
(1985) 04 RAJ CK 0026

In the Rajasthan High Court

Case No : Civil Special Appeals No. 115 and 116 of 1985

Sushil Kumar and Party and Another

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 01-04-1985

Acts Referred:

COMPANIES ACT, 1956 — Section 11, 4, 65, 70

Citation : (1985) 2 WLN 265

Hon'ble Judges : S.N. Bhargava, J;N.M. Kasliwal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.M. Kasliwal, J.—Arguments in both the special appeals were heard on March 28, 1985, and after hearing the arguments we were convinced that there was no force in these appeals and as such the same were dismissed with no order as to costs. As the time was short, we had ordered that the reasons for our judgment shall be given subsequently.

2. We are now giving our reasons for dismissing the above special appeals. The Excise Commissioner for Rajasthan issued a notice inviting, tenders on February 11, 1985, for grant of wholesale and retail off licence for Indian Made Foreign Liquor (here in after referred to as "the IMFL") for the period from April 1, 1985 to March 31, 1986. The last date for submission of tenders was February 25, 1985 and for opening of tenders was February 26, 1985 at 10. a.m. In response to the tender notice three tenders were received for all the shops included in 10 zones for city of Jaipur. The highest tender was for Rs. 5,42,29,400 submitted by Magh Raj. The next was submitted by Ghanshyam and party for Rs. 5,21,00,001/-. The third tender was submitted by Sushil Kumar Badru Khan and party for Rs. 4,55,00,001/-. Writ petition No. 425/85 was filed jointly by Surjeet Singh, Chhotu Khan and Hukam Singh, who had not submitted any tender but after the tender had been opened they had sent a telegram on February 25, 1985, raising objections against the acceptance of tender in favour of

Ghanshyam and party and offered Rs. 5,21,00,001/-. Writ petition No. 437/85 was filed by Sushil Kumar Badru Khan & party who had submitted the third tender as mentioned above. It may be mentioned that the highest tender of Magh Raj was not accepted as the party was not found to be genuine and the next highest tender of" Ghanshyam and party was accepted.

3. Several contentions were raised before the learned Single Judge OB behalf of the petitioners but did not find favour by the learned Single Judge and as such both the writ petitions were dismissed. Preliminary objections-regarding the maintainability of the writ petitions were also raised by the learned counsel for the respondents but the learned Single Judge did not consider it necessary to deal with the preliminary objections, as he had dismissed the writ petition on merits.

4. Learned counsel for the appellants raised before us almost the same contentions which had been raised before the learned Single Judge and we propose to discuss some points only as we agree with all the conclusions arrived at by the learned Single Judge. Preliminary objections were also raised regarding the maintainability of the writ petition, but we also do not consider it necessary to deal with the preliminary objections as in our view, the writ petitions fail on merits itself.

5. It. was strenuously contended by learned counsel for the appellants that a joint tender by 29 persons including one Magh Raj was submitted by Ghanshyam and Party and out of the aforesaid 29 persons Magh Raj being a defaulter and arrears of the Excise Department being due against him, was not eligible to submit a tender. It was submitted that the Excise Commissioner had no right to grant licence in favour of other 28 persons by excluding Magh Raj, as the tender was submitted jointly in the name of 29 persons including Magh Raj. It was contended that it was illegal on the part of the Excise authorities to have accepted the tender in the name of 28 persons, when initially the offer was made jointly in the name of 29 persons. It was further submitted that the offeree must have unreservedly assented to the exact terms of the offer to bring about a concluded contract. In case a counter offer was given by the Excise authorities, the effect of such a counter offer in the eyes of law was to destroy the original offer. The offer given by a tender in the joint name of 29 persons having once refused by the offeree was a dead offer & could not have been accepted unless renewed. Reliance in support of the above contentions is placed on the following observations made in Moolji Jaitha and Co. Vs. Seth Kirodimal,

The offeree must unreservedly assent to the exact terms of the offer to bring about a concluded contract. If, while purporting to accept the offer as has had no opportunity of examining, he is in fact merely making a counter-offer. The effect of such a counter-offer in the eyes of law is to destroy the original offer. An offer once refused is dead and cannot be accepted unless renewed. But it is sometime difficult to determine whether a communication by the offeree amounts to a counter-offer or not. The offeree, for example, may be seeking further

information before making up his mind or may be but making an enquiry as to whether the offerer will not modify his terms. Such requests do not obliterate the original offer. The question whether the terms added are intended to be part of the contract or are merely in the nature of enquiries for further information has to be decided by the court in individual cases by looking into the effect of the words used in particular cases and thereby gathering the intention of the parties.

We find no force in the above submission made by the learned counsel for the appellants.

6. Ghanshyam and Party consisting of 29 persons had submitted a tender by which an offer was made by them to accept the grant of wholesale and retail off licence for IMFL. As Magh Raj, who was one of the 29 persons was disqualified in view of condition No. 15 of the conditions for submission of tenders, the Excise Authorities asked Ghanshyam and party whether they were willing to accept the tender in the name of 29 tenderers excluding Magh Raj. This counter offer was accepted by the offerer and the amended offer in the name of 28 persons excluding Magh Raj was accepted by the Excise authorities. It was perfectly legal and justified to do so and no fault can be found in accepting the tender in the name of 28 persons. It is further important to note that no challenge on this account is forth-coming on the part of the offerer or the offeree but the contract is being challenged by third parties. Admittedly, Ghanshyam and party, who is an offerer and the Exise authorities as offeree, have taken a common stand that the original offer made by 29 persons was subsequently amended by excluding Maghraj, who was disqualified and the tender was accepted in the name of remaining 28 persons. We fail to understand as to how the petitioners, who are third parties can raise any objection on the above score, in the above mentioned admitted facts of the case. Moolji Jaitha and Company's case (supra) does not render any assistance to the appellants. In the above case one of the parties to the contract had filed a civil suit claiming damages for breach of contract. That apart it has been observed in the passage quoted above that the question whether the terms added are intended to be part of the contract or are merely in the nature of inquiry for further information has to be decided by the Court in individual cases by looking into the effect of the words used in particular cases and there by gathering the intention of the parties. In the case before us the intention of both the parties i.e. offerer and offeree is common and there is no difficulty in gethering their intentions.

7. Another contention raised by the learned counsel for the appellant is that the tender of Ghanshyam and party being of more than 20 persons was illegal as the same was in violation of Section 11 of the Companies Act, 1956. It was submitted that Sub-section (2) of Section 11 prohibited formation of company, association or partnership consisting of more than 20 persons for the purpose of carrying on any other business that has for its object the acquisition of gain, unless it was registered as a company under the Companies Act, or was formed in pursuance of some other Indian Law. It was submitted that under Sub-section

(5) of Section 11 of the Companies Act every person being a member of company, association or partnership formed in contravention of this Section is punishable with fine which may extend to Rs. 1,000/-. It was argued that Ghanshyam and party was an association or partnership consisting of more than 20 persons formed for the purpose of carrying on business of selling IMFL and the same was neither registered as a company under the Companies Act nor formed in pursuance of any other law. Such association or partnership was absolutely illegal and every person, who is a member of such association or partnership of criminally liable to a fine and as such no licence should have been granted in favour of Ghanshyam and party. Reliance in support of the above contention is placed on AIR 1930 113 (Privy Council) , Union of India (UOI) Vs. The Commercial Association, Amritsar, Katra Hari Singh Amritsar and Others, Seth Badri Prasad and Others Vs. Seth Nagarmal and Others, and Bapulal v. Laxmi Bharat Trading Co. and Ors. AIR 1966 Raj 14.

8. On the other hand, it was submitted by learned counsel for the respondents that Ghanshyam and party was neither an association nor a partnership formed for the purpose of carrying on any business, but a group of persons had joined themselves for the purpose of submitting tender to obtain a licence of IMFL. It was further submitted that the act of submission of tender by the respondents was actuated with a view to make one tender for the entire city of Jaipur which was divided into 66 shops spread over 10 zones. Attention was drawn to clause (c) of para 6 of reply given on behalf of respondent No. 14. The following plea was taken in the above reply:

There would arise no occasion for carrying on the business of any kind whatsoever or of making any gain only-after the licence has been given and the respondents have settled amongst themselves as to what zone and/or shops would be taken over by the said respondents Nos. 4 to 31 amongst themselves and only after the said respondents have taken over those shops according to the arrangements arrived amongst others and started doing the business.

It was further submitted that upto the stage of submission of tender nothing else was done except that they had pooled money and made one common tender in order to get the city of Jaipur area to be distributed in turn amongst themselves. Reliance is placed in support of the above contention on Bhola Nath-Shankar Das Vs. Lachmi Narain and Others, Madan Copal and Anr. v. Shewal Das AIR 1934 Lah 882, G.K. Naidu v. C.K. Mouleshwar AIR 1962 AP 406 and V.V. Ruia Vs. S. Dalmia,

9. As similar kind of contention was raised by the learned counsel for the petitioners before the learned Single Judge. It was held by the learned Single Judge that the question as to whether there existed a legal relation between the 28 persons, who formed Ghanshyam and party and whose tender has been accepted and whether the said legal relation had given rise to rights and obligations or mutual rights or duties was a question of fact which could not be determined in these proceedings. It was further observed that on the face of it, it

was not possible to say that the said 28 persons formed an association and that the said association had been formed in violation of Section 11(2) of the Companies Act. Further more, consequence of non-compliance of Section 11(2) were laid down in Sub-sections (4) and (5) of Section 11 of the Companies Act. Learned Single Judge thus observed that in his view the acceptance of tender of 28 tenderers, who submitted their tenders in the name of Ghanshyam and party cannot be set aside that it was done in contravention of provisions of Section 11 of the Companies Act.

10. We have given our thoughtful consideration to the contentions raised by learned counsel for the parties. Section 11(2) and (5) of the Companies Act read as under:

Section 11. Prohibition of associations and partnership exceeding certain number:

(1) (2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act or is termed in pursuance of some other Indian law.

(3) (4) (5) Every person who is a member of a company association or partnership formed in contravention of this Section shall be punishable with fine which may extend to one thousand rupees.

11. The above provision prohibits the formation of a company association, or partnership consisting of more than 20 persons for the purpose of carrying on any other business that has for its object the acquisition of gain by the Company, association or partnership, or by the individual members thereof unless it is registered as a company or formed in pursuance of some other Indian law. There can be no manner of doubt that if Ghanshyam and party in the present case, comes within the purview of Sub-section (2) of Section 11 of the Companies Act, such formation would be illegal as admittedly it has not been registered as a company or formed in pursuance of some other Indian Law. In order to attract the provisions of Sub-section (2) of Section 11 it must be proved that it was a company, association or partnership consisting of more than 20 persons; that it was formed for purpose of carrying on any business that the business had for its object, the acquisition of gain and that it had not been registered as a company under the Companies Act nor being formed in pursuance of some other Indian law. In the present case, the respondents have taken a clear stand that upto the stage of submission of tender they have only pooled money for filing a common tender in order to get licence of IMFL for the city of Jaipur It has also been alleged that there would arise no occasion for carrying on the business jointly of any kind what so ever or of making any gain only after the licence had been given. The appellants have not been able to place any material before us not to accept the above statement of fact made by the respondents. A single venture

for the purpose of filing tender and obtaining licence cannot lead to the conclusion that Ghanshyam and party was an association of more than 20 persons for the purpose of carrying on any other business. Merely an act of forming an association for the purpose of filing a joint tender and to obtain a licence cannot be taken to mean that 20 persons or more than 20 persons shall remain joint in the form of an association, company or partnership to carry on the business of sale of IMFL. There can be no manner of doubt that in case such business is carried on by more than 20 persons by forming a company, association, or partnership without getting the same registered as a company or firm in pursuance of some other Indian law, every person, who would be a member of such company, association or partnership shall be punishable with fine which may extend to Rs. 1,000/-. In the facts and circumstances of this case, at this stage, it cannot be said that Ghanshyam and party was an association, company or partnership firm for the purpose of carrying on any business other than business of banking. In *Sonaji Kapurchand and Ors. v. Pannaji Devichand* AIR 1930 PC 300 it was observed as under:

No doubt a single venture where a single article or a number of articles on a single contract are purchased and sold may not amount to a business. But where a number of bales are purchased at one time, sales are to go on, profits are to be realised and these profits are to be divided among the partners, it is not a single venture and amounts to partnership with Section 4 of the Companies Act, 1913.

It may be mentioned that Section 11 of the Companies Act, 1956, is identical to Section 4 of the Companies Act, 1913. Thus, the above authority does not render any assistance to the appellants rather goes against them. There is no material on record before us to hold that after obtaining the licence, more than 20 persons will purchase and sell the IMFL jointly and divide the profits between themselves as partners.

12. In the *Commercial Association, Amritsar*'s case (supra) the Commercial Association, Amritsar was an association formed of 312 members, all of whom were members or individuals in Amritsar dealing in cloth. An objection was raised by the defendant Union of India that such association was an illegal body & no suit could be maintained by such illegal body, which was formed in violation of Section 4 of Indian Companies Act, 1913. In the above case it was found on the basis of material produced in the case that the extent of the dealings of the association could be seen in the accounts produced and proved by Ghasi Ram P.W. 1, who was one of the four members of the association, who had brought the suit in the representative capacity. These accounts, which were produced to prove the payment made to the firm of commission agents showed dealings between the association and the firm amounting to several lacs. It was also found that the above witness had clearly stated that the goods purchased through the commission agents were to be sold at a profit. In the above circumstances it was inferred that the profits realised by the sale of cloth were to be divided among

the members in accordance with the Rules of the association. In the above circumstances it was held that the plaintiff association was an illegal body and the suit filed on their behalf against the Government of India was not maintainable. The above case is, therefore, distinguishable.

13. In Badri Prasad's case (supra) it was held as under:

Where an association of more than twenty persons is formed in contravention of Section 11(2) of the Companies Act and a claim is made by some members of such illegal association against another member on the footing that the association should be treated as legal in order to give rise to a liability to render accounts in respect of the transactions of the association, such a claim is clearly untenable. Where a plaintiff comes to court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, the only course for the courts to pursue is to say that he is not entitled to any relief on the allegations made as the courts cannot adjudicate in respect of contracts which the law declares to be illegal.

14. In the above case when cloth control came into force in Reewa State the cloth dealers of Budhar, a town in that State, formed themselves into an association to collect the quota of cloth to be allotted to them and sell it on profit wholesale, and retail. The association at Budhar consisted of 25 members, who made contributions to the initial capital of the association, which was Rs. 1,00,000/-. No formal article of association was written, nor was it registered. The association functioned through a President and a pioneer worker; they kept accounts and distributed the profits. In the above circumstances it was held by their Lordships of the Supreme Court that the suit being for accounts of an illegal association, which was in existence at the relevant period for which accounts were asked, the plaintiff association was an illegal body. In Bapulal's case (supra), it was held as under:

A suit for recovery of loan was filed by the President, in representative capacity on behalf of himself and the other members of an Association, consisting of 115 persons known as Haj Vitran Committee. As the committee was not registered u/s 4 of the Act, the defendant challenged the maintainability of the suit. It was urged on behalf of the plaintiff the Committee was formed at the instance of the Government to help it in the proper distribution of grain among the public, and that it was not at all a company formed by its members to carry on any business with the object of acquisition of grain within the meaning of Section 4. In the alternative the plaintiff pleaded the benefit of Sections 65 and 70 of the Contract Act. But the evidence available from the plaintiff's own witnesses was, that a profit had been distributed among the members and that in addition to the work of distribution of grain the committee undertook some other activities also and did earn profits on these undertakings.

Held, Section 4 of the Companies Act was attracted and there could be no escape from the conclusion that the committee was an illegal association falling within

the mischief of the said Section and hence the suit could not be maintained.

15. A bare perusal of the above observations would show that it was a suit for recovery of loan filed by the President in representative capacity on behalf of himself and the other members of an association, consisting of 115 persons, known as Haj Vitran Committee. From the evidence available from the plaintiff's own witnesses it was found that a profit has been distributed among the members and that in addition to the work of distribution of grain the committee undertook some other activities also and did earn profits on those undertaking. This case is thus also distinguishable as there was clear evidence in this case that profit had been distributed among the members and there were other activities also from which profit was earned.

16. It would not be necessary to discuss the authorities relied upon by learned counsel for the respondents. As in our view, each case depends on its own facts and circumstances. We have already discussed in detail that Ghanshyam and party in the facts and circumstances of this case cannot be held to be an illegal body at this stage. All the authorities relied upon by learned counsel for the appellants were of cases where civil suits had been filed after several transactions done by the associations in question and the members of those associations had also divided profits. We are dealing with the writ petitions in these cases which have been filed by the petitioners at the stage of acceptance of tender and grant of licence.

17. Thus, in our view, the petitioner-appellants are not entitled to any relief and the appeals are liable to be dismissed.