:-

Reauction of shops had been tried several times. None some forward to bid the shops, firstly due to the influence of the writ petitioner in the

areas, secondly half a period of the excise year was over by then so that nobody took special interest to participate in the auction sale and thirdly

number of shops to be auctioned were large (i.e.,) 9 Arrack Shops 5 Toddy Shops covering about 1/10th area of Vilavancode Taiuk.

Even though the petitioner has raised a specific plea that Rule 5 of the Rules has not been complied with unfortunately in the counter-affidavit, there

is no specific reference whether re-auction was conducted strictly in accordance with Rule 5 or not? No-where in the counter-affidavit the

respondents informed that re-auction was conducted strictly as per Rule 5 and no particulars regarding the date of publication of the Notification in

the District Gazette has been furnished in the counter-affidavit, nor records have been produced before me to disprove the contention of the

petitioner. If the resale is not in accordance with the provisions of the Rule and if any loss is occurred, the petitioner cannot be blamed. In other

words, a duty is cast on the authorities if any licensee commits default, it is open to them to conduct re-auction in accordance with Rule 5 read with

rules 21 of the Rules and on satisfying the said rules, if no one come forward to run the shop undoubtedly it is open to the respondents to recover

the losses from the original licensee. In our case there is no material to show that respondents have fully complied with the provisions of rules 5 and

21 except stating that ""re-action of the shops had been tried several times."" At this stage, the learned counsel for the petitioner relying on the

decision of the Apex Court reported in State of Haryana and Others Vs. Jage Ram and Others, submitted that if the re- auction itself is invalid

recovery cannot be effected. In that case which is similar to our case, Their Lordships of the Supreme Court have observed thus:-

Since the reauction was not held in accordance with the rules, either in their letter or in their spirit, and since, especially, due publicity was not

given to the reauction, it is impossible to uphold the reauction and mulct the respondents in the resultant shortfall. We arc of the opinion that Rule

36(3) of the rules was not even substantially complied with. It is reasonable to assume that since due publicity was not given to the reauction,

adequate bids were not received, resulting in prejudice to the respondents.

Accordingly, we set aside the finding of the High Court that the relevant rules governing reauction of vends were complied with substantially. Since

the reauction did not conform to the rules and the respondents were prejudiced thereby, they cannot be held liable to make goods the difference

between the amount which was payable by them and the amount which was fetched at the reauction.

In the light of the law laid down by the apex Court in the above referred decision and in the absence of any material by the respondents to show

that Rule 5 has been strictly complied with while conducting resale of the shops in question, I have no hesitation in holding that it is impossible to

uphold the reauction and mulct the respondents in the resultant shortfall. As stated in the said decision, the respondents must substantially comply

with and mere statement that reauction of shops had been tried several times may not be sufficient compliance. No doubt, the first respondent has

arrived at a conclusion that the petitioner is liable to pay the loss to the Government arising out of the cancellation of his licence even though the

cancelled shops were not re-sold. If the authorities (respondents) are able to show that there were proper resale including the publication in the

District Gazette, I have already expressed that there may not be any difficulty in accepting their case. In the absence of strict compliance of the

rules, the loss cannot be mulct with the petitioner. The very same view has been expressed by the Supreme Court and the said decision is directly

applicable to this case.

9. Net result, the writ petition is allowed and the order of the first respondent dated 6.5.93 is quashed. No costs.

10. It is unfortunate that in a matter like this, where recovery of loss from the defaulting licensee of arrack and toddy shops is involved, had the

Authorities strictly complied with the rules, the loss amount could have been recovered from the defaulted licensee. No sincere attempt, however, was made to bring to the knowledge of this Court that resale was conducted strictly in accordance with the Rules by placing the necessary records

(Gazette Notification). In such circumstance, this Court has no other option except to quash the impugned order as done by the Supreme Court in

the above referred decision.