(1996) 02 MAD CK 0003

In the Madras High Court

The State of Tamil Nadu and Others — APPELLANT

Vs

V. Subramaniam — RESPONDENT

Date of Decision : 16-02-1996

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 299, 299(1)

Citation : (1996) 1 LW 284 : (1996) 2 MLJ 487

Hon'ble Judges : P. Sathasivam, J

Bench : Division Bench

Judgement

P. Sathasivam, J.—The short facts leading to the above case are as follows: The State of Tamil Nadu, represented by Collector, Thanjavur

and Tahsildar (Excise), Sirkali are the appellants in the above second appeal. The respondent- plaintiff filed the suit Order S. No. 744 of 1973 on

the file of District Munsif Court, Sirkali for declaration that the defendants viz., State of Tamil Nadu and Tahsildar (Excise), Sirkali are not entitled

to collect a sum of Rs. 23,220 or any other sum as damages and for consequential relief to restrain the defendants from resorting to the provisions

of the Revenue Recovery Act.

2. The plaint averments are as follows: The retail toddy shops in Sirkali Taluk were put up for auction by the second defendant under Notification

5.6.1972 for the purpose of vending toddy in shops for the year 1972-73. The toddy shop No. 9 was in the village of Melavalla Natham in Sirkali

taluk and was put up for sale on 17.7.1972 in the Taluk Office, Sirkali by the second defendant at the instance of first defendant. The plaintiff was

the highest bidder in the auction held on 17.7.1972 and he paid an initial deposit of Rs. 200 and made a further deposit of Rs. 3,510. It is further contended that the plaintiff is an illiterate and he was not intimated the alleged acceptance of his bid nor was he informed that the same had been

confirmed. There was no confirmation of his bid, the plaintiff withdrew the same even on 17.7.1972 and intimated the said officer. He further

contended that no order confirming the provisional bid was either passed by the first defendant nor communicated to the plaintiff. The plaintiff was

informed by a notice dated 2.10.1972 that there was a re-auction of the abovesaid toddy shop and that by such re-auction the Government

suffered damages in a sum of Rs. 23,220. It is stated that the plaintiff was liable for the said sum and the amounts paid by the plaintiff would stand

forfeited to the Government. The plaintiff received a notice from the Special Tahsildar (Excise) dated 2.10.1972 that the plaintiff is liable for a sum

of Rs. 23,220 Thereupon the plaintiff sent a notice on 10.11.1972 u/s 80, C.P.C. Thereupon the second defendant served a notice on the plaintiff

under the provisions of the Revenue Recovery Act. It is further alleged that even if the first defendant has the right to apply the provisions of

Revenue Recovery Act, an opportunity should have been granted to the plaintiff to state his objections and further it ought to have held an enquiry

before applying the provisions of the Revenue Recovery Act. With these averments the plaintiff prayed for a decree for declaration and

consequential injunction.

3. The first defendant viz., the State of Tamil Nadu filed a detailed written statement with the following averments: The suit is not sustainable either

in law or on facts. The plaintiff was the successful bidder in the auction held on 17.7.1972 in respect of toddy shop No. 9 in Sirkali Taluk. The

Sale Officer apprised the bidders in the auction held on 17.7.1972 the terms and conditions relating to the privilege of sale of arrack and toddy

shops in retail shops during the period from 1.9.1972 and 31.8.1973. The plaintiff, who was one of the bidders in the auction held on 17.7.1972

was also apprised of the terms and conditions of the lease auction. The plaintiff with the full knowledge of the terms and conditions of the auction

made a deposit of Rs. 200 and then participated in the auction relating to toddy shop No. 9. His bid of Rs. 7,020 per month was the highest and

the Sale Officer accepted the same on 17.7.1972 itself and intimated the fact to the plaintiff, who had also signed the bid list accepting the fact that the bid for Rs. 7,020. The plaintiff also made a deposit of Rs. 3,510 representing half a month''s list as required under Clause VII(a) of the notice

of auction. The Sale Officer recommended for the confirmation of the auction in favour of the plaintiff in respect of toddy Shop No. 9. It is

submitted that there was a concluded contract so far as the plaintiff was concerned even on 17.7.1972 and it was not open to the plaintiff to resile

or retract from the contract. The plaintiff did not withdraw his bid or offer as alleged by him. The terms and conditions relating to the auction sale of

toddy shops are valid, enforceable and binding upon the plaintiff. It is further contended that the confirmation of the auction, in favour of the plaintiff

was accepted by the Collector of Tahsildar dated 21.7.1972 and by a circular a true copy of the same was duly communicated to the plaintiff. The

plaintiff was fully informed of the confirmation by the Collector and the plaintiff did not withdraw the bid or send any communication to the effect.

Though the plaintiff knew fully well that there was a concluded contract in his favour in respect of toddy shop No. 9, he failed to act upto the terms

and conditions and committed a default in performing his part of the contract. The re-auction was conducted after due publicity and after

complying with all legal formalities. One Rajagopal Naidu was the successful bidder for Rs. 5,085 per month, his bid was accepted and the lease

auction was concluded in his favour on 7.9.1972. The said re-sale was confirmed by the Collector dated 22.9.1972. By such re-sale the loss of

Rs. 23,220 had resulted and the plaintiff was required to make good the same by the impugned notice dated 2.10.1972. After hearing the

objections of the plaintiff, after deducting some amount as claimed by the plaintiff, the defendant sent a demand notice for Rs. 18,942 by invoking

the provisions of Revenue Recovery Act. With these averments the first defendant prayed for dismissal of the suit.

4. The second defendant, the Tahsildar (Excise) Sirkali filed a written statement in the following manner: The second defendant is an unnecessary

party and in other aspects, he adopted the defence taken by the first defendant.

5. In support of the plaintiff''s case, he examined himself as P.W.1 and marked Exs.A-1 to A-9. On the other hand one Bakthavatchalam and

Natarajan were examined as D.Ws.1 and 2 and Exs.B-1 to B-9 were marked in support of the defence by the defendants. On the basis of the evidence on record, the learned District Munsif came to a conclusion that the defendants have clearly established that the bid in the auction which

was held on 17.7.1992 was accepted by the Collector and it was communicated to the plaintiff and, therefore, held that the plaintiff had not

withdrawn his offer even before the acceptance and answered issue No. 2 against the plaintiff. However, relying upon some of the decisions of

various High Courts and the Apex Court (sic.) the trial judge came to a conclusion that in the absence of written contract between the plaintiff and

the defendants and in the light of Article 299(1) of the Constitution of India, no contract at all exists and the same cannot be enforced by the

Government. On the above basis, by a judgment and decree dated 27.8.1980, the learned District Munsif, Sirkali decreed the suit for declaration

that the defendants are not entitled to collect any amount as damages for the alleged loss by the re-auction of the toddy shop No. 9 in Melavalla

Natham Village and the defendants are not entitled to apply the provisions of Revenue Recovery Act and for consequential relief to restrain the

defendants by permanent injunction from resorting to the provisions of Revenue Recovery Act for the realisation of alleged arrears with costs.

6. Against the judgment and decree of the trial court, the unsuccessful defendants filed an appeal A.S. No. 162 of 1980 before the Sub Court,

Mayuram. The appellate judge also accepted the findings of the trial court on the first aspect viz., the plaintiff has miserably failed to establish that

the offer was withdrawn by him even before the acceptance and as such there is abundant material in this case to come to the conclusion that it has

already accepted. However, on the second aspect viz., that there is no concluded valid contract in accordance with Article 299(1) of the

Constitution, the learned Subordinate Judge, Mayuram by judgment and decree dated 23.10.1981 confirmed the decree of the trial court and

dismissed the appeal as well as the memorandum of cross-objections.

7. Against the concurrent findings of the courts below, now the State of Tamil Nadu, represented by Collector, Thanjavur and the Tahsildar

(Excise), Sirkali have filed the above second appeal before this Court. On 21.1.1983, while entertaining the above second appeal, this Court has

framed the following substantial question of law for consideration:

Whether the suit contract is not unenforceable for want of compliance of Article

299 of the Constitution of India?

8. Learned Additional Government Pleader appearing on behalf of the appellants contended that the conclusion of both the courts below granting

decree only on the ground that there was no written agreement between the department and the private person in terms of Article 299(1) of the

Constitution cannot be sustained. In this case, retail toddy shops in Sirkali Taluk were put up for auction by the Tahsildar (Excise), Sirkali, by a

notification dated 5.6.1972 for the purpose of vending toddy in shops for the year 1972-73. The said notification contained various clauses viz.,

how he has to participate in the auction, consequence of acceptance of his bid and the subsequent events to be followed in pursuance of his highest

offer in the auction sale. All the conditions were notified in the Tamil Nadu Government Gazette dated 6.6.1972, the same were published in local

dailies and according to the oral evidence of D.Ws.1 and 2 all the said conditions were brought to the notice of the intending bidders before

conducting auction. The plaintiff with full knowledge of terms and conditions of the auction made a deposit of Rs. 200 and then participated in the

auction of toddy shop No. 9. His bid of Rs. 7,020 per month was the highest and the Sale Officer accepted the same on 17.7.1972 itself and

intimated the said fact to the plaintiff who had also signed the bid list accepting the fact that he bid for Rs. 7,020. The plaintiff also made a deposit

of Rs. 3,510 representing half a month''s kist which was required under clause VII(a) of the notice of auction. The confirmation of auction in favour

of the plaintiff was accepted by the Collector, Thanjavur dated 21.7.1972, that is Ex.B-4 and by a circular a true copy of the same was duly

communicated to the plaintiff. This shows that the plaintiff was fully informed of the confirmation by the Collector and the plaintiff, it is significant to

note, did not withdraw the bid or send any communication to the effect. Though the plaintiff knew fully well that there was a concluded contract in

his favour in respect of the toddy shop No. 9 he failed to act upto the terms and conditions and committed default in performing his part of the

contract. Inasmuch as the plaintiff did not pursue further after proper notice, the defendants conducted a re-auction after due publicity and after

complying with all the legal formalities. By such resale since a loss of Rs. 23,220 had resulted, the plaintiff was required to make good this sum by the notice dated 2.10.1972 that is Ex.A-1.

9. On the basis of the materials, both the courts below concurrently held that the plaintiff had not withdrawn his offer even before the acceptance of

the same. It is not disputed by the respondent''s counsel. However, both the courts below granted decree in favour of the plaintiff on the solitary

ground that the defendants failed to take any written agreement from the plaintiff provided under Article 299(1) of the Constitution....

10. After going through the judgments of the courts below and the arguments of the counsel on both sides and in the light of the provisions of

auction notification published in the Tamil Nadu Government Gazette dated 6.6.1972, I am of the view that both the courts below committed an

error in decreeing the suit as prayed for. As narrated by me above, before the auction, the defendants published conditions of auction sale in the

Government Gazette in the local daily. It is also seen from the evidence of D.Ws.1 and 2 that the conditions were read out in the auction hall and

the participants were aware of the conditions and the consequences thereon. In this case, after knowing fully well the terms and conditions of the

auction, the plaintiff made a deposit of Rs. 200. His bid viz., Rs. 7,020 per month was the highest and the Sale Officer accepted the same on

17.7.1972, intimated the said fact to the plaintiff who had also signed the bid list accepting the fact that his bid was for Rs. 7,020. As a follow up

action the plaintiff has also made a deposit of Rs. 3,510 representing half a month''s kist as was required under the notice of auction. As

recommended by the Sale Officer the Collector of Thanjavur has confirmed the same and the confirmation was communicated to the plaintiff on

21.7.1972. One of the important purposes of selling exclusive right to vend liquor in wholesale or retail (retail in this case) is to raise revenue. The

licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of terms and

conditions attached to the auction cannot be permitted to wriggle out of contractual obligations arising out of the acceptance of his bid. The above

principle has been enunciated by the Supreme Court in the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and

Others, .

11. Coming to the reason given by the courts below granting decree in favour of

the defaulter is non-existence of written contract as per Article

299(1) of the Constitution. It is useful the refer to Article 299(1) of the Constitution.

All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the

Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be

executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

A reading of the above provision leads to the conclusion that both the courts below misconstrued the above referred provision. There is a

distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. Article 299(1)

applies to a contract made in exercise of the executive power of the Union or the State. Such a contract is nullified and becomes void if the

contract is not executed in conformity with provisions of Article 299(1) of the Constitution nor can there be any implied contract between the

Government and the other person. But Article 299(1) has no application to a case where a particular authority as distinguished from the Union or

the State entered into a contract which is statutory in nature. Such a contract even though it is for securing the interests of the Union or the States is

not a contract which has been entered into by or on behalf of Union or State in exercise of its executive power. When the State Government in

exercise of its statutory power grants an exclusive privilege of manufacturing or supplying or selling any intoxicant like liquor to any person on

certain conditions, there comes into existence a contract made in exercise of its statutory powers and such a contract does not amount to a

contract made by the State in exercise of the executive powers under Article 299(1) of the Constitution. As per the provisions of Tamil Nadu

Arrack and Toddy (Disposal in Auction) Rules and as per the terms and conditions of the auction sale as published in the Government Gazette and

dailies, once the bid offered by a person at an auction sale is accepted by the authority competent, a completed contract comes into existence and

all that is required is the grant of a licence to the person whose bid has been accepted.

12. In identical circumstances, the Supreme Court of India in a leading judgment in the case of State of Haryana and Others Vs. Lal Chand and

Others, , explained the cases which fall under Article 299(1) of the Constitution and other statutory contracts. In the case referred above, the

Deputy Excise and Taxation Commissioner, Hissar, conducted an auction for granting the right to sell country liquor for Mandi Dabwali for the

year 1969-70 at the Collectorate. At the commencement of the auction, the Deputy Excise and Taxation Commissioner had read out the auction

announcements and conditions of auction as required under the provisions of Punjab Liquor Licence Rules, 1956. The respondents M/s. Lal

Chand Bal Raj etc. offered the highest bid of Rs. 10,11,000 and their bid was provisionally accepted by the Deputy Excise and Taxation

Commissioner and they were declared to be the highest bidder as required by the Rules. However, the respondents failed to deposit the security

amount as required by the Rule. Accordingly, they were served with a notice for re-auction. Anticipating proposed auction, the respondents therein

sent a letter to wriggle out of their contractual obligations. In order to recover the deficiency in the re-auction, the said Officer sent a show cause

notice demanding Rs. 3,46,000 representing the loss of re-sale. However, the High Court of Punjab and Haryana quashed the notice of demand.

Against the order of the Punjab & Haryana High Court, the State has preferred an appeal before the Supreme Court. After referring to various

earlier decisions of the Apex Court, their Lordships while interpreting Article 299(1) of the Constitution observed as follows:

There is a distinction between contracts which are executed in exercise of the executive powers and contracts which are Statutory in nature. Under

Article 299(1) three conditions have to be satisfied before a binding contract by the Union or the state in exercise of the executive power comes

into existence: (1) The contract must be expressed to be made by the President or the Governor, as the case may be. (2) It must be executed in

writing. And (3) The execution thereof should be by such person and in such manner as the President or the Governor may direct or authorize.

There can be no doubt that a contract which has to be executed in accordance with Article 299(1) is nullified and becomes void if the contract is

not executed in conformity with provisions of Article 299(1) and there is no question of estoppel or ratification in such cases. Nor can there be any implied contract between the Government and another person.

It is well settled that Article 299(1) applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract

made in exercise of statutory power. Article 299(1) has no application to a case where a particular statutory authority as distinguished from the

Union or the States enters into a contract which is statutory in nature. Such a contract, even though it is for securing the interests of the Union or

the States, is not a contract which has been entered into by or on behalf of the Union or the State in exercise of its executive powers.

Their Lordships further observed, ""We are clearly of the opinion that in the case of a statutory contract like the one under the Excise Act, the

requirements of Article 299(1) cannot be invoiced.

12. With regard to withdrawal of the plaintiff''s bid, it is equally useful to refer the observation of the Supreme Court, ""Equally futile is the

contention that the respondents had withdrawn their bid and therefore they could not be mulcted for the difference between the amount realized by

resale of the vend. Nor would this amount to a breach of the conditions on the part of the State Government of Haryana by furnish a ground

absolving the respondents of their liability to pay the short fall. The second contention that the respondents had withdrawn their bid and were

therefore not liable for the loss on reauction of liquor vend at Mandi Dabwali cannot be sustained.

13. As stated earlier, both courts have concurrently held that the plaintiff had not withdrawn his offer even before the acceptance of the same. This

finding is to be confirmed. However, the decree passed on the sole ground that there was no written agreement between the defendants and the

plaintiff as per Article 299(1) of the Constitution cannot be sustained in the light of the decision of the Supreme Court referred above. With regard

to the above legal position, learned Counsel appearing for the respondent is unable to place any material in support of his case. Accordingly, the

judgment and decree of the District Munsif Court, Sirkali in Order S. No. 744 of 1973 as confirmed by the Sub Court, Mayuram in A.S. No. 162

of 1980 are set aside and the suit filed by the plaintiff is dismissed with costs. The Second Appeal is allowed with costs.

14. In view of the above conclusion, it is open to the defendants to proceed

further as per the notice issued by the second defendant to the plaintiff

dated 2.10.1972 (Ex.A-1) in accordance with law. It is needless to mention that the authorities before pursuing further have to give particulars to

the defaulter, ascertain the quantum of loss and thereafter, it is open to them to recover the same in accordance with law.

