

PETITIONER:
K. N. GURUSWAMY

Vs.

RESPONDENT:
THE STATE OF MYSORE AND OTHERS.

DATE OF JUDGMENT:
24/05/1954

BENCH:
BOSE, VIVIAN
BENCH:
BOSE, VIVIAN
MAHAJAN, MEHAR CHAND (CJ)
MUKHERJEA, B.K.
BHAGWATI, NATWARLAL H.
AIYYAR, T.L. VENKATARAMA

CITATION:
1954 AIR 592 1955 SCR 305

CITATOR INFO :

D	1960 SC 350	(8,16)
R	1963 SC 264	(5)
R	1965 SC1992	(10)
R	1973 SC 205	(3,4)
D	1974 SC 651	(18)
RF	1977 SC1496	(18)
D	1984 SC1030	(17)
R	1985 SC1147	(14)
RF	1988 SC 157	(8)

ACT:
Constitution of India, Art. 226-Writ of mandamus-Mysore Excise Act, 1901, rules.T (1 and 2), II(8 and 10)--Auction of liquor shops-Sale knocked down to highest bidder -Sale subject to confirmation by Deputy Commissioner-Sale cancelled by Excise Commissioner on a higher offer-Deputy Commissioner directed to accept the tender-Tender accepted-Whether wrong--Whether a writ of mandamus should issue under the circumstances.

HEADNOTE:

The appellant G and the fourth respondent T were rival liquor contractors for the sale of a liquor contract for the year 1953-54 in the State of Mysore. The contract was auctioned by the Deputy Commissioner under the authority conferred upon him by the Mysore Excise Act, 1901. The appellant's bid was the highest and the contract was knocked down in his favour subject to formal confirmation by the, Deputy Commissioner. The fourth respondent was present at the auction but did not bid. Instead of that he went direct to the Excise Commissioner and made a higher offer. The Excise Commissioner cancelled the sale in favour of G and directed the Deputy Commissioner to take action under rule II. 10. The latter accepted T's tender. The appollant's application for a writ of mandamus was dismissed by the High Court but he was granted a certificate under article 133(L) of the Constitution.

Held, (i) that the appollant's prayer for a writ of mandamus could not be granted as the Excise Commissioner exercised

his authority (though a little irregularly because the matter did not reach him through the proper channel) and the cancellation of sale by him under the circumstances was proper.

(ii) The subsequent action of the Deputy Commissioner in granting the contract to T was wrong because the arbitrary improvisation of an ad hoc procedure to meet the exigencies of a particular case adopted in the secrecy of an office cannot be accepted.

(iii) What the Legislature has insisted on is that wherever there is a departure from the methods of auction and tender provided for in the Rules, the departure must be sanctioned by Government and must be "notified". The matter cannot be left to the arbitrary discretion of some lesser authority.

(iv) The relief of a writ prayed for by the appellant to cancel the contract given to T could not be granted in the present case as barely a fortnight was left for the contract to expire and the grant of a writ would therefore be ineffective and meaningless.

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The relevant sections of the Mysore Excise Act and the rules made thereunder are given in the judgment.

State of Assam v. Keshab Prasad Singh and Others ([1953] S.C.R. 865) and Commissioner of Police, Bombay v. Gordhandas Bhanji 19521 S.C.R. 135) referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION
of 1953.

Civil Appeal No. 212

Under article 133(1) of the Constitution of India against the Judgment and Order dated the 10th July, 1953, of the Mysore High Court in Civil Petition No. 116 of 1953.

M.C. Setalvad Attorney-General for India, (H. J. Umrigar and Rajinder Narain, with him) for the appellant.

Nitoor Srinivas Rao, Advocate-General of Mysore, (R. Ganapathy Iyer, with him) for respondents Nos. 1 to 3.

M. S. K. Aiyangar for respondent No. 4.

1954. May 24. The Judgment of the Court was delivered by BOSE J.-We are concerned in this appeal with the sale of a liquor contract for the year 1953-54 in the State of Mysore. The appellant, Guruswamy, and the fourth respondent, Thimmappa, are rival liquor contractors. The contract for the City and Taluk of Bangalore was auctioned by the third respondent, the Deputy Commissioner, on 27th April, 1953. The appellant's bid of Rs. 1,80,000 a month was the highest, so the contract was knocked down in his favour subject to formal confirmation by the Deputy Commissioner. He also the same day the appellant deposited RS. 1,99,618-12-0. The fourth respondent, Thimmappa, was present at the auction but did not bid. Instead of that he went direct to the Excise Commissioner behind the appellant's back and made an offer of Rs. 1,85,000.

On 11th May, 1953, the Excise Commissioner passed the following order:-

" The highest bid received in the recent auction sale is Rs. 1,80,000 per mensem. As Sri Thimmappa

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has now offered Rs. 1,85,000 per mensem, the sale held by the Deputy Commissioner is cancelled. The Deputy Commissioner, Bangalore District, is requested to take further action under rule 10 of the Rules regulating the sales of Excise Privileges.

The tender given by Sri Thimmappa is herein enclosed."

The same day the Deputy Commissioner informed the appellant that the sale had been cancelled by the Excise Commissioner and on 16th May, 1953, he was given a copy of the Excise Commissioner's order.

On 12th May, 1953, the Deputy Commissioner made the following order:

" The Toddy sale held on the 27th April, 1953, in which a bid of Rs. 1,80,000 per month was secured. This sale has been cancelled by the Excise Commissioner in view of the fact that a higher tender of Rs. 1,85,000 per month has been received from Sri T. Thimmappa.

2. In these circumstances, the tender of Sri T. Thimmappa is accepted."

Protests and appeals were made to various authorities but they proved infructuous, so, on 19th June, 1953, the appellant applied to the State High Court at Mysore for a writ of mandamus. The petition was dismissed but the appellant was granted a certificate under article 133(1) of the Constitution and so has come here.

The matter is governed by the Mysore Excise Act of 1901 and the Rules made under it. Section 15 of the Act prohibits the sale of liquor without a licence from the Deputy Commissioner. Section 16 provides that-

"It shall be lawful for the Government to grant to any person or persons on such conditions and for such period as may seem fit the exclusive or other privilege....."

(2) of selling by retail
any country liquor within any local area.

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No grantee of any privilege under this section shall exercise the same until he has received a licence in this behalf from the Deputy Commissioner."

Section 29 authorises Government to make rules for the purpose of carrying out the provisions of the Act.

The notification containing the Rules is headed-

"..... the Government of His Highness the Maharaja of Mysore are pleased to frame the following rules to regulate the disposal of the privilege of retail vend of intoxicating liquors

Then comes Rule I. 1. It runs-

"The privilege of retail vend of excisable articles shall be disposed of either by auction or by such other method as may be notified by Government."

Rule I. 2. is also relevant. It says-

"In cases where the right of retail vend is permitted by Government to be disposed of by calling for tenders, a notification calling for the same shall be published by the Excise Commissioner in three successive issues of the Mysore Gazette, after obtaining the previous approval of the Government therefor."

Then follow a series of rules about auctions. Out of them, Rule II. 8 is all we need note. It runs-

,, The shops will be knocked down to the highest bidder, but the sale will be subject to formal confirmation by the Deputy Commissioner, who shall be at liberty to accept or reject any bid at his discretion. Such formal confirmation will be tantamount to an acceptance of the bid unless revised by the Excise Commissioner for special reasons".

Finally, we come to Rule II. 10. It is as follows:

"Shops remaining unsold at the first auction or shops, the sales of which have not been confirmed but cancelled, will ordinarily be disposed of by re-auction or by tender or otherwise at the discretion of the Deputy Commissioner later on."

This Court had occasion to observe in *State of Assam v. Keshab Prasad Singh and Others*(1)-a fisheries case that the sale of these licences forms such a lucrative

(I) Civil Appeal No. 176 of 1952.

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source of revenue that State Legislatures have deemed, it wise not to leave the matter to unfettered executive discretion; accordingly legislation has been enacted in most parts of India to regulate and control the licensing of these trades; Acts are passed and elaborate Rules are drawn up under them. It is evident that there is a policy and a purpose behind it all and it is equally evident that the fetters imposed by legislation cannot be brushed aside at the pleasure of either Government or its officers. The Rules bind State and subject alike.

The Act and the Rules make it plain that liquor licensing in the State of Mysore can only be done in certain specified ways and such discretion as is left to the authorities is strictly controlled by Statute and Rule.

Rule I. 1 gives two options: the licences must either be sold by auction or "by such other method as may, be notified by Government". It is not by such other method as may be desired by Government or thought fit by it but by such other method as may be notified. The notification is of the essence, and for good reason: these are matters of public concern and of importance to the State because of the revenue reaped. It is necessary therefore that all and sundry should know what is what by public notification in the Gazette and it is important that this should not be left to arbitrary executive pleasure.

Rule I. 2 indicates one of the many shapes the "otherwise" can take one of the "otherwise" methods can be by calling for tenders. But if that is selected, then a further fetter is forged. There must be a public call for the tenders by publication in no less than three successive issues of the Mysore Gazette, and more, the approval of the Government must first be, obtained. The careful elaboration of this Rule precludes us from holding that it can be by-passed or ignored at the will and pleasure of an executive officer. But the authorities are not tied down to the method of auction and tender; that may be undesirable for a variety of reasons, the urgency of the situation being

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one of them; nor are they bound to follow Rule I. 2 as an alternative. They have a discretion under Rule I. 1 and can act "otherwise". But if they wish to do that, then it is essential that due notice and publicity be given of the "otherwise" method in a Government notification as Rule I. 1 directs. The Gazette is issued every week and where necessary a special edition of the Gazette can be issued at a day's notice, so the urgency of the matter is no real reason for bypassing the Rules. What the Legislature has insisted on is that whenever there is a departure from the methods of auction and tender provided for in the Rules, the departure must be sanctioned by Government and must be "notified". The matter cannot be left to the arbitrary discretion of some lesser authority.

In the present case, there has not been any notification in the Gazette to bring the "otherwise" portion of Rule I. 1 into play, nor have tenders been called for in the only way which Rule I. 2 permits. We are therefore left with the normal mode of sale contemplated by the Rules, namely public auction.

It is admitted that the contract was auctioned on 27th April, 1953; it is admitted that the appellant bid up to Rs.

1,80,000 and it is admitted that that was the highest bid; it is also admitted that the contract was knocked down in his favour. But that was not final because under Rule II. 8 the sale was expressly subject to the formal confirmation of the Deputy Commissioner who is given a discretion to accept or reject a bid. The Deputy Commissioner did not give his sanction but equally he did not exercise his discretion. But that can be treated as an irregularity in this case because even if sanction had been given it was subject to revision by the Excise Commissioner "for special reasons". That fact distinguished this case from Commissioner of Police, Bombay v. Gordhandas Bhanji(1).

Now the Excise Commissioner exercised his authority : a little irregularly it is true because the matter did not reach him through the proper channel; but that would not call for interference -by way of a writ.

(I) [31952] S .C.R. 135

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The substance of the thing is there and as the High Court was not a Court of appeal-it could not have been called upon to correct a mere technical error in the exercise of a jurisdiction which was otherwise valid. It must be remembered that the Excise Commissioner was not a Court of law whose seisin was dependent upon the filing of a regular appeal. The sale was cancelled and a reason was given; and the fact that Government would be able to get an extra Rs. 5,000 a month as revenue is certainly a good reason. The cancellation was therefore proper and as the appellant obtained no right to the licence by the mere fact that the contract had been knocked down in his favour (the acceptance being subject to sanction) the appellant's first relief asking for a mandamus to confirm his right to the licence for 1953-54 cannot be granted.

We now pass on to the subsequent action of the Deputy Commissioner in giving the contract to Thimmappa. It was contended that the Deputy Commissioner acted within the ambit of his powers because Rule II. 10 gives him an absolute, discretion either to re-auction or act "otherwise" and no fetters are placed upon the "otherwise". It was argued that the Rules which precede Rule 11. 10 deal with the initial stages; they require either an auction or the calling for tenders by notification under Rule 1. 2, or such other method as may have been duly notified; but once there is an auction and it is cancelled under Rule II. 8, then the authorities are no longer bound by any rules and have an absolute and unfettered discretion. The urgency of the situation at that stage is advanced as a reason...

We are unable to agree, The same word appearing in the same section of the same set of Rules must be given the same meaning unless there is anything to indicate the contrary. The full content of the "otherwise" is specified in Rule I. 1. It must be construed in the same sense in Rule II. 10. But that apart, this would, in our opinion, run counter to the policy of the Legislature which is that matters of such consequence to the State revenue cannot be dealt with arbitrarily and in the secrecy of an office. Whatever is done must be done either under the Rules or under a notification

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which would receive like publicity and have like force, and of which the people at large would have like notice. Arbitrary improvisation of an ad hoc procedure to meet the exigencies of a particular case is ruled out. The grant of the contract to Thimmappa was therefore wrong.

The next question is whether the appellant can complain of

this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. Here we have Thimmappa who was present at the auction and who did not bid that it would make any difference if he had, for the fact remains that he made no attempt to outbid the appellant. If he had done so it is evident that the appellant would have raised his own bid. The procedure of tender was not open here because there was no notification and the furtive method adopted of setting a matter of this moment behind the backs of those interested and anxious to compete is unjustified. Apart from all else, that in itself would in this case have resulted in a loss to the State because, as we have said, the mere fact that the appellant has pursued this writ with such vigour shows that he would have bid higher. But deeper considerations are also at stake, namely, the elimination of favouritism and nepotism and corruption not that we suggest that that occurred here, but to permit what has occurred in this case would leave the door wide open to the very evils which the Legislature in its wisdom has endeavoured to avoid. All that is part and parcel of the policy of the Legislature. None of it can be ignored. We would therefore in the ordinary course have given the appellant the writ he seeks. But, owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go. We were told that the excise year for this contract (1953-54) expires early in June. A writ would therefore be ineffective and as it is not our practice to issue

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meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law. But as he has in reality won his case and is prevented from reaping the full fruits of his victory because of circumstances for which he is not responsible, we direct that the first respondent, the State of Mysore, and the fourth respondent, Thimmappa, pay the appellant his costs here and in the High Court. The other respondents will bear their own costs. Appeal dismissed.