

T.A. Anandan (Died) and Others Vs Union Territory of Pondicherry

Court: Madras High Court

Date of Decision: Dec. 10, 2009

Acts Referred: Constitution of India, 1950 " Article 14, 19(1), 299(1)

Pondicherry Excise Act, 1970 " Section 151(5), 152(5)

Pondicherry Excise Rules, 1970 " Rule 143, 144, 145, 151(5), 151(7)

Hon'ble Judges: T.S. Sivagnanam, J; F.M. Ibrahim Kalifullah, J

Bench: Division Bench

Advocate: G. Masilamani, for the Appellant; T. Murugesan Govt. Pleader and Public Prosecutor, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

T.S. Sivagnanam, J.

Since the issue involved in this batch of cases are identical, they are taken up together for disposal. For the purpose of

disposal of these matters, the facts in W.A. No. 1326/2000 and W.P. No. 9339/2000 are taken up for consideration. Writ Appeal Nos. 1323,

1324 & 1326/2000 have been filed against W.P. Nos. 8103/1998, 8105/98 & 7082/98. The prayer in the said writ petitions were for issue of a

writ of certiorarified mandamus to quash the order passed by the third respondent herein, dated 04.10.1997 and the consequential demand dated

21.04.1998.

2. Writ Appeal Nos. 1322, 1325 & 1327/2000 have been filed against the orders in W.P. Nos. 8104, 8106 and 6804/1998. The prayer in the

said Writ Petitions were for issuance of a writ of declaration to declare the condition "A bid once offered shall not be withdrawn" incorporated in

Section 152(5) of the Pondicherry Excise Act 1970 as unconstitutional.

3. All the Writ Petitions came to be disposed by a common order dated 04.12.1998 as against which the present Writ Appeals have been filed.

4. W.P. Nos. 9337, 9338 & 9339/2000 have been filed challenging the order of recovery of kist amount from the petitioners, being the alleged

loss of revenue in respect of the tender for right to vend arrack. These Writ Petitions have also been tagged along with the above Writ Appeals

and are heard together.

5. The matter arises under the provisions of the Pondicherry Excise Act 1970 and the Rules framed thereunder (hereinafter referred to as "the Act")

and the Rules). Essentially the dispute relates as to whether the order of confirmation of auction for grant of privilege to vend arrack, stated to have

been passed in favour of the petitioners was done within a reasonable time, as contemplated under the Rules, as to whether the appellants would

be entitled to withdraw their bids on the ground that there was no valid order of confirmation in their favour and such confirmation was not done

within a reasonable time and as to whether the appellants could be denied the relief on the ground that there is no fundamental right to carry on

trade or business in liquor as the same is ""res extra commercium"" (outside commerce) and the principles of ""res commercium"" and the Mercantile

Law has no application.

6. The facts giving rise to the present litigation is as follows: The third respondent issued a notification dated 19.07.1997 under the Pondicherry

Excise Rule, 1970, bringing to the notice of the Public the exclusive privilege of selling toddy and arrack for the period from 01.08.1997 to

30.06.1998 in the shops specified in schedule I and II of the notification. The present issue relates to arrack shops in Mahe Region and three of the

bidders are the appellants and the petitioners in the above matters. In terms of the notification, the bid is to be offered on monthly rental basis for

the duration of the license period and the licensee is liable to pay the rental for the entire license period of the 11 months. The notified date of

auction was on 29.07.1997 at 8.00 A.M to be conducted by the Deputy Commissioner and the sale was subject to the provisions of the Act and

Rules and the conditions of sale set down in the notification. It is seen that the auction was not conducted on the notified date, but was conducted

after a period of six days on 04.08.1997. The appellants participated in the auction sale conducted on 04.08.1997 in respect of three shops

namely Shop-I, II and III of Mahe Region. The conditions of sale which are relevant for the purpose of these appellants are that, person who

desires to participate in the auction shall produce a challan for remitting the earnest money to an amount equivalent to 10% of the eleven months

upset price for the shop and the other records to be produced are a Solvency Certificate, Nil Arrears Certificate from the Deputy Tashildar, a

certificate from an M.L.A or M.P stating that the bidder has not been sentenced by a Court of Law for a offence involving moral turpitude, Income

Tax Clearance Certificate and Birth Certificate. These certificates are required in terms of stipulation under Rule-4 and condition 4 of the sale

conditions. After having complied with the requirements, the list of intending bidders was prepared and in terms of condition 6(2) of the conditions

of sale, they were required to give an undertaking in Form U-1 confirming that they were aware of the condition of the sale and other formalities

and in case, he is declared as successful bidder he should comply with the other requirements. The intending bidder was required to remit a sum of

Rs. 5,000/- as participation fee in terms of condition 6(3). Clause 10 to 14 of the condition of sale are very relevant for the purpose of this case. In

terms of Clause 10(1), the person whose bid has been accepted provisionally, shall immediately produce the original title deeds of the property

offered by him as security, upon failure to produce, it is open to the Excise Official to select the next highest bidder. In terms of Clause 10(2), the

person whose bid is provisionally accepted shall execute an undertaking that he will not withdraw from the offer made by him and the offer will be

binding on him. The agreement to be executed is as per the statutory format in Annexure IV to the notification. In terms of Clause 13, the

acceptance of the bid shall be subject to the confirmation of the Government and the order of confirmation or refusal to confirm shall be

communicated to the person concerned within a reasonable time.

7. Clause 14 deals with the requirements to be complied with by person whose bid is confirmed by the Government. The person whose bid is

confirmed is required to remit the security deposit equal to five months bid amount within five days from the date of communication of the

confirmation order, to execute and register an agreement of lease in the prescribed format with the Government within ten days from the date of

receipt of a confirmation order, execute a mortgage at his expense in the statutory form DM-1 in respect of the property offered as security, which

shall also be done within ten days from the date of receipt of a confirmation order. In terms of Clause 14(2), if security deposit is not remitted

within five days, the confirmation order issued under clause -13 shall stand automatically cancelled without notice to the bidder. In terms of Clause

14(3), if the mortgage deed is not executed within 10 days, order of confirmation shall stand automatically cancelled without notice to the bidder

and deposit made shall be forfeited and right to vend would be granted to next highest bidder. Thus, it could be seen that a definite time schedule

has been prescribed under the Rules for the bidder to comply with formalities after the order of confirmation. However, the order of confirmation is

required to be made by the Government and shall be communicated to the person concerned within a reasonable time. It is true that no time limit

has been prescribed under Clause 13 and the expression used is within a reasonable time and the whole controversy in the present case revolves

around the interpretation of the expression ""reasonable time"".

8. As noted above, though the auction was notified to be held on 29.07.1997, the same was not held on the said date, but held on 04.08.1997.

The bids of all the three appellants were provisionally accepted in terms of Clause 10(1) of the conditions of sale. According to the appellant, the

order of confirmation was not passed within a reasonable time and therefore, the appellants submitted a representation on 23.09.1997 stating that

substantial money has been paid by them and there is no response from the Government for nearly two months and the Government cannot retain

such money without issuing license for such a long period of time and therefore requested for return of caution deposit and the original title deeds

immediately. This has been followed by another representation dated 17.10.1997 wherein, it was stated that the appellants expected the order of

confirmation or refusal to be communicated within one week and having not done so, the appellants cannot proceed further, since the Onam

festival season is over and the pilgrim season has commenced, there would be a substantial drop in the consumption of liquor during the said

period. It was further stated that the time taken was not a reasonable one and therefore, they were justified in withdrawing the offer. The earlier

representation dated 23.09.1997 was also referred in the representation dated 17.10.1997. The representation was sent by registered post and

received by the Deputy Commissioner (Excise), Mahe on 17.10.1997. Another representation has been sent on 08.12.1997 to His Excellency Lt.

Governor, Union Territory of Ponicherry and in the said letter, it has been mentioned that the appellants were orally informed by the clerk attached

to the office of the Deputy Commissioner (Excise), Mahe that their offer was accepted by the Government on 04.10.1997 and that the appellant

has withdrawn his offer by letter dated 23.09.1997. In view of the stand taken by the appellant, a re-auction notification was issued on

16.10.1997 and re-auction was conducted on 23.10.1997, thereafter, by an order dated 21.04.1998, the appellants were slapped with a demand

towards loss of revenue to the Government and they were required to pay the kist amount for the days between 04.10.1997 and 10.11.1997

(date of confirmation of the lessee in the re-auction) and the difference of kist amount. The said demands were impugned in W.P. Nos. 8103,

8105 and 7082/1998. As stated, the other three W.Ps. namely W.P. Nos. 8104, 8106 & 6804/1998 had been filed by the appellants challenging

the statutory provisions, which states that the bid once offered shall not be withdrawn.

9. Mr. G. Masilamani, learned senior counsel appearing for the petitioner would assail the correctness of the impugned order on various ground.

Firstly, that the conditions of sale states that the bid, which has been offered is subject to confirmation by the Government and confirmation or

refusal to confirm shall be communicated to the person concerned within a reasonable time. What would be reasonable time should be considered

taking into consideration the facts and the circumstances of the case and the time schedule stipulated under Act, Rules and conditions of sale. It is

contended that by taking note of the time schedule fixed for compliance of various requirements by the bidder after confirmation, the reasonable

time for Government to pass an order under Clause 13 should be in one week.

10. Learned Senior counsel would further submit that the auction was notified on 29.07.1997 and the period of license was for eleven months. The

auction was not conducted as per the schedule and was conducted only on 04.08.1997 and there is a delay of six days. Since no order of

confirmation was passed for nearly two months, the appellant had withdrawn the offer on 23.09.1997 and sought for return of caution deposit and

original documents of title. This request was reiterated in the subsequent representations dated 17.10.1997 and 08.12.1997, that the appellants

were orally informed on 06.10.1997 that the Government has confirmed the bid in favour of the appellants on 04.10.1997. Though, this oral

information was given by a clerk in the Excise Department, no written communication was received in this regard and even while filing the writ

petition, the petitioners sought for dispensing the production of the order of confirmation dated 04.10.1997 and the same was permitted by this

Court. The condition under Rule 151(5) stating that the bid once offered shall not be withdrawn is unguided, unjust and is an unfettered power and

the same is violative of Article 14 and 19(1)g of the Constitution of India. It is further submitted by the learned Senior counsel appearing for the

petitioners to do or not to do business in alcohol is not a fundamental right, but if the State decides to business in alcohol, it shall treat the citizen

fairly and justly and the same shall satisfy the touch stone of Article 14 of the Constitution and there cannot be any arbitrariness merely because it is

a business in alcohol. While interpreting what is reasonable time, the tenure of the lease period is a very relevant fact and a basic element and in the

instant case no decision was taken within a reasonable time, the tenure of lease was unilaterally and drastically reduced to eight months by the

belated order of confirmation said to have been passed on 04.10.1997 after more than 60 days from the date of auction, which was not also

communicated to the petitioners, that inspite of three representations sent by the appellant withdrawing their bids, they were not favoured with any

reply, that the so called confirmation is stated to have been made on 04.10.1997 which happened to be a Sunday and an officially declared holiday

by the Government, that all the circumstances would establish that the respondents have not acted fairly or reasonably, that the conduct of the

respondents was unusual, which goes to establish that there was no legally valid order of confirmation, that it was not a case of concluded contract

that it was well open to the appellant to withdraw their bids much earlier to the alleged order of confirmation, and the undertaking obtained from

the appellants prior to confirmation cannot operate as an estoppel, since no action was taken to pass orders of confirmation within a reasonable

time.

11. Learned Senior counsel would submit that reliance placed by the respondents before the Learned Single Judge on Judgments to support the

stand that there is no fundamental right to trade in liquor and the said product is ""res extra commercium"" would not apply to the facts and

circumstances of this case, since the question involved in the present litigation is as to whether the action of the State is reasonable and fair and as

to whether it satisfies the touch stone of Article 14 of the Constitution. According to the learned senior counsel, since the Government decided to

do business in alcohol, it is only thereafter the bids are invited and therefore, it falls outside the realm of the theory of ""res extra commercium"" and

this Court has sufficient jurisdiction to examine the legality and validity of the state action.

12. Leaned Senior Counsel appearing for the petitioners relied on the following Judgments for the proposition that there is no exclusion of Article

14 in contractual matters.

i) Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others,

ii) ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,

iii) Food Corporation of India and Another Vs. SEIL Ltd. and Others,

Learned Senior Counsel relied on the following decision in support of the contention that, what would be the reasonable time when no time limit is

prescribed.

i) Government of India Vs. Citedal Fine Pharmaceuticals, Madras and Others,

ii) H.I Trust v. Aaridas Mundhra : AIR 1972 SC 1826

iii) State of Kerala v. Narayana Pillai 2001(1) KLT 166 (SC)

13. Mr. T. Murugesan, learned Senior Counsel appearing for the respondents would contend that the right to trade in alcohol is vested with the

State and the said right has not been parted away by the State and the theory of ""res commercium"" has no application and in view of the decision

of the Constitution Bench of the Hon"ble Supreme Court in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, , the writ

petitions itself were liable to be dismissed. It is further submitted that there is no invitation to the trade and the appellants had volunteered

themselves and since the licence is in respect of right to vend liquor, the concept of Mercantile Law has no application.

14. Learned Senior Counsel would further submit that the order of confirmation was passed and the same was attempted to be served on the

petitioners, but was refused to be received and the order has been passed within a reasonable time and even assuming without admitting, the non-

service of order of confirmation is of no consequence, since the petitioner has given a statutory undertaking in Form No. U-2 and the order of

confirmation is only a consequential action. It is further submitted that there were valid reasons as to why the order was not passed immediately

and it has to be held that the time taken to pass the order was reasonable. By placing reliance on Rule 151(5), it is submitted that the petitioner

cannot withdraw from the offer and the stand taken by the appellants is only with an intention to wriggle out of the contract and the contention

raised by the Appellants were rightly rejected. It is further submitted that in view of the law laid down by the Hon"ble Supreme Court in Assistant

Excise Commissioner and Others Vs. Issac Peter and Others, the prayer sought for in the writ petitions were not maintainable as the petitioners

have no fundamental right to trade in liquor and such power had always vested with the state.

15. The learned senior counsel appearing for the respondents would rely upon the following Constitutional Bench Judgment of the Hon"ble

Supreme Court

(1) Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others,

(2) Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, and the decision of the Hon"ble Supreme Court in

State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another,

16. On the above grounds the learned Senior counsel would submit that the order passed in the writ petition calls for no interference.

17. We heard at length the respective senior counsel appearing for the appellants and respondents and perused the materials available on record.

Before proceeding to discuss the fact in issue, it would be appropriate to first consider the submissions made by the learned senior counsel

appearing for the respondents, contending that the right to trade in alcohol is vested with state and the said right has not been parted away and the

theory of ""res commercium"" has no application as the trade or business in potable liquor is a trade or business falls within the concept of ""res extra

commercium"". The learned senior counsel appearing for the respondents placed reliance on the Judgment of the Constitution Bench of the Hon"ble

Supreme Court, in the Khoday Distilleries Limited, referred supra, and would contend that the appellants cannot be permitted to wriggle out of the

contract and they are bound by the terms and conditions by which the trade has been regulated and the question of applying Article 14 or Article

19(1)g of the Constitution of India does not arise.

18. In the case of Khoday Distilleries Limited, the Hon"ble Supreme Court was dealing with the batch of appeals in which the question which was

referred for decision was as to whether appellants have, a fundamental right to carry on trade in liquor. After considering the various Judgments of

the Hon"ble Supreme Court, it was held that a citizen has no fundamental right to trade or business in liquor as a beverage and that the state can

prohibit completely the trade or business in potable liquor, since liquor as beverage is ""res extra commercium"". The State may also create a

monopoly in itself for trade or business in such liquor and can place restrictions and limitations on such trade or business, which may be in nature

different from those on trade or business of articles ""res commercium"".

19. In our view, the question as to whether, liquor as a beverage is ""res extra commercium"" does not arise for consideration in the present appeals.

We have been called upon to decide the correctness of the order passed by the learned Single Judge, who held that the Appellants are not entitled

to withdraw from the bids under no circumstances and that the order of confirmation was orally communicated to the Appellants, such confirmation

was done within a reasonable time and on account of the failure of the appellant to execute necessary documents, the reauctioning of the shops

was justified. It is to be noted that the Government of Pondicherry had taken a decision to trade in the sale of the privilege to vend arrack and for

which purpose issued a notification informing that the exclusive privilege of selling arrack for the period from 01.08.1997 to 30.06.1998 is to be

given and intending bidders should offer their bids. Therefore, the Government having taken a policy decision to trade in liquor, the question as to

whether grant of privilege to vend arrack is ""res extra commercium"" or ""res commercium"" loses its significance, as on and after the issuance of the

notification, the subsequent conduct of the Government has to be tested on the touch stone of Article 14 of the Constitution of India, since the state

had decided to do business in potable alcohol as a beverage and if that be the case, the state is bound to treat the bidders in the auction reasonably

and fairly and every action taken by them should be free from arbitrariness. In fact, the answer to the question can be found in the Judgment of the

Hon"ble Supreme Court in the case of Khoday Distilleries Limited, itself Wherein it has been held as follows:

46. In Doongaji and Co. Vs. State of Madhya Pradesh and others, a Bench of two learned Judges while dealing with the question whether, after

the expiration of the licence given to the appellant, fixation of the prices of the plant and machinery of the distillery and the attached warehouses

and stock-in-trade and payment thereof to the appellant, was a condition precedent to taking possession thereof and giving delivery to the new

licensee which was a State-owned Corporation found on facts that the appellant had no exclusive possession of the distillery which always

remained with the Excise Department and the appellant was only working out the contract of manufacturing rectified spirit in the distillery and

wholesale supply of the same to the retail vendors within the area attached to it. Due to non-cooperation of the appellant, possession was taken

and delivered to the incoming licensee as per the Rules and the appellant was not entitled to restitution. In that connection, the Court observed as

follows: (SCC p. 320, para 15)

It is settled law by several decisions of this Court that there is no fundamental right to a citizen to carry on trade or business in liquor. The State

under its regulatory power, has power to prohibit absolutely any form of activity in relation to an intoxicant, its manufacture, possession, import and

export. No one can claim, as against the State, the right to carry on trade or business in any intoxicants, nor the State be compelled to part with its

exclusive right or privilege of manufacture, sale, storage of liquor. Further when the State has decided to part with such right or privilege to the

others, then State can regulate consistent with the principles of equality enshrined under Article 14 and any infraction in this behalf at its pleasure is

arbitrary violating Article 14. Therefore, the exclusive right or privilege of manufacture, storage, sale, import and export of the liquor through any

agency other than the State would be subject to rigour of Article 14.

60(g). When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or

business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or

business.

(h). The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted

is not discriminatory.

20. Thus, in view of the law laid down by the Hon'ble Supreme Court that once the respondents have decided to grant exclusive privilege to vend

toddy and arrack, the same should be regulated strictly based on the principles of equality enshrined under Article 14 of the Constitution.

Therefore, we are unable to accept the submissions of the learned senior counsel appearing for the respondents and the question of the theory of

res extra commercium", has no application to the facts and circumstances of the present case, as the stage in which appellants have approached

this Court is after the State has decided to do business in alcohol by parting away their exclusive right and all that, which is required to be decided

is as to whether:

- i) What is the reasonable time to be taken for the purpose of issuing an order of confirmation.
- ii) How should the reasonable time be computed in the facts and circumstances of the present case, and
- iii) Whether based on the undertaking given by the appellant, it could be said that they cannot withdraw from the offer till the order of confirmation

is passed.

Therefore, the decisions relied on by the learned senior counsel appearing for the respondents have no application to the facts and circumstances

of the present case.

21. In terms of Rule 143 of the Rules, the respondent had decided to lease the right of retail vending of liquor by means of auction and a

notification in this regard came to be issued on 19.07.1997, under Rule 144 of the Rules. Rule 145 deals with the manner of submission of tender

and salient conditions being that, each tender should be accompanied by a challan for payment of earnest money deposit of an amount equal to

10% of the upset price for the shop, a solvency certificate, no due certificate from the Deputy Tashildar, a certificate from M.L.A or M.P stating

that the bidder has not been sentenced by a Court of law for a offence involving morally turpitude and Income Tax Clearance Certificate. In terms

of Rule 151(1), the Deputy Commissioner shall prepare a list of intending bidders and only those included in the such list are permitted to bid Sub-

section (5) of Section 151 is relevant for the purpose of this case, which reads as follows:

5. The bids offered shall be recorded in such list and the signature of the highest bidder shall be obtained in token of his offer. A bid once offered

shall not be withdrawn.

22. In terms of Sub-rule of (7) of Rule 151, the Deputy Commissioner shall provisionally accept the highest bid and announce the same. After

announcing of such provisional highest bidder, the said bidder shall immediately on the day of such acceptance produce the title deeds relating to

the property offered as security as described in the solvency certificate, failing which, the Deputy Commissioner may select the next highest bidder

as provisional lessee. The scheme of the rules as stated above are mentioned in the conditions of sale in the auction notification, in terms of Clause

13, thereof the acceptance of the bid by the officer conducting the sale shall be subject to confirmation by the Government, the order of

confirmation or refusal to confirm shall be communicated to the person concerned within a reasonable time.

23. In a case, where the auction is confirmed by the Government and communicated within a reasonable time, the bidder is required to comply

with the following, viz, remit the security deposit equal to five months bid within five days from the date of communication of the confirmation

order, execute and register an agreement of lease at his expense, in the statutory form within ten days from the date of receipt of the confirmation

order, create a mortgage on the property offered as security in the statutory format within ten days from the date of receipt of confirmation order.

Thus, the conditions of sale have fixed definite time schedule, within which the bidder is required to comply with the various formalities and in

default, he shall lose his right. The only place in which a definite time schedule has not been mentioned is in Clause 13, the time for issuing order of

confirmation by the Government and the expression ""reasonable time"" has been employed.

24. As stated, in the instant case, notification was issued on 19.07.1997 and the date of auction was fixed as 29.07.1997. However, auction was

not held on the said date, but was held on 04.08.1997. The bids offered by the appellants were provisionally accepted in terms of Clause 10(1) of

the condition of the sale and they have also furnished the original title deeds relating to the property on the same date and also executed an

agreement in the statutory format stating that the offer made by them shall not be withdrawn, until, the Government confirms or refuses to confirm

the bid and they shall be bound by the offer until such time, the Government communicates its acceptance or non acceptance of the bid offered by

the appellants and in the event, they withdraw the offer, they agreed to indemnify, the Government for the losses that would be sustained. It is

stated that the officer conducting the sale, forwarded the provisional bids of the appellants for confirmation by the Government. It is the case of the

respondents that the order of confirmation was passed by the Government on 04.10.1997. This is emphatically denied by the appellants by stating

that they were only orally informed by the clerk working in the Department on 06.10.1997 about the confirmation of their bids and much prior to

the same (i.e) on 23.09.1997 itself, they have withdrawn their bids and no such written order of confirmation was communicated to them and

owing to the said reason, they sought for dispensation of the production of the order dated 04.10.1997 before this Court, when they filed the writ

petitions and the same was also granted by this Court. Therefore, it is the contention of the appellants that in the absence of any valid order of

confirmation, and in the absence of any such order being communicated to them as required under the conditions of sale, there was no concluded

contract between the parties and in fact, there was no contract in the eye of law. Further, it is the case of the appellants that the delay of two

months in confirming the auction is not a reasonable time, considering the facts and circumstances of the present case, namely the tenure of the

lease.

25. On the first issue, the learned single Judge while dismissing the writ petition in paragraph 34 of the order rendered a finding that there was

nothing on record to show that there was any communication in writing relating to the order of confirmation. In the said paragraph, the learned

single Judge has also observed that attempt was made to serve the order of confirmation on 05.10.1997 on the appellants, but was refused to

accept the same and neither the agreement nor the condition of sale says that the communication should be in writing. We are afraid that, this

observation is not in consonance with the conditions of sale, since Clause 13 of the condition of sale states that the order of confirmation or refusal

to confirm should be communicated to the person concerned within a reasonable time and in case where the bid is confirmed the various

requirements to be complied with by the successful bidder are time bound either five or ten days, which has to be computed from the date of

communication of the confirmation order. Therefore, it is necessary that the confirmation should be in the nature of an order and the order is

required to be in writing to be communicated to the successful bidder. Any other interpretation given of and the said clause would be contrary to

the specific terms contained therein and the parties cannot be expected to act on oral communication from the Government. Therefore, based on

the facts on record and the observation in the order of learned single Judge, it is amply established that there was no written order of confirmation

served on the appellants. As rightly contented by the learned senior counsel appearing for the appellants, even assuming that the appellant refused

to receive one such order, nothing prevented the respondents in communicating the order by resorting to other modes of service. Thus, in the

absence of any reasonable step having been taken by the respondents to serve such an order of confirmation stated to have been made, we hold

that there was no written order of confirmation of the bid offered by the appellants which should have been communicated to them. Having held so,

we also propose to decide the question as to whether even assuming an order of confirmation was passed on 04.10.1997, whether such order

was passed within a reasonable time.

26. Learned senior counsel appearing for the appellants by placing reliance on the Judgment of Citadel Fine Pharmaceuticals, as referred above,

would contend that when period of limitation has not been prescribed, what would be reasonable period would depend upon the facts of each

case. In support of the said proposition, learned senior counsel would also rely upon two other decisions of the Hon"ble Supreme Court in the

case of H.I Trust v. Aaridas Mundhra and State of Kerala v. Narayana Pillai as referred above. In State of Kerala v. Narayana Pillai as referred

supra was, a case arising under the Kerala Abkari shops (Disposal in Auction, Rules 1974). The Hon"ble Supreme Court was considering the

mandate of Rule 5 (14) of the said rules to the effect that the rejection or confirmation shall be conveyed as soon as possible. It is relevant that in

the instant case, the condition of sale mandates the order of confirmation to be made within a reasonable time. The Hon"ble Supreme Court while

deciding the said issue held as follows:

3. Admittedly, in the present case the auction period commenced on 1st April, 1981. The auction sale had taken place on 27th March, 1981 but

confirmation of sale, however, was not made by the Board of Revenue till 07.05.1981. It was not communicated to the successful bidder, till

11.05.1981. The mandate of R.5(14) to the effect that the rejection or confirmation shall be conveyed ""as soon as possible"" was obviously

respected in its breach. The respondent, pleaded justification, in the admitted facts of the case to withdraw because of the delay in confirmation of

the sale. Before the High Court it was, however, pleaded on behalf of the appellants that confirmation of sale had been made "without any delay".

The High Court wanted the file relating to confirmation of sale to be produced before it to satisfy itself about the cause of delay in confirming the

sale. The High Court observes:

In fact, we wanted to know the proceedings of the Board in regard to this matter. The Government Pleader was given sufficient opportunity after

the bearing was begun to enable the production of the file. He confessed that he is not in a position to place the file before us. We have to say that

in writ proceedings, this Court has got the obligation to examine the file. Petitioner wants this Court to call for the file and when once the notice is

issued, normally the files have to be placed before the Court. But as a practice the Court insists the file to be placed before it only at the time when

the case is being heard. This Court is indulgent always to give time to the Government to enable the Government to place the files before this

Court. In this case, we have given more than two opportunities to search for the file to enable the Government to place it before us, but it was not

done. We wanted the Government Pleader to show us the order of confirmation. Government Pleader was not in a position to show that order.

We wanted to see whether it was a considered order by the Board of Revenue. We wanted to know whether the Board of Revenue has given any

reason for the delay in its order or proceedings. That was also not available. The order of confirmation, according to the petitioner has not been

served on him. The Government Pleader submitted that the Assistant Excise Commissioner served a notice to the petitioner stating that the sale has

been confirmed, and that the petitioner has refused to receive that notice. We thought that the Assistant Excise Commissioner will have the

communication from the Revenue Board confirming the sale. The file of the Assistant Excise Commissioner in regard to this case also does not

contain such a communication, the Government Pleader submitted so. We have to observe that there is absolutely no jurisdiction for the

Government not to produce the file of the Board of Revenue regarding this matter when the Court wanted to peruse the file.

4. The above observations are tell tale. Why was the file withheld, we are unable to understand?. The High Court, in the facts and circumstances of

the case, would have been justified to draw an adverse inference against the State Government for holding back the record, against which the Writ

Petition had been sought. In view of the conduct of the appellant of with-holding vital information from the Court, the Court was perfectly justified

in allowing the Writ Petition and directing the refund of the security deposit of Rs. 8,70,300/- and the return of the Solvency Certificate for Rs.

5,80,200/- to the respondents. No fault can be found with these directions. The State cannot complain against the directions because of its own

conduct.

27. In our view the Judgment of the Hon"ble Supreme Court in the above case could be applied to the facts and circumstances of the present case

and it can be safely held that the order of confirmation was not served and we would be justified in law to draw an adverse inference against the

respondents. As held by the Hon"ble Supreme Court what would be reasonable time should depend upon the facts and circumstances of each

case and this is a question of fact, which has to be decided taking into consideration various factors relatable to the particular contract/grant. In the

instant case the period of licence as notified was for eleven months. The auction was not conducted on the notified date, but after six days from the

notified date, as could be seen from the condition of the sale and the rules where the time frame which a bidder is required to comply with various

requirements have been definitely ascertained and fixed giving no room for any ambiguity. In fact, the title deeds are required to be furnished by the

bidder on the same day on which his bid is provisionally accepted and he is also required to execute an agreement in terms of annexure-2. As

observed earlier, on confirmation of the bid the various requirements, which are to be complied with by the bidder has been fixed either as five or

ten days in the maximum. In default of either of the conditions, the bidder loses his right. Thus, taking into consideration the totality of the facts and

circumstances of the present case, it can be safely held that ten days could be taken as a reasonable time within, which the order of confirmation

should have been passed. This is more so because the privilege itself is for eleven months and the auction itself was conducted after delay of nearly

six days and the period of more than two months taken by the Government for issuing the alleged order of confirmation cannot be taken to be a

reasonable time when, the period of lease itself had been drastically reduced by almost 2= months. Therefore, we hold that the time taken by the

Government to pass the so called order of confirmation dated 04.10.1997 has not been made within a reasonable time.

28. The learned senior counsel appearing for the respondent, placed reliance upon the decision of the Hon"ble Supreme Court in State of Punjab

and Another Vs. Devans Modern Brewaries Ltd. and Another, The question which arouse for consideration before the Hon"ble Supreme Court in

the said case related to imposition of import fee on beer and increase of import fee on IMFL (Indian made foreign liquor). The decisions of the

Constitution Bench in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , the decision of the Hon"ble Constitution

Bench in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, , referred supra and the Judgment of the Hon"ble Supreme

Court in the case of Assistant Excise Commissioner and Others Vs. Issac Peter and Others, , referred supra were relied on while considering the

issue, two points were framed for consideration namely whether the import fee levied in the price for parting with the privilege given to import

liquor into the state and therefore, the same is within the competence of the state to impose import fee and whether the imposition of import fee

does not, in any way restrict trade, commerce and intercourse among states. While considering the said issue the Hon"ble Supreme Court in a

majority Judgment held that the freedom is not available in trade in liquor, since the trade is ""res extra commercium"". The learned senior counsel

appearing for the respondent by placing reliance on the Judgment of the Hon"ble Supreme Court in the case of State of Punjab v. Devans Modern

Breweries Ltd., would contend that the Appellants cannot wriggle out of the contractual obligation and the respondent was fully justified in passing

the impugned orders. In fact the Hon"ble Supreme Court in the said case relied on several decisions on the point that the licensee cannot turn

around subsequently and repudiate the obligations with the obtained privilege. One of the decision relied on is State of Haryana and Others Vs. Lal

Chand and Others, . In the said case the Punjab High Court, quashed the impugned notices of demand for recovery of the difference between the

amount which they required to pay under the terms of auction of a liquor vend and the amount realised on re-auction of vend and the defaulted

installment of license fee. The Constitution Bench Judgment in Har Shankar and Others, referred supra, was also relied on. The Hon"ble Supreme

Court held that contracts made in exercise of statutory powers are not covered under Article 299(1) of the Constitution and on facts held:

11. ...whereas under the Punjab Excise Act, 1914, like some other State Excise Acts, 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.

16. ...This is not a case of the type reported in Union of India (UOI) and Others Vs. Bhim Sen Walaiti Ram, which laid down the well-settled

principle that an offer can always be withdrawn before it is finally accepted and that a conditional acceptance is not an acceptance in law. In Bhim

Sen Walaiti Ram's case, supra, the Court held that the contract of sale was not complete till the bid was confirmed by the Chief Commissioner and

till such confirmation the person whose bid had been provisionally accepted was entitled to withdraw his bid and that when the bid was withdrawn

before the confirmation by the Chief Commissioner, the bidder was not liable for damages on account of any breach of contract or for the short-

fall on the re-sale. It was observed (at p. 2298 of AIR):

It is not disputed that the Chief Commissioner has disapproved the bid offered by the respondent. If the Chief Commissioner had granted sanction

under Clause 33 of Ex. D-23 the auction sale in favour of the respondent would have been a completed transaction and he would have been liable

for any shortfall on the re-sale. As the essential pre-requisites of a completed sale are missing in this case there is no liability imposed on the

respondent for payment of the deficiency in the price.

In this Judgment, the Hon"ble Supreme Court approved the view of the Madhya Pradesh High Court in Shrimati Nanhibai Vs. The Excise

Commissioner and Others, , wherein it was held:

In every auction sale of a liquor shop at which liquor is sold in wholesale or retail, there is a sale of the lease of the Government's right of selling

country liquor/intoxicating drug. On the acceptance of a bid of a person at an auction sale, a contract for the demise of the Government's interest is

brought into existence and this is followed by the grant of a licence to the person whose bid has been accepted.

29. Thus, the cases were quite different on facts from the case on hand since in those cases the parties to the contract attempted to wriggle out of

the obligation under the contract after they obtained the licence which is a sequel to an order of confirmation. As noted earlier the facts of the

present case are entirely different, the case being that there was no valid order of confirmation passed and communicated to the Appellants within a

reasonable time.

30. In our view the decisions relied on by the learned senior counsel appearing for the respondent would not advance their case, in view of the

peculiar facts and circumstances of the case on hand. What is called in question in the present batch of cases is as to whether the time taken by the

respondent Government for the purpose of confirming the auction in favour of the appellant was a reasonable time and whether it is necessary to

communicate the order of confirmation, whether the order of confirmation so passed should be in writing and what would be the mode in which

such order should be communicated. The case of the appellant itself is that there was no written order of confirmation, no such order was served

on them and even assuming, there is an order of confirmation as stated by the respondents, the time taken to pass such order being 2= months

from the date of auction is not a reasonable period. That apart, it is to be noted that unless the order of confirmation in writing is communicated to

the appellants no right accrues in their favour, since unless and until a license is issued, the question of a contractual obligation does not arise. The

facts and circumstances of the cases relied on by the learned senior counsel appearing for the appellants are all cases, where licenses were issued

to the respective parties and they were aggrieved by an imposition of a fee or increase of a fee. However, the facts and circumstances of the

present case are couched in an entirely different scenario. It is also relevant and needs to be emphasised that neither before the learned single judge

nor before this Bench the so called order of confirmation dated 04.10.1997 was produced by the respondents. It is therefore a mystery whether

such an order of confirmation really exists.

31. As, we have held that the provisions of Article 14 and 19(1)g of the Constitution would be applicable to the facts and circumstances of the

present case, since, the state had decided to do business in alcohol and merely because the same falls within a domain of contractual obligation, it

would not relieve, the respondents of their duty to comply with the basic requirements of Article 14 of the Constitution. In the instant case, the

dispute relates to the decision making process and such process is required to meet the test of fairness and reasonableness and our conclusions are

fully supported by the decision of the Hon'ble Supreme Court in the case of Shri Lekha Vidhyarth, ABL International Ltd and FCI and Anr. v.

SEJL Limited and Anr., relied on by the learned senior counsel appearing for the appellants.

32. Thus, we hold that the reasonable time in the instant case, for issuing an order of confirmation to the provisional bid submitted by the appellant

could be taken as ten days from the date on which the bid is provisionally confirmed.

32.1 While computing the reasonable period the relevant factor would be in the instant case, the tenure of the lease, the time limit prescribed under

the other conditions of sale and the nature of the present trade.

32.2 The undertaking obtained from the appellant stating that they shall not withdraw the offer till the order of confirmation is passed, could be put

to use only if the respondent had acted within a reasonable time. Such undertaking obtained from the appellants cannot be used to place the

appellant in a state of uncertainty and endless wait and such undertaking obtained in a statutory format, if sought to be used to fasten a liability on

the appellant should be held to be an exploitation of unequalness in bargaining power between the parties.

32.3 Therefore, for all the above reasons, the appellants are bound to succeed and W.A. Nos. 1323/2000, 1324/2000 and 1326/2000 are

allowed, we hold that there was no valid order of confirmation passed in favour of the appellant and consequently, the impugned orders dated

21.04.1998 demanding differential kist are quashed and the respondents are directed to return the original title deeds of the properties of the

appellants, refund the earnest money deposit paid by the appellants in respect of the shops for which they bid at the auction together with interest

at the rate of 6% per annum from the date of payment till the date of refund. In view of the orders passed in these appeals W.P. Nos. 9337/2000,

9338/2000 & 9339/2000 are allowed as prayed for.

33. It is brought to the notice of this Court by the learned Counsel appearing for the appellant that pursuant to interim orders granted by this Court

in the Writ Petitions, the petitioners in W.P. No. 9337 & 9338/2000 have deposited Rs. 5,00,000/- each and the petitioner in W.P. No.

9339/2000 has deposited Rs. 3,50,000/- as a condition for grant of interim stay. In view of the order passed allowing the Writ Petitions, the

respondents shall refund the amount deposited by the respective writ petitioners as indicated above.

34. W.A. Nos. 1322, 1325 and 1327/2000 have been filed against the dismissal of W.P. Nos. 8104, 8106 and 6804/1998 praying for a writ of

declaration to declare the condition in Rule stating that a "bid once offered shall not be withdrawn" as unconstitutional and in valid.

35. In view of the decision taken in the W.A. Nos. 1323/2000 etc., we feel, it is unnecessary for us to go into the validity of the said provision,

since on facts, we have held that the undertaking obtained from the appellants based on such Rule cannot be put against the appellants, considering

the peculiar facts and circumstances of the present case. Therefore, Writ Appeal Nos. 1322, 1325 & 1327/2000 and W.P. No. 8104, 8106 &

6804/1998 are closed leaving the question open to be canvassed at a later stage, if need arises. No costs. Consequently, connected miscellaneous

petitions are also closed.