(1978) 11 AP CK 0006

In the Andhra Pradesh High Court

Case No : Writ Petition No. 4137 of 1978

Sangisetty Veerabhadra Rao APPELLANT

Vs

State of A.P. and others RESPONDENT

Date of Decision : 13-11-1978

Acts Referred:

Andhra Pradesh Excise Act, 1968 — Section 72
Constitution of India, 1950 — Article 226

Citation : (1978) 11 AP CK 0006

Hon'ble Judges : Jeevan Reddy, J

Bench : Single Bench

Advocate : T.A. Babu and E. Raja Rao, for the Appellant; G.V.L. Narasimha and M.Y.K. Rayudu for the Respondent No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Jeevan Reddy, J.—The petitioner was one of the bidders at the excise auction conducted on 5-9-1978 in respect of Pithapuram group of arrack shops. The 4th respondent was the highest bidder for a sum of Rs. 1,22,200-22 Ps (Monthly rental). According to the petition he was the next highest bidder. (He has not, however, stated what was his bid amount.). The 4th respondent being the highest bidder and her bid having been accepted, she had to deposit one month''s rental plus 2 percent of the annual rental by way of earnest money, i.e., a total amount of Rs. 1,51, 529-22 Ps. on the same day. She, however, deposited a sum of Rs. 1,41,000/- on the same day, and the balance amount, i.e., Rs. 10,529-22 Ps, on 8-9-1978. On 8-9-1978 the petitioner submitted a petition before the Excise Superintendent requesting him to conduct a re-auction, in view of the non-compliance of Rule 20 of the Andhra Pradesh Excise (Lease of Right to Sell Liquor in Retail) Rules, 1969 (hereinafter referred to as "the Rules"), on the part of the 4th respondent. No action appears to have been taken on that petition. On the contrary, the excise authorities accepted further amounts, within the meaning of Rules 18 and 19 of the Rubs, from the 4th respondent and proposed to issue a licence in her favour. In those circumstances, the present writ petition was filed on 22-9-1978, and an interim order obtained staying the grant of licence to the 4th respondent. Subsequently, however, on the 4th respondent applying for vacating the interim stay, I bad vacated the same.

2. Mr. T. Ananta Babu, the learned Counsel for the petitioner, contends that Rule 16 is mandatory. Since in this case there is an admitted non-compliance of the said Rule, this Court must issue a writ of mandamus directing the Excise authorities to conduct a re-auction.

3. On the other hand, it its contended by the learned Government Pleader and the Counsel for the 4th respondent that the writ petition is not maintainable, in view of the alternative statutory remedy provided by Rule 17 of the Rules which the petitioner had failed to adopt. It is contended by the learned Counsel for the 4th respondent that the writ-petitioner did not even file the present writ petition within seven days, prescribed by Rule 17. He submitted that his client paid an amount of about Rs. 1,75,000/- on 18-9-78 in addition to Rs. 1,51,529-22 paid on 5th and 8th of September, 1978. It is contended that the writ petitioner cannot be said to have suffered such injury as to call for interference by this Court.

4. Rules 16, 17, 18, 19 and 20 of the aforesaid Rules, which are relevant for the present purposes, read as follows:-

"16. Payment of rental by the auction - purchaser:-The auction-purchaser shall pay 2 Percent of the annual rental as earnest money together with one month''s rental on the day of the auction-immediately after the acceptance of the tender or bid, as the case may be. The earnest money and one month''s rental shall be in addition to the rental deposit required in rule 18. In case of failure to remit the earnest money if any and one month''s rental on that day, the shop or group of shops shall be reauctioned.

"17. Cancellation of auction or re-auction:-The Commissioner may suo motu at any time or on an application made by an aggrieved party within seven days of the date of acceptance of a bid or tender, for reasons to be recorded by him in writing, and after giving an opportunity to the party or parties concerned thereto;

a) cancel the auction of any shop or group of shops and order re-auction and make any other alternative arrangements in respect thereof, notwithstanding that the right of sale has been granted to the auction-purchaser,

b) cancel any re-auction conducted in respect of any shop or group of shops and restore the auction in favour of the original auction-purchaser and direct payment of damages, if any, to the auction-purchaser in the re-auction not exceeding one month''s rental of the re-auction;

Provided that every person who makes application for the cancellation of auction or re-auction of a shop or a group of shops shall deposit with his application, an amount equal to his four months rental, for the purpose of adjustment towards any loss or decrease of rental in re-auction,

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18. Other Requirements:-(1) Within fifteen days from the date of auction-purchaser shall deposit one month''s rental in cash or in fixed deposit receipts of a Scheduled Bank taken for the period of lease or furnish a guarantee on any such Bank.

2) Where the monthly rental accepted is. 25,000/- or above the auction-purchaser shall furnish within the aforesaid period of fifteen days a non-encumbrance certificate issued by the Sub-Registrar concerned for the properties shown in the affidavit under Rule 5 (ii).

3) Where the shop is assigned to a Tappers Co-operative Society, the Society need not deposit one month''s rental. It shall however pay the annual rental in 9 equal instalments commencing from October.

4) All interest accruing on such certificates shall be adjusted towards the dues including interest, if any, outstanding against the auction purchaser, and if there be no such dues, shall be refunded to the auction-purchaser at the end of the lease period.

Provided that where the auction is conducted after the 15th September in any year, the deposit referred to shall be made within fifteen days of auction, or before the expiry of the same month, whichever is earlier".

19. Additional Formality to be Completed by Auction-Purchaser of Arrack Shops: -

The auction purchaser in respect of arrack shops shall pay in advance an amount calculated at the rate of 50 paise per litre in 60 the case of 40 UP arrack and 30 paise per litre in the case of UP arrack on the minimum quantity of arrack guaranteed for the year, within fifteen days of the acceptance of the bid or tender and if the auction takes place after the 15th September, within 15 days of auction or before the end of the same month whichever is earlier.

20. Re-Auction In the Case of Failure to Deposit Moneys:-

1) In case of failure to pay the deposit or advance money within the specified period, the auction shall be cancelled by the auctioning authority, the earnest money or any amount deposited under Rules 16 and 18 shall be forfeited to the Government, and the right of sale shall be re-auctioned or alternative arrangements made at the risk of the original auction-purchaser who shall be liable in respect of the lease till the auction-purchaser in the re-auction takes it over;

2) If the re-auction or the other arrangement results in monetary benefit to Government, the original auction-purchaser shall have no claim over it, but if it results in monetary loss or if the right remains unsold, for want of bidders, the original auction-purchaser shall be liable to indemnify the Government for the resultant loss,

3) The provisions of sub-rules (1) and (2) shall apply in relation to the auction-purchaser in re-auction as they apply in relation to the auction purchaser in the

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original auction".

These Rules are made u/s 72 of the Andhra Pradesh Excise Act and are, therefore, statutory.

5. No direct decision of this Court has been brought to my notice on Rule 16 and Rule 20. However there have been more than one decision, V. Parthasarathi, J. held in Writ Petition No. 3411 of 1971 dated 19-11-1971 that Rule 20 is not mandatory, but only directory. To the same effect is the judgment of Chinnappa Reddy in Writ Petition No. 4747 of 1975, dated 4-11-1975. It appears however that another learned Judge of this Court took a contrary view in W.P. No. 5770/1972, but it appears that this decision was reversed in Writ Appeal No. 492/1974. So far as Rule 16 is concerned there are certain observations in the aforesaid judgments which are relied upon by Sri. T. Anantha Babu, which I shall now refer to :-

Parthasarathi, J. observed:-

"...The scheme laid down by the rules, imposes successive obligations which indicate that they are divisible. When once the initial obligation under rule 16 has been met and the fundamental requisite is fulfilled, the licence becomes effective. The breach of the later obligation under rule 18, is not tantamount to a frustration of the entire transaction. After the licence becomes effective, the failure to perform the succeeding obligation under rule 18, cannot be equated to a breach of a condition. Judged in the light of the well known principles applicable to the law of contracts, the intention of the draftsman of the rule appears to be to make deposit under rule 16 a condition precedent for the licence becoming effective. The performance of the initial obligation brings about the legal relationship of licensor and licensee. There are, no doubt, other obligations, but the delay in performing them cannot result in the same consequence as the failure to perform the initial obligation ".

6. Firstly, the question whether Rule 16 is mandatory or directory was not before the learned judge. The said observations were made only in the course of discussion relating to rule 20. Secondly, the assumption "of the learned Judge that once the initial obligation under Rule 16 has been met the licence becomes effective and that, the relationship of licensor and license arises, appears to be unsustainable. A licence is issued only after the deposits under Rule 18 are made and the advance money, if any, under Rule 19 is paid, and not before that. The relationship of licensor and licensee does not arise with the making of the initial deposit under Rule 16. The observation therefore, that the deposit under Rule 16 is the only condition precedent for a licence becoming effective, appears plainly contrary to the Rule.

7. Before Chinnappa Reddy, J. both the Counsel appearing for the parties, appear to have conceded that Rule 16 is mandatory. This is what the learned Judge said:

"...Both the learned Counsel agreed that this rule is mandatory and that re-

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auction is a necessary consequence of failure to remit the earnest money and one month''s rental on the day of auction".

The learned Judge, however, proceeded to observe:-

"It is important to note at this juncture that Rule 16 does not entail any further penal consequence than a re-auction in case of failure of the auction-purchaser to pay the earnest money and one month''s rental. Rule 17 enables the Commissioner Suo Motu at any time or on an application made by an aggrieved party within seven days of the acceptance of the bid or tender to cancel the auction and order re-auction and make any other alternative arrangement. The proviso to Rule 17 requires that every person who makes an application for the cancellation of the auction shall deposit with his application an amount equal to four months'' rental for the purpose of adjustment towards any loss or decrease of rental in auction.,...".

Then the learned Judge referred to the provisions of Rules 18 and 20 and held "once a bid or tender is accepted and the time for taking action at the instance of an aggrieved party under Rule 17 has passed, parties other than the auction-purchaser and the Excise authority walk out of the picture. Thereafter only persons who are concerned are the auction-purchaser and Government ". For that reason, the learned Judge held that no bidder, tenderer, or a third-party have any right to object if the deposits contemplated by Rule 18 or Rule 19 are not made in time, or if the Excise authorities accept such deposits beyond the prescribed date. Since one of the principal objects of the Excise Act and the Rules is to raise revenue, the learned Judge held-agreeing with Parthasarathi, J-that Rule 20 is not mandatory but only directory, inspite of the language employed in Rule 20 which, prima facie, makes it appear mandatory.

8. The language employed, in so far as it is material, in both Rule 16 and Rule 20, is identical. Under Rule 16 if the requisite amount is not paid on the same day, the shop or group of shops shall have to be re-auctioned. Under Rule 20 also, if the deposit or advance money is not paid within the specified period the auction has to be cancelled, the amounts deposited forfeited and the right of sale re-auctioned at the risk of the original auction purchaser. Not only both the Rules use the word "shall" but both the Rules provide for the consequences of a default. In both cases, the consequence of the cancellation of the auction and a re-auction. Of course, under Rule 20, certain penalties are provided, viz., forfeiture of the deposits already made, as also the continuing liability of the auction-purchaser for loss, if any, resulting from a re-auction.

9. Now, the use of the word ''shall'' should ordinarily indicate that the Rule is mandatory. Similarly, the circumstance that the Rule itself provides for a penalty in case of non-compliance with the Rule, should also make it mandatory; (vide; Sri Baru Ram Vs. Prasanni and Others, and State of U.P. Vs. Manbodhan Lal Srivastava, Yet, Rule 20 has been held to be only directory. The reasons are not far to seek. One of the principal aims of the Excise Act and Rules is the raising of

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revenue. It is inevitable that consideration should colour the approach of the Court to these Rules. But then, an argument can immediately arise. If Rule 20, inspite of its emphatic language, is construed as directory, there is no reason why Rule 16 should be construed otherwise, Mr. Anantha Babu, however argues that if the Courts hold that Rule 16, is directory, then there will be a large scope for abuse. The auctioning authorities and the auction-purchaser can collude and a person having no money with him at all can bid at an auction or submit tenders in a speculative spirit and then make the deposits at his leisure. He says that such a situation, fraught as it is with mischief, should not be brought about by an interpretative process. I see good amount of force in this submission. While it is true that this consideration is equally relevant in the matter of Rule 20, still it cannot be ignored that there is significant distinction between Rule 16 and Rules 18 to 20. So far as the default in making the deposits under Rules 18 and 19 is concerned, the situation would be that by that date the auction-purchaser had already made the initial deposits contemplated by Rule 16 Rules 18 and 19, only contemplates further deposits. Once the auction purchaser has shown his earnestness by depositing the initial amount, there may be good reasons for holding that the Excise authorities have a discretion to condone the delay, in proper circumstances, in making the deposits under Rules 18 and 19. Further, as pointed out by Chinnappa Reddy. J., while in the case of Rule 16 no penalty is visited upon the auction-purchaser under Rule 20 the entire deposits made until then are liable be forfeited, and the re-auction conducted is at his risk. If the deposits contemplated by Rule 16 are not made, the only consequence is a re-auction, and nothing more. Another consideration would be that if the highest bidder cannot make the initial deposit itself within the specified period there is no reason why the Excise authorities should show him any consideration. Showing of any such consideration would not be in the interest of public revenue.

10. It should also be remembered that these auctions are not conducted individually, but that it is a continuous process. It is well known that in every district, and generally in the month of September, auctions are held over a number of days. If a shop is auctioned on a particular date and if the initial deposits under Rule 16 are not made, then the shop would be put to re-auction immediately on the succeeding day, so that there is no necessity of a fresh notice of auction inviting bidders. All the bidders are there, and if not on one day, the shop can be auctioned on the other day in the same course of auctions. No doubt, in cases of shops in respect of which the bids have not been accepted for one reason or the other, or those which are left over from the auction for some or other reason, they are subsequently auctioned, and sometimes there are also individual auctions, but, generally, the auctions are held as a single continuous process spread over a number of days. Now, if Rule 16 is construed as directory and if the auctioning authority is given the power and the highest bidder is given the liberty of paying the requisite amount not on the same day as required by the Rule but even later, then it would introduce an element of confusion. Neither the authorities nor the persons concerned would know which shop is auctioned

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and which shop will be put for auction again. The interests of revenue are also likely to suffer, since in the re-auctions and individual auctions the number of bidders would be less. For these reasons, I agree with Mr. T. Anantha Babu that Rule 16 must be held to be mandatory.

11. The question then arises, whether this Court should interfere in this case? It is well settled that the discretionary remedy under Art. 226 would not be exercised to correct every error of law. Interference will be made only when such interference is called for in the interests of justice or to further the ends of justice Vide Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, .. In my opinion, the High Court under Art. 226 is not a forum for sterile combats. According to sub-clause (b) of Clause (1) of Art. 226, as it now stands, the injury resulting from the Contravention of a statutory provision must be Substantial. Mr. Anantha Babu argues that in every case, where a violation of law is established, a writ must issue, more so in the case of Mandamus. Otherwise, he says, an element of uncertainty would be introduced into the power. In one case, a Judge may think that interference is not warranted, but in the same case, another Judge may think otherwise. I am, however, unable to agree with the reasoning. In every case of judicial discretion, the likelihood of difference of opinion is there, but that is no ground for taking away the discretion itself. A discretion, it should be remembered, is given to a Court, and to an administrative officer. The requirement of hearing, and in some cases, the remedy of appeal, coupled with the character, authority exercising the discretion, constitute a sufficient safeguard against arbitrary or capricious exercise.

12. Now, what are the facts and circumstances of this case? Petitioner was a bidder along with the fourth respondent. Highest bid was lower. The fourth-respondent deposited Rs. 1,41,529 on the same day, the deficit being only Rs. 10,000/-. The petitioner, while complaining of non-compliance of Rule on the part of the fourth-respondent, did not offer a higher rental. He did not also file a petition before the Commissioner under Rule 17, making the necessary deposits to show his Bonafides. Like Shylock, he insisted "I stand here for law". His only right is to participate in a re-auction. He cannot even be compelled to do that. Even if he participates, his may not be the highest bid. He approached this Court only on 22-9-1978 by which date, the fourth-respondent had made all the requisite deposits. The position may well have been different, if he has come forward, on 8th and 9th of September, with a higher offer or had he indicated his Bonafides in some other concrete manner--e.g., by making an application under Rule 17 accompanied by necessary deposits. In these circumstances, I am not inclined to set aside the auction in favour of the fourth-respondent and direct a re-auction. In this view, it is not necessary for me to go into the question whether Rule 17 is attracted in a case like the present one. Mr. T. Ananta Babu says that where Rule 16 is not complied with, the auction becomes automatically void and hence there is no question of setting it aside under Rule 17. Under that Rule he argues, the Commissioner is given the power to set aside a auction, though it is good on all accounts. On the other hand it is argued by the learned

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Government Pleader and the Counsel for the fourth-respondent that there is no reason to place a restrictive interpretation upon the Rule. An application to set aside an auction, on whatever grounds, they argue, lies under the Rule. They also say that even if Rule 16 is mandatory, the same result follows. If the auctioning authority, instead of putting up the shop for re-auction as required by Rule 16, proceeds to accept the deposits belatedly, even then the remedy is an application under Rule 17. It is not necessary to resolve this issue in this writ petition,. It must, however, be said that the petitioner could not have decided this issue by himself, To show his Bonabides he could have approached the Commissioner under this Rule.

For the reasons stated herein before, the writ petition fails and is dismissed but without costs.

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