
(1997) 02 KL CK 0036
In the High Court Of Kerala
Case No : A.S. No"s. 45 and 48 of 1986

State of Kerala

APPELLANT

Vs

Govindan Ponnammam and Others

RESPONDENT

Date of Decision : 28-02-1997

Acts Referred:

Contract Act, 1872 — Section 56, 73
Kerala Abkari Act, 1077 — Section 29
Kerala Abkari Shops (Disposal in Auction) Rules, 1974 — Rule 8(2)

Citation : AIR 1997 Ker 302

Hon'ble Judges : T. Ramachandran, J

Bench : Single Bench

Advocate : Gopinathan Nair, Govt Pleader, for the Appellant; K.P. Dandapani and K. Jaiju Babu and C.M. Devan, for the Respondent

Final Decision : Allowed

Judgement

T. Ramachandran, J.—These two appeals arise from the common judgment and decrees in O.S. No. 239//81 and O.S. No. 240/81 of the Additional Sub Court of Quilon.

2. The appellant in both the appeals is the State of Kerala and the State was the defendant in both O.S. No. 239/81 and O.S. No. 240/81 before the Sub Court of Quilon. O.S. No. 239/81 was filed by the respondents in A.S. No. 45/86 for declaration that the abkari contract with the State is rescinded and for mandatory injunction directing the State to refund portion of the bid amount already deposited. The plaintiffs are abkari contractors and they were the successful bidders of 25 arrack shops of Quilon excise range for the financial year 1981-82. The auction was held on 23-3-19981 as per the sate notification dated 27-2-1981. The bid amount was Rs. 99,72,000/-. The auctioning officer on behalf of the Suite made in announcement before the auction that 5,760 litres of arrack would be the monthly quota and that any quantity in excess of the announced monthly quota of arrack would be supplied whenever demanded for

as was done in the earlier years. The plaintiffs, after bidding the auction remitted Rs. 14,400/- as the duty for 5760 litres on 1-4-1981. As required by the rules the plaintiffs deposited 30% of the bid amount, amounting to Rs. 299,91,600/- on 23-3-1981 and furnished solvency certificate for 20% of the bid amount. But no arrack could be supplied by the State. The plaintiffs had obtained for sale in the previous year more than 6 lakhs litres in excess of the monthly quota. When the plaintiffs did not get any arrack, they made representations to the Range Officer, Circle Inspector of Excise and Assistant Excise Commissioner on 2-4-1981; 3-4-1981 and 4-4-1981 respectively. But they were informed that no stock was available with the Government for supply. The plaintiffs came to know that there was acute shortage of arrack in all the warehouses. No arrangement was made by the State for supply of spirit and alcohol to manufacture arrack. According to the plaintiffs the auction was conducted in suppression of the real state of affairs and as such there was fraudulent misrepresentation on the basis of which the plaintiffs were induced to enter into the agreement with the State for obtaining arrack. According to the plaintiffs their monthly expenses for running the arrack shops would be Rs. 20 lakhs including the interest payable to the security deposit which was raised by taking loans from the banks and also the rent of the shops, salary and wages of the employees. Thus according to the plaintiffs the loss from 1-4-1981 to 4-4-1981 was nearly Rs. 2.64.000/-. Thus on 4-4-1981 the plaintiffs were forced to rescind the contract and notice was sent to that effect on 4-4-1981. But on 8-4-1981 the plaintiffs received a copy of letter from the Inspector of Excise, Quilon Range showing the date as 4-4-1981 intimating them that the Inspector of Excise, Pamba Distillery would be supplying 5706 litres of arrack at Thiruvalla. The plaintiffs informed that the contract was already rescinded. Then on 11-4-1981 demand notice was received u/s 7 of the Revenue Recovery Act demanding the remittance of Rs. 9,97,200/- with 12% interest as kist arrears.

Then the plaintiffs filed O.P. No. 1972 of 1981 before this Court to quash the above order. As per the order in the original petition this Court directed the State to send a reply to the suit notice within six weeks from 27-7-1981. Then a reply was received on 28-9-1981 by the plaintiffs stating that the security amount cannot be refunded and hence the contract cannot be rescinded unilaterally. Thus the plaintiffs filed the suit for declaration that the contract was already rescinded and for mandatory injunction directing the State not to proceed under the Revenue Recovery Act. On behalf of the State written statement was filed by the Chief Secretary admitting the announcement regarding the monthly quota of arrack at the time of auction and contended that arrack in excess of the monthly quota is to be issued by the Board of Revenue. It was also contended that the supply of excess quota was subject to availability of arrack to the excise department. According to the State there was no announcement regarding supply of excess quota. It was admitted that even though Rs. 14,400/- was remitted by the plaintiffs on 1-4-1982 as duty for 5760 litres of arrack no supply could be made due to non-availability of arrack in the warehouses. According to the State

there was no agreement to supply monthly quota on the first date of the financial year and that it could be supplied any day within the month. According to the State, on 4-4-1981 the plaintiffs were directed by the Range Inspector to take their quota of arrack from M/s. Pamba Distillery, Thiruvalla. Even though the plaintiffs accepted the notice, they did not take supply of arrack from the distillery. It was contended that the plaintiffs have no right to rescind the contract unilaterally and that arrack was not supplied in time only due to non-availability in the warehouse. The plaintiffs did not conduct the arrack shop and as such the department had to take steps for resale of the right. The State contended that the security amount deposited by the plaintiffs was adjusted towards the dues from them as per the rules and that there was no provision for return of the said deposit. Thus the State contended that the revenue recovery proceedings were properly initiated. When the plaint was amended impleading additional plaintiffs 3 to 8, additional written statement was filed by the State contending that plaintiffs have to prove that plaintiffs 3 to 8 were partners of the firm.

3. The said plaintiffs filed O.S. No. 240/81 against the State. The prayers in O.S. No. 240/81 were the same as in O.S. No. 239/81. The cause of action for filing O.S. No. 240/81 was that the plaintiffs were the successful bidders for 12 arrack shops in Chathanoor Excise Range in Quilon district for the financial year 1981-82 in the auction held on 23-3-1981. The state notification was dated 27-2-1981. The bid amount was Rs. 19,10,000/-. The monthly quota to be supplied was 990 litres of arrack for these 12 arrack shops. There was an announcement that arrack in excess of the announced monthly quota would be supplied to the plaintiffs on demand. Thus the plaintiffs remitted Rs. 2,475A as duty for 990 litres on 1-4-1981 and deposited 30% of the bid amount i.e. Rs. 5,73,000/- and also furnished solvency certificate for 20% of the bid amount. But no arrack was supplied by the State. The plaintiffs approached the Range Officer on 2-4-1981, the Circle inspector of Excise on 3-4-1981 and the Assistant Excise Commissioner on 4-4-1981. But the plaintiffs were informed that there was no stock available with the Government for supply. The plaintiffs came to know that the State did not make arrangement for supply of rectified spirit or alcohol to manufacture arrack. Thus according to them the auction was conducted in suppression of the real state of affairs amounting to fraudulent misrepresentation on the basis of which the plaintiffs were induced to enter into agreement with the State: It was alleged that the monthly expenses of the plaintiffs for running the said shops would be Rs. 2 lakhs including the interest payable on the security deposit which was raised by taking loan from the banks and also rent of the shops and salary and wages of the employees. Thus the actual loss sustained by the plaintiffs from 1-4-1981 to 4-4-1981 was nearly Rs. 26,400/-. Thus on 4-4-1981 the plaintiffs rescinded the contract and sent a notice to that effect. But the Excise Inspector of Chathanoor Range issued a demand notice u/s 7 of the R.R. Act for remittance of Rs. 1,91,000/- with 12% interest as interest arrears of April, 1981. Thus the plaintiffs filed O.P. No. 1972 of 1981 before this Court to quash that order. That Original Petition was disposed of

on 27-7-1981 with a direction to the State to send a reply to the suit notice within six weeks from 27-7-1981. Thus a reply was received on 28-9-1981. The State took the stand that the plaintiffs had no right to rescind the contract. The contentions taken by the State were the same as in O.S. No. 239/81.

4. After framing necessary issues the Lower Court conducted joint trial of both the suits. P.Ws. 1 to 3 and D.W. 1 were examined and Exts. A1 to A9. B1. B2 series and B3 were marked. After hearing both sides the lower Court considered the matter and held that the plaintiffs were entitled to get the reliefs as prayed for. Thus both the suits were decreed as prayed for. Aggrieved by that judgment and decree in O.S, No. 239/81. A.S. No. 45/86 is filed and against the judgment and decree in O.S. No. 240/81. A.S. No. 48/86 is filed before this Court.

5. Counsel for both sides were heard. According to the learned Government Pleader, the lower Court went wrong in holding that the agreement is rescinded. It was further argued that the State was prepared to give monthly quota to the plaintiffs and that the plaintiff did not take delivery of the supply from Pamba Distillery, Thiruvalla. He further argued that delay of supply on 1-4-1981 was not intentional as arrack was not available at the warehouse. Thus according to him there was no breach of contract and that the demand notice sent by the State for Rs. 9.09.200A was proper and that the plaintiffs were not entitled to get any reliefs. It was further argued that as the plaintiffs did not conduct the arrack shops, resale was held. Then, in view of the direction of this Court in O.P. No. 1972/81 reaction was postponed. This Court allowed the stay on deposit of arrears only. When the stay was vacated, resale was conducted on 11-1-1982. According to the learned Government Pleader the security amount deposited was adjusted towards the dues from the plaintiffs and that the proceedings initiated under the Revenue Recovery Act were legal.

6. The points arising for consideration are : (1) whether there was breach of contract by the State: (2) whether the contract was rescinded: and (3) whether the plaintiffs were entitled to the relief's prayed for.

7. Point No 1. : The plaintiffs were abkari contractors and they were the successful bidders in Ponnukkara Range in Quil district and in Chathannur Range. In Ponnukkara Range 20 shops were bid by the plaintiffs and in Chathannur Range 12 shops were bid by them. The bid amount in Ponnukkara Range was Rupees 99,72,000/- and the bid amount in Chathannur Range was Rs. 19,10,000/-. 30% of the bid amount was deposited and solvency certificates were produced for 20%. The condition was that the State will be supplying rectified spirit or alcohol for the purpose of arrack through the warehouses. The plaintiffs alleged that arrack was not supplied on 1-4-1981 to 4-4-1998 : Thus according to them they sent a notice on 4-4-1981 rescinding the contract on the ground that breach was committed by the State. The monthly quota for Ponnukkara Range was 5760 litres per month and for the Chathannur range it was 990 litres of alcohol. According to the plaintiffs there was an announcement at the time of auction that excess quota would be supplied by the State wherever

required. But this announcement was denied by the State in their written statement. P.W.2, P. W.3 and D.W. 1 stated that there was no such announcement. Issue No. 1 framed by the lower Court was as to whether the plaintiffs were entitled to get arrack supply if an unlimited quota from Government from 1-4-1981 as per the terms of the auction and pursuant to the agreement entered into between the plaintiffs and the defendant. As per Rule 8(2) of the Kerala Abkari Shops (Disposal in Auction) Rules the supply of excess quota was only discretionary in accordance with the availability. Thus issue No. 1 was answered in favour of the State by the lower Court. The learned Government Pleader argued that no arrack was available even on 3-4-1981 due to non-availability of stock in the warehouse. Thus as per the original of Ext.A2 letter on 6-4-19981 the plaintiffs were informed to take supply from Pamba Distillery at Thiruvalla. But the case of the plaintiffs was that the contract was already rescinded on 4-4- 1981. The case of the State is that the State was informed of the rescinding of the contract on 13-4-1981 only as seen from Ext.A6 acknowledgment. Thus the learned Government Pleader argued that the plaintiffs ought to have taken supply as per Ext.A2 letter Even though the letter was dated 4-4-1981 the was no evidence to show that the letter was posted by the plaintiffs on 4-4-1981. The plaintiffs deposited the kist amount on 1 -4-1981 and Ext.A3 was the confirmation letter to execute agreement and to receive licence. Thus Exts. B1 and B2 agreements were executed. But no licence was received by the plaintiffs. P.W.2 admitted in page 17 of his deposition that licence was not taken. The conditions as shown in the licence are mentioned in form 3 of the Rules. P.W.2 at page 5 of his deposition, stated that on 3-4-1981 chalan was given at the Range Office. Till 6-4-1981 the plaintiffs were not ready with the licence. Admittedly the plaintiffs were contractors from 1975 onwards in both these ranges. Thus they were aware of the procedure and they knew that licence was necessary for taking delivery of the supply. The learned Government Pleader submitted that there was shortage of rectified spirit by the end of the year 1981. P.W.2 deposed that he had contacted Range Officers and even the Minister concerned. Ext.B3 register shows that there was no arrack supply from the warehouse from 3-7-1980 onwards. Thus the plaintiffs were aware of the position and knowing the scarcity of arrack they bid at the auction. Thus they cannot argue that the State had committed breach of contract. Thus the lower Court went wrong in holding that the State committed breach of contract.

8. The learned Counsel appearing for the respondents argued that it was mandatory on the part of the State to supply the monthly quota of rectified spirit and that regarding supply of excess quota alone there was discretion for the Government. The learned Counsel argued that the decision cited by Government Pleader as reported in 1984 Ker LT 88 (Issac v. Assistant Excise Commr.) was no more good law as it was reversed by the Apex Court in the decision reported in 1994 (2) Ker LJ 645 (Asst. Excise Commr. v. Issac Peter). In that decision it was held that contract being governed by statutory provisions the conditions of licence and counter part agreement are binding on both sides and they cannot be

varied by any officer or Government. Referring to Rule 6(26)) and 8(1) of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974, it was held that the State is not under an obligation to supply additional quota of arrack asked for by the licensee and that the State is bound to supply the monthly quota alone. The learned Counsel appealing for the respondent argued that Ext.A3 letter referred to Ext.A1 letter dated 1-4-1981. Ext.A2 letter regarding Quilon range was sent on 6-4-1981 and it was received by the plaintiffs on 8-4-1981. Then reply was sent on 10-4-1981 stating that the contract was already rescinded on 4-4-1981 by the plaintiff. Ext.A5 is dated 4-4-1981 and it shows that no stock was available. The learned Counsel referred to the averment in paragraph 15 of the written statement wherein it was stated that supply could not be made. Ext.A5 letter referred to the application dated 2-4-1981. P.W. 1 stated in page 6 of his deposition that he did not know when the letter was received. P.W.2 at page 4 of his deposition admitted that monthly quota was not supplied on 1-4-1981,, 2-4-1981 or 3-4-1981. D.W. 1 stated at page 10 of his deposition that the State was bound to give the monthly quota. But that monthly quota was not given as stated by D.W. 1 at page 12 of his deposition. The learned Counsel argued that the monthly quota ought to have been supplied by the State. But in the present case it can be seen that attack could not be supplied till 4-4-1981 only because arrack was not available in the warehouse. The State did not take the stand that no monthly quota would be supplied. The learned Counsel argued that in view of this fact it was clear that the State was not in a position to perform their part of the contract on the date of the bidding. Thus he argued that it was misrepresentation coming u/s 18 of the Contract Act and that the contract is made voidable. It is to be noted that the State could not make any supply till 4-4-1981 and they expressed their willingness to supply the required rectified spirit from the Pamba Distillery at Thiruvalla. Thus it was not a case of non-performance of their part of the contract. There was no condition that the monthly quota will be supplied on 1-4-1981 itself. Thus the lower Court was not correct in holding that the State committed breach of contract. On the other hand, as the plaintiffs did not take the licence and as the plaintiffs did not take delivery of the rectified spirit from the Pamba Distillery at Thiruvalla, it is clear that they committed breach of contract. The point is answered accordingly.

9. Point No, 2: The case of the plaintiffs was that they had rescinded the contract on 4-4-1981. The learned Counsel appearing for the respondents argued that the contract was frustrated under Sections 54 - 56 of the Contract Act. He referred to the decision reported in *Satyabrata Ghose Vs. Mugneeram Bangur and Co.* and Another, . That was a case coming u/s 56 of the Contract Act wherein the contract had become impossible of performance. That was not applicable to the facts in the present suit. There was only delay in supply of rectified spirit by the State. Hence it cannot be said that the contract had become impossible of performance. When the State informed the plaintiffs regarding the availability of rectified spirit at Pamba Distillery at Thiruvalla, no steps were taken by the plaintiffs to take delivery of that spirit. On the other hand, they took the stand

that the contract was already rescinded on 4-4-1981. It is to be noted that a contract cannot be rescinded unilaterally and the plaintiffs were aware of the circumstances under which the bidding was done. Thus the lower Court went wrong in holding that the contract was rescinded.

10. Point No. 3 : In view of the breach of contract committed by the plaintiffs, they are not entitled to get any reliefs as prayed for. Thus the judgment and decree of the lower Court are liable to be set aside.

For the above reasons these appeals are allowed and setting aside the judgment and decree of the lower Court the suits are dismissed with costs in both the Courts.