(2006) 10 MAD CK 0145

Madras High Court

Case No: Writ Petition No. 7789 of 1999

A. Arumugam		APPELLANT
	Vs	
The State of Tamil Nadu		RESPONDENT

Date of Decision: Oct. 31, 2006

Acts Referred:

- Tamil Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981 - Rule 21, 36(3), 5

Hon'ble Judges: K. Raviraja Pandian, J

Bench: Single Bench

Advocate: M.M. Sundresh, for the Appellant; D. Srinivasan Govt. Advocate, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K. Raviraja Pandian, J.
The above writ petition is filed for issuance of a writ of certiorari to call for the records of the second respondent District Collector culminated in his proceedings in Na.Ka.V.B.NO.3/92/J1 dated 30.3.1999 in determining the notional loss to the respondent revenue by the petitioner and subsequent action for recovery of the said amount and and quash the same.

2. The case of the petitioner is as follows:

The petitioner was successful bidder with reference to Arrack Shop No. 9 for the excise year 1981-82. The monthly kist payable was Rs. 38,600/-. Licence was granted in his favour on 16.7.1981 for the said shop. A third party in the suit in O.S. No. 2693 of 1981 has obtained interim injunction against running of the said arrack shop. In view of the said injunction order, the petitioner could not run the shop and had to surrender the licence to the authorities concerned and requested them to refund his

kist amount. However, the Taluk Excise Officer by his proceedings dated 3.10.1982 directed the petitioner to pay a sum of Rs. 3,46,400/- as notional loss. That order of the Excise Officer was put in issue by the petitioner by filing writ petition in W.P.No. 5003 of 1989 and this Court by its order dated 26.6.1998 set aside the demand of the notional loss as determined by the Excise Officer on the ground that the Excise Officer has no jurisdiction and further allowed the respondents to do the exercise afresh in accordance with law. Thereafter, the District Collector by his proceedings dated 18.2.1999 issued a show cause notice calling upon the petitioner to show cause as to why the amount of loss sustained by the Revenue in view of the inaction on the part of the petitioner to run the arrack shop should not be recovered by quantifying the loss in a sum of Rs. 3,46,400/- . The petitioner submitted his explanation on 7.3.1999 disputing the demand made against him. On consideration of the explanation, the District Collector by his order dated 30.3.1999 passed the impugned order quantifying the notional loss as stated in the show cause notice and confirmed the show cause notice in the order. That order is put in issue in this writ petition.

3. It is true that the petitioner was a successful bidder for the amount referred to above. But he was not able to run the arrack shop because of the interim order granted by the Civil Court against the petitioner for locating the shop. Of course, there is statutory liability on the part of the petitioner to pay any notional loss as per Rule 21 of the Tamil Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981. But the crux of the case of the petitioner is that the respondent authority has not re-auctioned the arrack Shop No. 9 as provided in Rule 5 read with Rule 21 of the above said Rules. The re-auction has to be conducted in accordance with Rule 5 by publication of the said auction in the District Gazette. Such procedure is a mandatory one. If that re-auction has not been conducted in accordance with the statutory provisions, then the re-auction cannot be considered as a valid re-auction and any quantification of the notional loss pursuant to the re-auction cannot be regarded as a legal demand. The first respondent Secretary to the Government filed counter almost stating the very same facts. However, the re-auction conducted by the respondents has been explained in para 5 of the counter affidavit that as per the Tamil Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981 vide Collector''s letter dated 30.11.1981 the re-auction was ordered to be held on 23.12.1981, 27.1.1982, 27.2.1982 and 29.3.1982 and there were no bidders on those dates also. Thereafter having regard to the kist amount paid by the petitioner the notional loss was arrived at by the respondent. Though such explanation has been offered, there is no material as to whether Gazette notification as contemplated under Rule 5 of the Tamil Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981 has been published. In identical set of facts in the case of N. Velappan Nair v. The Commissioner of Prohibition and Excise and Ors. 1998 Writ L.R.406, this Court has taken a view that in a re-auction under Rule 21, the procedure as contemplated in Rule 5 which is mandatory in nature has to be followed. If the re-auction has not

been conducted by following Rule 5, the re-auction cannot be regarded as a valid re-auction and the quantification of the notional loss pursuant to the re-auction, which is not in accordance with Rule 5 cannot be legally sustainable. In order to have clarity the relevant portion of the order is extracted below:

8. Now in order to appreciate the contention of the learned Counsel for the petitioner, let me consider the relevant rules. Rule 5 deals with notice of auction. It runs as follows:

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 5 contemplates that when 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 10 days in advance of the date of auction in the District Gazette and in such other manner as the Collector may deem fit. As per the said Rule, if the Collector intends to conduct auction to grant the privilege of retail sale of liquor, the notice of the proposed auction shall be published by him 10 days in advance of the date of auction in the District Gazette. Apart from the Gazette publication, it is open to the District Collector to publish auction notice in such other manner as he may deem fit. It is the grievance of the petitioner that the Collector has not notified the re-sale in the District Gazette as per Rule 5. Notification in the District Gazette ten days in advance of the date of auction is a mandatory one. If the Collector so desires to conduct auction in such other manner, he can do so in addition of the notification in the District Gazette. Hence notification in the District Gazette is a mandatory as per Rule 5. On conducting proper-resale, if there is any loss arising from the re-sale, undoubtedly as per Rule 21, the petitioner has to pay the same to the respondents and failing compliance, it is open to the respondents to recover the amount as if it were arrears of land revenue. No doubt, Explanation to Rule 21 says that
for the purpose of this rule, disposal otherwise than by resale, includes closure.

In the counter affidavit in para 5 it is explained as follows:

Reauction of shops had been tried several times. None came forward to bid the shops, firstly due to the influence of the writ petitioner in the areas, secondly half a period of the excise year was over by then so that nobody took special interest to participate in the auction sale and thirdly number of shops to be auctioned were large (i.e.) 9 Arrack Shops 5 Toddy Shops covering about 1/10th area of Vilavancode Taluk.

Even though the petitioner has raised a specific plea that Rule 5 of the rules has not been complied with unfortunately in the counter affidavit, there is no specific reference whether re-auction was conducted strictly in accordance with Rule 5 or not ? No-where in the counter affidavit the respondents informed that re-auction

was conducted strictly as per Rule 5 and no particulars regarding the date of publication of the Notification in the District Gazette has been furnished in the counter affidavit, nor records have been produced before me to disprove the contention of the petitioner. If the resale is not in accordance with the provisions of the rules and if any loss is occurred, the petitioner cannot be blamed. In other words, a duty is cast on the authorities if any licensee commits default, it open to them to conduct re-auction in accordance with Rule 5 read with Rule 21 of the Rules and on satisfying the said rules, if no one come forward to run the shop undoubtedly it is open to the respondents to recover the losses from the original licensee. In our case, there is no material to show that the respondents have fully complied with the provisions of Rules 5 and 21 except stating that "re-auction of the shops had been tried several times". At this stage, the learned Counsel for the petitioner relying on the decision of the Apex Court reported in State of Haryana and Others Vs. Jage Ram and Others, submitted that if the re-auction itself is invalid recovery cannot be effected. In that case which is similar to our case, their Lordships of the Supreme Court have observed thus:

Since the reauction 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 reauction 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 reauction of vends were complied with substantially. Since the reauction did not conform to the rules and the respondents were prejudiced thereby, they cannot be held liable to make goods the difference between the amount which was payable by them and the amount which was fetched at the re-auction.

In the light of the law laid down by the Apex Court in the above referred decision and in the absence of any material by the respondents to show that Rule 5 has been strictly complied with while conducting resale of the shops in question, I have no hesitation in holding that it is impossible to uphold the reauction and mulct the respondent in the resultant shortfall. As stated in the said decision, the respondents must substantially comply with and mere statement that reauction of shops had been tried several times may not be sufficient compliance. No doubt, the first respondent has arrived at a conclusion that the petitioner is liable to pay the loss to the Government arising out of the cancellation of his licence even though the cancelled shops were not resold. If the authorities (respondents) are able to show that there were proper resale including the publication in the District Gazette, I have already expressed that there may not be any difficulty in accepting their case. In the absence of strict compliance of the rules, the loss cannot be mulct with the

petitioner. The very same view has been expressed by the Supreme Court and the said decision is directly applicable to his case.

4. Following the above said judgment, the impugned order is quashed and the writ petition is allowed. While allowing the writ petition this Court is constrained to echo the very same sentiments, which the learned Judge has stated in para 10 of the decision cited supra which reads as follows:

10. It is unfortunate that in a matter like this, where recovery of loss from the defaulting licensee of arrack and toddy shops is involved, had the Authorities strictly complied with the rules, the loss amount could have been recovered from the defaulted licensee. No sincere attempt, however, was made to bring to the knowledge of this Court that resale was conducted strictly in accordance with the Rules by placing the necessary records (Gazette Notification) . In such circumstances, this Court has no other option except to quash the impugned order as done by the Supreme Court in the above referred decision.

5. It is submitted by the learned Counsel for the petitioner that when notice of motion was ordered by this Court in the writ petition, interim order has been passed on 29.4.1999 directing the petitioner to pay a sum of Rs. 1,00,000/- in order to have the indulgence of interim order. Now that as the Court has taken the view that the demand itself is not legally sustainable and impugned demand is set aside, it is needless to say that the petitioner is entitled to refund of the said amount.

6. With this observation, the writ petition is allowed. No costs.