

**Bhola Ram Vs. State and ors.**

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**Court :** Rajasthan

**Decided On :** Nov-21-2002

**Reported in :** II(2003)BC600; 2003(2)WLC347

**Judge :** Arun Madan, J.

**Acts :** [Constitution of India](#) - Article 226

**Appeal No. :** Civil Revision Application No. 9 of 1996 in Civil Writ Petition No. 4274 of 1988

**Appellant :** Bhola Ram

**Respondent :** State and ors.

**Advocate for Def. :** Pratap Singh, Deputy G.A. for Respondent No. 1 and; O.P. Gandhi, Adv. for Respondent Nos. 2 and 3

**Advocate for Pet/Ap. :** N.S. Rathore, Adv.

**Disposition :** Review petition dismissed

**Judgement :**

ORDER

**Arun Madan, J.**

1. This review petition arises out of the common judgment and order dated 13.12.1994 passed by this Court in SBCWP No. 4274/1988 (Bhola Ram v. State and Ors.) and five other connected matters i.e. SBCWP Nos. 112/85, 1439/86, 456/86, 1433/85 and 1195/85.

2. Since the questions raised in the present review petition are pure legal questions of law, I need not advert to the facts of the writ petition separately.

3. The grounds of review of the order dated 13.12.1994 which have been urged by Mr. N.S. Rathore, learned Counsel representing the petitioner are :

(i) It was not the case of the petitioner that the demand has been raised by the respondent though the adequate supply of liquor was not made by respondents themselves while, the case of the petitioner before the learned Single Judge was that though the petitioner was not even a licensee, no licence whatsoever was issued in his favour and, therefore, he was nowhere concerned with the sale and purchase of liquor but despite, the demand was raised against him and this Court without going into the merits of the case disposed of the writ petition in a summary manner alongwith other cases.

(ii) As per Section 21 of the Rajasthan Excise Act, 1950, no liquor can be bottled for sale and excisable otherwise than in accordance with the terms and conditions of the licence granted in that behalf. Since, the petitioner had only moved an application before the respondents that he was interested in entering into the partnership with one Noora and that he should also have been made co-licensee, the District Excise Officer simply recorded the statement of both the parties and after that nothing was heard from the respondents authorities as to whether they were inclined to enter his name as co-licensee or not.

4. It has been contended in this regard that since the name of the petitioner was not included in the licence as a co-licensee, he neither gave any order for the supply of liquor nor any liquor was supplied by the department to the petitioner. On this basis, it has been sought that since the petitioner did not have any connection whatsoever for the retail sale of country liquor at Badagaon for the year 1967-68, as such recovery proceedings against the petitioner vide order dated 1.9.1988

(Annexure-6) for the period i.e. 1967-68 for a sum of Rs. 14,640.30 is liable to be quashed and set-aside since the petitioner was not a licensee but one Noora (Nuruddin), he is not liable for the acts of omissions and commissions of the co-licensee i.e. Nuruddin.

5. Further, the impugned judgment suffers from an error apparent on the face of the record because as per Section 31 of the Act, 1950, every licence, permit or pass granted under the Act shall be granted by such authority, on payment of such fees (if any) subject to such restrictions and on such conditions and in such form and containing such particulars and for such period as the State Govt. may prescribe by rules. In the instant case, the learned Counsel for the petitioner sought to build the argument in this regard by contending that since the respondent authority did not place any licence whatsoever which was given to the petitioner nor he highlighted any condition of the licence in pursuance of which recovery proceedings against the petitioner were initiated, as such the impugned judgment of this Court deserves to be reviewed.

6. When the recovery proceedings were initiated against the petitioner in the year 1980, he had made a representation to the respondent authority. His objections remained undecided and not only notice of auction was raised on the petitioner on 30.9.1982 against which the petitioner filed objections before the District Excise Officer (respondent No. 2) on 12.11.1992 which remained undecided till 1.9.1988 when notice of attachment/auction was issued to the petitioner directing auction of the shop and recovery of the amount due against the impugned demand being not in accordance with the provisions of Section 257B of the Rajasthan Land Revenue Act, 1956 and hence liable to be quashed and set-aside.

7. On the basis of the above grounds, the learned Counsel for the petitioner has contended that the judgment of this Court which is impugned in this review petition suffers from an error apparent on the face of the record and the recovery of the stipulated amount is in violation of the provisions of Section 21 of the Act of 1956 which stipulates that no liquor shall be bottled for sale, and no excisable article shall be sold, otherwise than in accordance with the terms and conditions of a licence granted in that behalf.

8. Counsel further contended that no notice for distress sale was ever issued to the petitioner and the matter was never agitated by the co-licensee Nuruddin in whose absence and without determining that he was a co-partner in business with the petitioner, the respondent authorities proceeded to decide the matter unilaterally and issued notice of demand to the petitioner which suffers from the vice of discrimination and hence not sustainable. Furthermore there was no such controversy regarding short lifting of liquor by the petitioner and he was nowhere concerned with the sale or purchase of the liquor at Badagaon as he was not a licensee duly authorised by the respondents to carry out this task. Merely because, there was an application to the respondent for making him as co-licensee, would not make him liable for payment of the demand raised by the respondents.

9. In reply to show-cause notice, the respondents have contended inter alia that the petitioner was called for hearing by respondent No. 2 viz. the District Excise Officer (Recovery) Jaipur Rural. On 20.12.1984, he was heard in person and he stated that whatever he had to say had already been submitted by him in writing.

10. Be that as it may, the writ petition was for the recovery of short fall in the granted amount for the year 1967-68 in relation to the country liquor shop of which the petitioner was co-licensee with one Noora (Nuruddin) at Badagaon, Tehsil Udaipur, Distt. Jhunjhunu. The original shop had been auctioned for Rs. 35,500/- in favour of Noora on 13.3.1967. On 26.6.1967, the petitioner moved an application to the District Excise Officer to the effect that he was desirous of entering into partnership with Noora for half of the said share for which he had already paid half of the security amount to the said co-licensee with whom he claimed the partnership.

11. The aforesaid position has also not been refuted or denied by the petitioner (co-licensee) in his application by mentioning himself that he would be bound to meet out the losses relating to the shop as well. The District Excise Officer on the aforesaid application, recorded the statement of the co-licensee 'Noora' as well as of Bholaram (the present petitioner).

12. During the course of hearing, the learned Counsel for the petitioner has not been able to controvert this fact that the petitioner had not started business of country liquor with Noora and, therefore, it cannot be said that his name had not been included. It has further not been disputed that the impugned demand raised by the Excise Department pertains to the relevant period in question i.e. 1967-68 when the petitioner had indisputably joined partnership with co-licensee for the country liquor shop at Badagaon.

13. It has been contended in reply that the notice of demand was issued to the petitioner for depositing the amount due and, therefore, it cannot be said that the action was taken against the petitioner all of a sudden without affording opportunity of hearing. The respondents have rather specifically denied the receipt of any representation dated 30.12.1980 from the petitioner. The petitioner had further submitted representation on 19/20.11.1982 while the sale proclamation was issued on 20.1.1982 and, thereafter on 30.12.1982. However, the auction could not be taken place. As regards the amount due to the respondents for the period in question i.e., 1967-68, it has been contended that the petitioner had joined as a partner with one Nuruddin for sale of country liquor at Badagaon. His objections have already been considered and the amount was found outstanding against him.

14. As regards the rejection of supply of rectified spirit or molasses in Rajasthan, it has been specifically denied by the respondents that there were any shortage of liquor in the State. The respondents have further denied that the shortfall in supply of liquor cannot be attributed for any lapse on the part of Excise Authority but in fact, the same had occasioned on account of inability of the petitioner himself to lift the specified quantity of the liquor from the outlet from where supply was made at Badagaon.

15. It has further been contended by the respondents that the distress auction proceedings were initiated by adhering to the provisions of Section 257-B of the Rajasthan Land Revenue Act, 1956 wherein, the procedure has been prescribed that once the recovery proceedings have been initiated against any person for the recovery of any sum referred to in said provision, such person may at any time,

before any property attached in such proceedings is knocked down at a sale thereof, pay the amount claimed and at the same time deliver a protest signed by himself, or by his authorised agent to the Revenue Officer taking such proceedings.

16. In other words, it is always open to the defaulter to deposit the amount under protest which in turn shall be forwarded to the competent authority to adjudicate the same and the person so paying the amount under protest can thereafter file a suit for refund of the amount so paid under protest. This option though available to the petitioner was not exercised.

17. From the perusal of reply, it is further apparent that the respondents have nowhere admitted that there were any short supply of country liquor or that no recovery could be made. Rather, the stand of the respondents in this regard is that the alleged short-fall had been properly adjudicated upon against the petitioner and the demand had rightly been calculated as regards the recovery of proceedings by auction sale.

18. Admittedly, no such alternative remedy of depositing the amount under protest or filing a suit thereafter for refund of the amount was ever done by the petitioner notwithstanding the statutory remedy available to him. Even apart, the amount relates to the payment of excise dues and appeal under the Rajasthan Excise Act, 1950 (Act No. 2 of 1950) under Section 9A was available to the petitioner which admittedly he had not availed of.

19. Section 9A(1)(a) of the Act of 1950 stipulates that an appeal against the (original) order passed by any Excise Officer under this Act shall lie to the Excise Commissioner whereas Section 9A(1)(b) stipulates that an appeal against the (original) order passed by the Excise Commissioner shall lie to the Divisional Commissioner of the area, where matter arises and limitation for such appeal having been filed is sixty days under Sub-section (2) of Section 8 of the said Act.

20. As regards the petitioner's contention regarding short supply of country liquor, the learned Counsel for the respondent has contended that the petitioner at no stage whatsoever had ever raised any such objections nor he had deposited the

requisite amount demanded from the petitioner but on the contrary had not been regularly depositing the amount against the supply made as and when the demand was raised and, therefore, the question of there being any alleged short fall for the period in question i.e. 1967-68 does not arise. Moreover, this contention is not tenable for the reason that a Committee was constituted by the Excise Department pursuant to the directions of this Court on 9.5.1980 in CWP No. 4274/88 to examine the case remanded by this Court regarding the recovery of outstanding arrears of short fall pertaining to the period in question. The said aspect has been elaborately dealt with in the order dated 13.12.1994 wherein this Court held, as under:

'There was liability of short fall only in respect of 5 cases which do not involve any of the petitioners in the present writ petitions as so contended by Mr. Rathore, the learned Counsel for the respondents, and not so controverted by the learned Counsel for the petitioners.

A perusal of the committee report further reveals that the parties were satisfied with the position of liability worked out in their presence. One of the petitioners who was not satisfied with the decision of the Committee had filed a writ petition in this Court titled as Prabhu v. State of Rajasthan and Ors., S.B. Civil Writ Petition No. 3063/ 74, which came to be finally decided by this Court vide order dated 9.5.1980 alongwith 136 other connected petitions which were also disposed of in terms of the common order dated 9.5.1980.'

21. In support of his aforesaid contentions, the learned Counsel for the respondents has placed reliance upon the Division Bench's judgment of the Delhi High Court in the matter of Hari Singh v. Smt. S. Sethi, 58 (1995) DLT 651 (DB)=AIR 1996 Delhi 21, and judgments of Apex Court in Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh, AIR 1964 SC 1372, and State of Rajasthan v. Shri Nandlal, JT 1992(5) SC 655.

In Hari Singh (supra), the controversy which had arisen for consideration before the learned Single Judge of Delhi High Court in Special Appeal regarding the scope of exercising jurisdiction in entertaining review petition by the High Court by having resort to the provisions of Section 114 read with Order 47, CPC, the Delhi

High Court held thus :

'If before the making of an application for review, an appeal from the judgment ought to be reviewed has already been filed and is pending then the Court has no jurisdiction to entertain the review application, secondly where the application for review is first made and thereafter, an appeal is preferred, the review application can be disposed of provided the Appellate Court has not disposed of the appeal before the review application is taken up for disposal.'

The Delhi High Court further held that:

'the dismissal of an appeal under Order 41 Rule 11(1). CPC in limine precludes the Court from which the appeal is preferred, from entertaining an application for review of the decree because it cannot be said in such a case that no appeal has been preferred, within the meaning of Section 114 and Order 47 Rule 1, CPC, There is no difference between an appeal disposed of on merits or under Order 41 Rule 11(1), C.P.C. Secondly, a review application filed before an appeal is preferred, cannot be taken up for consideration in case the appeal against the judgment or order sought to be reviewed, has been disposed of in limine under Order 41 Rule 11(1). CPC before the review is disposed of.'

22. In *M/s. Thungabhadra Industries Ltd. (supra)*, the Apex Court held that grant of special leave after notice to respondent and giving him hearing, revocation of new ground of objection as to leave cannot be permitted except in exceptional circumstances.

23. In *State of Rajasthan v. Nandlal (supra)*, the Apex Court held that whether there was failure on the part of the State to supply country liquor as and when demanded by the licensees, the burden of proof was on the licensee to establish the same. The Apex Court further held that the allegation of non-supply must be established by the licensees separately through documentary evidence and the mere fact of short fall of production would not establish that the quantity asked for was not supplied. The Apex Court while allowing the appeal preferred by the State of Rajasthan had set-aside the judgment of this Court which was subject-matter of challenge in appeals.

24. I have perused the ratio of the aforesaid decisions and in my view, the same are attracted to the facts and circumstances of the instant case.

25. As regards the contention of the petitioner that without deciding the objections which were pending, it was not open to the respondents to direct auction sale and in my view, this contention is absolutely fallacious and it is not open for him to agitate the same since all such objections as raised by him were duly considered by the department on 20.12.1984 when the petitioner was heard in person by the respondents. Moreover, the property of the petitioner was attached in pursuance of the auction notice dated 1.9.1988 (Annexure-6) as against the recovery for the period 1967-68 while the petitioner waited till 15.11.1988 when he filed the writ petition in this Court. Those sparing reasons for having waited till the said date remain unexplained on the record.

26. That apart when during the course of hearing, the learned Counsel for the petitioner was asked a specific question as to whether he availed of the alternative remedy under Section 9A of the Act for filing an appeal before the Excise Commissioner of the area concerned, he stated at the Bar that the petitioner had not availed of any such remedy except to approach this Court by way of this writ petition.

27. Controverting the aforesaid contention of the learned Counsel for the petitioner, the learned Counsel for the respondent has stated that the petition involves adjudication of disputed questions of facts which cannot be tried or adjudicated in exercise of extraordinary jurisdiction of this Court under Article 226 of the [Constitution of India](#). He has further contended that the writ petition was grossly belated since the auction notice had been issued earlier in the year 1982 which he failed to challenge and, therefore, it was not open for him to challenge the same by way of the aforesaid writ petition filed earlier in this Court which has already been heard and decided by a reasoned order and which does not call for any interference.

28. From the above, I am of the considered view that the law is well-settled in this regard that once a person enters into a partnership with another, both the persons would be equally liable under the Partnership Act, 1932 for any liability which may

arise pertaining to partnership business. Hence, it cannot be assumed that a party is only be entitled to share the profits while the liability as regards the sharing of losses would be unilateral, This principle is in consonance with the well-settled norms of the partnership as stipulated by the Legislature in the Act itself.

29. Hence, in my view, the aforesaid contentions of the petitioner merits no substance and deserves to be out-rightly rejected also, keeping in view the principles of natural justice as he was given due opportunity of hearing not only by the department earlier but so also by this Court while deciding the writ petition vide order dated 13.12.1994 and hence, at this stage it is not open to him to plead to the contrary.

30. As a result of the above discussion, I find no merit in any of the contentions advanced by the learned Counsel for the petitioner muchless any error apparent on the face of the order which would call for any interference by this Court in exercise of its review jurisdiction. Hence, the review petition accordingly stands dismissed being not maintainable.

31. D.B. Special Appeal (Writ) No. 331/95 (Bhola Ram v. State of Rajasthan) which is tagged with this review petition be detached.