

State of U.P. Vs. Ram Kishan

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Court : Allahabad

Decided On : Sep-06-2012

Judge : Prakash Krishna & Arvind K. Tripathi

Appeal No. : First Appeal No. 985 of 1999

Appellant : State of U.P.

Respondent : Ram Kishan

Advocate for Pet/Ap. : Sri. Mukesh Prasad

Judgement :

1. This is defendants' appeal against judgment and decree dated 28th April, 1998 passed by Sri J.P. Pandey, Civil Judge (Senior Division), Muzaffarnagar in O.S. No.143 of 1995, decreeing the suit, declaring that the amount recovered by the defendants from the plaintiff towards the arrears of licence fee without adjusting the damages suffered by the plaintiff is illegal. A decree for mandatory injunction directing the defendants to adjust Rs. 10,01,520/- first towards the damages suffered by the plaintiff was passed. Further, the amount recovered as pendente lite may also be adjusted and final accounting be done. It has also been provided that if any excess amount is found due to the plaintiff, it shall carry six per cent interest.

2. Ram Kishan, the plaintiff, an excise licensee under the U.P. Excise Act, instituted the aforesaid suit on the allegations that he in the auction dated 26th

April, 1977 took four liquor shops for the excise year 1977-1978 held at Muzaffarnagar for a sum of Rs. 34 lakhs for the period 27.4.1977 to 31st March, 1978. Under the licence he was entitled to open shops from 10:00 AM to 10:00 PM. By a gazette notification dated 18th September, 1977, the time for running shops by late evening was reduced by two hours from 10:00 AM to 8:00 PM. It was alleged that it is evening when major business of selling liquor takes place. Late evening hours are the peak hours of such kind of business and by restricting it up to 8:00 PM, he has suffered damages and that is the reason he could not deposit the licence fee etc. The shop was also ordered to be closed during the Vidhan Sabha election which caused a loss of Rs.34,00/- for three days. The cause of action arose as the defendants instead of acceding to the request of the plaintiff to grant remission issued a recovery warrant for Rs. 10,01,520/-. Out of the said amount certain amount was recovered. Earlier, the plaintiff had filed suit at Meerut which was dismissed on 13.4.1982 by the Civil Judge, Meerut holding that the Meerut Court has no territorial jurisdiction to try the suit. The matter was carried in first appeal no.305 of 1982 before the High Court and the High Court vide its order dated 12th August, 1994 ordered for return of the plaint.

The suit was contested by raising number of pleas including that the suit is not maintainable. It was pleaded that the suit is barred by sections 279, 287A and 330 of U.P.Z.A. and L.R. Act. It is barred by Revenue Recovery Act. It is barred by U.P. Public Money Recovery Act. It is barred by sections 34 and 41 of the Specific Relief Act etc.

3. The trial Court framed thirteen issues on the basis of the pleadings of the parties. They are as follows:-

1. Whether the defendants were empowered to issue order dated 18th September, 1977 to reduce the working hours and opening days?

2. Whether the plaintiff has suffered any loss due to the order dated 18th September, 1977 and is entitled for remission of the amount shown in the replication?

3. Whether non supply of spiced liquor has caused damages to the plaintiff and is entitled to adjust it against licence fees?
4. Whether the plaintiff is entitled to get refund of Rs.19,70,000/- from the defendants?
5. Whether the suit is barred by section 80 CPC and is not maintainable?
6. Whether the plaint is liable to be dismissed under Order 7 Rule 11 CPC?
7. Whether the suit is bad for misjoinder of the parties?
8. Whether the suit is barred by Revenue Recovery Act?
9. Whether the suit is barred by U.P. Public Money Recovery Act?
10. Whether the suit is barred by sections 34, 31 and 41 of the Specific Relief Act?
11. Whether the suit is barred by principles of estoppel and acquiescence?
12. Whether the Civil Court is not competent to entertain the suit?
13. To what relief the plaintiff is entitled?

4. The plaintiff examined himself as PW/1. The defendant examined Sri Sulekh Chand, Excise Inspector as DW/1. The suit has been decreed by the trial Court.

Learned standing counsel has raised many arguments relating to the maintainability of the suit on various grounds including that it is barred by the provisions of Revenue Recovery Act, U.P. Public Money Recovery Act, by sections 34, 31 and 41 of the Specific Relief Act. It was also raised that the suit is barred by section 78(2) of the U.P. Excise Act. The present appeal was heard along with the First Appeal No.789 of 1992. It was found that the ground that the suit is barred by section 78(2) of the U.P. Excise Act was not urged in the present case before the Court below. In this view of the matter, the learned counsel for the respondents was put to notice by the order dated 14th of August, 2012 as recorded in the order sheet and the matter was adjourned. He was also put to notice that the suit for injunction is not maintainable, as was submitted by the

learned standing counsel as recorded in the order sheet dated 17th of August, 2011.

5. The learned standing counsel submitted that the remedy, if any, of the plaintiff respondent was to institute a suit for recovery of the damages. He relied upon a judgment of this Court in First Appeal No.796 of 1987, Vijay Kumar Talwar Vs. State of U.P., dated 8.7.2003 holding that the remedy is to file suit for damages instead of suit for injunction.

6. The learned counsel for the respondents, on the other hand, submits that the suit was maintainable and he has referred the following cases in support of his argument:-

1. 1983 UPTC 1146, Ram Lal Vs. Commissioner of Sales Tax.

2. 2002 RD 924, M/s. Naman Chemicals Pvt. Ltd., Aligarh and others Vs. State Financial Corporation Ltd., Aligarh.

3. AIR 1966 SC 1089, K. S. Venkatraman v. State of Madras. For the purposes of the disposal of the present appeal we confine our judgment on the following two points:-

1. Whether the suit for injunction as framed is maintainable?

2. Whether the suit is barred by section 78(2) of the U.P. Excise Act?

Point NO.1 We find that the controversy involved in the present case is squarely covered by the decision relied upon by the learned standing counsel referred to above. Similar controversy was involved in the said appeal. There, the plaintiff was a licensee of the country liquor shop for Excise Year 1977-1978 and had filed a suit for injunction challenging the notification dated 18 th September, 1977 restricting the working hours up to 10:00 AM to 8:00 PM by two hours. There the suit was filed for permanent injunction restraining the defendants from realising the certain amount of licence fee on the ground that he was entitled for adjustment of the same in view of the fact that he was illegally restrained from selling his liquor from 8:00 PM to 10:00 PM. It was held that this is a breach of contract and the

remedy was to file a suit for damages. For the sake of convenience, the said judgment is reproduced below:-

"The plaintiff was a licensee of the country made liquor for excise year 1977-78. According to the plaintiff he was entitled to sell liquor from 10.00 a.m to 10.00 p.m. He was restrained from selling liquor from 8.00 p.m. to 10.00 p.m, in view of the notification dated 18th of September 1977. After the excise year was over, he filed original suit no. 200 of 1980 for the permanent injunction restraining the defendant from realising the amount of Rs.7,10,282/- of the license fee from the plaintiff on the ground that he was entitled for adjustment of the same, in view of the fact that he was illegally restrained from selling his liquor from 8.00 p.m. to 10.00 p.m. This suit has been dismissed by the trial court on 23rd of May, 1987, hence the present appeal. We have heard Sri Mukesh Prasad, counsel for the appellant and Standing Counsel appearing for the respondent. According to the appellant under the terms of the contract, he was entitled to operate his liquor shop for 12 hours from 10.00 a.m. to 10.00 p.m. but was illegally restrained by the respondents by selling his liquor from 8.00 p.m. to 10.00 p.m. This is a breach of contract and in case it was to so then the remedy of the appellant was to file a suit for damages, instead of a suit for injunction. Appeal has no merit. It is dismissed." Respectfully following the aforesaid decision, we are of the opinion that the suit for injunction is not maintainable. Section 41 of the Specific Relief Act enumerates the grounds on which an injunction claimed for can be refused.

7. Point NO.2 A suit bearing no.564 of 1979 was instituted on 23 rd August, 1979 for permanent injunction before the Civil Court at Meerut which was dismissed on 13th of April, 1982 for the lack of territorial jurisdiction. In first appeal no.305 of 1982 the High Court by its judgment dated 12 th of August, 1994 directed that instead of dismissing the suit, the plaint should have been returned. Accordingly, the High Court directed the return of the plaint which was presented before the Civil Judge, Muzaffarnagar and was registered as suit No.143 of 1995 giving rise to the present appeal.

8. On these facts the learned standing counsel submitted that since the suit has not been filed within the period of six months from the end of Financial Year 1977-

1978 i.e. 31 st of March, 1978, the suit is barred under section 78(2) of the U.P. Excise Act.

Section 78 of the U.P. Excise Act provides bar on certain suits in any civil court. Its sub section (1) provides that no suit shall lie in any Civil Court against the Government or any Officer or person for damages for any act in good faith done, or ordered to be done, in pursuance of the Act or of any other law for the time in force relating to the excise revenue. Its sub section (2) is material for the present purposes and is therefore, reproduced below:-

(2) Limitation of suits.--

No Civil Court shall try any suit which may lawfully be brought against [Government] in respect of anything done, or alleged to have been done, in pursuance of this Act, unless the suit is instituted within six months after the date of the act complained of.

9. The sub section (2) of section 78 provides a different period of limitation of six months in respect of any suit which may lawfully be brought against the government in respect of anything done or alleged to have been done in pursuance of the U.P. Excise Act. The contention of learned standing counsel is that this sub section provides a different period of limitation and therefore, even if such a suit is maintainable before the Civil Court, the suit will be barred by time unless it is instituted within six months after the date of the act complained of.

10. The submission is that the plaintiff felt aggrieved by the order dated 18th September, 1977 passed by the Excise Commissioner. The suit should have been instituted within six months therefrom. The license came to end on 31/3/1978, meaning thereby the suit should have been filed not later than six months from 31/3/1978. The act complained of by the plaintiff was of the Commissioner Excise who exercised the statutory power under the U.P. Excise Act. The learned counsel for the plaintiff has placed reliance upon a decision of the Apex Court in the case of Bombay Housing Board Vs. Karbhase Naik and Co., AIR 1977 SC 763 on the following paragraph:-

"Section 19 provides that the Board may enter into all such contracts as it may consider necessary for carrying out the purposes of the Act. Section 23 (1) states that the Board may incur expenditure and undertake works for framing and execution of housing schemes. Section 23(2) says that the government may entrust to the Board the framing and execution of any housing scheme. Therefore, the Board has statutory duty to frame schemes for construction of houses and execute them. Section 24(f) would also indicate that the purpose of a scheme is construction of house. In these circumstances, we think that the contract entered into the Board for construction of buildings might be an act done in pursuance to the provisions of the Act. We will also assume that it makes no difference whether it was deemed to be entered the contract was or whether it was deemed to be entered 54 of the Act. But the question is whether the act complained of, namely the non-payment of a claim for money based on breach of contract, was an act done or purporting to have been done in pursuance of the Act. There can be no doubt that the act complained of by the respondent was the non-payment of money as damages or compensation resulting from an alleged breach of contract. In *The Municipal Borough of Ahmedabad v. Jayantilal Chhotalal Patel*(1) the Court held that when a municipality has power to enter into a contract under the Municipal Boroughs Act and the municipality purports to exercise its power to enforce such contract, any act done in the exercise of its power to enforce the contract is not in pursuance of the Act but in pursuance to the contract and, therefore, a suit brought against the municipality for return of deposit under a contract to clean the streets was not a suit of the type described in s. 206 of the Bombay Municipal Boroughs Act, 1925 which is in pari materia with s. 64 of the Act. In the course of the judgment, Chagla, J. (as he then was) observed that what the plaintiff sought to enforce was, the right which came into existence as a result of the contract entered into between the plaintiff and the municipality and not a public duty cast upon the municipality by the statute, that in forfeiting the deposit, the municipality was not acting in pursuance to the power given to 'it under statute but was doing so in pursuance of a power given to it under the contract and, therefore, the suit to enforce rights under the contract entered into with the municipality which the municipality was not under any obligation to enter into, cannot fall within the ambit of the section. We think that the decision lays down the

law correctly, and that the principle deducible from it is applicable to the facts here. Mr. S. T. Desai referred to the decision of the Madras High Court in *Athimannil Muhammad v. The Malabar District Board*(2) and said that the decision therein would govern the instant case. That was a case where a suit was filed against the District Board more than six months after the date of the accrual of the cause of action, claiming damages on the ground that its President improperly cancelled a contract of lease for one year of the tolls in certain places, which was stated to have been entered into by the plaintiff with the Board through its Vice President. The President in performance of what he thought was his duty under the Madras Local Boards Act accepted a higher offer by another person and the necessary consequence of it was cancellation of the acceptance of the plaintiff's offer. It was held that though the distinction between actions on contract and actions independent of contract may be convenient enough as a working rule, the real test to be applied was whether what was complained of was some act done in pursuance of a statute. Varadachariar, J. in delivering the judgment of the Court said that the cancellation of the acceptance of the offer was the necessary result of what the President thought was his duty in accordance with the terms of the Act as he interpreted them namely to accept the highest tender and that he did this on the footing that the Vice President's acceptance of the plaintiff's tender was not in compliance with the Act. He further said that the right to collect tolls was a special privilege conferred upon local bodies by statute and that they were authorized either to manage the collection of the tolls themselves or through their own agency or to lease them out, and that in any case what the President as representing the Board did in connection with the leasing out of the right to levy tolls was undoubtedly an act done in execution of his powers or duties under the Act. We need not consider the correctness of this decision as, even on the assumption that it is correct, it has no application to the facts here. There the Court found that the act complained of had reasonable connection with the discharge of his statutory duty as President or at any rate, he thought that it was his statutory duty as President to accept the highest bid. The distinction between an act done with some semblance of authority or show of right and a prima facie illegal act in this context has been clearly pointed out in the decision in *Jalgaon Borough Municipality v. The Khandesh Spinning and Weaving Mills Co. Ltd.* (1) where the

question was whether-notice under s.206 ,of the Bombay Municipal Boroughs Act, 1925, was necessary before filing a suit to recover a sum of money on the basis of a contract. The Court held that an act which is Prima facie illegal is not within the category of acts done or purported to have been done in pursuance of that Act, and that it is only an act done under a vestige or semblance of authority or with some show of a right that would fall within the category. Bhagwati, J. in the course of his judgment said that the acts which would fall within the category of those done or purported to have been done in pursuance of the Act could only be those which were done under a vestige or semblance of authority, or with some show of a right and that the distinction between ultra vires and illegal acts on the one hand and wrongful acts on the other wrongful in the sense that they purport to have been done in pursuance of the Act is that they are intended to have been done in pursuance of the Act and are done with a vestige or, semblance of authority or sort of- a right invested in the party doing those acts."

We hardly see relevancy of the above quoted paragraph to the controversy in hand. If at all it applies, it supports the contention of the learned standing counsel. It was a case of non payment of a claim for money based on breach of contract. The appellant Housing Board came out with the case that for such a claim the suit is barred under section 206 of the Bombay Municipal Boroughs Act, 1921. Repelling the said objection the Court held that a simple contract for work done does not fall within the category of acts done or purported to have done in pursuance of that Act. It logically follows that if the act done or purported to have been done was an act under the Act will fall within the ambit and scope of the act done or purported to have been done. Be that as it may, a different expression has been used in sub section (2) of section 78. The expression used is "in respect of anything done or alleged to have been done, in pursuance of this Act." We are of the considered opinion that the order dated 18 th of September, 1977 was an act done by the Excise Commissioner in exercise of the statutory power conferred on him and therefore, the action should have been brought within a period of six months from 18 th September, 1977 and not thereafter. The order dated 18th September, 1977 was issued by the Excise Commissioner in exercise of statutory power, therefore, obviously this action was done under the Act.

11. Section 29(2) of the Limitation Act, 1962 provides that where any special or local law provides for a different period of limitation for any suit, appeal or application than the one prescribed by the Schedule of the Limitation Act, the period of limitation so prescribed by special or local law will prevail. Any consequence by operation of section 29(2) of the Limitation Act, the limitation prescribed by section 78(2) of the Limitation Act for filing suit will be attracted.

12. The learned counsel for the respondents invited attention of the Court towards a judgment of this Court in Union of India Vs. Ghasi Ram Laxmi Narain, AIR 1967 Alld. 546, a case under Central Excise and Salt Act wherein provisions of sections 35 and 40 of the said Act were under consideration. The relied upon judgment is not applicable to the facts of the present case as the question of limitation was not in issue there. The judgment is, therefore, distinguishable and cannot be relied upon. It was delivered under different factual background. It is held that the suit is barred by time as it was filed after the time prescribed under section 78(2) of the U.P. Excise Act.

At this juncture, we may notice the one argument of the respondents that the period of limitation shall apply only to such suits which will be governed by sub section (1) of section 78. The said argument is fallacious. Sub section (1) of section 78 bars certain suits and there is no question of providing any period of limitation for filing such suits. The suits which can be filed and are not barred under sub section (1) shall be governed by the period of limitation prescribed under sub section (2) of section 78 of the Act. The U.P. Excise Act is a special law dealing with the rights and obligations, under the Act and it prescribes a different period of limitation for filing a suit, will prevail over Limitation Act.

13. In view of the above discussion, the appeal is on terra firma. The appeal is hereby allowed with cost throughout and the judgment and decree of the court below is set aside. The original suit no.143 of 1995 stands dismissed.