

(2002) 02 SC CK 0073

In the Supreme Court Of India

Case No : Civil Appeal 1673 of 2002 and Special Leave Petition (Civil) 21484 of 2001

State of Karnataka and Others

APPELLANT

Vs

Saveen Kumar Shetty

RESPONDENT

Date of Decision : 26-02-2002

Acts Referred:

Bengal Excise Act, 1909 — Section 63, 64

Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969 — Rule 10, 11, 11(7), 12, 13

Sea Customs Act, 1878 — Section 167(12A), 52A

Citation : AIR 2002 SC 1248 : (2002) AIRSCW 1042 : (2002) 80 ECC 255 : (2002) 2 JT 474 : (2002) 2 SCALE 430 : (2002) 3 SCC 426 : (2002) 2 SCR 49 : (2002) 2 Supreme 242

Hon'ble Judges : Shivaraj V. Patil, J;B. P. Singh, J;B. N. Kirpal, J

Bench : Full Bench

Advocate : Harish N. Salve, Solicitor General and N. Ganpathy, for the Appellant; A.K. Ganguly and Padmanabha Mahale and Rajesh Mahale, for the Respondent

Final Decision : Allowed

Judgement

Kirpal J.

1. Special leave granted.

2. On 4th May, 1999, auction for retail vend of arrack for the year 1999-2000 in respect of 272 shops in Mangalore Taluka took place. The respondent was declared successful bidder on 12th May, 1999 and thereafter this bid was confirmed.

3. Pursuant to the confirmation of the bid on 12th May, 1999, a temporary licence was given to the respondent on 28th June, 1999 and the licence was extended upto 15th August, 1999. According to the Karnataka Excise (Lease of Right of Retail Vend of Liquors) Rules, 1969 (hereinafter referred to as "Rules"),

when the bid is made it is provisionally accepted and thereafter the confirmation takes place. On the provisional acceptance of bid certain money is required to be deposited and thereafter under Rule 17 security has to be furnished and a lease deed executed. In the instant case, the respondent admittedly failed to furnish the security amount under Rule 17 and also did not execute the lease deed. As a consequence thereof, on 14th October, 1999, the Government passed an order cancelling the confirmation of the bid and forfeited the deposit of Rs. 1,25,10,000/- which had been made by the respondent under Rule 13(1) when his provisional bid had been accepted.

4. The cancellation of the bid was first challenged by the respondent by way of filing a Writ Petition bearing No. 38779/1999. This writ petition was dismissed as withdrawn reserving liberty to the respondent to pursue his remedies in accordance with law. On a representation being filed, the Government of Karnataka by its order dated 1st June, 2000, came to the conclusion that Rule 20 of the aforesaid Rules did not provide for refund or adjustment of the forfeited deposit and the amount which had been deposited was liable to forfeiture under Rule 18.

5. This decision was again challenged but a Single Judge of the High Court dismissed the writ petition by coming to the conclusion that the amount had been rightly forfeited and the respondent was not entitled to refund of the same.

6. The Division Bench of the High Court, in an appeal filed by the respondent against the dismissal of the writ petition, came to the conclusion that the forfeiture contemplated by Rule 18 was not automatic. It set aside the order of the Government and directed it to pass a fresh order after giving an opportunity of hearing to the respondent. Hence, this appeal.

7. In the instant case, the licences were to be given by auction held under Rule 11 of the said Rules. The said Rule contemplates that the intending bidders in respect of each shop or group of shops are to be short-listed and, if they are not otherwise disqualified, they can take part in the auction. Each bid which is given is to be signed and the bid is not allowed to be withdrawn. Under Sub-rule (7) of Rule 11 the Deputy Commissioner or the Divisional Commissioner after recording the bids is to provisionally accept the highest bid and make the said announcement.

8. It is not in dispute that in the instant case the highest bid of the respondent was provisionally accepted under Sub-rule (7) of Rule 11.

9. Rule 13 which requires deposit to be made reads as follows:

"13. Deposits to be made:-

(1) The person whose tender, offer or bid is accepted provisionally under Rules 9, 10, 11 and 12 shall, immediately on the day such acceptance is announced, make a deposit of an amount which together with the earnest money deposited under Sub-rule (6) of Rule 5 is equal to one month's rent of the shop, or group of

shops or the area or areas for which his tender, offer or bid is provisionally accepted.

(2) If the deposit as required by Sub-rule (1) is not made, the provisional acceptance of the tender, offer or bid shall stand cancelled, the earnest money shall be forfeited and the Deputy Commissioner or the Divisional Commissioner may either accept provisionally the next highest tender, offer or bid or dispose of the right of retail vend of liquors afresh. In the latter case, the disposal shall be at the risk of the defaulter who shall not be entitled to any excess amount realised but shall be liable for the losses sustained by the State Government shall be entitled to assess such loss and recover it from the defaulter as if it were an arrear of land revenue.

(3) A defaulter shall not be entitled to tender, offer or bid at the auction held under Sub-rule (2)."

10. According to Rule 15, whenever the Deputy Commissioner or the Divisional Commissioner has provisionally accepted the bid, he has to forward the proceedings to Excise Commissioner who then has the authority to recommend to the State Government for confirmation of the bid. It is also admitted that the bid of the respondent was so confirmed.

11. According to Rule 16, a person whose bid is accepted and confirmed is required to enter into an agreement of lease with the State Government within 15 days of the confirmation order. Rule 17 which deals with the application for licence and contemplates furnishing of security, reads as follows:

"17. Application for licence and conditions to be fulfilled:-

(1) The person in whose favour the disposal of the right of retail vend of liquors is confirmed shall-

(a) within fifteen days from the date of communication of the order of confirmation make an application together with a list of sites with its boundaries selected for locating the shop or shops, or the area or areas for a licence in respect of each shop or group of shops or the area or areas,

(i) to the Deputy Commissioner of the district where the disposal is of shops or group of shops within that district;

(ii) to the Excise Commissioner where the disposal is of shop or group of shops situated in more than one district;

(b) within fifteen days from the date of communication of the order of confirmation furnish security for an amount equal to three and one tenths of the monthly rent in the form of cash deposit, Government securities or other securities recognised by the Government or an irrevocable guarantee given by a Scheduled Bank.

(2) On the provisions of Sub-rule (1) and rule 16 being complied with the Deputy

Commissioner, or the Excise Commissioner as the case may be, shall issue licences in Form AS-I in respect of each shop.

(3) NO lessee shall be entitled to exercise the right of retail vend of liquors until the licensee under Sub-rule (2) is issued to him."

12. The consequence of failure to execute lease agreement is provided by Rule 18 which reads as follows:

"18. Failure to execute lease agreement, etc.:-

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 govt. 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 to assess such loss and recover it as if it were an arrear of land revenue."

13. It is not in dispute that there were two defaults committed by the respondent in the instant case. Firstly, it did not execute the lease deed under Rule 16 and secondly it did not make the deposit of security under Rule 17(1)(b). It is for these defaults that the impugned order of 1st June, 2000, was passed cancelling the bid of the respondent.

14. The High Court on a construction of the Rules came to the conclusion that while forfeiture was mandatory under Rule 13(2) the same was not the consequence which would follow on an interpretation of Rule 18. According to the High Court, the Government had the discretion whether to exercise the right of forfeiture or not under the said Rule 18.

15. In our opinion, the High Court erred in coming to the aforesaid conclusion. Rule 13(2) is in two parts. It first deals with the situation where a deposit is required to be made under Sub-rule (1) is not made. Rule 13(2) provides that in such an event the tender, offer or bid shall stand cancelled and the earnest money shall be forfeited. Therefore, the non-deposit results in automatic cancellation and forfeiture, but the authorities have the right at that time to either provisionally accept the next highest bid or offer or to dispose of the right of retail vend of liquors afresh. Where however, the deposit under Rule 13(1) has been made, the question of exercising right under Rule 13(2) does not arise. But

in the event of failure of complying with the provisions of Rules 16 and 17, the Government under Rule 18 has a discretion whether to cancel the bid or not. But once it is cancelled, Rule 18(1) provides that "the deposit made by such person shall be liable to be forfeited to the State Government."

16. In the instant case, within 15 days of the confirmation, the respondent was under an obligation to make the deposit under Rule 17(1)(b) and also execute the lease deed under Rule 16. When the respondent failed to do so, the Government under the first part of Rule 18(1) exercised the jurisdiction in not cancelling the bid but extended the temporary licence. When there was further default and non-compliance with Rules 16 and 17, it is only thereafter that the Government exercised its discretion in cancelling the bid by its order dated 14th October, 1999. Once the bid was cancelled, then the latter part of Rule 18(1) comes into play and the deposit made by such person was liable to be forfeited. Nothing more was required to be done.

17. A constitution Bench of this Court in *Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs and Others*, was required to construe the phrase "shall be liable to confiscation" occurring in Section 167(12A) of the Sea Customs Act, 1878 (No.8 of 1878). It came to the conclusion that once an offence had been committed the vessel had to be confiscated and there was no discretion with the Adjudicating Officer in this behalf. In other words, such a phrase indicated that confiscation was a statutory corollary in the event of contravention of Section 52A and that it was not open to the Customs Authorities not to confiscate the vessel. To the same effect are the two other decisions of this Court in *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal Vs. Abani Maity*, and *Chern Taong Shang and Others Vs. Commander S.D. Baijal and Others*, .

18. Somewhat contrary view has been expressed by a Two Judges Bench of this Court in *State of M.P. v. Azad Bharat Finance Company & Anr.* 1966 Suppl. SCR 473. Dealing with the provisions of Section 11 of the (Madhya Bharat Amendment) Act, the Court came to the conclusion that where there was a truck found carrying opium, then confiscation of the same was not mandatory, though the said Section 11 had used an expression "shall be confiscated". As pointed out by this Court in *Abani Maity's case* (supra), what appears to have influenced the decision in *Azad Bharat Finance Co.'s case* was the fact that the owner of the truck was not even aware that the same was being used for transporting opium. It is also to be seen that the attention of the Court in *Azad Bharat Finance Co.'s case* was apparently not drawn to the binding decision of the Constitution Bench in *Indo-China's case* which was followed as a precedent in the subsequent decisions - *Abani Maity* and *Chern Taong Shang & Ors.* (supra).

19. It can, therefore, be said to be settled law that where the expression used is "shall be liable to confiscation" it means that there is no discretion with the Adjudicating Authority but to impose such a penalty. Where, however, the option is given like in *Abani Maity's case* u/s 64 of the Bengal Excise Act, 1909, either to

order confiscation or give the owner of the vehicle an option to pay fine in lieu of confiscation, then that is the only discretion which is available with the Magistrate. The Magistrate could not waive the penalty completely. He either has to order confiscation u/s 63 read with Section 64 or in lieu of confiscation impose such fine as he thought fit. Once an offence was established, one of the two consequences contemplated by Section 64 had to follow.

20. On the interpretation of Rule 18 in the instant case, it is clear that once a discretion has been exercised by the Government under Rule 18 to cancel the bid then a forfeiture of the amounts deposited is a consequence to the said act of cancellation and there is no discretion in the Government whether to exercise the right of forfeiture or not. This being so, the question of affording an opportunity to the respondent before effecting the forfeiture cannot arise. Opportunity was granted before cancelling the bid. Admittedly, there was a default in non-compliance with the provisions of Rules 16 and 17. This being so, the appellant-State was right in its decision to cancel the bid and to forfeit the amount deposited under Rule 13(1).

21. For the aforesaid reasons, this appeal is allowed and the decision of the Division Bench of the High Court is set aside and the writ petition filed by the respondent before the High Court would consequently stand dismissed. The appellant would be entitled to costs.