Union Territory Of Pondicherry And ... vs P.V. Suresh And Others on 23 September, 1993

Equivalent citations: 1994 SCC (2) 70, JT 1993 (5) 410, 1993 AIR SCW 3549, 1994 (2) SCC 70, (1994) 1 BANKCAS 8, 1994 ALL CJ 1 516, (1993) 3 SCJ 463, (1993) 5 JT 410 (SC)

Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy, S.P Bharucha

PETITIONER:
UNION TERRITORY OF PONDICHERRY AND OTHERS

Vs.

RESPONDENT:
P.V. SURESH AND OTHERS

DATE OF JUDGMENT23/09/1993

BENCH:
JEEVAN REDDY, B.P. (J)
BENCH:
JEEVAN REDDY, B.P. (J)
BHARUCHA S.P. (J)

CITATION:
1994 SCC (2) 70 JT 1993 (5) 410
1993 SCALE (3)869

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by B.P. JEEVAN REDDY, J.- The Union of India represented by the Union Territory of Pondicherry is the appellant in these appeals which are directed against the judgment of a Division Bench of Madras High Court in a batch of writ petitions filed by the respondents, arrack licensees of Pondicherry and Mahe. Civil Appeal Nos. 1543-1630 of 1984 pertain to Pondicherry territory while Civil Appeal Nos. 693 to 695 and 695-A pertain to Mahe

territory. In the Union Territories of Pondicherry, Mahe and Karalkal, arrack licences are granted by way of auction. For the excise year 1981-82 (commencing from July 1, 1981 to June 30, 1982) auctions were conducted in June 1981. The writ petitioners were the highest bidders in respect of respective shops. They made the necessary deposits and obtained permits to commence their business with effect from July 1, 198 1. The arrack licensees from Pondicherry territory also deposited the three months' rental at the inception of the excise year as required by the rules. They drew supplies from the Government depots and carried on their business for a period of three months. Thereafter they approached the High Court at Madras by way of writ petitions for issuance of an appropriate writ order or direction directing the respondents in the writ petition to forbear from collecting the 'kist' amount in respect of each of the shops and for directing the respondents further to supply the quantity of arrack at the rate at which it was supplied during the previous excise year (i.e. 1980-8 1).

2. So far as the arrack licensees from Mahe area are concerned, they did not deposit the three months' rental as required by the rules. They drew the initial supply of arrack, did business for 15 days and thereafter abandoned the business. They too approached the Madras High Court by way of writ petitions for a direction to the respondents therein to issue to the petitioners the full quantity of arrack as was being supplied to them during the previous excise year, failing which to reduce the 'kist' payable by the petitioners proportionately.

3. According to the law in force at the relevant time in the said Union Territories, the arrack licensees were obliged to draw their supplies only and exclusively from the Government source. They were prohibited from drawing their supplies from any other source. Further, they were also obliged to sell the arrack at the price fixed by the Government. The Government had its own factories where the arrack was manufactured, which was distributed among the several shops in the Union Territories. For the previous excise year i.e., for 1980-8 1, the supplies were made at the rate of one decalitre per day for an annual revenue of Rs 18,000. In other words, if the annual bid in respect of an arrack shop was Rs 18,000, such shop was entitled to and was supplied arrack at the rate of one decalitre per day. For the excise year 198081, however, the authorities prescribed the ratio of one decalitre for an annual bid of Rs 40,000, which meant that the quantum of supplies to which each arrack shop was entitled to went down for the year 1981-82 compared with the previous year i.e., 1980-81. On the representation of the licensees, the said ratio was altered to one decalitre per day for an annual bid of Rs 34,000 on October 27, 1981. What is important to notice is that the Government did not notify the said ratio at the time of conducting the auctions for the excise year 1981-82. It appears that it was not doing so during any of those years, which defect, if we can call it one, is said to have been remedied in the later years. It is this defect in the system of auction that has led to the crop of writ petitions in the Madras High Court, from which these appeals arise. In many other States, the minimum guarantee quota which the Government undertakes to supply and which the licensee is equally under an obligation to lift, is specified even at the time of the auctions. Where this is done, there is no room for the controversy of the type arising herein.

4. The grievance made in the writ petitions filed by Pondicherry licensees was this since the authorities did not announce or intimate at the time of conducting the auctions that the rate of supply is being altered, the writ petitioners assumed that arrack will be supplied at the same rate it

was supplied for the previous excise year i.e., 1980-81. For the previous excise year, arrack was supplied at the rate of one decalitre for an annual bid of Rs 18,000. It is on the said basis and assumption that the petitioners had given their bids which were far in excess of the bids received for the previous excise year. Only after they paid the amounts and commenced the business that they were apprised of the change in the rate of supply which came as a shock to them. Since the licensees have no other source of supply, and because they are obliged to sell at the price fixed by the Government, they were not able to realise even the 'kist' amount (monthly installment) by the sale of arrack supplied to them. Even at the rate of one decalitre for an annual bid of Rs 34,000, the licensees were bound to and were incurring losses. There cannot be a contract which is so constituted that it can result only In loss to the licensee. At the said rates of supply, no licensee can ever meet even the monthly 'kist', let alone meet his establishment charges and other expenses and earn profit. By changing the rate of supply the administration has removed the basic assumption, the underpinning, underlying the contracts. The contracts thus stand frustrated. In any event, the contracts are vitiated by mistake of fact. The authorities are responsible for this situation inasmuch as they failed to intimate the prospective bidders of the change in the rate of supply at the time of auctions. They are precluded from changing the rate of supply by the rule of promissory estoppel. The Administration is bound to supply them arrack at the rate of one decalitre for an annual bid of Rs 18,000. Alternatively, 'kist' may be collected from them for the entire excise year at the rate of Rs 18,000 per decalitre supplied. In other words, the 'kist' amount be reduced proportionate to the rate of supply in vogue during the previous excise year. (We shall deal with the writ petitions filed by licensees of Mahe area separately and therefore we are not mentioning contentions at this stage.)

5. The Administration (respondents in the writ petitions) opposed the writ petitions saying that the petitioners have no statutory right to supply of any particular quantity of arrack, nor is the administration under a statutory obligation to supply a particular quantity or all the quantity that may be asked for by the licensees. The Government has reserved to itself the right to revise the quantity of arrack even during the currency of the lease, vide condition 22(3) of the licence. The change in the rate of supply of arrack has been necessitated on account of the concern of the Administration to ensure equitable distribution of arrack produced in the Pondicherry distilleries among the several licensees in the Union Territory. The annual 'kist' has been taken as the yardstick for fixing the quota of arrack to individual licensees. This was the practice followed at all points of time. Even during the previous excise year, the rate of supply was not uniform. It was changed three times during that year and the rate of one decalitre for Rs 18,000 annual bid was the rate obtaining towards the end of the previous excise year. In the circumstances, the writ petitioners had no basis or justification for assuming that supply of arrack during the current year (1981-82) will be at the said rate of one decalitre for an annual bid of Rs 18,000. Indeed, all these arguments are nothing but mere after thoughts. The writ petitioners of Pondicherry area paid the deposits, took permits and licences and did business without any complaint for a period of three months. Only when auctions in the neighboring State of Tamil Nadu were conducted wherein the bids went up exceedingly high as compared to the previous year's bids, on account of which arrack became dearer in Tamil Nadu shops, diving the consumers to Pondicherry shops that the writ petitioners started asking for more supplies to meet the said heightened demand. When the Administration did not supply such excessive supplies, they came forward with the writ petitions. The story put forward in the writ petitions is one fabricated to buttress their case in the writ petitions. Indeed, when the licensees

made representation for alteration of the rate of supply, the administration reduced it from one decalitre for an annual bid of Rs 40,000 to one decalitre for an annual bid of Rs 34,000. There is no question of the writ petitioners suffering any loss in the circumstances. It was also submitted that even the sale price fixed by the Government was raised substantially with effect from December 29, 1981 for Pondicherry region; it was raised from 68 paise to one rupee. The Government also raised an objection that the writ petitioners having entered into contracts with the Administration cannot wriggle out of their contractual obligations by resorting to Article 226 of the Constitution. It was submitted that because the subject-matter of the writ petitions was purely contractual in nature, the writ petitions were not maintainable.

6. The High Court overruled the objections of the administration with respect to the maintainability of the writ petitions. It then examined the merits of the controversy and found that at the rate of supply prescribed for the excise year 1981-82, the licensees were bound to suffer losses, even if the rate of supply is one decalitre for an annual bid of Rs 34,000. It demonstrated the said fact by setting out the following table in its judgment:

"Monthly upset price (upset rental)	Yearly upset price (upset rental)	One day's kist (upset price)
Rs 38,000	Rs 4,56,000	Rs 1249.32

Calculation of quota of arrack supplied as per original order of Government.

(a) Quota per day at 1 Cec. Litre for 114 litres Rs 40,000 of annual 'kist'

(b) Quota per day for Rs 34,000 134 litres Cost of arrack at distillery at the (a) Rs 492.48 price fixed in the notification (b) Rs 578.88

(a) Total upset rental at rate (a) Rs 1741.80

(b) -do- at rate (b) Rs 1828.20 Sale price Income on sale at price fixed by notification.

Rate(a)Rs.12.60 Per litre x 114 litres Rs 1436.40 Rate(b)Rs.12.60 per litre x 134 litres Rs 1638.40 Loss Per Day: Cost price minus sale price:

(1741.80-1436.40) = 305.40 (1828.20-1638.40) = 189.80 Loss Per Year: (a)Rs 1,11,325.00

(b) Rs 51,027.00"

(From the above statement, it appears that the High Court has adopted the price of Rs 12.60 paise per litre which according to the administration is the rate prevailing up to December 27, 1981 where after it had gone up substantially. The counsel for the parties before us could not throw any light in this aspect.)

7.Having found that the licensee was bound to incur loss even at the rate of onedecalitre for an annual bid of Rs 34,000, the High Court held that it was an inherently impossible contract. It opined that no licensee can be expected to or will be in a position to pay the prescribed 'kist' amount in the circumstances. Having come to the said conclusion, the High Court accepted the writ petitioners' plea that in such a situation the petitioners should be permitted to pay the 'kist' amount applying the formula Rs 18,000 per annum for every decalitre of arrack supplied per day. Accordingly, it allowed the writ petitions with the following directions:

> "Taking all these aspect into consideration, we hold, that all the writ petitioners are bound to pay the 'kist' at the rate that was obtained for a particular shop during the previous year i.e. 1980-81. Moulding relief on the above lines, all the writ petitions are allowed in part to the extent indicated above and dismissed in other respects. There will be no order as the costs."

8.In these appeals, it is submitted by Shri A.S. Nambiar, learned counsel for the Administration (Union of India) that the High Court has exceeded its jurisdiction in granting the relief it did. The High Court, it is complained, has actually remade the contract between the parties. It ha specifically altered the terms and conditions of the agreement and licence prescribed by law. No writ can be issued contrary to the provisions of law Indeed, the writ petitions ought to have been dismissed on the ground that the writ petitioners were seeking to enforce contractual rights. The writ petitions raised a purely contractual dispute. There was no violation of any statutory provision on the part of the Administration. The Administration did not violate any of the obligations under the contract. There was no statutory right inhering in the writ petitioners to demand the supply of arrack at a particular rate. The only obligation of the Administration was to make an equitable distribution of the available supplies among the several licensees. The theory that the writ petitioners are bound to suffer losses at the rate of supply prescribed by the Administration for the excise year 1981-82 is not correct as a fact. Even if it is correct, it is no ground for the High Court to interfere in the matter. It is no part of the court's obligation to ensure profit to the licensees. On the other hand, the learned counsel for the licensees (respondents in these appeals) supported the reasoning and conclusion of the High Court.

9.As indicated by us at the inception of this judgment the present controversy is the result of the omission to mention the rate or quantum of supply in the auction notification. This was necessary in view of the fact that not only the source of supply for the licensees was the Administration alone but also because the licensees were obliged to sell the arrack at the rate fixed by the Administration. If the Administration had indicated at the time of auction that the rate of supply for the excise year 1981-82 would be at the rate of one decalitre per day for an annual bid of Rs 40,000, the bidders (including the writ petitioners) would have modulated their bids on that basis. It may be that strictly speaking, the Administration is right in saying that there was no basis for the bidders including the writ petitioners to assume that the rate of supply would be one decalitre per day for an annual bid of Rs 18,000 because that was not the constant rate even for the whole of the previous excise year much less for the earlier years. It is equally true that the rate of supply has always been changing. But at the same, it cannot be gain said that the rate of supply has a fundamental significance to the viability of the contract. The High Court has demonstrated through the above statement of

particulars that at the rate of supply of one decalitre per day for an annual bid of Rs 40,000 or even Rs 34,000, the licensee is bound to incur loss and would not be able to pay even the 'kist' let alone meet establishment expenses and earn profit. Maybe we are not sure that the said statement of particulars is based upon the sale price which was in force from July 1, 1981 to December 27, 1981 and not the sale price effective from December 27, 1981. Even so, it cannot be forgotten that the sale price of arrack was revised only on and from December 27, 1981 by which date practically half of the licence period was over. Similarly, the revision in the rate of supply from one decalitre per day for an annual bid of Rs 40,000 to one decalitre per day for an annual bid of Rs 34,000 was with effect from October 27, 198 1, by which date again about four months' period (out of 12 months' licence period) had expired. In the above state of facts, the High Court was perhaps justified in holding that the contracts entered into between the licensees and the Administration require to be modified in the peculiar facts and circumstances of this case. In our opinion, the main vitiating factor was the omission to mention the rate of supply at the time of conducting the auction itself even where the Administration had the right to revise it during the licence period. It is, however, not necessary for us to go into the question what effect the said omission had upon the contracts. The licensees writ petitioners did their business for the entire excise year under the interim orders of the High Court. They were allowed to draw supplies and pay 'kist' calculated on the basis of Rs 18,000 per annum for supply of one decalitre per day. The contract period was over long ago. At this stage all that remains to be done is to devise a formula appropriate to the circumstances. The situation herein is undoubtedly exceptional and unusual which in turn calls for an unusual solution.

10.At this stage, it is necessary to point out that the High Court while seeking to demonstrate that at the rate of one decalitre for an annual bid of Rs 40,000 or even at the rate of one decalitre per day for an annual bid of Rs 34,000, the licensee is bound to suffer losses, did not pause to consider what would be the result if the 'kist' amount is reduced applying the formula Rs 18,000 annual bid for the supply of one decalitre per day. As we have pointed out herein before, the rate of supply was never constant and that even during the previous excise year, the rate of supply was revised upwards on two occasions. Accordingly, the writ petitioners could not have, reasonably speaking, assumed either that the said rate of supply (one decalitre per day for an annual bid of Rs 18,000) would be the rate of supply at the inception of their licence period or that the said rate of supply would remain unchanged during the whole of the year 1981-82. Not only Rule 22(3) empowered the Administration to alter it at any time, it was actually changed twice during the previous excise year. In the face of the Rule position and the practice, there was no basis or justification for the writ petitioners to assume what they say they assumed. The rate of supply could have been altered at any time during 1981-82.

11.In the circumstances of this case, our inquiry is limited to the question whether the contract was so constructed that loss was inherent and implicit in it; if so, it ought to be modified. Otherwise, the Court has no jurisdiction to alter the terms or rewrite the contract between the parties.

12.The learned counsel for the appellant placed before us a memo of calculation according to which the profits earned by licensees at the rate prescribed by the High Court would be about 66 per cent on their investment. We do not propose to go into these calculations. In the peculiar circumstances of this case, we are of the opinion that the 'kist' amount should be revised to such a figure (on the

basis of actual supplies made to each shop) as would in all the circumstances ensure a margin of 15 per cent on (sic of) the annual bid. This 15 per cent would take care of the establishment expenses and also include profit. Since this formula cannot satisfactorily be evolved by us for lack of relevant material before us, we remit the matter to the Government. The Government shall, after hearing the writ petitioners, evolve a formula which ensures the above margin. While evolving the formula, the Government shall take into account the change in the sale price and the change in the rate of supply referred to hereinabove. On such determination, if the licensees are found liable to pay any further amounts, the same shall be paid by them and recovered in accordance with law. If, on the other hand, the Administration is found liable to refund any amounts, the same shall be refunded to the licensees. We must reiterate that the formula evolved by us is peculiar to the facts of this case and has been evolved in view of the exceptional facts and circumstances of this case, and shall not be treated as a precedent. The writ appeals are accordingly allowed with the above directions. The judgment of the High Court under appeal is modified accordingly insofar as it pertains to the licensees of Pondicherry area/territory. No costs in these appeals.

13.Now coming to the licensees of the shops in the Mahe area, the situation is different altogether. These licensees did not deposit the three months' 'kist'. They did business for the first 15 days and thereafter abandoned the shops. In that situation, the Administration had no opinion but to issue the notice dated August 17, 1981. Under the said notice issued by the Deputy Commissioner Excise, Mahe, the attention of the said licensees was invited to the fact that they have failed to remit the security deposit and to execute the necessary agreements as per the rules and therefore they were called upon to explain, within two days of the receipt of the said notice, the reasons for then- lapse in remitting the security deposits and in executing the agreements, failing which, it was indicated, appropriate action would be taken against them according to law. Soon after receiving this notice, they rushed to the High Court with writ petitions praying for issuance of directions to the respondents (Administration) "to issue to the petitioner the full quantity of arrack as was being supplied to him during last year failing which to reduce the 'kist' payable by the petitioner proportionately on the basis of the arrack supply and in respect of the petitioner's arrack shop No. 1 situated at Mahe". (Prayer quoted from Writ Petition No. 6652 of 198 1.) In these writ petitions the said four licensees asked for an interim injunction "restraining the respondents herein from taking any proceedings pursuant to the memo of the second respondent No. 2228/A2/81-81, dated August 17, 1981 by either canceling the bid or forfeiting the earnest money deposit of the petitioner in respect of arrack shop No. 1, at Mahe". In the said miscellaneous application Justice Padmanathan passed the following order on August 25, 198 1:

> "1. That notice returnable in four weeks from this date, do issue to the respondents to show cause why this petition should not be complied with; and
>
> 2.interim injunction do issue to the respondents herein restraining them from taking any proceedings pursuant to the memo of the 2nd respondent No. 2228/A2/81-82, dated August 17, 1981 by either canceling the bid or forfeiting the earnest money deposit of the petitioner In respect of arrack shop No. 1 at Mahe, pending further orders on this petition."

14.We must say that we are not only surprised at the order passed by the High Court but also feel disturbed that the High Court chose to pass an order if interim injunction restraining the authorities from taking any action by way of canceling the licence or forfeiting the earnest money deposit, without simultaneously calling up the petitioners to deposit the 'kist' amount and other deposits according to the Rules. The result of the said order was that the licensees writ petitioners neither paid any deposits or 'kist' amounts nor did they do any business in the shops. They just kept quiet. They continued to abandon the shops; meanwhile the excise year was over. When the writ petitions came up for final hearing, the licensees of these four shops argued that inasmuch as they have not drawn any supplies and have not done any business in the respective shops, they should not be made liable for paying the 'kist' amount or deposits in accordance with the Rules. This plea has been rejected by the High Court in our opinion rightly. The petitioners having abandoned the shops and thereafter having obtained an interim injunction of the nature indicated above thereby re straining-the authorities from taking any action against the licensees for recovery of the amounts due and/or from terminating their licences/permits and also from conducting re-auction (unless the licences in favour of these writ petitioners were cancelled, no re-auction could be conducted) they cannot escape the consequences of their action. The interim order cannot and does not protect them. One must also notice the different manner in which the prayer in the writ petition and the prayer in the petition for injunction have been phrased. (We have set out both of them herein before.) The fact that the court granted the interim injunction as prayed for by them does not absolve them from the consequences of their action which flow according to law. They must pay the whole amount due. The benefit of the order made in the case of the Pondicherry licensees shall not be available to these licensees. The appeals preferred by them, Civil Appeal Nos. 693, 695 and 695-A of 1985 are dismissed with costs. The costs of the appellant are assessed at Rs 5000 in each of the four appeals which shall be paid by the respondents writ petitioners in the said appeals.

15.Before parting with the case, we feel constrained to reiterate our unhappiness about the interim injunction order made in the Mahe writ petitions. Passing of interim orders is not and cannot be a matter of course nor a matter of charity. In the matters touching public revenue the courts ought to be more cautious. For better or worse, the courts have come to acquire a veto over the public exchequer. This power should be exercised with good amount of self-restraint and with a sense of responsibility. The power is coupled with accountability accountability to the Constitution, to the laws of the land and above all to ourselves. The court must apply its mind to the facts of the case and must also envisage the implications and consequences of the order it proposes to make. This is so even at the ad interim stage when the respondent is not represented. We are sorry to say that none of these considerations appear to have been present in the mind of the learned Judge while passing the orders of injunction relating to Mahe shops. We are not happy at making these remarks but we felt compelled to say so in the circumstances. We hope and trust that no occasion would arise ever again for reiterating these remarks.