
(1999) 09 MP CK 0099
In the Madhya Pradesh High Court
Case No : F.A. No. 101 of 1996 (J)

State of M.P. and Another

APPELLANT

Vs

Harishchand

RESPONDENT

Date of Decision : 20-09-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 2

Citation : (2000) 2 MPJR 489

Hon'ble Judges : Usha Shukla, J; Miss, J; D.M. Dharmadhikari, J

Bench : Full Bench

Advocate : Naman Nagrath, for the Appellant; Kishore Shrivastava and Sanjay Agrawal, for the Respondent

Final Decision : Allowed

Judgement

D.M. Dharmadhikari, J.

The judgment in this appeal shall decide the connected appeals - F.A. No. 260/96 (State of M.P. v. Harbansh Singh) and F.A. No. 273/96 (State of M.P. v. Mevalal Jaiswal) also. These appeals preferred by the State of M.P. in its Excise Department arise out of three civil suits filed separately by three contractors (respondents herein) which have all been decreed.

In the excise period 1991-92, the excise contractors were granted statutory licences for selling country liquor in various areas specified in the licences in Sidhi district.

At the time of auction, in the sale memorandum issued, it was specifically mentioned that the excise contractors would be allowed to keep their shops open for sale from 10.00 in the morning to 10.30 in the night. The contractors highest bids offered for the shops were accepted. In the statutory conditions of the licences, issued under the provisions of M.P. Excise Act, however, it was mentioned that they would be entitled to keep open their shops for sale of liquor between 10.00 in the morning to 10.00 in the night instead of 10.30. The case of

the plaintiffs is that they pointed out the above variation in the conditions of the licences and the conditions given in the sale memos but the District Excise authorities paid no heed to it. It is only on 25.7.1991 that the District Excise authorities issued a corrigendum to the conditions of the licence bringing the condition in the licence about the time of opening and closure of the shops in conformity with the conditions of the auction memo. The excise contractors by three different suits claimed remission of licence fee and damages for loss caused between the period 1.4.91 to 24.7.91 during which according to them they were compelled under the conditions of the licence to close their shops at 10.00 in the night i.e. half an hour ahead of the time during which they could continue to sale liquor from the shops. The quantum of claim towards remission of the licence fee and loss or damage is contained separate in Schedule "Ka" and "Kha" annexed to the plaint. In Schedule "Ka" containing the amount claimed towards remission of licence fee, the calculation appears to be made on the basis of the total licence fee payable for each of the shops. The licence fee payable for the entire period is made basis to work out licence fee "per hour" and then on that basis licence fee payable for each 1/2 hour is worked out. Calculating in the manner aforesaid in schedule "Kha" for loss of sale for each half an hour each day per shop, proportionate remission of licence fee has been claimed. A perusal of schedule "Ka" makes the above position clear.

In Schedule "Kha" of the suit, the quantum of damages claimed for loss of sale for half an hour on each day between the period 1.4.91 to 24.7.91 has been given in a chart form. On the basis of the total sales effected during the contract period in question, the proportionate loss of sale due to closure of the shop half an hour before the scheduled time is worked out between the period 1.4.91 to 24.7.91. On the above basis, the total amount of loss suffered due to loss of half an hour of sale period every day has been worked out. In all the three suits, the basis of claim is the same as has been shown in Schedules "Ka" and "Kha" of each suit.

The State resisted all the suits and disputed the heads of claim in Schedules "Ka" and "Kha" of the suits pleading, inter alia, that although there existed a typing mistake in the licence conditions regarding the time of closure of shop at 10.00 in the night instead of 10.30, the excise contractors continued to keep open their shops till 10.30 even during the disputed period i.e. 1.4.91 to 24.7.1991. It is submitted that as and when the shops of the contractors were inspected they were found carrying on sales upto the scheduled time of 10.30 in the night. On behalf of the State it is submitted that the excise contractors are trying to gain substantial advantage on the basis of an inadvertent mistake in the conditions of the licence when in fact no loss at all was caused to them because of such mistake in the statutory licence.

The trial Court by judgments impugned in these appeals found that there was admittedly a mistake in the conditions of the statutory licences by mentioning the time of closure of shops at 10.00 instead of 10.30 which was not in

conformity with the auction conditions and the sale advertisement. Having thus found a mistake on the part of the Excise Department, the Court straightaway decreed the whole claim of the excise contractors on the basis of their calculation for remission of licence fee in Schedule "Ka" and for loss of sales in Schedule "Kha"

The trial Court granted a decree in each of the cases based on Schedule "Ka" of declaration that the plaintiffs are entitled to remission of licence fee proportionate to the total period at half an hour each day of loss of sale for the period in question. It also granted decree for the loss towards sale on the basis of quantum mentioned in Schedule "Kha" in each suit,

Shri Naman Nagrath, learned counsel appearing for the State severely criticised the action of the trial Judge in straightaway decreeing the whole claim in the absence of any evidence whatsoever of any loss caused to the contractors. Shri Kishore Shrivastava, learned counsel appearing for the excise contractors, however, made strenuous efforts to support the decree.

After hearing the learned counsel for the parties, in the considered opinion of this Court, it is not possible to uphold the decree for more reasons than one.

So far as the decree granted of declaration for proportionate remission of licence fee is concerned, the provisions contained in M.P. Excise Act, 1950 and the Rules framed thereunder do not permit remission of licence fee except u/s 32 when, the State Government itself withdraws a licence during its currency. In no other situation the provisions of the Act or the Rules permit remission of licence fee. The decree granted by the trial Court of a declaration for remission of licence fee proportionate to the period during which the contractors could not affect sales from their shops is founded on a misconception and misunderstanding of the nature of this levy i.e. "licence fee". The "licence fee" is charged in the shape of auction money for granting by lease the monopoly right or privilege of the State Government to deal in liquor. The licence fee stipulated to be paid by the contractors is the price or consideration or rental, which the government charges from the licensee, for parting with its privilege, in stipulated lump sum payment - may be that for the sake of convenience of its recovery it is collected in 12 equal instalments. The auction money thus is a rental or consideration for the privilege granted by the government for vending liquor. [See: Pannalal v. State of Rajasthan - (1975) 2 SCC 633]. The auction money charged in twelve equal instalments is thus a rental or consideration charged for parting with the monopoly right of the government to deal in liquor. Assuming for the sake of argument that the contractors for the period in question closed their shops, strictly in accordance with the licence conditions, at 10.00. In the night, it cannot be held that they were deprived of their right to carry on trade in liquor. There could not, therefore, have been a remission of licence fee proportionate to the total period during which they were compelled to close each day their shops half an hour ahead of the scheduled time. Such a decree granting remission towards licence fee, therefore, is neither warranted by the provisions of the Excise Act

and the Rules framed thereunder, nor by the terms and conditions of the licence.

The decree granted on the basis of calculation contained In Schedule "Kha" in each of the suits towards the loss caused in sales of liquor because of closure of shops each day half an hour ahead of the scheduled time, the trial Court should have seen that mere claim based in the suit on the schedules "Ka" and "Kha" was no evidence. It was necessary for the contractors to have led evidence to show that each day during the period in question, due to closure of shop half an hour ahead of scheduled time, the actual sales which they could have made from the shops had been adversely affected.

Learned counsel appearing for the contractor submits that in a case where the shops are compelled to be closed half an hour ahead of the scheduled time, it is well high impossible to prove the actual loss suffered due to loss of period each day in carrying on business. Learned counsel, therefore, submits that it is only on the basis of calculation as given in Schedule "Kha" that compensation for loss of half an hour of sale period each day can be claimed and decreed.

We have given considerable thought to the submission made on behalf of the contractors in respect to their claim for loss of sales from the shops because of loss of half an hour period each day. As is apparent from the licence conditions on the basis of licence, the contractor got exclusive right to sell liquor at a particular place and there was no other competitor in the area of the shops in question, if the shops of the contractors remained open only till 10.00 in the night, it is not necessary that their total sales were affected or that they would have gained more sales if additional half an hour period would have been made available to them.

There is no evidence to show that any person willing to purchase liquor returned because the shop was closed. It is submitted on behalf of the contractor that time between 10 and 10.30 in the night is the peak period of sale of liquor. There is no ground to assume so. Customers approach the shops on the basis of the timings of the shops. It cannot, therefore, be assumed that only because each day the shops were closed at 10.00 in the night the contractors suffered loss in their business.

13-A. It is equally true that even if there would have been better sales between 10 and 10.30 in the night, it is difficult for the contractors to prove the same in such a situation where there is a breach of the contract, but no evidence of the quantum of loss, the question is whether the plaintiff has to be totally non-suited or he deserves to be granted some relief. Taking help from the authoritative work of Chitty on contracts, Vol.1, Paragraph 26-004, we find that in a situation like the present one obtaining before us, the contractors can be granted nominal damages sufficient to save them from suffering the loss of total cost of litigation. See - the following observations in Chitty's book, namely, "Chitty on Contracts" General Principles, Vol.1, Para 26-004:

Nominal damages - Wherever the defendant is liable for a breach of contract, the

plaintiff is in general entitled to nominal damages although no actual damage is proved; the violation of a right at common law will usually entitle the plaintiff to nominal damages without proof of special damage. Normally, this situation arises when the defendant's breach of contract has in fact caused no loss to the plaintiff, but it may also arise when the plaintiff, although he has suffered loss, fails to prove any loss flowing from the breach of contract, or fails to prove the actual amount of his loss. A regular use of nominal damages, however, is to establish the infringement of the plaintiff's legal right, and sometimes the award of nominal damages is "a mere peg on which to hang costs".

It may also be necessary to mention that we find no evidence led by the State that despite the mistake about timing of the closure of shop in the licence conditions, during the period in question, the contractors in fact effected sales from their shops upto 10.30 in the night and this was so found in periodical inspections by the excise authorities. No such evidence was led by the State in the trial Court. The application now filed in this appeal on behalf of the State under Order 47 Rule 2 C.P.C. for the purpose appears to be an after thought and we reject the same. As during the period in question the contractors' conditions of licence permitted them to keep their shops open only till 10.00 in the night, we have to assume that the contractors, in the absence of any evidence led by the State, transacted sales each day only upto 10.00 in the night. The finding of the trial Court to the extent that for the period in question the contractors transacted the business of sale from the shops only till 10.00 in the night deserves to be upheld.

So far as the quantum of damages is concerned, as has been held by us above, the decree based on Schedule "Ka" of each suit towards remission of licence fee could not have been granted. The decree of declaration granted towards remission of licence fee in each suit is set aside. The other part of the decree in each case for loss of sales of half an hour each day for the period in question, the quantum decreed on the basis of Schedule "Kha" is hereby set aside. Instead, it is held that in each case the contractor is entitled to nominal damages to the extent of total cost incurred by him in instituting the suit, i.e. Rs. 11,346.50 in F.A. No. 101/96, Rs. 3796.50 in F.A. No. 273/96 and Rs. 6,198.50 in F.A. No. 260/96.

Normally cost of litigation is awarded in favour of plaintiff who has partially or fully succeeded. The question arises whether the plaintiff who has only been awarded nominal damages can also be awarded full costs of litigation. The following observations contained in the celebrated work of McGregor, namely, "McGregor On Damages", Fifteenth Edition (1988), Page 405, based on the observations of Devlin J. in *Anglo-Cyprian Agencies v. Paphos Industries* ([1951] 1 All E.R. 873) is instructive and quoted hereunder to award nominal damages to the plaintiffs to defray full costs incurred by them in the trial Court and in these appeals as respondents:

No doubt the ordinary rule is that, where a plaintiff has been successful, he

ought not to be deprived of his costs, or at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a "successful" plaintiff. In certain cases he may be, e.g. where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained. To that extent a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff, but it is necessary to examine the facts of each particular case.

17-A. Consequent to the aforesaid discussion, the appeals preferred by the State succeed partly to the extent of setting aside the decree granted by the trial Court in each case except to the extent of Rs. 11,346.50p. in F.A. No. 101/96, Rs. 3,796.50p. in F.A. No. 273/96 and Rs. 6,198.50p. in F.A. No. 260/96. The amounts are awarded as nominal damages to the plaintiff in each case. In the circumstances, however, the State-appellant shall bear its own costs and shall also bear the costs of the respondents in these appeals. Counsel's fee shall be paid as per schedule, if pre-certified.