

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 128 OF 2013

(Arising out of S.L.P. (C) No. 19133 of 2009)

State of Bihar and Others
Appellants

...

Versus

Nirmal Kumar Gupta

..Respondent

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. The pivotal issue that emerges for consideration in this appeal is whether the Division Bench of the High Court of Judicature at Patna has correctly interpreted the effect and impact of the Bihar Excise (Settlement of Licences for retail sale of country/spiced country liquor) Rules, 2004 (for short “the Rules”) and the

sale notification published by the Collector of Kishanganj in Excise Form 127 for various excise shops in groups in the said district for the year 2006-07 and the terms of licence.

3. As the factual matrix would exposit, the Collector, Kishanganj, got the sale notification in Excise Form 127 issued for settlement of various excise shops in various groups in the district of Kishanganj for the financial year 2006-07 which stipulated that the settlement shall be made on 23rd March, 2006 on auction-cum-tender basis and, accordingly, applications were invited from interested persons. As the settlement could not be effected in respect of group 'ka' shops in the said district, the Collector issued a second notification on 17th May, 2006 for the said group 'ka' which consisted of six country spirit shops and three spiced country spirit shops. On 5th June, 2006, the group 'ka' excise shops were settled in favour of the respondent at a monthly licence fee of Rs.8,29,600/-. The respondent deposited the advance security of Rs.8,29,594/- on 7th June, 2006

and further Rs.8,29,600/- on 22nd June, 2006. The Collector, Kishanganj moved the Commissioner for his approval and the same was granted on 1st July, 2006 in the office of the Collector on 5th July, 2006 and on that day itself, the licence was issued in favour of the respondent-licencee. It is the case of the appellant that as the respondent did not deposit the requisite 1/4th amount of the annual licence fee as advance security as prescribed under the Rules but did so in three instalments, there was delay in obtaining the approval from the Excise Commissioner in terms of Rule 17(kha) of the Rules. Despite the delay in the payment of the advance deposit, the Collector had recommended his case for approval and, eventually, the Commissioner approved the grant of licence in respect of group 'ka' shops and, ultimately, the licence was issued, as stated earlier, on 5th July, 2006.

4. As there was breach of the conditions of the licence, a demand was raised for the period commencing 5th June, 2006 to 5th July, 2006 by the Excise

Superintendent, Araria-cum-Kishanganj on 27th March, 2007. On receipt of the demand notice, the respondent moved the Excise Superintendent on 29th April, 2007 asking him to withdraw the demand on the ground that he had not utilized the privilege during that period. Thereafter, he challenged the demand notice before the Excise Commissioner, who rejected the application vide order dated 18th September, 2008. Being grieved by the said order he moved the High Court invoking the writ jurisdiction in CWJC No. 16577 of 2008.

5. The High Court referred to Rules 16, 17, 20, 22 and 24 and recorded its opinion in the following manner: -

“That group of shops have been settled in favour of the petitioner in the midst of excise year, is not in dispute. It is also a fact that on 5th June, 2006, the bid made by the petitioner for group ‘ka’ excise shops of Kishanganj District was highest and accepted by the auctioning authority by such acceptance is subject to approval of the Excise Commissioner. There also does not seem to be any dispute that there was some default on the part of the petitioner in payment of the advance security amount. However, the default seems to have been condoned as despite the said default, his bid dated 5th.

June, 2006 was not cancelled and licence was issued in Form 26C of the Rules on 5th July, 2006. Rules 16 and 17 of the Rules, when read together, would show that the final acceptance of the bid by the auctioning authority, by itself, does not entitle the bidder to get the licence as the said bid has to be accepted by the Commissioner of Excise and only after it is accepted by the Commissioner, then the licence is issued. In the backdrop of the aforesaid legal position, when we turn to the facts of the present case, it would be seen that although highest bid of the petitioner was accepted on 5th June, 2006 but it was only on 30th June, 2006 that the Licensing Authority recommended to the Commissioner of Excise for approval of settlement and it was approved by the Excise Commissioner, Bihar on 1st July, 2006 and after receipt of the approval from the Excise Commissioner on 5th July, 2006, the licence was issued by the Licensing Authority on that date. Surely, in the backdrop of the facts that the licence was issued on 5th July, 2006 the petitioner could not have been fastened with the liability to pay licence fee from 5th June, 2006."

[Underlining is ours]

6. Questioning the correctness of the aforesaid conclusion, it is submitted by Mr. Gopal Singh, learned counsel for the State of Bihar, that the High Court has fallen into error by construing that the default has been condoned though there is no concept of condonation in such a trade. It is urged

by him that as the requisite advance licence fee was not deposited as per the Rules, the approval could not be obtained earlier and hence, the Department, not being at fault, should not suffer the loss of revenue more so when the licensee had accepted the conditions enumerated in the licence. That apart, submits Mr. Singh, as per the Rules, in such a situation, the respondent was legally bound to pay the licence fee from the date of settlement.

7. Mr. Shantanu Sagar, learned counsel appearing for the respondent, per contra, has submitted that the High Court has correctly determined the controversy that the liability would be from the date of issue of the licence and not earlier than that, for unless the licence is issued, he cannot trade in liquor and further it cannot be said that the State has parted with the exclusive privilege.
8. To appreciate the controversy, it is necessary to refer to certain Rules. Rule 16 of the Rules deals with the acceptance of bid or tenders. It reads as follows: -

“16. Acceptance of bid or tenders.- (1)

The Auctioning Authority shall not be bound to accept the highest bid or tender or any bid. If the highest bid or tender is not accepted, the licensing officer shall instantaneously declare the date of fresh auction, mentioning the reasons. In such a circumstance, the entire deposited advance money will be refunded to those applicants who do not want to participate in subsequent auction.

(2) If the bid amount in any auction is finally accepted, any subsequent offer with regard to that bid shall not be considered. No further negotiation shall be entertained by the Licensing Authority or the officer conducting the auction.”

9. Rule 17 of the Rules which provides for final acceptance of the bid is as follows: -

“17. Final acceptance of bid. - (a) The recommendation to grant exclusive privilege of retail sale for the shop or group of shops to the person bidding highest, and acceptance under Rule 16, shall be sent to the Commissioner of Excise by the Licensing Officer, and after his acceptance a licence will be issued.

(b) The amount of highest bid, accepted will be the annual amount of licence fee.”

10. On a perusal of the aforesaid two Rules, it is vivid that the Licensing Officer conducting auction accepts the bid and, thereafter, sends his recommendation for grant of exclusive privilege of retail sale for the

shops or group of shops to the Commissioner and after his acceptance, the licence is issued. The pertinent part of this Rule is that the amount of highest bid accepted would be the annual amount of licence fee.

11. Rule 19 provides for payment of advance security in the manner prescribed therein. The said Rule is reproduced hereinbelow: -

“19. Payment of Advance Security. - After the declaration of acceptance of the highest bid the Licensing Authority, one fourth, portion of the annual licence fee shall be paid by the highest bidder as advance security in the following manner for due execution of a contract: -

- (a) An amount equivalent to sixth portion of annual licence fee shall be immediately deposited in cash or in the form of Bank Draft. The amount of cash/Bank Draft and that of advance money deposited previously under Rule 11(a) and Rule 11(c) respectively, shall be adjusted in part from security amount.
- (b) The payable remaining amount on account of advance security shall have to be deposited within ten days of auction or before commencement of the licence whichever is earlier.”

12. On a plain reading of the said Rule, it is manifest that the highest bidder has to immediately deposit one fourth of the annual licence fee as advance security money in the manner provided in sub-clauses (a) and (b) of the Rule.

13. Rule 20 deals with the consequences of default in advance security. It reads as under: -

“20. Default in advance security. - In case of failure to deposit the amount of advance security, as mentioned in Rule 19, within the prescribed time, the settlement and the licence, if issued, shall stand cancelled and the deposited amount, if any, shall be forfeited to the Government. In such a circumstance, a re-auction or alternative arrangement shall be made by the Licensing Authority.”

14. The aforesaid Rule, when properly scrutinized, clearly lays the postulate that if the advance security amount is not deposited in accordance with the time limit prescribed under Rule 19, the settlement and the licence, if issued, shall stand cancelled and the deposited sum, if any, shall be forfeited to the Government. Thus, there is a distinction between settlement and issue of licence.

15. Rule 23 deals with adjustment/refund of advance security amount. It stipulates that the security amount referred to in Rule 19 shall be refunded at the end of the settlement period if all the dues and claims of the State Government with regard to the auctioned shop or group of shops have already been paid by the licensee.
16. Rule 24 deals with the commencement of the period of licence. It is as follows: -

“24. Commencement of the period of licence. - A licence issued in favour of any auction-purchaser shall be effective from 1st April of the excise year unless the Licensing Authority orders otherwise. The auction-purchaser shall be liable to pay the bid money from the first day of the licence period, even if the licence has been issued thereafter.

Provided that if any shop or a group of shops is settled in the midst of the excise year, the licence shall commence from the date of settlement of the shop or the group of shops.

The Licensing Authority shall mention details of the shops/licences to be settled and annual minimum guaranteed quantity to be lifted under those licences and the reserved fee thereof, in the sale notification for every excise year.”

17. The said Rule has to be carefully x-rayed and understood. It clearly lays down that the licence shall be effective from 1st April of the excise year and the auction-purchaser shall be liable to pay the bid money from the first day of the licence period, even if the licence has been issued thereafter. The proviso further stipulates that if any shop or a group of shops is settled in the midst of the excise year, the licence shall commence from the date of settlement of the shop or the group of shops.
18. The High Court, interpreting the Rule position, has opined that the shops were settled in favour of the respondent in the midst of the year, i.e., on 5th June, 2006, and after obtaining the approval on 1st July, 2006 from the Excise Commissioner, the licence was issued by the Licensing Authority on 5th July, 2006, and, therefore, the demand of licence fee for the period from 5th June, 2006 to 5th July, 2006 is not sustainable.
19. As the factual matrix would reveal, the notification in Form No. 127 was issued on 23rd March, 2006. The

terms and conditions of the settlement of excise shops were duly incorporated in the sale notification and as per Rule 8, the terms and conditions mentioned in the notification are deemed to be included in the conditions of the licence. As per the first notification, all the three country spirit shops could not be settled and further steps were taken for settlement and, eventually, the bid of the respondent was accepted on 5th June, 2006 with the annual licence fee of Rs.99,55,200/- or at a monthly fee of Rs.8,29,600/-. The respondent was required to pay 1/4th of the annual licence fee as advance security money but he failed to do so in time. He deposited the requisite amount in three instalments, i.e., first on 7th June, 2006, second on 22nd June, 2006 and third on 17th July, 2006. As per Rule 19(a), he was required to deposit 1/6th portion of the annual licence fee immediately in cash or in the form of bank draft. The remaining amount of advance security was to be deposited within ten days of the auction or before the commencement of the licence. Thus, the respondent

failed to comply with the said Rule. However, the Collector recommended his case on 30th June, 2006 which was accepted on 1st July, 2006 and the licence was issued on 5th July, 2006. It is worthy to note that thereafter, demand notice of Rs.16,03,893/- was issued by the Excise Superintendent. The Commissioner took note of the fact that out of Rs.74,36,071/-, the licensee had paid Rs.66,36,794/- and, hence, a sum of Rs.7,99,277/- remained to be paid. Be it noted, on 3rd March, 2007, the licence was cancelled for breach of other conditions and in the present case, we are not concerned with those conditions, for the controversy in praesenti only relates to the demand commencing 5th June, 2006 to 5th July, 2006.

20. The High Court has opined that the State had not parted with the exclusive privilege till the licence was issued. Under Rule 24, a licence issued in favour of the auction-purchaser is effective from 1st April of the excise year unless the Licensing Authority orders otherwise and the auction purchaser is liable to pay

the bid money from the first day of the licence period even if the licence has been issued thereafter. That apart, he is supposed to pay the licence fee from the commencement of the settlement period and the licence commences from the date of the settlement. In the case at hand, it was settled on 5th June, 2006. The licence was issued on 5th July, 2006. The principle of condonation of default has been taken recourse to by the High Court on the foundation that despite default in making deposit of advance security, the licensing officer recommended his case for approval to the Commissioner of Excise. The default, as we perceive, comes into play if there is violation of Rule 19 which stipulates for advance security. There is no dispute over the fact that there was delay. The respondent was clearly responsible for the same. The licensing officer thought it appropriate to recommend his case and the Excise Commissioner did approve it and on receipt of the approval, the licence was issued on the same day. The respondent accepted the licence knowing fully

well the terms and conditions of the licence and that he has to pay the licence fee from the date of the settlement.

21. At this juncture, we may usefully address to the issue whether in a case of this nature, the principle of condonation of default by way of conduct can be attracted. First of all, under the Rules, the authorities are entitled to forfeit the amount deposited when there is non-compliance of the Rules. It is to be borne in mind that the nature of the trade has also its own significance. In ***Amar Chandra Chakraborty v. The Collector of Excise, Govt. of Tripura, Agartala and others***¹, this Court held thus: -

“Trade or business in country liquor has from its inherent nature been treated by the State and the society as a special category requiring legislative control which has been in force in the whole of India since several decades. In view of the injurious effect of excessive consumption of liquor on health this trade or business must be treated as a class by itself and it cannot be treated on the same basis as other trades while considering Article 14.”

¹ AIR 1972 SC 1863

22. In the case of ***Nashirwar etc. v. State of Madhya Pradesh and Others***², this Court opined that the State has the exclusive right or privilege in manufacturing and selling of liquor and a citizen has no fundamental right to do business in liquor. It has been further ruled that it is within the police power of the State to enforce public morality by prohibiting trade in noxious or dangerous goods.
23. In ***Har Shandar and Others etc. v. The Deputy Excise and Taxation Commissioner and others etc.***³, the Constitution Bench reiterated the principles that there is no fundamental right to do trade or business in intoxicant and the State has the authority to prohibit every form of activity in relation to intoxicant including manufacture, storage, export, import, sale and possession. It has also been laid down that a wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants in such terms of general application as the State deems expedient.

² AIR 1975 SC 360

³ AIR 1975 SC 1121

24. In ***State of M.P. and others etc. v. Nandlal Jaiswal and others etc.***⁴, this Court held that trading in liquor is inherently punitive in nature.

25. In ***M/s. Khoday Distilleries Ltd. v. State of Karnataka***⁵, the Constitution Bench has ruled that the right to carry on occupation, trade or business does not extend to trade or business or any activities which are injurious and against the welfare of the general public. It is further held therein that a citizen has no fundamental right to do business in intoxicant as liquor.

26. In ***M/s. Ugar Sugar Works Ltd. v. Delhi Administration and others***⁶, this Court reiterated the said principle and emphasized on the regulatory powers of the State.

27. In ***State of M.P. and Ors. etc. etc. v. Nandlal Jaiswal and Ors. etc. etc.***⁷, a two-Judge Bench, while expressing the view that Article 14 of the Constitution is attracted to grant of exclusive right or privilege for

⁴ AIR 1987 SC 251

⁵ (1995) 1 SCC 574

⁶ AIR 2001 SC 1447

⁷ AIR 1987 SC 251

manufacture and sale of liquor as it involves the State largesse, has stated thus:-

“33. But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government had done, unless it appears to be plainly arbitrary, irrational or *mala fide*.”

[emphasis supplied]

28. In ***P.N. Krishna Lal and Ors. v. Govt. of Kerala and Anr.***⁸, the Court expressed thus:-

“28....dealing in liquor inherently pernicious or dangerous goods which endangers the community or subversive of morale, is within the legislative competence under the Act. The State has thereby the power to prohibit trade

⁸ 1995 Supp (2) SCC 187

or business which is injurious to the health and welfare of the public and the elimination and exclusion from the business is inherent in the nature of liquor business. The power of the legislature to evolve the policy and its competence to raise presumptive evidence should be considered from this scenario."

[emphasis supplied]

29. In ***Secretary to Govt., Tamil Nadu and Anr. v. K. Vinayagamurthy***⁹, it has been held as follows:

"7....So far as the trade in noxious or dangerous goods are concerned, no citizen can claim to have trade in the same and the intoxicating liquor being a noxious material, no citizen can claim any inherent right to sell intoxicating liquor by retail. It cannot be claimed as a privilege of a citizen of a State. That being the position, any restriction which the State brings forth, must be a reasonable restriction within the meaning of Article 19(6) and reasonableness of the restriction would differ from trade to trade and no hard and fast rule concerning all trades can be laid down...."

30. In ***State of Punjab and Anr. v. Devans Modern Breweries Ltd. and Anr.***¹⁰, it has been reiterated that trade in liquor is considered inherently noxious and pernicious.

⁹ AIR 2002 SC 2968

¹⁰ (2004) 11 SCC 26

31. We have referred to the aforesaid decisions to accentuate the nature of the trade, the role of the State, the economic concept of the policy, limited attractability of Article 14 of the Constitution as regards the legislation or policy, the restriction inherent in the policy and the duty of the court. On the aforesaid touchstone, we are required to see whether the doctrine of condonation by conduct, especially in the present case, could have been taken recourse to by the High Court. The respondent had availed the benefit of the licence being fully aware of the Rules, notification and the terms incorporated in the licence. The Rules provide that he has to pay from the date of the settlement and in this case, the settlement took place on 5th June, 2006. In view of what has been engrafted in the Rules, there cannot be any trace of doubt that the respondent has to be made liable to pay the licence fee from the date of the settlement. There could not have been condonation of default. Such a concept is alien to the present nature of trade and a licensee cannot claim any benefit under the same as the whole thing is governed by the command of the Rules. That apart, we

are unable to subscribe to the interpretation placed by the High Court that the auction-purchaser is liable to pay from the date of issuance of licence but not from the date of the settlement as that runs counter to the plain language of Rule 24. Reading the Rules in a comprehensive manner in juxtaposition with the notification which forms the terms and conditions of the licence and the nature of the trade, the irresistible conclusion is that the liability accrued from the date of the settlement and, therefore, we find that the order passed by the Excise Commissioner was just and proper and there was no warrant on the part of the High Court to interfere with the same.

32. Consequently, the appeal is allowed, the order passed by the High Court is set aside and that of the Excise Commissioner is restored. The parties shall bear their respective costs.

.....J.
[K. S. Radhakrishnan]

.....J.
[Dipak Misra]

New Delhi;
January 08, 2013

