

(2007) 04 MAD CK 0199
In the Madras High Court
Case No : W.A. No. 1538 of 1998

The Commissioner of Prohibition and Excise, The District
Collector and The Taluk Excise Officer

APPELLANT

Vs

N. Velappan Nair

RESPONDENT

Date of Decision : 13-04-2007

Acts Referred:

Tamil Nadu Toddy and Arrack Shops (Disposal in auction) Rules, 1981 — Rule 15, 21,
21(1), 36(3), 5

Citation : (2007) WritLR 531

Hon'ble Judges : V. Dhanapalan, J; S.J. Mukhopadhaya, J

Bench : Division Bench

Advocate : G. Sankaran, Additional Government Pleader, for the Appellant; G.S. Thamby, for the Respondent

Final Decision : Allowed

Judgement

V. Dhanapalan, J.—The respondents in W.P. No. 12661 of 1993, aggrieved by the order dated 04.09.1997 passed by a learned Single Judge in the said writ petition, have preferred this writ appeal.

2. The facts, in brief, leading to the present writ appeal are, as under and the parties are referred to as per their ranking in this writ appeal.

The respondent was a licensee to run nine arrack shops and five toddy shops in Vilavancode Taluk. For the excise year 1982-83, on his failure to remit the monthly kist for November 1982 for five arrack shops and five toddy shops, the third appellant had sent a show-cause notice to the respondent asking as to why his licences should not be cancelled and also as to why re-auction should not be conducted. Since there was no reply from the respondent, the authorities cancelled the licences and notified resale of shops on 29.11.1982. Meanwhile, the respondent filed O.S. No. 605 of 1982 before the District Munsif, Kuzhithurai, seeking an order of injunction and got an order of interim injunction. However, the suit was dismissed subsequently with a direction to the respondent to remit

the entire arrears of rent before 23.01.1983 and the third appellant sent a notice on 06.09.1983 directing the respondent to remit a sum of Rs. 4,07,500/- before 23.01.1983 failing which the appellants could proceed as per Rules. When the matter was taken up by the respondent before this Court, by an order dated 11.09.1991 in W.P. No. 1951 of 1983, this Court quashed the said notice issued by the third appellant. The writ appeal preferred by the appellants challenging the order in the said writ petition was also dismissed but with a direction to the first appellant to conduct an enquiry afresh as regards their claim and to decide the case of the respondent after affording him an opportunity of hearing. Accordingly, after complying with the said direction, the first appellant, by his order dated 06.05.1993, holding that the respondent is liable to make good the loss of Rs. 4,07,500/- to the Government, directed the third appellant to recover the same from the respondent and this order of the first appellant was under challenge in the writ petition before the learned Single Judge.

3. The learned Single Judge, though admitted that the respondent had committed default in payment of kist, came to the conclusion that the appellants had not complied with the provisions contained in Rules 5 and 21 of the Tamil Nadu Toddy and Arrack Shops (Disposal in auction) Rules, 1981 (in short "the Rules") with regard to re-auction, and by relying on a judgment of the Supreme Court in the matter of State of Haryana and Others Vs. Jage Ram and Others, , held that the respondent cannot be mulcted for the loss incurred by the Government because of non-compliance of relevant rules by the appellants and accordingly, allowed the writ petition.

4. Challenging the order passed by the learned Single Judge in the writ petition, the respondents in the writ petition have preferred this appeal.

5. Mr. G. Sankaran, learned Additional Government Pleader, has contended that the respondent was at default in making payment of kist and hence, attempts were made to conduct re-auction; but, when the respondent, had, time and again, thwarted the attempts made by the appellants in the collection of computed loss by resorting to various legal proceedings, the learned Single Judge ought not to have allowed the writ petition by holding that the appellants have not complied with the relevant rules in regard to re-auction, particularly when Notification on re-auction was not at all challenged in the writ petition. It is also his strenuous contention that the learned Single Judge has gone wrong in placing reliance on the judgment of the Supreme Court reported in State of Haryana and Others Vs. Jage Ram and Others, which is not applicable to the facts of the case on hand.

6. In support of his contention that the Government is not powerless to recover loss from the licensees in default on resale of shops or disposal otherwise than by resale which includes closure, the learned Counsel for the appellants has relied on a decision of the Supreme Court reported in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, and the relevant portion reads as under: (para 26)

...We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.

7. On the same aspect, further reliance has been placed by the counsel for the appellants on a decision of this Court reported in 1988 Law Weekly 383 in the matter of P.A. Aliyar Saheb and 288 Ors. v. Independent Dy. Tahsildar, Pallipattu, Chingleput and Ors. wherein it was held that recovery can be made from the defaulter after sending a notice and by affording an opportunity of hearing.

8. Per contra, Mr. G.S. Thamby, learned Counsel for the respondent, has vehemently contended that the learned Single Judge, by observing that it is impossible to uphold the re-auction and mulct the respondent in the resultant shortfall, has rightly set aside the order dated 06.05.1993 passed by the first appellant and hence, the order of the learned Single Judge does not warrant any sort of interference.

9. Heard both sides.

10. The points for determination in this appeal are as follows:

a. whether the learned Single Judge is correct in holding that the appellants have not followed Rule 5 and Rule 21 of the Rules in the process of re-auction of shops?

b. whether the learned Single Judge is correct in placing reliance on the judgment of the Supreme Court reported in State of Haryana and Others Vs. Jage Ram and Others, ?

11. Before dealing with the above questions, it would be relevant to refer to Rule 5 and Rule 21 of the Rules which are as follows:

Rule 5

Notice of auction:

Where it is proposed to grant the privilege of retail sale of liquor, a notice of the auction to be conducted shall be published by the Collector ten days in advance of the date of auction in the District Gazette and in such other manner as the Collector may deem fit.

Rule 21 - Resale of shop

1. On the failure of any person to make a deposit or apply for a licence or to comply with any requisition or to execute any bond, deed or agreement under these rules, the shop may be resold under the orders of the collector or on a report from the Assistant Commissioner, the Sale Officer, the Collector may otherwise dispose of the shop. Resales under this rule shall be at the risk of the defaulting bidder who shall forfeit all gain, if any, that may secure by the resale and in the event of a loss by resale, the defaulting bidder shall be required to make good the deficiency between the total amount payable for the whole period under the terms of the original sale and by the total amount payable by the successful bidder at the resale. In the latter case, the deposit already made by defaulting bidder, excluding the amount of earnest money deposit if any, forfeited to the State Government under Rule 15 shall be forfeited and deducted from the loss arising from the resale, and the balance of the loss, if any, shall be recoverable in the same manner as if it were an arrear of land revenue. Should, however, the deposits be greater than the loss by resale, only such part of the deposits as is necessary to cover the resale, shall be forfeited and the balance refunded to the defaulter. The defaulting bidder shall be similarly liable if the shop is disposed of otherwise than by resale and such disposal results in loss to the State Government as compared with the original sale.

Explanation: For the purpose of this Rule, disposal otherwise than by resale includes closure.

2. Where the successful bidder discontinues the privilege during the period for which it was granted or his privilege is cancelled, the shop shall be resold for the remainder of the period and the provisions of Sub-rule (1) shall apply mutatis mutandis to such resale.

12. There is no dispute that for the excise year 1982-83, the respondent had taken nine arrack shops and five toddy shops in auction out of which he had paid the entire kist amount due for the year for four arrack shops. It is also not in dispute that for the balance of five arrack shops and five toddy shops, the respondent had failed to remit the kist amount.

13. In his proceedings dated 06.05.1993, which was impugned in the writ

petition, the first appellant, by making reference to the relevant records, has categorically stated that re-sales were notified on 29.12.1982 by the Sub-Collector, Padmanabhapuram and subsequently on various dates in 1983, by the Assistant Commissioner (Excise), Nagercoil. As regards the stand taken by the respondent that the appellants had not taken any action to bring the shops for resale as mandated by relevant Rules, the first appellant, by pointing out the Explanation to Rule 21(1) extracted above, has stated that disposal otherwise than by resale includes closure. It has been further stated by him in the said proceedings that the Excise authorities had taken adequate steps to bring the shops for resale and there had been no bids in all the attempted resales and hence, it was a case of closure of shops which has to be treated as disposal otherwise than by resale. Even in the counter-affidavit filed in the writ petition, the reasons attributed by the appellants for poor response in re-auction are as follows:

Influence of the respondent in that area

Expiry of half a period of the excise year

Large number of shops for re-auction covering 1/10th area of Vilavancode Taluk

14. Thus, when re-auction did not prove to be an effective way to dispose of the shops for which licences were cancelled due to the respondent's default in making kist payment, the appellants had resorted to closure of shops in the middle of the excise year which has resulted in a loss of Rs. 4,07,500/- to the Government. It is relevant to point out in this context that according to Rule 21(1) of the Rules, the defaulting bidder shall be liable if the shop is disposed of otherwise than by resale which includes closure and such disposal results in loss to the State Government as compared with the original sale. The Explanation to the provision clearly specifies that for the purpose of this Rule, "disposal otherwise than by resale" includes "closure". Thus, when the appellants had no other option but to close the shops since there was no bid forthcoming in the re-auction conducted due to three reasons as already stated in the previous paragraph and though the learned Single Judge was seized of this Explanation to Rule 21(1), we are not able to find any reason as to why it was held that there was no strict compliance of the rules and as such, the loss cannot be mulct with the respondent.

15. To come to such a conclusion, the learned Single Judge has relied on the judgment of the Supreme Court reported in *State of Haryana and Others Vs. Jage Ram and Others*, and the relevant portion of the judgment of the Supreme Court which was relied on by the learned Single Judge reads as under:

Since the re-auction was not held in accordance with the rules, either in their letter or in their spirit, and since, especially, due publicity was not given to the re-auction, it is impossible to uphold the re-auction and mulct the respondents in the resultant shortfall. We are of the opinion that Rule 36(3) of the Rules was not even substantially complied with. It is reasonable to assume that since due

publicity was not given to the re-auction, adequate bids were not received, resulting in prejudice to the respondents.

Accordingly, we set aside the finding of the High Court that the relevant rules governing re-auction of vends were complied with substantially. Since the re-auction did not conform to the rules and the respondents were prejudiced thereby, they cannot be held liable to make good the difference between the amount which was payable by them and the amount which was fetched at the re-auction.

16. It is pertinent to note, in this context, that the above the above-referred judgment is not directly on the point in question for the reason that it was a case where re-auction was conducted, but, not in accordance with the relevant rules and hence, it was held by the Supreme Court that the licensee at default cannot be asked to make good the loss since the authorities concerned failed to comply with the relevant rules. Such a question does not arise in this case in view of the fact that no bids were forthcoming in the re-auction conducted and the shops were disposed of by the appellants by disposal otherwise than by sale which is nothing but closure, i.e. yet another way to dispose of the shops in question. Further, admittedly, the show cause notice was served on the respondent on 12.11.1982 and there was no reply from him and therefore, the authorities cancelled his licences with effect from 01.12.1982 and notified resale of the shops on 29.11.1982. This notification is not challenged before this Court. What is under challenge before this Court is only the recovery of Rs. 4,07,500/- as demanded by the appellants. Thus, in view of these reasons, we hold that the learned Single Judge ought not to have held that the appellants had not acted in conformity with the relevant rules, which was not at all a point urged upon and was not correct in placing reliance on the judgment of the Supreme Court (*supra*) to come to such a conclusion in which the point involved was resale, which is not applicable to the case on hand where the challenge is only to recovery of a sum of Rs. 4,07,500/- as has already been discussed by us in view of the settled proposition of law.

17. It may also be pointed out in this context that in case of contracts freely entered into with the State, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract for the purpose of altering or adding to the terms and conditions of the contract. The mutual rights and liabilities of the parties are governed by the terms of the contracts and the laws relating to the contracts. There is no warranty against incurring losses. It is a business for the licensees. The State does not guarantee profit to the licensees in such contracts. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract.

18. In the instant case, the respondent had committed default in making payment of kist as per Rules and was at default and thus, the Government had incurred loss which has to be made good by the party at default who is none other than the respondent herein. In such a situation, the first appellant had no

other option but to recover the loss from the respondent and accordingly, after considering all aspects of the matter and after affording a reasonable opportunity to the respondent, the first appellant has passed a speaking order dated 06.05.1993 directing the third appellant to recover a sum of Rs. 4,07,500/- from the respondent and that is under challenge. This would reveal that when there was no resale due to various circumstances as already stated, the learned Single Judge ought not to have given such a finding that there is violation of Rule 5 and Rule 21 of the Rules by the appellants, particularly when there was no challenge to the Notification on the reauction.

Thus, having regard to the facts and circumstances of the case, the relevant rules, the discussion made above and the judgment relied on by the counsel for the appellants, we are constrained to set aside the order of the learned Single Judge which is impugned in this writ appeal. Accordingly, the proceedings dated 06.05.1993, passed by the first respondent, which was impugned in the writ petition, is upheld and as a result, the writ appeal stands allowed. No costs.