

PETITIONER:
STATE OF UTTAR PRADESH

Vs.

RESPONDENT:
KISHORI LAL MINOCHA

DATE OF JUDGMENT 21/12/1979

BENCH:
GUPTA, A.C.
BENCH:
GUPTA, A.C.
TULZAPURKAR, V.D.
VENKATARAMIAH, E.S. (J)

CITATION:
1980 AIR 680 1980 SCR (2) 724
1980 SCC (3) 8
CITATOR INFO :
E 1984 SC 993 (27)
D 1984 SC 1326 (13)

ACT:
Constitution of India 1950, Article 299 and U.P. Excise Act 1910, S. 39-Rule 357(5) of Excise Manual requiring purchaser at excise auction to deposit one-sixth of annual fee on conclusion of sale-Purchaser not making deposit-Resale by excise authorities fetching lesser price-Original purchaser whether liable to pay deficiency in price.
U.P. Excise Act 1910, S. 77 & Excise Manual Rule 357-Rule not published as required-Whether has the force of law.

HEADNOTE:

The respondent who was a bidder at the annual excise auction offered the highest bid for two groups of country liquor shops, and which were knocked down in his favour. He affixed his signature to the respective bid sheets in token of his acceptance and also in the register of Settlement Record. He, however, did not deposit 1/6th of the bid amounts on conclusion of the sales as required under the Excise Rules but took time for deposit. In spite of repeated reminders he did not pay the advance deposits. The Excise Authorities resold the excise privileges in respect of the two groups of shops and in the re-auction the shops fetched a lesser amount than what the respondent had offered. The State Government, appellant directed the respondent to make good the loss. Since he failed, a suit for recovery was instituted by the appellant. The suit was contested, the respondent pleading (1) that there were no completed contracts between the State Government and himself and consequently there could be no breach of contracts; (2) that the entire auction proceedings, having been against the rules and instructions of the Government were illegal and void; (3) the contracts, if any, were unenforceable as they did not satisfy the conditions mentioned in Article 299 of the Constitution; and (4) that the State Government having accepted his prayer to be relieved from the bids made by him and subsequently re-auctioning the groups of shops to others was estopped from fixing any civil liability on him. The trial court decreed the suit.

On appeal, the High Court dismissed the suit on the view that there was no valid contract which could be enforced by the appellant as the requirements of Article 299(1) of the Constitution had not been complied with. It, however, held that the failure to deposit 1/6 of the bid amount did not make the proposal incomplete and that the absence of the approval of the Excise Commissioner which was in the nature of a power vested in him to reverse the acceptance of a bid made by the officer holding the auction did not in any way exonerate the respondent from the liability if he was otherwise liable.

In the appeal to this Court on the question whether the respondent would not be liable to make good the loss even though no contract in writing had been executed in accordance with Article 299 of the Constitution.

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HELD : [Per Gupta and Tulzapurkar, JJ.]

1. The suit must be dismissed as there was no concluded contract between the parties, nor was there any statutory rule permitting recovery of the deficiency on re-sale from the respondent. [728 B]

2. The last part of 5th clause to Rule 357 providing that in case of default, if the price fetched at the re-sale was less than the bid at the first sale the defaulter had not been published. [729 C]

3. Assuming that different clauses of Rule 357 barring the last part of the 5th clause embody the condition of sale, it is clear from the 2nd clause that in the absence of the final sanction of the Excise Commissioner the bid cannot be said to have been finally accepted. In the instant case it is not claimed that the bid offered by the respondent was sanctioned by the Excise Commissioner. [729 E]

There was thus no concluded contract between the parties to make the respondent liable for the alleged loss. [729 E]

Union of India and others v. M/s. Bhimsen Walaiti Ram [1970] 2 S.C.R. 594 referred to.

(Per Venkataramiah J. dissenting)

1. The respondent should be made liable for the sum claimed in the suit and the decree made by the trial court should be restored. [745 G]

2. The respondent was liable for the sum claimed made by the State Government even though no contracts were formally entered into between the respondent and the State Government, [745 B]

In the instant case on the pleading and evidence it has to be assumed that the respondent knew that he was under an obligation to deposit with the officer holding the auction 1/6th of the bid amount and that if he committed any default in doing so, the excise licences in question were to be resold and that he would be liable to pay any loss suffered by the State Government on such re-sale. [733 E]

3. Condition No. 5 in the sale proclamation which provides that if the price at the re-sale be less than that at the first sale, the difference will be recovered from the defaulter negatives the contention of the respondent that in the absence of the approval of the Excise Commissioner, he would not be liable to make good the loss. [73 H, F]

4. There was no disapproval of the Excise Commissioner of the bids offered by the respondent. On the other hand, the excise authorities requested the respondent to perform his part of the obligation under the sale proclamation. [734 E]

5. In Union of India & Ors. v. M/s. Bhimsen Walaiti

Ram, [1970] 2 S.C.R. 594, this Court proceeded on the basis that the liability of the bidder could arise only as a consequence of the breach of a completed contract. No attention appears to have been given in the case to the question whether the act of the offering of the highest bid which was accepted by the officer holding the auction and which resulted in the closure of the auction could by itself become a source of liability when the highest bidder failed to comply with the conditions stipulated in the sale proclamation. [734 F]

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6. In section 39, the words "all excise revenue, including all amounts due to the Government by any person on account of any contract relating to the excise revenue, may be recovered from the persons primarily liable to pay the same" by him on account of any contract relating to the excise revenue. The words "on account relating to the excise revenue" include within their scope not merely any compensation which a person may be liable to pay on account of the breach of contract committed by him after the contract is completed but also any other amount that may become due on account of a contract which would come into existence if all the formalities are completed, having regard to the scheme and manner in which the excise privilege is disposed of by the excise authorities. [735 E-F]

7. A reading of clauses 1 and 2 of Rule 357 of the Excise Manula show that the officer holding the sale was empowered to accept the bid and that his acceptance was only subject to the sanction of the Excise Commissioner. They mean that the power which had been reserved to the Excise Commissioner, only enabled him to set aside the acceptance already made by the officer conducting the sale. If it was not set aside by him, the acceptance of the officer conducting the sale would be effective. [737 B]

In the instant case the Excise Commissioner had not refused to sanction the acceptance of the highest bids offered by the respondent. The liability of the highest bidder to deposit a sum equivalent to 1/6th of the bid offered by him arises as a consequence of his offering the highest bid with the knowledge of the conditions of the auction, immediately on the conclusion of the sale for the day in his favour and if he does not make such deposit, the officer holding the same is entitled to put the excise privilege for re-sale either immediately or on a subsequent day with liberty to recover from the defaulter any loss that may be occasioned to the Government by such re-sale. [737 C-D]

8. The completion of the contract or the execution of a contract in accordance with Article 299 of the Constitution arises only after the highest bidder has deposited 1/6th of the bid offered by him on the conclusion of the sale which is a condition precedent for the completion of the contract or for execution of a formal document in accordance with Article 299 of the Constitution. It is not, therefore, correct to determine the liability of a defaulting bidder on the basis of a completed contract or a formal document to be executed under Article 299. [737 E-F]

9. In the interest of public revenue, excise privileges, privileges of cutting and removing timber from Government forests, occupancy right over Government lands and building sites etc. are disposed of in public auction by the Central Government, State Governments, statutory boards and local authorities and in almost every such auction, there is invariably a condition that the acceptance

of the highest bid at the auction is subject to the sanction of some superior officer or statutory or the appropriate Government. If the liability of such a bidder is to be funded only on the basis of a completed contract then in then in the case of auctions held by or on behalf of the Central or State Governments, no liability can arise even if such sanction is accorded, unless it is followed up by a formal document executed under Article 299 of the Constitution which alone amounts to a completed contract where Government is a party. [737 H-738 A, 738 D]

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In the instant case the respondent by his own conduct in not depositing 1/6th A of the bids offered by him made it impossible for the excise authorities to conclude the contract. 'the question may have been different if the respondent had done all that he had to do under the condition of the auction but the excise authorities had not intimated him that he could exploit the excise privileges in accordance with law. [744 E]

10. The liability of the respondent arises under the statute and it also arises as the result of a civil wrong or a tort committed by him, in offering the highest bid with open eyes and in not fulfilling the obligations arising therefrom. The latter source of liability may appear to be novel but if justice requires, the Court should not hesitate to impose it on the person who has committed the wrong to secure justice for the innocent injured party. [745 C]

A. Damodaran & Anr. v. State of Kerala & ors. [1976] 3 S.C.R. 780; Candlar v. Crane Christmas & Co. [1951] 2 K.B. 164 at p. 178 referred to.

K. P. Chowdhary v. State of Madhya Pradesh & Ors. [1966] 3 S.C.R. 919 distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 173 of 1969.

From the Judgment and order dated 2-4-1968 of the Allahabad High Court in First Appeal No. 5/62.

G. N. Dikshit and O. P. Rana for the Appellant.

H. K. Puri and Miss Madhu Mulchandani and V. K. Bahal for the Respondent.

The Judgment of A. C. Gupta and V. D. Tulzapurkar, JJ. was delivered by Gupta, J. E. S. Venkataramish, J. gave a dissenting opinion.

GUPTA, J.-This appeal by certificate is from a judgment of the Allahabad High Court, Lucknow Bench, dismissing the suit instituted by the appellant, State of Uttar Pradesh, for recovery of a sum of Rs. 20,100 from the respondent. The facts stated in the plaint on which the claim is based are these. The annual 'excise auctions' for the year 1951-52 for Faizabad district were held at Faizabad on February 22, 1951 "under the Excise Rules." The respondent offered the highest bid of Rs. 73,000 and Rs. 48,000 respectively as fees for two groups of country liquor shops but as he did not deposit 1/6th of the aforesaid sum on conclusion of the sales as required under the Excise Rules, the two groups of shops had to be sold again on March 30, 1951. The resale fetched respectively Rs. 65,700 and Rs. 35,200 for there two groups of country liquor shops. According to the State of Uttar Pradesh it suffered-a total loss of Rs. 20,100 which is the difference between what the respondent had offered and the sum for which the shops were later sold, and the respondent was liable to compensate 9-91SCI/80

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the loss. The suit was decreed by the trial court. On appeal the High Court dismissed the suit on the view that there was no valid contract which could be enforced by the plaintiff as the requirements of Article 299(1) of the Constitution had not been complied with. We are also of the view that the suit must be dismissed but for a slightly different reason; in our opinion there was no concluded contract between the parties, nor was there any statutory rule permitting recovery the deficiency on re-sale from, the respondent.

The sale proclamation which is said to have contained the conditions of sale was not produced. The Assistant Excise Commissioner (P.W. 1) in his testimony referred to rule 357 of the Excise Manual. The relevant part of the rule is as follows:

"The following conditions shall apply to all sales under the auction system, and will be inserted at the foot of the sale proclamation if such proclamation is issued by the Excise Commissioner:

- (1) The officer conducting the sales is not bound to accept the highest or any bid. In any case when the highest or any bid is not proposed to be accepted, the next highest bid should also be reported to the Excise Commissioner.
- (2) The final acceptance of any bid is subject to the sanction of the Excise Commissioner.
- (3) Every person bidding will be held to his bid, whether it be the highest or not.
- (4)
- (5) A sum equal to one-sixth of the annual fees shall be payable immediately on the conclusion of the sales for the day, and the balance by such instalments as are specified in the licence to be granted. If default be made in the payment of the advance instalment, the shop on farm will be resold, and if the price finally bid at the re-sale be less than that bid at the first sale, the difference will be recovered from the defaulter." I

Section 77 of the U.P. Excise Act, 1910 states:

"All rules made and notifications issued under the Act shall be published in the official gazette and shall have effect as if enacted in this Act from the date of such publication or from such other date as may be specified in that behalf."

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The High Court found that the conditions mentioned in rule 357 had never been published as required and they did not, therefore, have the force of law. The High Court held that Part II of the Excise Manual which includes rule 357 contained provisions which were "commonly referred to as rules" but were not really statutory rules and that it was "a sort of book of guidance". Before us it was claimed on behalf of the appellant that some of the conditions contained in rule 357 had been published in the official gazette, but the learned counsel for the appellant, State of Uttar Pradesh, was not in a position to dispute that at least the last part of the 5th condition providing that in case of default, if the price fetched at the re-sale was less than the bid at the first sale the difference would be recovered from the defaulter, had not been published. That being so it must be held that there was no law under which the respondent could be asked to make amends for the shortfall.

The question that remains to be answered is, even if there was no statutory provision, whether there was a concluded contract between the appellant and the respondent under which the respondent was liable to pay Rs. 20,100 which represents the difference between the highest bid at the first sale and the price fetched at the re-sale. The sale proclamation containing the conditions of sale has not been produced. Assuming that the different clauses of rule 357 barring the last part of the 5th clause embody the conditions of sale, it is clear from the 2nd clause that in the absence of the final sanction of the Excise Commissioner, the bid cannot be said to have been finally accepted. It is not claimed by the appellant that the bid offered by the respondent was sanctioned by the Excise Commissioner. There was thus no concluded contract between the parties to make the respondent liable for the alleged loss. The point appears to have been decided by this Court in *Union of India and another v. M/s. Bhimsen Walaiti Ram(1)*. This was a case of an auction for the sale of licence for a country liquor shop in Delhi for the year 1949-50. Clause 33 of the conditions of sale provided inter alia : "All final bids will be made subject to the confirmation by the Chief Commissioning who may reject any bid without assigning any reasons". This condition is similar to clause 2 of rule 357 in the instant case. Ramaswami J. speaking for the court in Bhimsen's case observed:

"It is, therefore, clear that the contract of sale was not complete till the bid was confirmed by the Chief Commissioner and till such confirmation the person whose bid has been provisionally accepted is entitled to withdraw his bid.

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When the bid is so withdrawn before the confirmation of the Chief Commissioner the bidder will not be liable for damages on account of any breach of contract or for the shortfall on the resale. An acceptance of an offer may be either absolute or conditional. If the acceptance is conditional the offer can be withdrawn at any moment until absolute acceptance has taken place."

The appeal is dismissed but in the circumstances of the case we make no order as to costs.

VENKATARAMIAH, J. I have had the advantage of perusing the judgment prepared by my learned brother, Gupta, J. I regret my inability to agree with the conclusion reached by him.

Since some of the facts which are necessary for the purpose of this case have not been set out in the judgment of my learned brother, I have to mention them at this stage. The excise auctions for the year 1951-52 were held on February 22, 1951 under the provisions of the U.P. Excise Act, 1910 (hereinafter referred to as 'the Act'). The respondent offered the highest bid of Rs. 73,000 for the chowk group shops and of Rs. 48,000 for Rakabganj group shops. At that auction, the shops in question were knocked down for the above-mentioned amounts in favour of the respondent who affixed his signatures to the respective bid sheets in token of his acceptance and also in the register of Settlement Record. The respondent, however, did not deposit 1/6th of the above mentioned amounts on the aforesaid date but took time for its deposit later on. In spite of repeated reminders, the respondent did not pay the advance deposits in both the cases. The excise authorities resold the excise privileges in question and on such resale,

the chowk group shops fetched Rs. 65,700 and the Rakabganj group shops fetched Rs. 35,200. Consequently, the State Government the appellant herein suffered a loss of Rs. 20,100. As the respondent did not pay the said amount of Rs. 20,100, a suit was instituted by the appellant against him for recovery thereof before the Civil Judge, Faizabad. In the course of his written statement, the respondent, after a general denial of the allegations in the plaint, raised among others the following additional pleas:-

- "1. There was no completed contract between the plaintiff and defendant. Consequently there had been no breach and no cause of action for the suit.
2. The entire auction proceedings having been against the rules and instructions of the Government were illegal, void and ineffective.
3. The plaintiff himself having accepted the prayer of the defendant to be relieved from the bid made by him and subsequently re-auctioning the shops or the groups of shops to others was now estopped from fixing any civil liability on the defendant."

Four contentions were urged on behalf of the respondent in the 1 trial court viz. (1) since the offers of the respondent had not been accepted, no valid contracts had come into existence; (2) as the respondent had withdrawn the offers before their acceptance, there could be no enforceable contracts in existence; (3) the contracts, if any, were unenforceable as then did not satisfy the conditions mentioned in Article 299 of the Constitution and (4) that even though the respondent had committed the breach of the agreements he was not liable to pay any damages as the excise authorities had not taken any steps to mitigate the loss by granting the excise licences in question to the second highest bidder in each case. The trial court after rejecting the contentions of the respondent made a decree for Rs. 20,100 with costs. Aggrieved by the decree of the trial court, the respondent filed an appeal before the High Court of Allahabad. In the course of the appeal, the High Court formulated four points for its consideration as can be seen from the following extract from its judgment:-

"The points now requiring consideration are (1) whether there came into existence a contract, (2) whether by reason of non-deposit of one-sixth of the bid money there was a breach of the contract on the part of the appellant; (3) whether this breach entitled the respondent to re-auction the shops and to recover the loss on re-auction from the appellant; and (4) whether the deficit of Rs. 20,100 represents the legal loss recoverable from the appellant."

Before the High Court in so far as the first point was concerned, the respondent's contention was three fold-(i) since the bids were not accompanied by 1/6th of the bid amount, there were no completed proposals and, therefore, there could be no acceptance thereof so as to bring into existence a contract; (ii) as the Excise Commissioner had not accorded his approval, there was no acceptance of the proposal and (iii) as no agreements in writing had been executed by the person competent to do so under Article 299 of the Constitution, no contracts had come into existence. The High Court rejected the first two contentions by holding that the failure to deposit 1/6th of the bid amount did not make the proposals incomplete and that the absence of the

approval or the Excise Commissioner which was in the nature of

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power vested in him to reverse the acceptance of a bid by the officer holding the auction did not in any way exonerate the respondent from the liability if he was otherwise liable. It, however, held that since the requirements of Article 299 of the Constitution had not been fulfilled, the respondent was not liable to pay any damages on the ground that he had committed a breach of contract.

On the second point which was formulated by the High Court for its consideration, it observed as follows:-

"Coming to the second point of controversy, to wit, whether by reasons of non-deposit of one-sixth of the bid money there was a breach of the contract on the part of the appellant, the answer must be in the affirmative for the simple reason that the deposit of the money was one of the conditions of the contract. This condition, as has been shown above, follows both from the statutory provision and the admission of the appellant himself that there was this deposit to be made."

On the third point viz. whether the breach committed by the respondent in each of the two cases entitled the State Government to re-auction the shops and to recover the loss on such re-auction from him the High Court held that the right to re-auction had not been proved to be founded on either any statutory rule or on any express terms of the contract but the said right was the 'natural outcome of the breach of an accepted term of contract', when the respondent failed to deposit the amounts in terms of the agreement. It further held that when the respondent had failed to deposit the amounts in terms of the agreement on which the bids were given and accepted the State Government was under an obligation for minimising the loss arising from the breach of the contract to re-auction the shops and in case of any loss arising therefrom, to recover the same from the respondent.

On the last point of controversy viz. the quantum of damages, the High Court held that the extent of loss suffered by the State Government on account of breach on the part of the respondent was in the order of Rs. 20,100. The High Court, however, allowed the appeal and set aside the decree of the trial court on the ground that there were no valid contracts which satisfied the requirements of Article 299 of the Constitution. Dissatisfied with the judgment of the High Court, the State Government has come up in appeal to this Court.

In the instant case, the only question which arises for consideration is whether the respondent is not liable to pay the damage even though

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no contract in writing had been executed in accordance with Article A 299 of the Constitution. It was not the case of the respondent that the excise authorities had no right to re-sell the excise licences. after he had committed default in depositing 1/6th of the bid amounts. His principal pleas were (i) that there were no completed contracts between the State Government and himself and consequently there could be no breach of contract; (ii) that the entire auction proceedings, having been against the rules and instructions of the Government were illegal and void and (iii) that the State Government, having accepted his prayer to be relieved from the bids made by him and subsequently re-auctioning the groups of shops to others was estopped from fixing any civil

liability on him. It is seen from what is stated above that no attempt was made; by the respondent to make good his plea regarding the legality of the auction proceedings and the plea of estoppel. The only plea raised in the written statement which ultimately appealed to the High Court was that the respondent was not liable to pay any damages as there were no completed contracts which satisfied the requirements of Article 299 of the Constitution. The other plea that the offers made by the respondent had not been approved by the Excise Commissioner was rejected by the High Court by observing that the power of the Excise Commissioner to accord his approval was only a power which had been vested in him to set aside the acceptance of the bid by the officer holding the auction. Having regard to the pleadings and the evidence in this case, it has to be assumed that the respondent knew that he was under an obligation to deposit with the officer holding the auction 1/6th of the bid amounts and that if he committed any default in doing so, the excise licences in question were to be resold and that he would be liable to pay any loss suffered by the State Government on such resale. The contention that in the absence of the approval of the Excise Commissioner, he would not be liable to make good the loss has to be rejected in view of condition No. 5 which according to the testimony of the Assistant Excise Commissioner (P.W. 1), which cannot be rejected, had been mentioned in the sale proclamation, which read thus:

"5. A sum equal to one-sixth of the annual fees shall be payable immediately on the conclusion of the sale for the day, and the balance by such instalments as are specified in the licence to be granted. If default be made in the payment of the advance instalment, the shop on farm will be resold, and if the price finally bid at the resale be less than that bid at the first sale, the difference will be recovered from the defaulter."

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It is no doubt true that in Union of India & ors. v. M/s. Bhimsen Walaiti Ram, (') this Court held that the contract of sale was not complete till the bid was confirmed by the Chief Commissioner and till such confirmation the person whose bid had been provisionally accepted was entitled to withdraw his bid and that when the bid was so withdrawn before the confirmation of the Chief Commissioner, the bidder was not liable for damages on account of any breach of contract or for the shortfall on the resale. Those observations were made by this Court in that case in the context of the disapproval of the bid by the Chief Commissioner and this is borne out by the following observations of this Court at page 598:-

"It is not disputed that the Chief Commissioner had disapproved the bid offered by the respondent. If the Chief Commissioner had granted sanction under cl. 33 of Ex. D-23 the auction sale in favour of the respondent would have been a completed transaction and he would have been liable for any shortfall on the resale. As the essential pre-requisites of a completed sale are missing in this case there is no liability imposed on the respondent for payment of the deficiency in the price."

In the case before us there was no disapproval of the Excise Commissioner of the bids offered by the respondent. On the other hand, the excise authorities requested the respondent to perform his part of the obligation under the sale proclamation. It is also further seen that this Court

in the case of M/s. Bhimsen Walaiti Ram (supra) proceeded on the basis that the liability of the bidder could arise only as a consequence of the breach of a completed contract. No attention appears to have been given in that case to the question whether the act of the offering of the highest bid which was accepted by the officer holding the auction and which resulted in the closure of the auction could by itself become a source of liability when the highest bidder failed to comply with the conditions stipulated in the sale proclamation.

It is necessary to refer briefly to some of the relevant provisions of law governing the disposal of the excise licence by auction system which were in force during the relevant time. Section 21 of the Act prohibits sale of any intoxicant without a licence by the concerned excise authority. Section 24 of the Act authorises the grant of exclusive privilege of selling by wholesale or by retail any intoxicant within any specified local area. The right to sell any excisable article under a licence issued by the excise authority can be acquired only by paying
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such fees or amount which may be equivalent to the highest bid offered at an auction when an auction is held. Section 39 of the Act which deals with the recovery of excise revenue reads as follows:-

"39. Recovery of excise revenue-All excise revenue, including all amounts due to the Government by any person on account of any contract relating to the excise revenue, may be recovered from the person primarily liable to pay the same, or from his surety (if any) as an arrears of land revenue or in the manner provided for the recovery of public demands by any law for the time being in force. In case of default made by a holder of a licence the Collector may take the grant for which the licence has been given under management at the risk of the defaulter, or may declare the grant forfeited and resell it at the risk and loss of the defaulter. When a grant is under management under this section, the Collector may recover as excise revenue any moneys due to the defaulter by any lessee or assignee:

Provided that no licence for an exclusive privilege granted under section 24 shall be forfeited or re-sold without the sanction of the authority granting the licence."

In the above section, the words "all excise revenue, including all amounts due to the Government by any person on account of any contract relating to the excise revenue, may be recovered from the person primarily liable to pay the same" show that the Government is entitled to recover from a person any amount due by him on account of any contract relating to the excise revenue. The words "on account of any contract relating to the excise revenue" include within their scope not merely any compensation which a person may be liable to pay on account of the breach of a contract committed by him after the contract is completed but also any other amount that may become due on account of a contract which would come into existence if all formalities are completed having regard to the scheme and manner in which the excise privilege is disposed of by the excise authorities. The relevant rules governing the conduct of excise sales are found in a notification bearing No. B. O. No. 423/V-284-B dated September 26, 1910. The rules require the publication of a sale proclamation announcing the dates of sale and the place where it will be held. Before the

sales for the day commence, the general conditions governing the sale which are set out in paragraph 373 of the U.P. Excise Manual (Vol. I) shall be read out and explained to all present so that the competitors may clearly understand the conditions on which they bid. The general conditions governing retail vend and the special

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conditions governing each class of licence shall also be read out in public before the sales to which they apply. Information should be freely given on all matters affecting the value of licence about to be sold. The officer conducting the sales shall record the name of each person making a bid and the amount of bid. Signature of the highest bidder and the next two lower bidders shall also be taken on the bid sheet, whether such persons have been accepted as auction-purchasers or not. At the time of the sale the person accepted as the auction purchaser shall be required to sign his name or affix his mark against the relevant entry of the licence in the Record G-14, it being explained at the time that the deposit paid in advance will be returned in the event of the licence being subsequently refused. The final bid accepted shall invariably be recorded with his own hand by the officer conducting the sales. The treasurer of the district, or one of his recognised assistants, shall be required to attend the sales to receive the advance fees paid by bidders provisionally accepted. The amount that has to be paid as advance deposit is a sum equivalent to 1/6th of the annual fees which shall be payable immediately on the conclusion of the sales. for the day, and the balance by such instalments as are specified in the licence to be granted. If default be made in the payment of the advance instalments, the shop or farm will be resold. If the price finally offered at the resale be less than that at the first sale, the difference will be recovered from the defaulter through a civil suit. If any person whose bid has been accepted at auction fails to make the advance deposit or if he withdraws from his bid, the excise authority may sell the contract immediately or on any subsequent date fixed by him.

It is not the case of the respondent in the instant case that he was not aware of the above conditions, which had been set out in the sale proclamation and also which must have been read out at the commencement of the sale, as required by the rules for the information of the intending purchasers. The question for consideration is whether having offered the highest bid, it was open to the respondent to avoid the liability arising from his act of offering the highest bid merely because the Excise Commissioner who had the power to refuse to sanction the sale had not sanctioned it. It is no doubt true that one of the conditions of the auction was that the acceptance of any bid by the officer conducting the sale was subject to the sanction of the Excise Commissioner. It, however, did not mean that the acceptance of the bid would be complete only after the sanction was accorded by the Excise Commissioner because of the other conditions which read as under:-

"1. The officer conducting the sales is not bound to accept the highest or any bid.

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2. The final acceptance of any bid is subject to the sanction of the Excise Commissioner."

A reading of the two clauses referred to above shows that the officer holding the sale was empowered to accept the bid and that his acceptance was only subject to the sanction of the Excise Commissioner. They meant that the

power which had been reserved to the Excise Commissioner only enabled him to set aside the acceptance already made by the officer conducting the sale. If it was not so set aside by him, the acceptance of the officer conducting the sale would be effective. As mentioned earlier, in this case, the Excise Commissioner had not refused to sanction the acceptance of the highest bids offered by the respondent. The liability of the highest bidder to deposit a sum equivalent to 1/6th of the bid offered by him arises as a consequence of his offering the highest bid with the knowledge of the conditions referred to above immediately on the conclusion of the sale for the day in his favour and if he does not make such deposit, the officer holding the sale is entitled to put up the excise privilege for resale either immediately or on a subsequent day with liberty to recover from the defaulter any loss that may be occasioned to the Government on such resale. In a case like this, no question of waiting till the contract either being completed on a formal document coming into existence in accordance with Article 299 of the Constitution can arise. The completion of the contract or the execution of a contract in accordance with Article 299 of the Constitution arises only after the highest bidder has deposited 1/6th of the bid offered by him on the conclusion of the sale which is a condition precedent for the completion of the contract or for execution of a formal document in accordance with Article 29 of the Constitution. It is not, therefore, correct to determine the liability of a defaulting bidder on the basis of a completed contract or a formal document to be executed under Article 299. If the contention urged on behalf of the respondent is accepted, it will make every public auction held by a Government a mockery. A man without a pie in his pocket may offer the highest bid at an auction thus scaring away other bona fide bidders who have assembled at the auction to offer their bids and then claim that he is not liable to pay any damages only because a completed contract or an agreement in writing in accordance with Article 299 of the Constitution has not come into existence. We should remember that, in the interest of public revenue excise privileges, privileges of cutting and removing timber from Government forests, occupancy rights over Government lands and building sites etc. are disposed of in public auction by the Central Government, State Governments, statutory boards and local authorities and in almost every such auction, there is invariably a condition that the acceptance

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of the highest bid at the auction is subject to the sanction of some superior officer or a statutory authority or the appropriate Government. If the contention urged on behalf of the respondent is accepted then a person who offers the highest bid in any such auction can always absolve himself of all his liability flowing from his act of offering the highest bid by writing a letter immediately after the conclusion of sale to the concerned authority expressing his intention to withdraw from the bid or by resiling from it in any other manner. The result will be that on the one hand the other bona fide bidders who have come to offer the bids would not be entitled to claim the privilege or property that is put up for sale and on the other the defaulting bidder would also be not liable to carry out his obligation flowing from his act of offering the highest bid. If the liability of such a bidder is to be founded only on the basis of a completed contract then in the case of auctions held by or on behalf of the Central or State Governments, no liability can arise even if such sanction is accorded,

unless it is followed up by a formal document executed under Article 299 of the Constitution-which alone amounts to a completed contract where Government is a party. Judged from the foregoing, I am of the view that the acceptance of the conclusion reached by my learned brother would lead to enormous public prejudice and instead of advancing the cause of justice would hamper it. This case is an illustration of what prejudice is likely to be caused to the public revenue when default is committed by the highest bidder. The documents produced before the Court in the present case show that the second highest bid in the case of chowk group shops offered by some other bidder was Rs. 72,500 and in the case of Rakabganj group shops was Rs. 47,000. If the respondent had not offered his bids Government could have realised Rs. 1,19,50 from both the groups i.e. Only Rs. 1,500 less than what the respondent offered. By the intervention of the respondent's bids and the default committed by him, the Government could realise on resale only Rs. 1,00,900 thus resulting in a loss of Rs. 20,100. Can it be said that in such a case where legal injury is sustained, there is no remedy available to the State Government ?

In a somewhat similar but not identical situation, this Court in *A. Damodaran & Anr. v. State of Kerala* Ors was called upon to decide whether the highest bidder at an excise auction was liable to be proceeded with for recovery of excise dues in the absence of an agreement executed in accordance with Article 299. In that case, the appellants offered the highest bid at the auction sales held in respect of some toddy shops. The conditions of the sales, notified in pursu-

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ance of the statutory provisions were: (1) that it was incumbent upon the bidder to pay immediately 10% of the amount due, (2) that the successful bidder had to deposit 30% of the amount payable on demand by the Assistant Commissioner and to execute agreements before getting the necessary licences and (3) that if the contract could not be executed, the whole amount was to be forfeited and the shop itself was to be resold. The appellants deposited the necessary amount on demand and were allowed to start business even before agreements were executed or licences were issued. But the appellants failed to pay the balance due to the State. The amounts were sought to be recovered under section 28 of the Kerala Abkari Act (Act No. 1 of 1967) which was more or less similar to section 39 of the Act. The High Court of Kerala held that the amounts were recoverable from the appellants. In the appeal before this Court, the appellants contended that as no agreement was executed between the appellants and the Government in the manner prescribed by Article 299 of the Constitution, they had not become the 'grantees' of any privilege and hence were not liable to pay the amounts sought to be recovered. Dismissing the appeal, the Court held that the absence of an agreement executed in accordance with the provisions of Article 299 of the Constitution could not be a bar for recovering the excise dues in view of section 28 of the Kerala Act. The Court held that the liability was one which arose under the statute and therefore was enforceable. In taking that view, this Court observed at pages 782-783 thus:

"The appellants submit that they had not become 'grantee' of any privilege without the execution of contracts complying with the requirements of Article 299 of the Constitution. The learned Judge of the Kerala High Court relied on *Madhavan v. Assistant Excise Commissioner, Palghat* (I.L.R. (1969) 2 Kerala 71),

affirmed by a Division Bench in Damodaran v. State of Kerala (1969) Kerala Law Times 587. It appears that, although the Division Bench did 'not specifically consider whether a bidder at an auction of the kind before us was the "grantee" of a privilege within the meaning of section 26 of the Act, yet, it held that the liability to satisfy the dues arising out of a bid was enforceable under section 28 of the Act quite apart from any contractual liability. Reference was also made, in this connection, to the decision of this Court in Union of India v. A. L. Ralia Ram (A.I.R. 1963 S.C. 1685), for contending that the absence of formal contract is not fatal in all cases so as to make the whole transaction null and void ab initio.

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Statutory duties and liabilities may be enforced in accordance with statutory provisions. Equitable obligation may also arise and been forced by decrees of Courts quite apart from the requirements of article 299 of the Constitution. Mulamchand v. State of Madhya Pradesh (1968) 2 S.C.R. 214 affords an instance where on a claim for compensation or restitution under section 70 of the Contract Act, this Court relied upon the principle stated in Nelson v. Harbolt (1948) 1 K.B. 30 as follows at p. 222:-

"It is no longer appropriate to draw a distinction between law and equity. Principles have not to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the Court orders restitution if the justice of the case so requires."

In the case before us, we are concerned with the legality of proceedings under section 28 quoted above of the Act. It is evident that these proceedings can be taken in respect of "all amounts due to the Government by any grantee of a privilege or by any farmer under this Act or by any person on account of any contract relating to the Abkari Revenue.". It is clear that dues may also be "recovered from the person primarily liable to pay the same or from his surety (if any)". It is not a condition precedent to recovery of an amount due and recoverable that it should be due under a formally drawn up and executed contract."

In reaching the above conclusion, this Court approved the observation made by Mathew, J. in Madhavan v. Assistant Excise Commissioner, Palghat which ran as follows:-

"It was contended on behalf of the petitioners in some of these cases that no agreements were executed by them, and therefore, the Government are not entitled to recover any amount by way of rental. Reliance was placed upon the decisions of the Supreme Court in H. P. Chowdhry v. State of M.P. (AIR 1967 SC 203) and Mulamchand v. State of M.P. (1969(II) S.C.W.R. 397), for the proposition that unless there is an agreement executed in accordance

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with the provisions of Article 299 of the Constitution, the petitioners in the case where no agreements have been executed, would not be liable to pay rental. The argument was that the liability to pay rental arises only out of the agreement, and if there is no

agreement, then there is no liability to be enforced As I have indicated the liability to pay the rental arises not only by virtue of the agreement but also by the provisions of section 28 of the Act. The decision of the Supreme Court in H. P. Chowdhry v. State of M.P. would make it clear that if there are provisions in the Act, the liability to pay the rental can be enforced. I think that even if no agreement has been executed, there was the liability under section 28 of the Act, and that the liability would be enforced under the provisions of the Revenue Recovery Act. (See Sections 6 and 62 of the T.C. Act) ".

Chandrashekhar, J. (as he then was) has also taken more or less the same view in-State of Mysore v. Dasappa Naidu. In that case, the plaintiff who was a licensee for sale of ganja had executed a counterpart agreement as required by section 25 of the Mysore Excise Act but no formal deed was executed by both the plaintiff and the State Government as required by Article 299 of the Constitution. When the period of contract expired, rental for four months was in arrears. When the Government sought to bring the licensee's properties to sale for recovery of the arrears, the plaintiff executed a mortgage in favour of the State to secure payment of the arrears undertaking to pay the arrears in monthly instalments. As he defaulted in payment of the instalments, the Assistant Commissioner issued a sale proclamation for sale of the mortgaged properties. In the suit he questioned the said sale proceeding on the ground that the counterpart of the agreement and the mortgage deed executed by him were void for nonfulfillment of the requirements of Article', - 299 of the Constitution. The learned Judge held that the absence of a document conforming to Article 299 was not a bar in view of the statutory provisions contained in the Mysore Excise Act.

The Rajanagaram Village Co-operative Society by its Secretary, . Parthasarathi Pillai v. P. Veerasami Mudaly was a reverse case and the facts involved in it were these: The defendant Co-operative Society put up a property belonging to it for sale at a public auction. H

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The auction was held by a sale officer. One of the conditions of the auction sale was that the sale would be knocked down in favour of the highest bidder subject to the approval of the defendant Co operative Society and the Chittoor District Bank. The plaintiff was the highest bidder at the auction and the sale was knocked down in his favour by the sale officer. He-deposited on the date of the sale with the sale officer the amount which he had to deposit under the conditions of the sale and also deposited the balance with t the defendant within the stipulated period. The Chittoor District Bank took up the matter for consideration at its meeting held on a date subsequent to the date of the sale and approved the sale. This resolution was, however, not communicated to the plaintiff and no sale deed was executed in favour of him. The plaintiff by his notice called upon the defendant to execute a conveyance in his favour. There upon the Bank cancelled its previous resolution and directed a re-sale of the property. The plaintiff thereafter instituted a suit for enforcing the sale on the basis that there was a concluded contract in his favour which was denied by the defendant in the written statement. The main contention urged on behalf of the defendant was that the contract did not become final and complete as the approval of the Chittoor District Bank was not communicated to the plaintiff. Under section 4 of the

Contract Act, it was claimed, that even the approval should have been communicated like acceptance as according to the contention of the defendant that constituted a final acceptance of the contract. The trial court accepted the contention of the defendant and dismissed the suit. The first appellate court reversed the decision of the trial court and granted a decree for specific performance of the contract in favour of the plaintiff. While affirming the Judgment of the first appellate court, the High Court observed in the above decision as follows:-

"The defendant appointed a sale officer who, under the terms of E. D. I was authorised to knock down in favour ' of the highest bidder the property subject of course to the approval of Mahasabha and the Chittoor District Central Bank. No point was raised in the courts below, and indeed it could not be raised before me, that this sale officer had no authority to accept any bid on behalf of the defendant. Further there was also no plea anywhere that there was no approval of the sale by the Mahasabha, that is the defendant. The defendant should have known if there was no such approval and should have put that matter in the forefront of the case if really there is any substance in that contention

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in the second appeal. The matter, therefore, for consideration is whether the sale officer, in knocking down the bid subject to the approval of the Bank, had or had not accepted the offer of the plaintiff subject to the condition of approval. Ever since the well-known decision of *payne v. Cave*, (1789) 3 T.R. 148: 100 E.R. 502, it has been established that the position of an auctioneer is that of an agent of the vendor and that until the bid is knocked down, there is no concluded contract in favour of the bidder and the bidder was at liberty to withdraw his offer before it was accepted. To a similar effect is also the decision *Cook v. Oxley*, (1790) 3 T.R. 653: 100 E.R. 785. If there is no further condition of an approval or confirmation, ordinarily if the bid is knocked down, the acceptance is communicated by the acceptance of the bid in the presence of the bidder and no further communication would be necessary. If, however, the acceptance was conditional, the condition being that it is subject to the approval or confirmation by some other person, what is the position? The acceptance in such circumstances, in my opinion, is conditional acceptance and that has to be communicated. Nobody suggests that in order to make the contract enforceable, it is not necessary to have the approval of the person indicated in the conditions of the auction sale. The question is whether the approval also in such circumstances, should be communicated to the bidder in order to conclude the contract. In my opinion, the acceptance contemplated may be absolute or may be conditional and when once that conditional acceptance is communicated, there is no need or necessity for a further communication of the fulfillment of the condition when the acceptance is a conditional acceptance. The communication of the acceptance twice is not needed".

The correctness of this decision is doubted elsewhere. It is not necessary in this case to decide whether the view expressed by the High Court of Madras in the above case is correct or not for the situation in the instant case is anterior to the situation which obtained in the said case.

The officer who held the same in the present case had the power to accept the bids though it was subject to sanction by the Excise Commissioner. The respondent who offered the bids after conclusion of the sale failed to make the initial deposit and thereby drove the Department to hold the resale. It was high conduct which ultimately resulted in the loss suffered by the Department. 10-91SCI/80

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The decision of this Court in *K. P. Chowdhary v. State of Madhya Pradesh & Ors* is not of much assistance to the respondent in this case, since in that case the officer who held the sale was not competent to accept the bids of the appellant therein as the bids offered were higher than what he could accept. The appellant therein resiled from the offer made by him by raising a dispute as to the marking of the trees even before the Chief Conservator of Forests who was competent to accept the bids could accept them. This Court no doubt upheld the plea of the appellant therein as there was no acceptance of the bid by the competent officer. This case is one falling in the category of cases where the sale officer has no power to accept the bid and not one falling under the category of cases involving a conditional acceptance as observed in the case of the *Rajanagaram Village Co-operative Society* by its Secretary, *Parthasarathi Pillai* (supra). It is not the case of the respondent in this appeal that the officer who held the excise auction was not competent to accept the bids. It is further seen that the question whether the appellant in the above case was liable in any other manner also was not considered in that decision. Hence no reliance can be placed on the above decision.

The respondent by his own conduct in not depositing the 1/6th of the bids offered by him made it impassible, for the excise authorities to conclude the contract. The question may have been different if the respondent had done all that he had to do under the conditions of the auction but the excise authorities had not intimated him that he could exploit the excise privileges in accordance with law. The documents produced before the Court show that on February 24, 1951, the Deputy Commissioner, Faizabad wrote a letter (Exh. S) 11' calling upon the respondent to make the initial deposit which he had to make at the conclusion of the sale at the fall of the hammer on the date of the sale within three days of the receipt of that letter and intimating that in the absence of compliance with the said demand, the shops would be re-auctioned and the amount of deficiency resulting on such re-auction would be recovered from him. That letter was received by the respondent on March 8, 1951. As the respondent did not comply with the demand, the excise authority concerned decided to conduct a resale of the excise privileges on March 21, 1951, and also to prosecute the respondent for an offence punishable under section 185 of the Indian Penal Code. Thereafter the respondent gave a representation (Exh. 7) on March 30, 1951 stating that I any action other than prosecuting him may be taken. He stated in that representation that his sole object in offering the bids was to

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help the Government and to help himself but when he calculated whether he would make any profit he felt that he would not do so. According to the said representation, that was the reason for not depositing 1/6th of the bid amount at the fall of the hammer. He, however, did not question the authority of the excise authorities to put up the excise privileges for resale and to claim the loss occasioned by

such resale from him. In these circumstances I am of the view that it is not possible to hold that the respondent was not in law liable for the claim made by the State Government even though no contracts were formally entered into between the respondent and the State Government. The liability of the respondent in the instant case arises under the statute and it also arises as the result of a civil wrong or a tort committed by him, in offering the highest bid with open eyes and in not fulfilling the obligations arising therefrom. The latter source of liability in this case may appear to be novel but if justice requires, the Court should not hesitate to impose it on the person who has committed the wrong and secure justice for the innocent injured party. The following observation of Denning L.J. (as he then was) in *Candler v. Crane, Christmas & Co.*(1) at page 178, though in minority, are apposite:-

"This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v. White* (1703) 2 Ld. Raym, 938, *Pasley v. Freeman* (1789) 3 Term Rep. 51 and *Donoghue v. Stevenson* (1932) A.C. 562, you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side, there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed."

Considering the facts and circumstances of the instant case, I am of the view that the respondent should be made liable for the sum claimed in the suit and the decree made by the trial court should be restored.

ORDER

In view of the majority judgment, the appeal is dismissed with no order as to costs.

N.V.K.

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