

Paulose Vs. State of Kerala

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Court : Kerala

Decided On : May-17-2005

Reported in : 2005(3)KLT850

Judge : M. Ramachandran and; K.P. Balachandran, JJ.

Acts : [Contract Act, 1872](#) - Sections 73 and 74; Madras Sales Tax Act; Kerala Abkari Act, 1077 - Sections 29 and 69; Kerala Abkari Shops Departmental Management Rules, 1972 - Rules 5(10), 5(15), 6, 6(10), 6(14), (28), 13 and 35; [Constitution of India](#) - Article 226

Appeal No. : O.P. Nos. 1369 and 2180 of 1995

Appellant : Paulose

Respondent : State of Kerala

Advocate for Def. : P.I. Davis, Government Pleader and; M. Vijayakumar, Adv.

Advocate for Pet/Ap. : S. Venkatasubramonia Iyer, Sr. Adv.,; V. Giri,; P.S. Geo

Disposition : Petition dismissed

Judgement :

M. Ramachandran, J.

1. The above two Original Petitions were heard together, and as suggested by the parties, they are being disposed of by a common judgment. Recovery steps under Abkari liabilities are subjected to challenge.

2. In O.P.No. 1369 of 1995, there had been advertence to another Original Petition filed by a similarly situated person as O.P.No. 8318 of 1994. After noticing the contentions, this Court, by judgment dated 1.2.2002, had dismissed the said Original Petition. But, however, taking notice of the submissions of the petitioners that the arguments may be noticed afresh, we had gone to the merits of the contentions raised.

3. The Original Petitions had been referred to be heard by a Bench, by order dated 13.6.2002. The learned Judge had recorded that the arguments urged by the petitioners with reference to Sections 73 and 74 of the Indian Contract Act were to be noticed. The scope and impact of the amendment to Rule 13 of the Abkari Shops Departmental Management Rules, 1972, also were to be looked into. We had heard Mr. V. Giri and Mr. Bechu Kurian Thomas for the petitioners, as also the learned Government Pleader.

4. The petitioner in O.P.No. 1369 of 1995 was the licensee of Group No. 2 Arrack Shops in Kalpetta Range for the year 1993-94. The bid amount was Rs. 27,27,001/-. The security amount of Rs. 8,18,100/-, which was 30% of the bid amount, had been remitted by him. Solvency Certificate had been made available and on the basis of the concluded contract, the licensee had been permitted to run the shops for the abkari year commencing from 1.4.1993.

5. The petitioner submits that there was inadequate supply of arrack. It was far insufficient to the needs and as days passed it became evident that adequate quantity of arrack could not have been possible to be procured. According to him, exasperated, he had represented to the Excise Commissioner about his predicaments and the Government had also been addressed in the matter. Ultimately, by his letter dated 1.9.1993, copy of which is produced as Ext.P3, he had informed the Government that he was closing the arrack shops effective from 30.8.1993.

6. The petitioner submits that the full facts presented by him had not been appreciated by the Government, but he had been served with an order dated 11.10.1993 stating that the licence issued to him had been cancelled and a resale is ordered at the risk of the licensee. The reason shown was that he had discontinued the running of the shops for 30 days consecutively. Ext.P4 is the above said communication. The petitioner submits that in spite of the above there were about 46 days delay in putting the shops in Departmental management and by consistent and impractical attitude shown, possible aspirants, who would have stepped into his shoes, had been dissuaded. It is pointed out that though the shops were notified for sale in the last week of November 1993, the upset price was shown as Rs. 27,27,001/-. Resultantly, the Departmental management continued up to 31.3.1994.

7. It is however disclosed that the petitioner had in the meanwhile filed O.P.No. 2971 of 1994 for a declaration praying that the rights and liabilities based on bidding of Group No. 2 Arrack Shops had come to an end by 30.8.1993 and no liability whatsoever subsisted thereafter in respect of the contract. Later, on his request the Original Petition had been closed giving him liberty to move the Department appropriately. Consequent to his representations, however, the Department had held that he was always answerable for the loss which the Government had sustained. Thereafter, Ext.P9 demand notice came to be issued. Consequential enforcement proceedings as Exts.P10 and P10(a) are therefore subjected to challenge in these proceedings.

8. The petitioner reiterates his contentions that after his notice there was no discretion or rights left with the Department to demand any amount from him as liability. It is submitted that it was a case where steps had been enforced under Rule 6(28) of the Abkari Shops (Disposal in Auction) Rules and therefore the rigour of Sub-rule 5(15) of the Rules could not have been applied to him. The contract turned out to be one impossible of being carried out. Arrack had become a scarce commodity to be procured. Therefore, it could not have been a case where he was a defaulting licensee and consequently was not liable for any damages on principles of frustration.

9. According to Mr. Giri, learned counsel, the Government had not done anything to mitigate the possible damage or loss. The Original Petition had been amended so as to agitate the principles enunciated under Section 73 of the Indian Contract Act. The argument was that the party who suffered loss consequent to breach of contract, namely the Government, might have been entitled to only compensation for loss or damage. The Government was bound to do everything reasonably possible for mitigating the loss. Prompt and effective steps for a resale for the rest of the months had not been carried out. For almost about five months the Abkari shops concerned were under Departmental management. This was against the mandate of the Rules. Further, income realised by the conduct of business for the above period, in any case, should have been credited to him while assessing the dues, as the Government was not expected to make a gain at the expenses of the petitioner. Therefore, the amendment brought in during December, 1993 to Rule 13 of the Departmental Management Rules denying such benefit was inapplicable to the contract which had commenced earlier. The demand for excise duty, beyond August, 1993 also was per se invalid, as the Excise duty would have arisen only if arrack had been lifted for distribution. As there was no case that the shop was being run, the claim was preposterous. Therefore, according to him, the demand as presented was not enforceable.

10. The petitioner had secured an order of stay against the steps for recovery, and it was in operation all through out.

11. A counter affidavit had been filed by the respondents controverting the contentions. It is submitted that having entered into a contract for a prescribed right, the petitioner could not have wriggled out of the contract, himself, for any of the reasons urged in the Original Petition, In view of Rule 6(10) and 6(14) of the Kerala Abkari Shops (Disposal in Auction) Rules, a licensee was to keep the shops open unless closure is authorised by the competent authority. Therefore, the premature closure would have had no legal effect. It is also submitted that as per the amended provision, brought with effect from 4.3.1993 by G.O.(P) No. 29/93/TD, the responsibility to procure spirit or arrack for sale was placed on the concerned contractor alone. He had stopped the shop unauthorisedly, and thereby prevented the Government from gaining the premium otherwise payable. The

prescribed amount of duty payable on the designated quantum was to be remitted on or before 10th day of every month. Failure to remit the duty was to be treated on par with failure to remit kist. Therefore, the petitioner had legal liability to pay the price offered as also the duty payable from month to month as the Government should not have been put to prejudice because of any conduct of the petitioner.

12. The allegation that there was lethargy on the part of the Department, is also controverted. It is submitted that after terminating the licence, the shops were put under Departmental management. This was from 27.11.1993 to 31.3.1994. The counter affidavit shows that in the meanwhile steps had been taken for resale of the shops and on several occasions, auction proceedings were conducted, but no bidders had come up. The allegation is refuted, viz., that there was no attempt made for mitigation of the loss. Departmental Management Rules obliges the Government to see that as far as possible there is no gap in the matter of running of the shops, but rules also provide that if there are no substantial offers forthcoming, the Department is authorised to close down the shops. The petitioner has no locus standi in the matter, and the Rules also did not envisage any notice, in the given circumstances to be issued to him.

13. In the counter affidavit, it had been admitted that when the shops were under the Departmental management, the Department had received Rs. 5,06,472/- as Departmental management fee and Rs. 2,05,129/- as Excise duty, but the petitioner could not have claimed any benefit out of the sums so received. Because of the amendment brought about in December, 1993, the fee could have been adjusted only in a contingency where the contractor had demised during the terms of the contract, and at no other time.

14. According to the Government Pleader, principles of the Indian Contract Act have no relevance, since the transaction between the petitioner and the respondents was a statutory contract, the terms of which stood governed by statute. The claims presently urged are contrary to public interest. The liability was absolute in nature. It was not an instance where one of the parties to contract became a sole arbiter, since the petitioner could not have wriggled out of the liability of payment of the price in respect of the shops he bid and which stood

confirmed as prescribed by the Rules. The contracted price required to be paid. The licence was obliged to be cancelled at his risk and responsibility. The notices issued were therefore legal and valid in all respects. These were the trend of the pleadings.

15. O.P.No. 2180 of 1995 had been filed jointly by two persons, who were licensees of Mattancherry Group No. 5 Arrack Shops for the year 1993-94. The bid amount of this Group was Rs. 47,07,007/-. They had furnished cash security for a sum of Rs. 14,12,100/- and Solvency Certificate for a like sum. Licence evidently had been granted in their favour because of a valid contract that had been entered into between them and the Government.

16. Here also the petitioners had discontinued the running of the arrack shops on the plea that sufficient quantity of arrack was not forthcoming. Reference is made to Ext.P1 letter dated 20.7.1993 addressed to the Commissioner of Excise. It was requested that they may be relieved from the contract already entered into and the amount deposited is to be adjusted appropriately. Further prayer was that they were not to be mulcted with penal consequences. The shops were offered to be surrendered. It is seen that by order dated 28.8.1993 (Ext.P2), the Assistant Excise Commissioner had cancelled the licenses issued in favour of the petitioners. He had further directed that the shops were to be put to resale. The proceedings disclose that there was default in the payment of kist from the month of May onwards and in spite of directions security amount had not been replenished. Exts.P3 and P4 recovery notices issued thereafter had however been subjected to challenge. More or less identical contentions had been raised by the petitioners herein, as urged in O.P.No. 1369 of 1995.

17. Even though interim orders had been passed in O.P.No. 2180 of 1995, staying the steps taken by the Department for enforcing the recoveries, because of certain developments the stay has been vacated. We may briefly advert to the above as well.

18. The second petitioner in O.P.No. 2180 of 1995 had filed an affidavit on 10th of June, 2003 alleging that he has been made a party to the proceedings without his knowledge and consent. He claims that he had not signed the Original Petition. He

had not executed any vakalath, and his name had been dragged into the petition without bona fides, at the instance of the first petitioner (Padmini Amma). He even had alleged that the counsel who filed the Original Petition had committed professional misconduct. I.A.No. 4020 of 2003 had been filed by him requesting this Court to pass orders allowing him to be impleaded as an additional respondent in the Original Petition.

19. This was stoutly opposed by the first petitioner. A counter affidavit and additional documents were made available to show that the second petitioner had turned turtle with least of bona fides.

20. Taking notice of the allegation of forgery, earlier this Court had directed that the Deputy Inspector General of Police, Ernakulam Range is to look into the matter. A report had been filed by the said officer. However, we find that the report as above is not satisfactory, and the version of the first petitioner has not been appropriately ascertained. It will in any case be risky to rely on the report for any purpose. Consequently, any further action on the crime registered as 201/2004 in the Pattanakad Police Station is to be discontinued. The second petitioner has failed to explain the countless loose ends in his anxiety to wash off his hands. We notice that the second petitioner had been a beneficiary of the interim orders passed in the said Original Petition. It is too much to assume that the first petitioner had duped the Assistant Excise Commissioner, when the bid had taken place, when the agreement was signed, and no particular reason is shown to explain the conduct of the first petitioner for remitting a sizable sum of Rs. 13 lakhs at the inception of the agreement, giving equal credit to the second petitioner. He had also not challenged the steps taken by the Excise Authorities implicating him in the proceedings for recovery, on allegation of fraud.

21. Taking notice of the controversy, by an order dated 1.11.2004, the stay granted in the Original Petition had been vacated. As of now, it may not be just or proper to grant permission to the petitioner for participating in the proceedings as a respondent. The application is therefore rejected, and the second petitioner is to be deemed as continuing as petitioner for all purposes, especially as there was no submission made by him for permission to withdraw from the proceedings in the

course of hearing.

22. We may examine the legal contentions that had been raised in the aforesaid context. The learned counsel for the petitioners had adverted to a decision of a Division Bench of this Court reported in 1994 (1) KLT 627 (Bhavani Amma v. State) in respect of their submission that principles of the Contract Act are to be applied and the demand as put up against them is misconceived. Counsel also submits that the contentions raised by the parties therein had found acceptance and the appeal filed therefrom had been dismissed by the Supreme Court in the decision reported as State v. Narayana Pillai, 2000(1) KLT 166. But the facts of the case appear to be different and the observations therefore may not be safe to be relied on. Petitioner there had deposited the bid amount and presented the solvency certificate as required by the rules, he having been declared the successful bidder. However, the Board of Revenue had not confirmed the sale for quite some time, which is mandated by the Rules. Because of the above, he was prevented from executing a regular agreement and no formal licence had been given over. The petitioner had contended that he was to be given confirmation before 1.4.1981 and finding that this is not forthcoming he had issued a notice on 6.4.1981, urging the respondents to take expeditious action. There was no response from the respondents. He had again issued a notice on 16.5.1981 informing that therefore he was not willing to be a licensee in respect of the shops in question.

23. However, the Department ignored such letters and took a stand that he became answerable for the full dues and he could not have been permitted to withdraw. This evidently was on the strength of Rule 5(10) and (15) of the Abkari Shops (Disposal in Auction) Rules. Because of the reluctance of the petitioner however, the Department had been obliged to re-notify the sale and later on in respect of the shops Departmental management was brought about. Thereafter, claims had been put up requiring the bidder to pay the compensation. It was on the plea that the consequential steps taken were at the risk of the petitioner. These proceedings were challenged. Taking notice of the facts of the case, the Court had held that the petitioner therein was not liable to pay any amount of penalty, as the department had been at fault, and it was a case where he was entitled to get back

his security deposit in full.

24. But the petitioners can hardly rely on the said decision. In the present cases, the facts show that there was an offer and acceptance and at the volition of the petitioners alone, later, the shops were surrendered. Therefore, the consequences were to follow as provided by the statute. The counter affidavit speaks about the efforts taken by the Department to put the shops for resale. Earnest attempts were made for resale of the shops by publication of notice in the official gazette, and repeated attempts were made thereafter. We feel that the Government had not shirked their responsibility, as postulated by the Rules, and it may not be justified or proper for the petitioners to allege that the Government had not taken steps for mitigating the loss.

25. Considerable reliance had been placed on the second limb of the decision in Bhavani Amma's case (supra) and especially, the principles laid down in paragraph 32, which are extracted herein below :--

'32. The general principle of contract and Contract Act cannot be totally ignored in considering the rules. We have to remember that we are considering a piece of delegated legislation. A delegated legislation cannot claim same equality, insulation and immunity which is enjoyed by a statute passed by a competent Legislature. The subordinate legislation is always liable to be questioned on all the grounds on which a plenary legislation could be questioned. In addition, certainly the delegated legislation can be challenged on the ground that it does not conform to the statute under which it is made. It may further be faulted on the ground that it is contrary to some other statute. It is a cardinal principle that subordinate legislation must yield to plenary legislation. We may also say that subordinate legislation may also be questioned on the ground that it is unreasonable in the sense that it is manifestly arbitrary. This concept of invalidating a delegated legislation can be seen from the decisions of English Courts where Judges would say 'Parliament never intended authority to make such rules. They are unreasonable and ultra vires'. The position of law has been clearly stated by Diplock, L.J. in *Mixnam Properties Ltd. v. Chertsey U.D.C.*, 1964 (1) QB 214 thus: The various grounds upon which subordinate legislation has sometimes been said

to be void...can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus the kind of unreasonableness which invalidates a bye-law is the not antonym of 'reasonableness' in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a Court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.... If the Courts can declare subordinate legislation to be invalid for 'uncertainty', as distinct from unenforceable...this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain...'

26. Argument is that the veracity of subordinate rules is to be tested with reference to the specific authorisation, the parent statute supplied. The principle of the decision cannot be disputed. But, however, the observations made as above do not appear to be relevant as far as the present case is concerned.

27. We had occasion to notice the provision of the statute which referred to rule making powers. General powers are given by Section 29. Section 29(r) is to the following effect:-

29(r) 'for the forfeiture notwithstanding provisions to the contrary contained in the Indian [Contract Act, 1872](#) or in any other law, of the whole or any portion of the kists deposited by persons who purchase the right to sell toddy, arrack, foreign liquors or ganja, in addition to damages recoverable by Government on account of the breach of conditions of sale laid down by the Government from time to time.'

Coupled with the above, Section 69 is worded in the following manner:-

'69. Publication of rules and notifications.-- 'All rules made and notifications issued under this Act shall be made and issued by publication in the Gazette. All such rules and notifications shall thereupon have the force of law and read as part of this Act and may in like manner be varied, suspended or annulled.'

28. But this section as such may not be supplying extra punch to the Rules in spite of the wording of the section, as they continue to be subordinate legislation, and normally will have to be understood with a restriction, as observed in Bhavani Amma's decision. Further the weighty observation of the Supreme Court made in *State of Kerala v. Abdulla and Co.*, : [1965]1SCR601 construing a similar provision of the Madras Sales Tax Act throws light into these aspects. The Rules can be only rules, and cannot transpose itself as provisions of the Act.

29. But power is reserved with the Government to frame rules by Section 29(r). The Abkari Shops (Disposal in Auction) Rules have been brought in exercise of such powers, and the non obstante clause puts them beyond the reach or restriction of the Indian Contract Act. It is evident that the attention of the Division Bench, while Bhavani Amma's case was being considered had not been brought to existence of the above section in the Abkari Act. However, as the said decision mainly rested on the facts of the case, we do not think the issue requires to be placed before a larger Bench. The Supreme Court, while affirming Bhavani Amma's case in *State v. Narayana Pillai*, 2000 (1) KLT 166 had also not gone to the above aspects and the delay in confirmation of the contract as spoken to by Rule 5(13) of the Abkari Shops (Disposal in Auction) Rules alone had come to be highlighted.

30. The cancellation of the respective licences was in exercise of powers under the said Rules. It is true that Rule 5 of the Rules are mostly relevant at the point of time of the sale of the shops. But, compartmentalisation in absolute terms appears to be not proper, as at least certain conditions spill over to later periods of the tenure, e.g. Rule 17, which states that the auction purchaser shall be liable to the penalties for any of the breach of the condition under the Rules, even in a case where formal licence is not issued. As far as the petitioners are concerned, that stage is over, and Rule 6 appearing in Chapter V of the Rules were to be applied. Under Rule 6(14), shops once opened, but in which the sales have been discontinued for more than thirty days consecutively shall be liable to be resold at the risk of the licensees. Again, Sub-rule 28 provides that defaults invite cancellation of licence and resale is at the risk of the licensee. The Officer has authority to bring it under departmental management, or otherwise dispose of the

same. The losses shall be borne by the defaulted licensees. Such provisions have statutory sanction, because of Section 29(r) of the Act. The breach of the contract is not disputed, though excuses have been raised, but in proceedings under Article 226 of the [Constitution of India](#), such question cannot be examined satisfactorily. We are of the view that the coercive proceedings are therefore not illegal, and powers vested alone had been enforced.

31. A licence issued under the Abkari Act is not a right as is ordinarily understood by the said term, but only a privilege. The contract entered into by the parties and their conduct can only be on the lines laid down by the statute. Import of provision of other statute therefore could be necessarily excluded, as what governs the parties is a self contained code. We repel the contentions raised by the petitioners, for this reason also.

32. Petitioners urged that on principles of mitigation of loss, the party who suffered the loss was expected to exert itself for reducing the loss, and this had not been attempted by the Government, and to this extent, the petitioners were entitled to relief. But, under Rule 6(28) of the Abkari Shops (Disposal in Auction) Rules, closure is given an extended meaning. It is declared that 'Disposal otherwise than by resale includes closure'. We had found that the Department had attempted to put the shops on resale, but were not successful. They could have discontinued the shops. Therefore, the contentions raised by the petitioners do not appear to have any merit.

33. What has been demanded from the petitioners are payments which are statutorily permissible and we hardly find any reason to interfere with such demands. But of course in respect of certain items it would be necessary to make clarifications. Excise duty had been demanded from the petitioners on the plea that such liability continues even after the surrender of the shops and termination of the original contract and therefore it cannot be avoided at the instance of defaulter. The plea of the petitioners, on the other hand, is that impost of Excise duty arises only when the commodity is lifted from the supplier and therefore, demand cannot validly be raised when there was no such supply at all.

34. Even though in the first blush, it may appear that the contention is valid, we have to observe that acceptance of such contentions will interfere with the terms of a statutory contract. It is not disputed that by the stipulation of the contract, Excise duty was payable for the designated quantity and distributed for the period of lease, as undertaken. This was a price agreed and by a unilateral step, the petitioners cannot get any advantage to the detriment of the Government. The petitioners have no case that they had withdrawn from the field because of the conduct of the other contracting party. Therefore, we cannot accept a position whereby Government is to suffer loss. The issue had also been finally settled by the Supreme Court in : 2001(75)ECC718 (Solomon Antony and Ors. v. State of Kerala and Ors.) Grant of permit to import or purchase of a designated quantum of duty paid rectified spirit, at the contractor's request, on condition that they would remit the Excise duty on such quantum in each month, according to the Supreme Court, was sufficient authority for the Government to make such a demand for the whole period. It had been held that the contractors were liable to pay the duty in respect of even unlifted portion of the designated quantum of rectified spirit. Therefore, the argument cannot be accepted.

35. Nevertheless, in the case of the petitioner in O.P.No. 1369 of 1995, it has come by way of an admission in the counter affidavit, that an amount of Rs. 2,05,129/- has come to the Government exchequer as Excise Duty for the period from 27.11.1993 to 31.3.1994. The petitioner will be entitled to get credit for this amount, as otherwise it will amount a double payment of duty. We presume, for want of materials, that for the above period the designated quota of arrack had been procured. The advantage at least technically has therefore to go over to him. Such relief may not be available to the petitioners in O.P.No. 2180 of 1995, as there is no such plea forthcoming.

36. One other item of remission claimed was in respect of the Departmental management fee that had come to be collected in respect of the shops, which is the subject matter of O.P.No. 1369 of 1995. An amount of Rs. 5,06,472/- had come as Departmental management fee in respect of the said shops. The plea of the Government is that because of the amendment brought in 1993 to Rule 13 of the Kerala Abkari Shops (Departmental Management) Rules, 1972 excepting in a

case of death of the licensee, such fee is not to be given credit to and this amount will not be available therefore to be considered as repayment from the petitioner. However, the petitioner refers to a Division Bench judgment of this Court in O.P.No. 2861 of 1994, to which one of us was a party. It had been held that the contracts in those cases were entered into before the amendment of Rule 13, and the petitioners are liable to pay only the actual loss suffered by the Government in realization of rentals and excise duty. It had been noticed that there was no provision in the agreement for forfeiture of any departmental management fee. Although the learned Government Pleader submits that by virtue of Rule 35 of the Abkari Shops (Disposal in Auction) Rules, it would have been possible for the Government to incorporate additional conditions when statute was amended, we have to see and notice that the licence issued to the petitioner had been cancelled well before and even prior to the date of the amendment. Although the existing rule left the matter to the discretion of the Assistant Excise Commissioner, we feel that it will be unjust to deny the reliefs to the petitioner, and the benefit of the decision in the batch of cases.

37. Resultantly, the petitioner in O.P.No. 1369 of 1995 would be entitled to get credit of an amount of Rs. 5,06,472/-, which was received as departmental management fee for the period from 27.11.1993 to 31.3.1994 in respect of the shops.

38. Both the Original Petitions are dismissed. However, in respect of the petitioner in O.P.No. 1369 of 1995, demand notices are to be issued afresh, giving credit to the said petitioner for a total sum of Rs. 5,06,472 + Rs. 2,05,129 viz., Rs. 7,11,601/. (Total amount of Departmental Management Fee and Excise Duty levied in respect of the shops for the concerned year), but without benefit of any interest. The parties are directed to suffer costs.