

(1981) 10 KL CK 0012

High Court Of Kerala

Case No: A.S. No. 107 of 1976

State of Kerala

APPELLANT

Vs

K.K. Vasudevan and Company

RESPONDENT

Date of Decision: Oct. 16, 1981**Acts Referred:**

- Kerala Abkari Act, 1077 - Section 69

Hon'ble Judges: T. Kochu Thommen, J; G. Viswanatha Iyer, J**Bench:** Division Bench**Advocate:** K. Sudhakaran, General, for the Appellant; V. Parameswara Menon, N.V. Ramachandran and P. Mohandas, for the Respondent**Final Decision:** Allowed

Judgement

Viswanatha Iyer, J.

This is an appeal filed by the State against the decision of the Sub-Court, Trichur, granting a decree to the Plaintiff to recover Rs. 40,423-10 and further interest and also granting a declaratory decree declaring that he is not bound to pay the State Rs. 2,03,794-90 as abkari dues. The facts leading to this decision may be stated in brief. For the financial year 1970-71 the privileges of vending in toddy shops in the State were auctioned out by the Excise Department of the State. The notification regarding the terms and conditions under which the auction will be conducted was published in the Government Gazette. A copy of that notification forms part of the record in the case. As per that notification the auction dates were fixed as 10th March 1970 and 12th March 1970. There were nobody to bid in the auction in respect of 50 shops in Trichur District. So by another gazette notification, dated 26th March 1970 (Ext. B-2) the said shops were put up again in auction on 30th March 1970 as per the terms and conditions stipulated in the earlier notification. One of the terms and conditions of the auction is that one-tenth of the highest bid amount should be remitted immediately. The highest bid is to be accepted by the Assistant Commissioner and then another two-tenth of the bid amount should be paid before

1st April 1970 or within 10 days of the confirmation of the bid by the Board of Revenue whichever is earlier in date. This condition was modified by the Board of Revenue by a telegraphic message, dated 28th March 1970 (Ext. B-1) sent to the Assistant Excise Commissioner. By this a concession was given to the bidders to pay the two-tenth in two instalments, namely, one-tenth has to be paid before 10th April 1970 and the remaining one-tenth by 25th April 1970. The Plaintiff was the highest bidder of the above 50 shops. His bid was for Rs. 3,81,350. He paid on the auction date Rs. 38,135, but did not pay by 10th April 1970 another 38,135 nor did he furnish the solvency certificate as required by the said rules. So the Department cancelled the bid, entrusted the running of the shop to a co-operative society and subsequently re-auctioned the shops. In the re-auction the shops were bid for a sum of Rs. 85,000 only. There after alleging that the Plaintiff had suffered loss by the cancellation of the bid he issued a notice to the State on 16th January 1971. Ignoring that notice, for the loss sustained in the Plaintiff not complying with the terms of the bid, the Plaintiff's properties were attached. So the Plaintiff came forward with this suit for a declaration that the State is not entitled to recover any amount from him and also for recovery of Rs. 38,135 deposited by him when his bid was accepted by the Assistant Commissioner.

2. According to the State when the terms and conditions of the sale notification are not complied with by the highest bidder it is open to the State to re-auction the shops and if any loss is sustained to recover the same from the defaulting bidder. This right is claimed by the State under two grounds. Firstly it is contended that the sale notification has the force of law passed by the Legislature and a bidder who takes part in the auction is bound by such law. Secondly it is claimed that after the highest bid was accepted by the Assistant Commissioner the Plaintiff has executed a kychit to abide by the terms and conditions of the sale notification and also deposit one-tenth of the bid, amount as per the notification. Since the Plaintiff did not deposit any amount after the initial deposit of one-tenth he violated Clause 15 of the notification and so the State was justified in re-auctioning the shops and proceeding to recover the loss sustained in the re-auction. The lower court did not accept the defence set up by the State. It was held that as the Plaintiff has not deposited the two-tenth of the bid amount and executed an agreement as provided by the terms of the sale notification there was no completed contract and therefore the Plaintiff cannot be made liable for the breach of contract. Consequently the lower court granted the declaration asked for by the Plaintiff and granted him a decree to recover the amount paid by him as per the bid. This is challenged in this appeal.

3. It is true that the bid of the Plaintiff was not confirmed by any formal communication of the Board of Revenue as per the notification. The temporary kychit executed by the Plaintiff which he admits as having been executed is not produced in the case. So we are not in a position to find out its terms or whether the kychit will amount to a contract for the Defendant to contend that there is a breach of contract. It is also true that the Plaintiff did not deposit the two-tenth subsequent

to the bid. As per Ext. B-1 he could have deposited the same in two equal instalments, the first instalment being on or before 10th April 1970 and the second instalment before 25th April 1970. He has also not produced the solvency certificate or executed any formal agreement to fulfil the conditions of the sale notification. So it is not possible for the State Appellant to proceed against the Plaintiff for breach of contract. So the lower court is to that extent right in holding that the loss, if any, sustained by the Defendant in the re-auction cannot be realised by the State on the basis of the breach of contract.

4. But it does not conclude the question of the Plaintiff's liability for the loss sustained by the State in the re-auction. If there is a statutory provision for a bidder to comply with the terms and conditions of the sale notification and if there is a provision for making a defaulter liable for the loss there is no reason why that cannot be applied in a case of this type. The learned Advocate General appearing for the Appellant has referred us to the provisions of the Abkari Act, the Rules the notification issued in this behalf to make out his contention that the sale notification is a statutory instrument having the force of law and therefore a violation of the terms in that notification will create a statutory liability on the Plaintiff to compensate the State against any loss sustained. Section 18A empowers the Government to grant to any person or persons on such condition and for such period as they may deem fit the privilege of selling any liquor or intoxicating drugs within any area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction or negotiation or any other method as may be determined by the Government. Section 29 empowers the Government to make rules for the purpose of carrying out the provisions of the Abkari Act. In exercise of the powers conferred under these provisions the Government issued by a notification the rules governing the grant of this privilege by auction. The set of rules were published in the Government Gazette as required by Section 69 of the Abkari Act. By the said Section all the rules and notifications issued under the Act shall have the force of law and read as part of the Act. The sale notification for the relevant year has been published in the Gazette. Therefore by the force of Section 69 it is law regarding the conduct of auctions. Clause 15 of the sale notification requires the auction purchaser to deposit within 10 days from the date of the communication to him of the confirmation of the sale or before first April, whichever is earlier, to deposit a sum which will make up not less than three-tenth of the bid amount and execute a further agreement to take out the necessary licence. This three-tenth of the bid amount is inclusive of the one-tenth which the bidder has to deposit under Clause 10, when he is declared the highest bidder by the Assistant Commissioner. By Ext. B-1 telegraphic message the Board of Revenue gave a concession to bidders to deposit the two-tenth in two instalments. The first instalment has to be paid before 10th April 1970 and the second instalment before 25th April 1970. Admittedly the Plaintiff did not deposit anything towards this two-tenth. So as per Clause 15 the deposit already made by

him will be forfeited and the shops re-sold or otherwise disposed of by the Excise Commissioner subject to the confirmation by the Board of Revenue. This re-sale or other disposal is as per Clause 16 at the risk of the original auction purchaser. Clause 16 further, provides that in the event of loss he is required to make good the deficiency between the total amount under the original sale and the total amount payable by the re-sale purchaser. That clause further provides to deduct the forfeited deposit from the loss and the remainder to be recovered from the original purchaser in the same manner as if it were arrear of land revenue. This clause being the law governing the auction applies to the facts of this case and therefore legally it is open to the Government to take steps as against the Plaintiff to recover the loss on account of the re-sale of the shops. This is what was done by the Government when the Plaintiff did not deposit the balance two-tenth. It is not necessary and the Plaintiff cannot contend that no communication has been sent to him confirming his bid. Clause 15 requires him to deposit the two-tenth before 1st April 1970. That date is extended to 10th April 1970. So he should have deposited this amount without waiting for the confirmation. Since he did not do that he has incurred the liability as provided for by clauses 15 and 16. So the Excise Department was right in proceeding with the steps to recover from the Plaintiff the loss. It follows the Plaintiff has no cause of action against the Government proceeding with steps to recover the loss. The lower court did not understand the provisions of the sale notification in arriving to the conclusion that the State has no right to proceed against the Plaintiff in this case.

In the result the appeal is allowed, the judgment and decree passed by the lower court are set aside and the suit is dismissed with costs throughout.