
(2003) 04 AP CK 0054
In the Andhra Pradesh High Court
Case No : LPA No. 104 of 1996

State of A.P. and Others

APPELLANT

Vs

V. Narender Reddy and Others

RESPONDENT

Date of Decision : 04-04-2003

Acts Referred:

Andhra Pradesh Court Fees and Suits Valuation Act, 1956 — Section 24, 47
Contract Act, 1872 — Section 56

Citation : (2003) 4 ALD 345 : (2003) 5 ALT 51

Hon'ble Judges : G. Rohini, J; Bilal Nazki, J

Bench : Division Bench

Advocate : A.A.G, for the Appellant; V.V. Prabhakar Rao, for the Respondent

Final Decision : Allowed

Judgement

Bilal Nazki, J.—The plaintiffs were the highest bidders in the auction conducted for sale of arrack for the groups of Miryalaguda, Kodad and Huzurnagar of Nalgonda district for the Excise year 1990-91. The Excise year starts from 1st October and ends by 30th of September each year. In terms of the agreement between the parties a minimum guaranteed quota was fixed and that had to be lifted by the contractors (plaintiffs). Rentals had to be paid within stipulated period. For the sale of arrack in these three areas 300 shops had to be set up by the contractors. The plaintiffs had to deposit earnest money, container deposit, minimum guarantee quota deposit, one month's advance rentals in cash and one month's rentals by furnishing bank guarantee. The Minimum guarantee quota had to be lifted by depositing issue price within stipulated period. The plaintiffs on the other hand were entitled to conduct business of selling arrack in a fair and free manner. According to the plaintiffs, it was the responsibility of the defendants to provide an environment free of obstructions because State was overall in-charge of the affairs of the State and also licensing authority and a party to the contract. The plaintiffs further contended that they were not expected to pay rentals without being able to conduct the business in accordance

with the contract entered into and the licence granted. It was not enough for the State to grant licence and leave the plaintiffs to make their own arrangements for maintaining the law and order. Although the plaintiffs made their arrangements, even if they were not supposed to make under the contract, but they failed in conducting the business when the naxalites started interfering in the business of the plaintiffs. In the first week of October, 1990 the naxalites directed that arrack shall not be sold and even if it was sold it had to be sold at the rate at which it had been sold during the year 1989-90. The plaintiffs further contended that in 1989-90 arrack was sold at Rs. 60/- per bulk litre which in turn works out to Rs. 6/- per 100ml sachet. There were no problems in selling arrack during the year 1989-90 but as compared to year 1989-90 there was an increase of 35% in the rentals for the Excise year 1990-91. In view of the increase in rentals higher selling price had to be fixed but the naxalites threatened that the sale price should not exceed Rs. 3/- in villages and Rs. 4/- at Mandal headquarters. In some of the villages the naxalites did not even allow the plaintiffs to open the shops. The owners of the premises were threatened with dire consequences if they let out the premises to run arrack shops. Because of the threats from the naxalites and a price list having been fixed by the naxalites the plaintiffs could not run the business. The plaintiffs tried to resist, as a result they were not allowed to open certain shops and some shops were even burnt along with arrack and furniture. There was looting, arson and violence on large scale. The Excise officials advised the plaintiffs to concede to the demands of the naxalites as there was no other alternative. The Excise authorities were not able to give enough police force for protecting the business of the plaintiffs. The plaintiffs made several representations for protection but the defendants expressed their inability in the matter and could not curb the naxal problem. For arrack there was no fixed selling price. The plaintiffs were entitled to sell the arrack at a price fixed by the plaintiffs but restrictions were placed on their right to sell at the price of their choice by the naxalites. It would have been only profitable business had the plaintiffs been able to sell arrack at the rate of Rs. 70/- per bulk litre. In any case the plaintiffs should not have sold the arrack for a rate less than Rs. 60/- per bulk litre. The monthly rentals for Huzurnagar, Miryalaguda and Kodad groups were Rs. 27,77,777.77 ps., Rs. 31,27,999.99ps, and Rs. 24,38,000.00ps. respectively. In addition to this, the issue price per bulk litre works out to Rs. 12.09ps. The plaintiffs contended that even though the contract was given to them to vend arrack in consonance with the conditions of the licence they were not permitted to sell arrack and there was impossibility of performance of their contract. The defendants were bound to see that there was no hindrance in the performance of the contract but they did not intervene and set right the things which resulted in impossibility of performance of the contract. The contract could not be performed but the defendants went on demanding payment of rentals even without considering these facts and ignoring representations. They further contended that for the whole of the year the business could not be conducted, only few shops could conduct business and arrack was sold at Rs. 2.75ps. to Rs. 4/- per 100ml. The average rate at which

100ml arrack could be sold worked out of Rs. 3/- per sachet but the defendants insisted on payment of rentals for the month of October, 1990 and in consequence of non-payment there was suspension and cancellation of licence. The plaintiffs filed Writ petition No. 15918 of 1990 in which time was granted to pay the rentals but that could not be done, licences were cancelled by the 6th defendant on 18-11-1990, the same was assailed before the 4th defendant, he passed an order on 12-12-1990 and imposed condition of paying exorbitant amounts with interest. The plaintiffs could not comply with the same in full. Pursuant to the said order they had paid substantial amounts but could not pay the instalments. From 1st January, 1991 all the arrack shops of Huzurnagar and Kodad were taken over by the State and were run departmentally. During the period for which the department carried the business departmentally the sale price had to be reduced by the department as well due to threat from naxalites. The State itself yielded to the dictates of the naxalites and sold arrack at the reduced rate. At times the selling price was even less than Rs. 30/- per bulk litre. When the plaintiffs held Writ Petition No. 17768 of 1990 the defendants opposed the petition for granting stay of re-auction therefore the stay of re-auction was refused by the High Court. Consequently re-auction was held on 7th February, 1991. The High Court also held that the order of 4th defendant was not challenged therefore there could not be any stay of re-auction. The plaintiffs sought an amendment in the relief seeking to challenge the order of the 4th defendant. This application was allowed. After the amendment the plaintiffs moved another application before the High Court seeking direction that the shops be handed over back to the plaintiffs but the High Court imposed a condition of deposit of 50% of amount and furnishing of bank guarantee which could not be complied with by the plaintiffs. Thereafter when the writ petition came for final hearing on 4-4-1991 the High Court found that the re-auction had been confirmed on 18-2-1991. High Court also found that there were questions of disputed facts therefore it observed that a redressal may be sought from the civil Court. The 7th defendant in the meantime passed an order on 14-3-1991 seeking recovery of Rs. 1,88,06,826/-. The plaintiffs thereafter pleaded for three months time so as to enable them to issue notice u/s 80 CPC and file the suit. The High Court by its order dated 4-4-1991 gave 2 1/2 months time from 4-4-1991 to enable the plaintiffs to issue a notice and file suit against the recovery. Even though the State filed writ appeal against the said order of the learned single Judge no interim suspension was granted and the appeal was not admitted. The appeal, however, stands pending before the Court. Notice was issued to defendants on 6-4-1991 u/s 80 CPC reiterating all the facts. Another distraint order dated 6-5-1991 was issued claiming Rs. 2,27,68,000/-. These amounts pertain to Huzurnagar and Kodad arrack groups. The notices issued by the plaintiffs were served on defendants. On the basis of these facts the suit was filed. With regard to the relief and Court fee the following was added to the plaint:

"The relief of declaration which is incapable of valuation is valued at Rs.

1,00,000/- and a Court fee of Rs. 3,426/- thereon is herewith paid u/s 24(d) of A.P.C.F. and S. V. Act, 1956, the relief of setting aside the distraint order, which is incapable of valuations is valued at Rs. 5,000/- under the residuary provision contained u/s 47 of A.P.C.F. & S.V. Act and Court fee of Rs. 136/- thereon is paid, the relief of mandatory injunction is valued at Rs. 1,000/- and a Court fee of Rs. 111/- is paid u/s 47 of A.P.C.F. & S.V. Act, 1956. The total Court fee is thus Rs. 3,630/- and is sufficient."

The reliefs claimed was in para-32 of the plaint reads:

"It is therefore prayed that this Honourable Court may be pleased to pass a judgment and decree:

(i) Declaring that the contracts entered in favour of the plaintiffs pursuant to the auction held for the Excise year 1990-91 pertaining to Arrack groups of Huzurnagar, Kodad and Miryalaguda of Nalgonda district, got discharged in view of impossibility of performance due to inaction on the part of the defendants in maintaining law and order;

(ii) Set aside the notice dated 16-5-1991 issued by the 7th defendant under the Revenue Recovery Act;

(iii) Mandatory injunction directing the defendants to make good the amounts kept in deposit by the plaintiffs pertaining to Huzurnagar, Kodad and Miryalaguda arrack groups of Nalgonda district.

(iv) Award costs of these proceedings; and

(v) Pass such other and further reliefs as are deemed fit and proper in the circumstances of the case."

Written statement was filed on behalf of the defendants. Execution of the contract was admitted. It is however stated that the rentals were to be paid by the plaintiffs in accordance with the rules framed under the A.P. Excise (Arrack and Toddy Licences General conditions) Rules, 1969. It is denied that the contract got frustrated because of the problem created by naxalites. Naxalite menace was there for several years even before the Excise year 1990-91. The problems faced from the naxalites by people dealing in liquor were not peculiar to the plaintiffs. Even before the commencement of auction the naxalites had given call that nobody should participate in the auction. The ground situation and the conditions were known to the plaintiffs when they participated in the auction. The naxalites had directed that the auction should not take place and people should not participate in such auction. In spite of that the plaintiffs did participate in the auction and obtained lease and started running business but taking the excuse of naxalite intervention they only wanted to evade payment of rentals. The defendants also contended that, if it were not possible for the plaintiffs to sell the liquor they would have not lifted the entire Minimum guarantee quota. They lifted it with the intention of selling it. There was no contractual obligation for defendants to provide security to their business. In the

month of October, 1990 entire Minimum guarantee quota was lifted in all the three units. The government does not control the retail sale price fixed by the licensee. The plaintiffs were at liberty to sell at any price. On 27-11-1990 the plaintiffs sought relief of payment of rentals in instalments to defendant No. 4 which was accordingly granted imposing the following conditions:

"1. That the licensees shall pay immediately i.e., before 15-12-1990 an amount of Rs. 21.825 lakhs towards the monthly rental for October, 1990 and November, 1990 out of the balance amount of Rs. 96.825 lakhs.

2. That the balance of Rs. 75.00 lakhs for both the units along with penal interest shall be paid in 7 fortnightly instalments of Rs. 10.00 lakhs each commencing from the 2nd fortnight of December, 1990 and 8th (last instalment of Rs. 5.00 lakhs plus the penal interest due as per rules).

3. For all subsequent releases of MGQ till the entire arrears amount is fully paid, the licensee shall pay proportionate rental and issue price prior to the lifting of MGQ. He should lift the entire monthly MGQ as per the distribution statement.

4. He shall be allowed to lift the short lifted MGQ of November 1990 on payment of issue price.

The plaintiffs complied with the first condition and failed to comply with the other three conditions. On failure to comply the conditions as laid down in the order of defendant No. 4 the units in auction were taken over by departmental management with effect from 1st January, 1991 and notified for re-auction on 8-1-1991. The re-auction was thereafter adjourned till 11th January, 1991 and in the meantime the licensees obtained interim orders dated 9-1-1991 in W.P.No. 17768/90. Since no bidder came forward, the re-auction was adjourned to 18th January, 1991 then to 25th January, 1991. Again the licensees approached the High Court and the High Court ordered status quo on 23-1-1991 in W.A. SR No. 4632/91. Hence re-auction could not be conducted 21-1-1991. On vacation of the stay by the High Court the re-auction was notified for 7th February, 1991. The re-auction of arrack units in Huzurnagar and Kodad were held on 7-12-1991. In the re-auction the following rentals were fetched:

On 8-2-1991 the High Court in W.P.M.P. No. 1688/91 in W.P.No. 17768/90 directed the plaintiffs to remit 60% of due rentals as on 29th January, 1991 in two equal instalments, for the balance of 40% the Court directed the plaintiffs to furnish Bank guarantee within a month from 8-2-1991. In the event of the plaintiffs failing to comply with the said conditions the defendants were given liberty to proceed with the confirmation of the re-auction. Since the plaintiffs failed to pay the rentals in accordance with the directions of the High Court, the Commissioner of Excise on 18-2-1991 confirmed the re-auction held on 7-2-1991. It was denied that Excise officials had ever advised the plaintiffs to concede to the demands of the naxalites. In fact there were no requests made by the licenses to the Excise Superintendent for providing police force. It was further contended that the contract was given under Excise Act and Rules. The

rights and liabilities of the parties are statutory and are governed by the Excise Act and the Rules made thereunder and not under the provisions of Contract Act. It is further contended that Section 56 of the Contract Act had no applicability. The notices issued by the defendants were lawful. It was further contended that the suit was wrongly valued. In fact the plaintiffs claimed u/s 80 CPC notice that they were not liable to pay to the Government due amounts demanded i.e., Rs. 1,88,06,826/-. The plaintiffs had also claimed that they were not liable to discharge their obligation under the licence for a sum of Rs. 12,29,37,517.62ps which included distraint notice amount and the amounts due towards resultant loss of arrack unit, Miryalaguda. The amount was clear and ascertainable to the plaintiffs, therefore the suit had been wrongly valued and the Court fee paid was insufficient. The distraint order which had been issued for Rs. 1,88,06,826/- was valued by the plaintiffs at Rs. 5,000/-. The valuation for mandatory injunction was also wrong. Under the mandatory injunction they wanted an injunction for not recovering an amount of more than Rs. 3.00 crores.

2. On the basis of these pleadings the following issues were framed by the Trial Court:

1. Whether the contract entered into in favour of the plaintiff pursuant to auctions held for the excise year 1990-91 pertaining to arrack shops Huzurnagar, Kodad and Miryalaguda got discharged in view of the impossibility of performance due to inaction of defendants in maintaining law and order?
2. Whether the distraint notice dated 16-5-1991 issued by the 7th defendant under the Revenue Recovery Act liable to be set aside?
3. Whether the plaintiffs are entitled to seek for the relief of mandatory injunction directing the defendants to make good amounts kept in deposit by them pertaining to Huzurnagar, Kodad and Miryalaguda arrack groups of Nalgonda district pertaining to auction held for the Excise year 1990-91?
4. Whether maintenance of law and order including the containing naxalite menace is not the function of the State?
5. Whether the valuation made and Court fee paid for the reliefs 1, 2 and 3 in the plaint is correct?
6. Whether the suit is not maintainable?
7. To what relief?

The Trial Court decreed the suit, thereafter an appeal was filed which was decided by the learned single Judge. The Trial Court granted the decree as prayed for with costs. It also decreed refund of the deposits made by the plaintiffs with the defendants pertaining to auction held for the Excise year, 1990-91 with 6% of interest. The appeal filed by the State was decided by the learned single Judge of this Court on 23rd February, 1996. The learned single Judge dismissed the appeal and confirmed the judgment and decree of the Trial

Court. Therefore, this Letters Patent Appeal.

3. We have heard the learned Counsel for the parties. The learned single Judge framed three questions for consideration;

1. Whether the contract is frustrated due to subsequent impossibility of performance due to naxalite menace?
2. Whether the State is bound to maintain law and order, wherein the respondents-plaintiffs being licensees can transact business freely and fairly? and
3. Whether section 56 of the Indian Contract Act cannot come into play as the licence was granted under the Andhra Pradesh Excise Act and the Rules made thereunder?

On all three questions the learned single Judge agreed with the plaintiffs and confirmed the decree. The learned Additional Advocate-General has drawn our attention to the memorandum of appeal filed before the learned single Judge and the grounds taken in that appeal. He referred to grounds No. 22, 23, 24 and 25 which reads as under:

"22. The Court below erred in holding that the suit was properly valued. The relief should have been valued on the basis on the advantage sought to be secured by the plaintiff or the disadvantage sought to be avoided. The relief in regard to the Revenue Recovery proceedings should have been valued at the total of the amounts sought to be recovered under the Revenue Recovery Act. The relief of refund should have been valued as equal to the total amounts of deposits.

23. The Court below should have seen that by a mere trick of pleading the plaintiff cannot avoid the payment of proper Court fee.

24. The Court below should have held that the concept of grant of mandatory injunction for refunding money is unknown to law. The valuation of the reliefs was capricious and the lower Court erred in entertaining the suit without ensuring that proper Court fee was paid. The lower Court practically exercised writ jurisdictions vested in the High Court and Supreme Court alone.

25. The lower Court, erred in stating mat the Government Pleader had not addressed any arguments in regard to valuation vide paragraph 58 of the judgment This is wrong. Further as an issue Had been framed specifically, in regard to valuation it was the duty of the Court to apply its mind to the issue of Court fee and valuation and record a proper conclusion. Court fee issues are a matter for the Court to decide irrespective of the defendants" posture."

The learned Additional Advocate-General submits that, although these grounds have been taken before the learned single Judge and have been argued, but the learned single Judge did not address himself to these issues which go to the root of the matter. It was further contended that the question of improper valuation of the suit would also go to the root of the case because the suit had been filed as a suit for mandatory injunction and if the suit for mandatory injunction is not

properly valued and if the suit is found to be suit of recovery under the guise of mandatory injunction, the injunction could not be granted.

4. In view of these submissions and in view of other submissions made we would like to decide the following questions, which arise in this petition, in the first instance.

(1) Whether the suit was correctly valued and the Court fee was paid?

(2) Was the contract frustrated because of militancy and if so whether Section 56 of the Contract Act was applicable as the contract was statutory in nature?

5. Coming to the first question, we have seen that a plea with regard to the Court fee and wrong valuation of the suit had been taken in the written statement. There had been an issue framed. The issue was decided very cursorily by the Trial Court in favour of the plaintiffs. In para-58 of the judgment of the Trial Court the learned Judge said; "Sri Giridhar Rao, learned Asst. Government Pleader has submitted that he has no arguments to advance as this issue lies within the discretion of the Court to decide." This assertion made by the learned Asst. Government Pleader would not by any stretch of imagination mean that the learned Counsel had conceded that the suit had been correctly valued and sufficient Court fee had been paid. The learned Counsel only mentioned that this was a matter which was within the discretion of the Court to decide. When the Court examined the file at the presentation of the suit the Court ordered registration of the suit and passed the following order:

"Valuation accepted u/s 47 of the APCF Act and the suit has to be admitted u/s 28(c) of the CPC even though Kodad, does not fall within the jurisdiction of the Court and also in view of the decision in 1977 LS 167, seen also the judgment of High Court in W.P. No. 17768/90."

The Trial Judge said that, since the plaint had been registered at the time of inspection, when no notice had been given to the defendants, therefore this should be taken as the last word for valuation and sufficiency of the Court fee. While coming to that conclusion the learned trial Judge lost sight of Section 11 of the A.P. Court Fee and Suit Valuation Act which lays down:

"11. Decision as to proper fee :--(1) (a) In every suit the Court shall, before ordering the plaint to be registered decide on the allegation contained in the plaint and on the materials furnished by the plaintiff the proper fee payable thereon.

(b) The decision of the Court under Clause (a), regarding the proper fee payable shall be subject to review, from time to time, as occasion requires.

(2) Any defendant may plead that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before the hearing of the suit as contemplated by Order XVIII in the First Schedule to the Code of Civil Procedure, 1908 (Central

Act V of 1908). If the Court decides that the subject-matter of the suit is not properly valued or that the fee paid is not sufficient, the Court shall fix a date before which the subject matter of the suit shall be valued in accordance with the Court's decision and the deficit fee shall be paid. If within the time allowed, the subject-matter of the suit is not valued in accordance with the Court's decision or if the deficit fee is not paid, the plaint shall be rejected and the Court shall pass such order as it deems just regarding cost of the suit.

(3).....

(4)"

The findings are erroneous because the learned Trial Court had not at all given its attention to the question whether the Court fee was sufficiently paid and whether the suit was correctly valued. Therefore, the finding of the learned trial Judge on this question could not at all be accepted. The learned single Judge, however, did not decide this issue at all although such a plea had been taken in the memorandum of appeal. Therefore the question relating to the sufficiency of the Court fee and valuation of the suit would have to be gone into.

6. Now let us see the distraint orders which were passed against the plaintiffs. In Exs.A29 and A30 which are distraint notices, specific demands have been made. It is also not denied that when the plaintiffs gave notice u/s 80 CPC they also knew how much amount is being sought to be recovered from them. Therefore, the plaintiffs could not have said that they could not value the distraint notices. The suit had to be valued at the amount for which a disadvantage had to be suffered by the plaintiffs. In the plaint, the plaintiffs also claimed the following two reliefs:

(1) Set aside the notice dated 16-5-1991 issued by the 7th defendant under the Revenue Recovery Act.

(2) Mandatory injunction directing the defendants to make good the amounts kept in deposit by the plaintiffs pertaining the Huzurnagar, Kodad and Miryalaguda arrack groups of Nalgonda district.

As a matter of fact the first relief mentioned above was to the effect that defendants should not recover an amount of Rs. 1,88,06,826/- and the second relief was as a matter of fact regarding recovery of the amounts deposited by the plaintiffs with the defendants. Both these amounts were known to the plaintiffs. The learned Additional Advocate-General submits that it is settled law that the plaintiffs had to value the suit on the basis of the advantage sought to be obtained or the loss to be averted. He referred to a Division Bench judgment of this Court reported in *Jabbar v. State of A.P.*, 1969 An.WR 411. The facts of that case reveal that, a suit was laid for declaration that the demand of Rs. 60,500/- as abkari arrears by the government was illegal. An injunction was also sought restraining the government from taking proceedings to recover the said arrears. The plaintiff valued the relief at Rs. 5,100/- and paid the Court fee u/s 24(d) of

the Court fee Act. Objection was taken that the relief was not properly valued u/s 24(d) of the Andhra Pradesh Court Fee and Suits Valuation Act and the suit ought to have been valued at Rs. 60,500/- and Court fee should have been paid on it. This objection was considered by the Division Bench. While interpreting the provisions of Section 24(d) the High Court went into the judgments passed earlier and finally came to the following conclusion:

"From the cases cited by the learned Counsel for the appellant-plaintiff, we find that the various High Courts though accepting the view that the relief has to be valued on the basis of the injury or loss that the plaintiff was trying to be relieved of or the advantage that he would gain, had refused to interfere in the valuation made by the plaintiff on the ground that in the particular cases there was nothing to show that the valuation made by the plaintiff was arbitrary or grossly inadequate. It can also be seen that when there are no specified provisions empowering the Court to go behind the valuation made by the plaintiff and enquire as to the proper valuation that should be made, the Courts were reluctant to interfere. But the provisions of Section 24(d) of the Act are very clear and empower the Court to value the relief claimed by the plaintiff. We are in full agreement with the principles laid down by our High Court that the relief sought by the plaintiff has to be valued on the basis of the advantage he would gain or the injury or loss he would avoid. Applying that test, from the plaint it is clear that the plaintiff had sought for a declaration that the demand of Rs. 60,500/- made against him by the Government is illegal. In case the demand made by the Government is allowed to stand, he will suffer an injury or loss to the extent of Rs. 60,500. There is no suggestion anywhere in the plaint or during the course of arguments that the Government will not be in a position to recover the whole of the amount from the plaintiff. The valuation put by the plaintiff is grossly inadequate and the plaintiff will have to value the reliefs prayed for by him at Rs. 60,500. He will make good the deficit Court fee here and in the Court below within four weeks from the date of this order. The appeal will be posted for final hearing after the deficit Court fee is paid by the plaintiff."

7. In our view, the present suit was not properly valued. The relief (2) which has been referred to herein above was as a matter of fact a relief for recovery of the deposits made by the plaintiff whereas relief (1) was in effect a relief which could have granted the advantage of Rs. 1,88,06,826/- to the plaintiffs if the suit was decreed,

8. Now, coming to the second question, before going to the legality or otherwise it would be pertinent to examine the evidence on record in the light of the assertions made by the plaintiffs and the defendants in their pleadings. Briefly stated, the plaintiffs claimed that militancy started in the first week of October, 1990 and dictates were issued by the naxalites not to sell the arrack and even if the arrack was sold it should be sold at a price fixed by them, whereas the defendants contention was that the militancy was there even before the notice inviting tenders was issued and in fact the naxalites had directed the people not

to participate in the auction itself. The plaintiffs examined 20 witnesses and defendants examined 1 witness.

9. P.W.1 is the 6th plaintiff. He stated that they could not transact the business from October, 1990 on account of the naxalite threats. The naxalites also demanded that they should sell the arrack at lesser rates. The naxalites threatened people in the villages and asked them not to give their premises in lease for establishing arrack shops. They told them that if anybody gave his premises for conducting of business in arrack his house would be blown up. They asked the people not to take arrack. The naxalities called him and threatened him and told him that he would not only suffer loss in business but would loose his life also. In 1991 the threat to business people dealing in arrack was prevalent in the whole State. In 1991 Mr. Marri Chenna Reddy was the Chief Minister of the State and on account of his liberal policy and soft attitude towards naxalites and their release from custody the naxalites got emboldened and took over the functions of the government. They resorted to kidnappings of not only ordinary persons out also government officials. Several persons were killed. Naxalites demanded from them abandonment of business of arrack. They fixed sale price at Rs. 2.75 ps. per sachet of 90ml in the villages, Rs. 3/- in the Mandal headquarters and Rs. 4/- in the towns. He stated that he continued with the business at some places at the rates fixed by the plaintiffs but the naxalites looted their shops and burnt them. The naxalites attacked their shops and they were not able to conduct business under licence granted to them. They had to incur an expenditure of Rs. 69/-bulk litre of arrack and in order to make some profit they could only sell one bulk litre at Rs. 70/-. The rentals fixed for 1990-91 were 35% more than the rates fixed for the previous year. Then he gave a detailed list of the shops numbering 20 which according to him were set at fire by the naxatlies. He also gave list of another 13 shops which according to him were looted by the naxalites. He also gave list of 28 shops where the naxalites did not allow them to start their business. He exhibited Exs.A1 being report of the Excise Superintendent of Nalgonda in December, 1990. Ex.A2 was the report in Cr.No. 10/90 dated 15th December, 1990, Ex.A3 & A4 were the statements sent by the Excise S.I., Miryalaguda. Exs.A5 to A21 were the Xerox copies of challans. Ex.A22 was the letter of contractor addressed to the Minister. Ex.A23 was the letter for reduction of sale price. Ex.A24 was the letter of 1st plaintiff dated 16th February, 1990. Ex.A25 was letter addressed by the 1st plaintiff to the Chief Minister. Ex.A26 was the proceedings of the Excise Superintendent, Nalgonda. Ex.A27 was proceedings of Commissioner of Excise, Hyderabad dated 12-12-1990. Ex.A28 was proceedings of Commissioner of Excise. Ex.A29 was Form No. 1. Ex.A30 was Appendix-V. Ex.A31 was notice u/s 80 CPC. Ex.A32 was the file containing the newspaper cuttings of different newspapers containing 16 sheets stating all about naxalite activities during the year 1990-91. Ex.A32(a) to (p) were also paper cuttings. In his cross-examination he stated that he was doing business for six years. He voluntarily participated in the auction and re-auction conducted. The plaintiffs gave their bid for the shops in Kodad group and

became highest bidders and took the contract. He accepted that the department had mentioned in the counterpart of the agreement the quantity of Minimum guarantee quota to be lifted in each month. In the months of October to December the MGQ would be less compared to December to February. The department was not concerned for going from village to village for selling the arrack or getting the shops established for the plaintiffs. He did not mention in his plaint any specific instances of the people approached by him who refused to give their premises on rent because of threat of naxalites, but he could not open about 60 shops in October, 1990 because of the naxalite threat. He informed the departmental officials orally. He had lifted the minimum guaranteed quota for October, 1990 but as the business could not be carried he could not sell the arrack. He did not know, if the business was not carried he had to return the arrack to the department. For 30 days for which the business was not carried out in 60 shops the MGQ lifted by him was not returned to the department as he was not aware of it. If 60 shops do not transact business for a month the loss sustained would be about 35,00,000/-. The naxalites had called him at a secret place in the village and warned him not to sell arrack or to sell it at the rates fixed by them. He did not mention this in the plaint. He informed about this to the Excise officials locally. Cases were registered for arson but he has not filed any report in the Court with respect to the registration of the cases.

10. P.W.2 is also a partner of the plaintiff group. He also stated what had been stated by the earlier witness. In his cross-examination he stated that he did not know if the agreement after re-auction contained a clause that the difference on account of re-auction would have to be borne by the contractor because the agreement was in English. P.W.3 is 2nd Plaintiff. He stated almost same things which have been stated by the other witnesses. He also stated that, in re-auction the rate was 35% lesser than the original bid. The fall in the rate was on account of naxalite activities and their threatening to them in carrying the business.

11. P.W.4 is an agriculturist and President of Mandal Praja Parishad, Damarcherla. He submitted that in 1991 the naxalites had ordered the contractors to sell arrack at Rs. 2/- in the villages and at Rs. 3/- in the Mandal headquarters. Prior to the plaintiffs taking contract for 1990-91 the rate per arrack packet was Rs. 5/-. The 1st plaintiff had to sell arrack in the village of Damarcherla at Rs. 3/- per packet wherever he could conduct the business. In cross-examination he said that he belongs to the Congress party. Since he was political worker he knew the politics in the State. He stated that there was naxalite problem in the districts of Warangal, Nizamabad, Adilabad. Apart from Damarcherla in Nalgonda district at Bhongir, Alair, Ramannapet, Chandur there was naxalite problem.

12. P.W.5 stated that he was Sarpanch of Nereducherla village. He also stated that there were dictates from the naxalites that arrack should be sold at a particular rate. In 1989-90 the rate was Rs. 6/- per packet. Even in 1991-92 the rate was Rs. 6/- per packet at Nereducherla. The arrack brought by 1st plaintiff

for sale was destroyed by naxalites.

13. P.W.6 is Mandal Praja Parishad President, He also stated that naxalite threat was there, they threatened the arrack dealers and fixed the rates. He contended that situation was bad particularly when Sri Mam Chenna Reddy was the Chief Minister on account of his soft policies towards the naxalites. In 1989-90, according to him, arrack was sold in his village at Rs. 5/- per packet and at the Mandal headquarters at Rs. 6/-. In 1991-92 it was sold at Rs. 5/- per packet in the village.

14. P.W.7 is another President of Mandal Praja Parishad. He also stated almost the same what had been stated by other witnesses. P.W.8 is also a President of Mandal Praja Parishad. He also stated what had been stated by others.

15. P.W.9 is member of raiding party in arrack depot at Nadigudem. He worked under 1st plaintiff. His duty was to see supply of arrack from Nadigudem to villagers. He also used to check supply of illicit distilled arrack. He toured nearly 20 villages around Nadigudem. In October/ November, 1990 the plaintiffs could not sell arrack. In the villages around Nadigudem naxalites set at fire the arrack shops of the contractors and therefore there was no sale of arrack.

16. P.W.10 is Sarpanch of Garedepally. He stated that before the 1st plaintiff took arrack contract the rate of arrack was Rs. 5/- in the villages and Rs. 6/- in the Mandal headquarters. In 1990-91 the arrack was used to be sold at the same rate but the naxalites forced the contractor to sell at Rs. 2.50 ps. and Rs. 3/- per packet. The arrack was sold in his village at Rs. 3/- in 1990-91.

17. P.W. 11 is Sarpanch of Botalapalem village. He also stated what had been stated by other witnesses. P.W.12 runs an arrack shop in Kokkadam village. He took commission of Rs. 2/- per packet. In October, 1990, according to him the plaintiffs could not sell the arrack completely. In the month of December, 1990 to February, 1991 he could run the business to some extent. Whenever he conducted the business he could sell the arrack at Rs. 3/- per packet. He was selling arrack on behalf of the 1st plaintiff at Kokkadam. The plaintiff could not conduct his business because of the threats from the naxalites. The naxalites asked the dealers to sell arrack at Rs. 3/- per packet. In the current year i.e., 1991-92 the arrack was sold at Rs. 5/- per packet.

18. P.W.13 & P.W.14 are also sellers of arrack on behalf of the plaintiffs. They also stated what has been stated by P. W.12.

19. PW15 is Sarpanch of Annipireddygudem village. On one night the naxalites visited their village and took out the arrack and set it at fire. Whole shop was destroyed in the fire

20. P.W.16 is a dealer in arrack and was selling arrack on behalf of the plaintiffs. He was also getting commission of Rs. 2/-per sachet. Same is the case in respect of P.W.17, P.W.18 and P.W.19.

21. P.W.20 is President of Mandal Praja Parishad, Mattampally. According to him, the plaintiffs could not conduct the arrack, business on account of threat of naxalites.

22. Now, before going to the evidence of D.W.1, we have seen the evidence of the plaintiff No. 1, He has miserably failed to show that he was not allowed to conduct the business and any rates had been fixed by naxalites. There are number of witnesses who were shop keepers and who were selling the liquor on behalf of the plaintiffs. According to the 1st plaintiff, if he could sell liquor only at the rate of Rs. 6/-per sachet then only he could get his expenditure recovered. But, all the persons who have been examined by him as the shop vendors who were selling liquor on his behalf slated that they were getting Rs. 2/- as commission. If the commission is paid at 33% then it is unbelievable that the naxalites had forced the plaintiffs to sell the liquor at a particular rate. The plaintiff No. 6 who was examined as a witness admitted that they had lifted the full monthly guarantee quota for the month of October, 1990. According to him, they were not able to sell it, but it was not even returned to the department. There was ample evidence that there was looting and arson but not even a case was registered with the police. In these circumstances, it is highly improbable that the plaintiffs had failed to sell the liquor at an appropriate rate because of the threat of the naxalites. The so called threat of naxalites has been tried to be used as an excuse for the purpose of depriving the government from licence fee. During the scrutiny of the evidence we have found that even in the re-auction of these areas for granting of licence for sale of liquor one of the plaintiffs being plaintiff No. 1 has again participated. It is unbelievable that a person who has lost so much because he was not allowed to conduct the business by naxalites and almost gave up the business can again participate in the re-auction. The conduct of the plaintiffs throughout shows that they were not at all interested in giving up the contract. The successive writ petitions and the applications filed before the High Court also demonstrate that demeanor. When a re-auction notice was issued they challenged it in a writ petition and tried hard that the contract is not re-auctioned. Had there been frustration of the contract due to impossibility to perform there was no question of plaintiffs moving from the authorities to the High Court in order to steal the contract. This aspect of the matter has not at all been looked into either by the Trial Court or by the learned Single Judge. Therefore, the question of applicability of Section 56 of the Contract Act would be only a question of academic interest. The plaintiffs were always very particular in going on with the contract. If they had felt that the contract could not be performed at all there was no question of their moving the High Court and then getting liberty from High Court to file a suit. Even re-auction was not confirmed till the High Court vacated the stay. For these reasons, we believe that the doctrine of frustration was not at all available to the plaintiffs and the suit should have been dismissed on this ground alone.

23. For these reasons, we find that the decree passed by the Trial Court, as upheld by the learned single Judge, cannot be allowed to be sustained which is

accordingly set aside. The appeal is accordingly allowed. No order as to costs.