
(2001) 07 KAR CK 0036
In the Karnataka High Court
Case No : Writ Appeal No. 7312 of 2000

Saveen Kumar Shetty

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 26-07-2001

Acts Referred:

Karnataka Excise Act, 1965 — Section 13

Citation : (2001) ILR (Kar) 4189 : (2002) 1 KarLJ 321

Hon'ble Judges : P.V. Reddi, C.J;N.K. Patil, J

Bench : Division Bench

Advocate : M.J. Yogendra Vikram, for the Appellant; M.N. Seshadri, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

1. The appellant participated in the auction for the retail vend of arrack for the year 1999-2000 in respect of 272 shops of Mangalore Taluk. At the auction, he was the highest bidder. On acceptance of the bid, one month's rental was deposited partly by way of adjustment of Earnest Money Deposit. However, after the bid was confirmed, he failed to furnish security for an amount equivalent to 3 1/10th of monthly rent in the form of cash deposit or Government securities or irrevocable guarantee of a schedule bank as contemplated by Rule 17(1)(b). The time for furnishing security was 15 days from the date of confirmation and under the rules he was required to enter into an agreement simultaneously. But, as already stated, the appellant failed to furnish such security. Nevertheless, by virtue of the general instructions issued by the Excise Commissioner, temporary licences were issued to the appellant from 1-7-1999 to 15-8-1999. Even thereafter, the appellant was permitted to run the shops on payment of kist amount daily. While so, by an order dated 14-10-1999, the Government on the basis of the report of the Excise commissioner, in exercise of power under Rule 18 of the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, cancelled the order of confirmation. By the same order, the deposit equivalent to

one month's rental made by the appellant was forfeited to the State. The Government directed re-auction of the right to vend arrack for Mangalore Taluk and further directed recovery of the loss if any, sustained on account of such re-auction. It is common ground that in the re-auction, the State did not suffer any loss inasmuch as much more amount had been realised. The said order inter alia forfeiting the deposit was challenged by the appellant by filing W.P. No. 3242 of 2000. Learned Single Judge having noted the contention that the Government did not suffer any financial loss on account of the appellant's default, observed as follows:

"If the facts as stated by the petitioner in his petition are correct and if the petitioner makes an application to the State Government for refund of the said sum of Rupees One crore twenty-five lakhs and other deposits made, the State Government shall consider the application on its merits in accordance with law and pass orders within four weeks from the date the petitioner makes the application".

2. The said writ petition was accordingly disposed of. Pursuant to the order of this Court, the appellant made a representation to the Government. The Government by an endorsement dated 1-6-2000, refused to refund the deposit. After referring to Rule 18, it is merely stated in the said "endorsement" that the petitioner failed to perform his part of the obligation as required by statutory rules. The additional reason given is that Rule 20 does not provide for refund/adjustment of the forfeited deposit. This endorsement has been challenged in W.P. No. 19077 of 2000 and the relief of refund of deposit was sought for. Learned Single Judge held that on account of the continued default on the part of the appellant to furnish security as per Rule 17-B, the Government was justified in forfeiting the deposit under the rules as a result of cancellation of confirmation of bid. Learned Single Judge remarked that the "petitioner has not been able to show that there were any special circumstances as to why the respondents should have exercised the discretion not to forfeit the security deposit". It is this order of the learned Judge that has been challenged in the present writ appeal.

3. Rule 18 which is the provision under which the forfeiture has been effected reads as follows:

"18(1) Where the person in whose favour the disposal is confirmed fails to comply with the provisions of Rules 16 and 17, the disposal of the right of retail vend of liquors may be cancelled by the Government at its discretion and if it is cancelled, the deposit made by such person shall be liable to be forfeited to the State Government and the right of retail vend of liquors shall be disposed of afresh in such manner as the State Government may direct:

Provided that till such disposal is made and fresh licences are granted, the Deputy Commissioner may continue the licence of the previous licensee in respect of the same shop or shops.

(2) The disposal under Sub-rule (1) shall be at the risk of the defaulter who

shall, however, be not entitled to any excess amount realised from such disposal but shall be liable for the losses sustained by the State Government. The Excise Commissioner shall be entitled to assess such loss and recover it as if it were an arrears of land revenue".

The language employed in Rule 18(1) gives an indicia as to the nature of power to be exercised by the Government. Firstly, it has to be noted that the cancellation of confirmation is at the discretion of the Government, but, it is not imperative. Secondly, in contrast with the wording "shall be liable to be forfeited", we find that as per Rule 13(2), in case of failure to deposit the amount payable under Sub-rule (1), the earnest money "shall be forfeited". An element of discretion to forfeit the deposit could be reasonably inferred from Rule 18(1) having regard to the language employed and also in the light of the immediately preceding clause under which the cancellation itself is subject to the discretion of the Government. Whether the entire deposit has to be forfeited consequent upon the cancellation of confirmation has to be decided by the Government on a consideration of all relevant circumstances. We are of the view that the forfeiture of the entire amount deposited under the rule is not an automatic consequence of the cancellation of confirmation. It is not reasonable to construe the expression "shall be liable to be forfeited" as casting a compulsive obligation on the Government to forfeit the whole lot of the amount deposited irrespective of any other considerations. The words shall be liable have been read as leaving no option to forfeit or confiscate in some cases whereas in some other decided cases, it was construed to be an enabling provision. In the Full Bench decision of the Andhra Pradesh High Court in *Government of Andhra Pradesh through Forest Range Officer, Burgumpad v. Dindu Kanakamma and Ors.*, it was observed-

"However, in relation to the expression "shall be liable for confiscation" which prima facie sounds to be peremptory and mandatory, the view of the Supreme Court is not uniform, though the preponderance of the view as reflected in three cases, viz., *Indo-China Steam Navigation Company Limited v. Jasjit Singh, Additional Collector of Customs, Calcutta and Ors.*, *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal v. Abani Maity and Chern Taong Shang and Ors.* v. *Commander S.D. Baijal and Ors.*, is to read into it an obligatory duty to confiscate. It was held in those cases that the confiscation of the offending vehicle or vessel is mandatory and the Court or the prescribed authority cannot avoid passing the order of confiscation on a consideration of graveness of the offence and extenuating circumstances. But, in *State of Madhya Pradesh v. Azad Bharat Finance Company*, the Supreme Court took the view that confiscation was not obligatory. In that case, the Supreme Court approved the view of the High Court which interpreted Section 11 of the Opium (Madhya Bharat Amendment) Act as permissive and not obligatory, notwithstanding the use of expression "shall be confiscated". The Supreme Court observed that the use of the word "shall" does not always mean that the enactment is obligatory or mandatory; it depends upon the context in which the word "shall" occurs and the other circumstances. One of the considerations taken into account was it would

be unjust to confiscate the truck of a person if he had no knowledge whatsoever that the truck was being used for transporting opium".

We are inclined to take the view that having regard to the context and the nature of power confided to the Government under Rule 18, the discretion not to forfeit the deposit or to forfeit only part of it has to be inferred. In fact, the learned Single Judge who decided the earlier writ petition, when he remitted the matter for consideration by the Government, proceeded on the basis that the Government had such discretion. Even in the impugned judgment, learned Single Judge felt that if there were special circumstances, the forfeiture of the whole amount need not be resorted to.

4. In the light of this legal position, if we examine the impugned order, the same cannot be legally sustained. The Government had given a short shrift to the whole issue as if the entire deposit (which is over and above the EMD in the instant case) should be forfeited, the moment the confirmation of bid is cancelled. The Government has approached the problem in a mechanical manner without due regard to the facts and circumstances of this case and the true legal position. The other aspect to be noticed is that the applicant's request has been erroneously rejected by making reference to Rule 20. Rule 20 reads as follows:

"The earnest money or other deposits made under the rules, unless forfeited or adjusted, shall be refunded to the depositor".

When the issue of forfeiture of the deposit is at large, this rule cannot be put against the appellant for denying relief. In case the Government comes to the conclusion that the entire amount need not be forfeited, there is nothing in Rule 20 which places an embargo against refund of the deposit amount. We are, therefore of the view that the impugned endorsement/order of the Government cannot be sustained. The matter has to be examined afresh by the Government. It may be, as rightly contended by the learned Government Advocate, the facts of this case may not warrant the total extrication of the appellant from the rigour of Rule 18; yet the adoption of a rational and equitable approach so as to confine the forfeiture to a part of the deposit, cannot be ruled out.

5. Learned Counsel for the appellant referred to Section 13 of the Karnataka Excise Act which provides for withdrawal of licence and the consequences of such withdrawal. Having regard to the factual position obtaining in this case, we do not think that the said provision has any relevance. There is nothing like "un-expired portion of the term of licence" in the instant case.

6. Learned Government Advocate pointed out that the appellant had not challenged the order of the Government dated 14-10-1999 by which the deposit was forfeited. It is submitted that in the writ petition out of which the present writ appeal arises, only the endorsement of the Government dated 1-6-2000 has been assailed. We find no substance in this objection which smacks of technicality. The earlier order forfeiting the deposit was in fact challenged in W.P. No. 3242 of 2000. With reference to that action only, this Court directed the

Government to consider the application for refund on merits. The issue of forfeiture of deposit and the refund of the amount deposited are integrally connected with each other. In such circumstances, we find no merit in this technical objection.

7. In the result, we set aside the impugned endorsement of the Government dated 1-6-2000 and direct the Government to pass a fresh order after giving opportunity of hearing to the appellant, keeping in view the observations made in the judgment. The order shall be passed, as far as possible, within a period of three months from the date of receipt of this judgment. The writ appeal is allowed to the extent indicated above. We make no order as to costs.