

(1985) 02 KL CK 0022

High Court Of Kerala

Case No: O.P. No. 10034 of 1984 and connected cases

K.K. John and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision: Feb. 20, 1985

Acts Referred:

- Constitution of India, 1950 - Article 299(1)

Citation: (1985) KLJ 355

Hon'ble Judges: K.P. Radhakrishna Menon, J

Bench: Single Bench

Advocate: C.P. Sudhakara Prasad, S.A. Nagendran and C.M. Devan, for the Appellant; M.K. Damodaran, R. Krishnan Nair Government Pleader and C.J. Balakrishnan, for the Respondent

Final Decision: Dismissed

Judgement

K.P. Radhakrishna Menon, J.

The questions that arise for consideration in these Original petitions, are practically the same. Facts are identical except to the extent of variations relating to the number of arrack shops, the locality where the arrack shops are situated and the rental on which respective parties have acquired the light to vend liquor in the respective areas. The Original Petitions are therefore disposed of by a common judgment. Facts relevant for considering the questions involved in these Original Petitions, are few. The notice of auction of arrack shops for the year 1983-84 was published in the Kerala Gazette dated 20-2-1984. The crucial statement, according to the petitioners, contained in the said Government Order, is:

The auction sale will be held subject to the conditions set forth in the Kerala Abkari Shops (Disposal in Auction) Rules, 1974.

Relevant rule in the Abkari Shops (Disposal in Auction) Rules, hereinafter referred to as "The Rules", to which particular reference has been made in these Original

Petitions, is Rule 8. This Court had occasion to interpret the scope of this Rule in the decision reported in *Issac v. Assistant Excise Commissioner & Others*, 1984 KLT 88. It is submitted that the Government has no authority to set at naught the said decision, without amending Rule 8. As per the said Rule, as interpreted by this Court, the Government are bound to supply additional quantity of arrack required by the petitioners. In some petitions, the petitioners have stated that it is only because of the existence of the above position, they offered huge amounts as rental in the auction. In short, they contended that the representation held out by the Government, that additional quantity of arrack will be supplied to them, made them offer huge rental for the right to vend liquor in the respective localities, mentioned in the agreements.

2. But it is stated, that after the confirmation of the sales by auction in favour of the petitioners and the execution of the permanent agreements thereafter, they came to know about a change in the condition in the licence granted to them. This change of the condition was introduced by G.O.M.S. 31/84/TD dated 22-2-1984, marked as Ext. P1 in O.P. 10892 of 1984. The petitioners allege that Ext. P1 order however, has not been published in the Gazette. Hence the same has no force of law.

3. Some of the petitioners have an additional case that even the agreed quantity of arrack was not supplied in time and therefore they had even to close the arrack shops for some time. However, it is not their case that the authority concerned has not supplied to them additional quantity of arrack at all. They do concede that the authority concerned has been supplying to them additional quantity of arrack; but they however, submit that the authorities concerned failed to supply the entire additional quantity, they had agreed to supply.

4. In these circumstances, the petitioners, it is submitted, defaulted payment of the instalments which resulted in the initiation of proceedings for recovery of kist arrears under the Revenue Recovery Act. In certain cases the licences have also been cancelled.

5. The petitioners in the above circumstances have prayed for the issue of a writ of mandamus directing the respondents to supply to the petitioners the monthly quota of arrack in time and also reasonable quantity of additional quota of arrack for each of the shops where they are vending arrack. There is yet another prayer namely, that a direction may be issued to the respondents not to enforce payments based on the demands made by the authority concerned consequent on the defaults committed by the petitioners in regard to the payment of the dues. Yet another relief prayed for is the issue of a writ of prohibition restraining the respondents from conducting any re-auction although the petitioners have defaulted payment of the instalments as agreed upon.

6. It is axiomatic that no citizen has the fundamental right to carry on trade or to do business in liquor. The State alone has the right or privilege of manufacturing and

selling liquor. The said right or privilege can be farmed out to citizens by following the procedure prescribed by law, enacted under the powers contained in Entry 8 of List II of the constitution.

7. The Abkari Act, 1 of 1077 for short "The Act" is one such law. The provisions governing the public auction for farming out the privilege or right to vend liquor are contained in Sections 18A and 24 of the Act. Section 18A empowers the Government to grant to any person or persons, on such conditions and for such period as they deem fit, the exclusive or other privilege of selling by retail, any liquor within any local area on his or their paying the rental in consideration of the grant of such privilege. The amount of such rental can be settled by auction, negotiation or by any other method as may be determined by the Government, from time to time. This rental can be collected to the exclusion of, or in addition to, the duty of tax leviable under Sections 17 and 18.

8. The grantee of a privilege under sub-section (1) of Section 18A however, cannot exercise the said privilege until he has received a licence in that behalf from the Commissioner (Vide sub-section (2) of Section 18A). Section 24 provides for the grant of a licence and the licence thus granted will be subject to such restrictions and conditions, the Government may direct either generally, or in any particular instance, in this behalf.

9. It can thus be seen that the grantee of a privilege can exercise the said privilege only in accordance with the terms and conditions of the licence granted in terms of Section 24. The power exercised by the Government under this Section (Section 24) is absolute. The Government is free to incorporate any clause in the licence.

10. The above principles of law notwithstanding, the learned counsel for the petitioners, relying on the Division Bench ruling of this Court in Issac's case, submitted that the respondents are bound to supply additional quantity of arrack to them and in as much as they failed to supply the same, the petitioners are entitled to the reliefs prayed for by them. They made particular reference to the following passage in the said decision:

The position, therefore, is that we find on a proper consideration of the contentions raised by the parties, the respondents were under a statutory obligation to permit the issue of such quantity of arrack in excess of the announced monthly quota as was demanded by the petitioner to meet the local requirements; the respondents having failed to fulfil partially, if not fully, that obligation, the respondents are estopped from demanding the payment of the full bid amount, and that they are not entitled to invoke the provisions of the Revenue Recovery Act for realisation of the amounts alleged to be in default, without a proper adjudication or quantification of the actual amount that might be found due to the respondents from the petitioner on account of the alleged default in payment of the kists; and that a writ petition would lie at the instance of the petitioner to prohibit the respondents from

proceeding with coercive steps under the Revenue Recovery Act for the recovery of the amount representing the balance of the bid amount.

11. From the discussions in the judgment it is clear that the petitioner therein was relying on the doctrine of promissory estoppel to avoid the recovery of arrears of kist amounts by initiating proceedings under the Revenue Recovery Act. No doubt, this Court had accepted the contentions of the petitioner therein that "the successful bidder would have the right to claim, and the excise authorities have a duty to permit, issue of arrack in excess of the announced monthly quota as contemplated in the latter part of the sub-rule (1) of Rule 8 of the Rules." This Court has also held that "A reasonable interpretation of the Rule coupled with the special condition in Ext. P31 licence that the Assistant Excise Commissioner would permit issue of arrack in excess of the announced monthly quota can hardly give room for doubting the right of the petitioner or the duty of the excise authorities in the matter. Even where such rights and obligations are not specifically mentioned in the contract, in the context in which the contract was entered into, such rights and obligations could be inferred."

12. In coming to the conclusion that the Assistant Excise Commissioner and others, the respondents in Issac's case, are estopped from demanding the payment of the full bid amount (kist amount), and that they are not entitled to invoke the provisions of the Revenue Recovery Act for the realisation of the amount alleged to be in default without quantification of the actual amount found due by the petitioner therein, this Court has drawn support mainly from the decision of the Supreme Court in [Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.](#) . The Supreme Court in a later decision, in Chingleput Bottlers v. Majestic Bottling Company, (1984) 3 S.C.C. 252, however has held that "The decision in Gujarat State Financial Corporation case turned on the doctrine of promissory estoppel and it does not justify the conclusion reached by the learned Judges in the present case for the issue of a writ of mandamus. It is needless to stress that if the requirement of law was that the advance of loan to be sanctioned by the Gujarat State Financial Corporation was to be subject to the prior approval of the Reserve Bank of India, the decision of the Court would have been otherwise."

13. The main question that arose for consideration in Chinglepu Bottlers case was whether the High. Court was justified in issuing a writ of mandamus directing the Commissioner to grant a licence to manufacture arrack to M/s. Majestic Bottling Company which was one of the applicants responded to the notice under Rule 3 (2) of the Tamil Nadu Arrack (Manufacturer) Rules. 1981, under Rule 7 of the said Rules. The grant of licence under Rule 7 is subject to the prior approval of the State Government. It was while interpreting these rules, the Supreme Court laid down the dictum extracted above.

14. The learned Senior Government Pleader Shri C.J. Balakrishnan submitted that the decision of this Court in Issac's case is distinguishable in view of the above

decision of the Supreme Court. He dilated this aspect thus. In the present case also the grantee of the privilege u/s 18A (1) cannot exercise the same until he has received a licence in that behalf from the Commissioner. The licence, the Commissioner may issue however, will be subject to such restrictions and on such conditions, the Government may direct either generally or in any particular instance in this behalf (under Section 24). According to the learned Senior Government Pleader the scheme of Sections 18 and 24 is such that the conditions stipulated in the contract, the bidder may enter into with the excise authorities on his bid being accepted, are distinct and different from the conditions, the Government would stipulate in the licence in the exercise of the power vested in the Government u/s 24. The power vested in the Government u/s 24 is absolute, he submits. In short, according to the learned counsel, the licence the Commissioner would issue to a grantee of the privilege u/s 18A (1) was subject to the conditions and restrictions the Government may direct either generally or in any particular instance in this behalf. It is in exercise of the said power u/s 24 the Government have changed the conditions in the licence as is seen from the G.O. Ms. 31/84/TD dated 22-2-1984, the learned Government Pleader argues. Referring to clause 3 of Rule 8, Chapter VII of the Rules, the Government Pleader submitted that the Board of Revenue has the power to restrict the supply of arrack provided the conditions stipulated therein exist. The prayer for the issue of a direction to the authorities to supply arrack as demanded by the petitioners is equally unsustainable. He therefore submitted that the decision in Issue's case has no application to the case on hand.

15. I am of the view that the learned Senior Government Pleader is well founded in the above submissions. In view of the later decision of the Supreme Court in Chingleput Bottlers case, the case of the petitioners based on promissory estoppel is not sustainable. I accordingly reject the same.

16. Equally unsustainable is the plea that Ext. P1 has no force of law as the same has not been notified in the Gazette in terms of Section 69 of the Adkari Act. Ext. P1 is only an order issued by the Government u/s 24 of the Act directing substitution of a new clause in the place of Condition 1 in the licence, as per which, according to the Division Bench, (Issac's case) the Assistant Commissioner is bound to supply additional quantity of arrack to the contractors.

17. The case of the petitioners is that the auction notice has made it clear that the auction is held subject to conditions set forth in Rule 8 of the Rules and therefore the authorities concerned are bound to supply additional quantity of arrack to the contractors. In support of this plea the counsel for the petitioners relied on the provisions contained in Rule 8 and also the decision in Issac's case interpreting this provision. It is true that this Court interpreting Rule 8 has held thus:

The auction sale will be held subject to the conditions set up under the Abkari shops (Disposal in Auction) Rules, 1974.

Which means that the successful bidder would have the right to claim and the excise authorities have a duty to permit, issue of arrack in excess of the announced monthly quota as contemplated in the later part of the sub-rule (1) of rule 8 of the Rules. A reasonable interpretation of the Rule coupled with the special condition in Ext. P31 licence that the Assistance Excise Commissioner would permit issue of arrack in excess of the announced monthly quota can hardly give room for doubting the right of the petitioner or the duty of the excise authorities in the matter. Even where such rights and obligations are not specifically mentioned in the contract, in the context in which the contract was entered into, such rights and obligations could be inferred.

However, this principle cannot be extended to a case where the Government in exercise of the powers vested in them u/s 24 incorporates a condition in the licence disentitling the contractor to claim additional quota of arrack as a matter of right. Rule 8 in no way interferes with the said power of the Government. That it is so can be seen from the preamble to "the Rules" which reads:

S.R.O. No. 157/74-In exercise of the powers conferred by Section 18-A and 29 of the Abkari Act, I of 1077, and of all other powers hereunto enabling and in supersession of all the rules, orders and notifications on the subject, the Government of Kerala hereby make the following rules:

The Rules thus govern only the procedure for granting the privilege to vend arrack in terms of Section 18A (1). The auction purchaser of the privilege will be a grantee within the meaning of Section 18A (1). However, such a grantee cannot exercise the said privilege unless he has received a licence in that behalf from the Commissioner. The power of the Commissioner to issue the licence is circumscribed by Section 24 of the Act. The licence should contain the conditions and restrictions imposed by the Government and as such the right of the contractor to exercise the privilege as a grantee u/s 18A (1), is to be judged in the light of the conditions in the licence. Here admittedly, by Ext. P1 the Government have introduced a new condition in the place of Condition No. 1 of the licence, the scope of which was considered by the Division Bench in Issac's case. Under the new clause, the petitioners are not entitled to demand additional quota as a matter of right because the power, the authorities would exercise under the said clause, is only discretionary.

18. On the acceptance of the bid of a person at an auction sale in terms of the Rules, a contract granting the privilege u/s 18A (1) comes into being. Such a grantee can however exercise the privilege only subject to the conditions stipulated in the licence that may be granted to him. The contract thus comes into being is a statutorey contract, distinct and different from the one executed in the exercise of the executive power of the Government under Article 299 (1) of the Constitution, I am fortified in this view by a decision of the Supreme Court, in State of Haryana v. Lal Chand, 0984) 3 S.C.C. 634.

19. The Supreme Court in A. Damodaran and Another Vs. State of Kerala and Others, , has noted with approval the following passage from the decision of this Court in Madhavan P.K., Kunissery v. Asst. Excise Commissioner 1969 K.L.J. 289 = ILR (1969) 2 Ker 71:

The decision of the Supreme Court In K.P. Chowdhry v. State of M.P. would make it clear that if there are provisions in the Act, the liability to pay the rental can be enforced. I think that even if no agreement has been executed, there was the liability u/s 28 of the Act, and that the liability could be enforced under the provisions of the Revenue Recovery Act. (emphasis supplied)

20. This Court held so, after rejecting the following plea:

Two additional contentions were urged by the petitioners who have bid in auctions the privilege to vend arrack, (1) that they were not supplied with the quantity of arrack specified in the auction notices, and therefore, they have been put to great loss. They contend that there was a clause in the auction notices which gave power to the Excise Commissioner to grant additional quota of arrack to them over and above the minimum quota, on payment of a commission and although the petitioners were prepared, and in fact in some cases paid the commission, they were not supplied with additional quota of arrack as promised. Apart from the question whether the contention is true, I do not think that this is a contention which could be urged in these proceedings. The question relates to the breach of the obligation arising out of the agreement, and this court should not be made the forum for an assessment of the damages sustained by the petitioners as a result of the failure of Government to supply the additional quota or even the minimum quota arrack.

Taking note of the above decision of this Court, the Supreme Court in Damodaran's case held that "Grantees u/s 28 of the Act are those who have received the privilege and not necessarily only those who have received the written contracts and licenses. The word "grantee" used there seems to us to carry this wider connotation with it." Accordingly the Supreme Court held that "the statutory duties and liabilities may be enforced in accordance with statutory provisions." This principle has been reiterated in Lal Chand's case.

21. Sub-clause (26) of Rule 6 in Chapter V of the Rules viewed in the light of the above principle of law makes it clear that the Original Petitions are without any merits.

22. Sub-clause (26) of Rule 6 reads:

No remission or abatement of the rental shall be claimable by the licensee on any account whatsoever.

"On any account whatsoever" in the context in which they are used mean that under no circumstance the grantee is entitled to claim any remission or abatement of the

rental, he has agreed to remit on his being granted the privilege to vend arrack in terms of Section 18A (I), And that a licensee is bound by the above rule is further indicated in sub-clause (39) of Rule 6. The said sub-clause provides:

The licensee shall be bound by all the rules which have been passed under the Abkari Act and which may hereafter be made under the said Act or under any law relating to Abkari Revenue which may hereafter be made.

23. These aspects, the Division Bench had no occasion to consider and therefore I am of the view that the decision in Isac's case should confine to the facts of that case. It has no application here. The proceedings initiated under the Revenue Recovery Act for the recovery of arrears of kist amounts from the petitioners are accordingly valid. They are beyond challenge.

24. The petitioners therefore are not entitled to any of the reliefs prayed for in the Original petitions. In identical circumstance, this Court in O.P. No. 4367 of 1984-E has held:

The conduct of the petitioner in approaching this Court in spite of the altered conditions in the sale notification, guidelines and the licence obtained by him can only be considered as an attempt to abuse the process of this Court. The Original Petition is, therefore, dismissed with costs including Advocate Fees which is fixed at Rs. 500/-.

25. A Division Bench of this Court in W.A. No. 43 of 1985 has expressed almost the same view. The Division Bench has held as follows:

The appellant having bid in abkari auction and obtained a licence, which made it clear that the Government is not under any obligation to supply any specific quantity by way of additional quota, he cannot now say that he is not bound to pay the amount, for each of the instalments as fixed in the agreement between the petitioner and the Government.

In some of the petitions, the petitioners have raised an additional contention that their licences have been cancelled or notified to be cancelled without following the procedure prescribed in that behalf and therefore the orders passed in that regard are liable to be quashed. I am of the view that this plea is linked with the main plea. I have already rejected the main plea and therefore this contention is also liable to be rejected. I accordingly reject the same. For the reasons stated above, I hold that the petitioners are not entitled to any of the reliefs prayed for by them. The Original petitions accordingly are dismissed with costs; including Advocate's fee which is fixed at Rs. 500/-.