

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29-07-2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION NOS.10355 to 10359 OF 1997

P.S. Jothi Selvaraj,
S/o. Subramanian .. Petitioner in all WPs

Vs.

1. The State of Tamil Nadu
rep. By the Commissioner and
the Secretary to the Govt.,
Department of Prohibition & Excise,
Fort St. George, Chennai 9.
2. The District Collector,
Tiruvannamalai Sambuvarayar District.
Tiruvannamalai .. Respondents 1 & 2 in all WPs
3. The Excise Officer, Vandavasi
4. Divisional Excise Officer, Cheyyar.
.. Respondents 3 & 4 in WP.Nos.
10355, 10356 & 10358/1997
R-4 in W.P.No.10359/1997
5. The Excise Officer, Polur
6. Divisional Excise Officer,
Tiruvannamalai. .. Respondents 3 & 4 in W.P.
No.10357/1997
7. The Excise Officer, Cheyyar.. Respondent No.3 in WP.No.
10359/1997

W.P.No.10355 of 1997 is filed under Article 226 of the Constitution of India for the issuance of Writ of certiorarified mandamus to call for the entire records relating to Na.Ka.The.2/20698/97 and quash the order dated 24.5.1997 made therein by the second respondent in respect of Arrack Shop No.2 Vandavasi Town for the excise year 1984-85 and further forbear the respondents from claiming any amount towards balance of Kist for the excise year 1984-85 in respect of Arrack Shop No.2 Vandavasi Town.

W.P.No.10356 is filed under Article 226 of the Constitution of India for the issuance of Writ of certiorarified mandamus to call for the entire records relating to Na.Ka.The.2/20702/97 and quash the order dated 24.5.1997 made therein by the second respondent in respect of Arrack Shop No.9, Chennavaram Village, Vandavasi Taluk for the excise year 1984-85 and further forbear the respondents from claiming any amount towards balance of Kist for the excise year 1984-85 in respect of Arrack Shop No.9 Chennavaram Village, Vandavasi Taluk.

W.P.No.10357 of 1997 is filed under Article 226 of the Constitution of India for the issuance of Writ of certiorarified mandamus to call for the entire records relating to Na.Ka.Tl.15178/97 and quash the order dated 22.5.1997 made therein by the second respondent in respect of Arrack Shop No.3, Polur Taluk, Chetpet Village for the excise year 1984-85 and further forbear the respondents from claiming any amount towards balance of Kist for the excise year 1984-85 in respect of Arrack Shop No.3 Polur Taluk, Chetpet Village.

W.P.No.10358 of 1997 is filed under Article 226 of the Constitution of India for the issuance of Writ of certiorarified mandamus to call for the entire records relating to Na.Ka.The.2/20697/97 and quash the order dated 24.5.1997 made therein by the second respondent in respect of Arrack Shop No.1, Vandavasi Town for the excise year 1984-85 and further forbear the respondents from claiming any amount towards balance of Kist for the excise year 1984-85 in respect of Arrack Shop No.1, Vandavasi Town.

W.P.No.10359 of 1997 is filed under Article 226 of the Constitution of India for the issuance of Writ of certiorarified mandamus to call for the entire records relating to Na.Ka.The.2.20998/97 and quash the order dated 24.5.1997 made therein by the second respondent in respect of Arrack Shop No.3, Arni Taluk, Arni Town for the excise year 1984-85 and further forbear the respondents from claiming any amount towards balance of Kist for the excise year 1984-85 in respect of Arrack Shop No.3, Arni Taluk, Arni Town.

For Petitioner : Mr.V.C. Janardhanam for
in all WPs M/s. Sarvabhauman Associates

For Respondents: Mr.K. Mahendran
in all WPs Special Govt. Pleader

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COMMON JUDGMENT

W.P.No.10355 of 1997 has been filed for issuing a writ of certiorarified mandamus to call for the records relating to Na.Ka.The.2/20698/97 and quash the order dated 24.5.1997 passed by the second respondent in respect of Arrack Shop No.2 Vandavasi Town for the excise year 1984-85.

2. W.P.NO.10356 has been filed to call for the records relating to Na.Ka.The.2/20702/97 and quash the order dated 24.5.1997 passed by the second respondent in respect of Arrack Shop No.9, Chennavaram Village, Vandavasi Town for the excise year 1984-85.

3. W.P.No.10357 of 1997 has been filed to call for the records relating to Na.Ka.The.1.15178/97 and quash the order dated 22.5.1997 passed by the second respondent in respect of Arrack Shop No.3, Polur Taluk, Chetpet Village for the excise year 1984-85.

4. W.P.No.10358 of 1997 has been filed to call for the records relating to Na.Ka.The.2/20697/97 and quash the order dated 24.5.1997 passed by the second respondent in respect of Arrack Shop No.1, Vandavasi Town for the excise year 1984-85.

5. W.P.No.10359 of 1997 has been filed to call for the records relating to Na.Ka.The.2.20998/97 and quash the order dated 24.5.1997 passed by the second respondent in respect of Arrack Shop No.3, Arni Taluk, Arni Town for the excise year 1984-85.

6. The basic facts in all these writ petitions being similar, I am referring to the facts in W.P.No.10355 of 1997. The questions being common, the discussion made hereunder is applicable to all the writ petitions.

7. The facts giving rise to W.P.No.10355 of 1997 are as follows :-
In May, 1984, privilege of sale of arrack in Vandavasi town for the year 1984-85 was auctioned and the petitioner was the successful bidder having offered to pay monthly Kist of Rs.43,052/-. On 20.4.1997, the third respondent directed the petitioner to lift the normal full quota of arrack for April 1985 and to pay the full Kist. However, W.P.No.4822 of 1985 was filed for quashing the Circular dated 21.4.1985 and further prayer was made for issuing a direction to collect only the proportionate Kist. Ultimately, the said writ petition was dismissed on 14.12.1992. Thereafter, on 8.11.1996, a memo was issued by the fourth respondent asking the petitioner to pay Rs.43,052/- for the Excise year 1984-85. Thereafter, after some correspondence, the impugned order dated 24.5.1997 was passed calling upon the petitioner to pay such amount failing which fourth respondent was directed to take proceedings in accordance with the provisions contained in the Tamil Nadu Revenue Recovery Act, 1864. Such order is being challenged in the present writ petition.

8. In the counter affidavit filed on behalf of the respondents it is indicated as follows :-

The shop in question was settled with the petitioner on a monthly rent of Rs.43,052/- and licence was accordingly issued. There was short supply of arrack from November, 1984 to March, 1985. However, when the stock position improved in the month of April 1985, the licensees were advised to lift the full quota of arrack on payment of full rent from the

month of April 1985 by order dated 20.4.1985. Even though such order dated 20.4.1985 was challenged, ultimately, the writ petition was dismissed by common order dated 14.12.1992. It was held that payment of Kist was not directly linked with supply of any specified quantity of arrack. The Government had decided to grant remission to the licensees for the period of short supply i.e., from November 1984 to March 1985 as per the observations made in W.P.Nos.9996 to 9999 of 1984 dated 30.1.1985. Accordingly, remission was granted to the petitioner for the month of December, 1984, January and March, 1985 and after making the calculations, notice was served for payment. The licensee, however, represented that proportionate Kist remission was not given for the entire excise year 1984-85 and if such proportionate refund would have been allowed, then the petitioner would not be required to pay any further amount. Since short supply was during the period between November, 1984 and March, 1985, the contention was rejected and orders were passed directing payment of the amount as per the calculation. In accordance with the direction in WMP.No.4822 of 1985, the basis of the claim has been disclosed and opportunity has been given to the licensee to represent and details had been disclosed in the notice. The representation of the licensee for remission of proportionate fees for the entire excise year was not acceptable as the short supply was for a few months. The contention of the petitioner that the claim was barred by limitation has been refuted by stating that the matter had remained pending in the High Court and the writ petitions were dismissed only on 14.12.1992 and as such, the claim was within the time.

9. The main contention in the writ petition is to the effect that without determining the right of the Government to any particular amount, the amount cannot be unilaterally claimed in a revenue recovery proceedings. For the aforesaid purpose, the learned counsel appearing for the petitioner has placed reliance upon the decision of the Supreme Court reported in 100 L.W. 150 (THE STATE OF KARNATAKA ETC. v. SHRI RAMESHWARA RICE MILLS, THIRTHAHALLI ETC.). In the aforesaid Supreme Court case, it was observed as follows :-

"7. ... On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages,

we do not think that adjudication by the Officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the Officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12."

10. On a careful reading of the aforesaid Supreme Court decision, I do not think the ratio of the said decision can be made applicable to the present case. In the present case, there is no dispute regarding the basic fact that the licensee was required to pay monthly Kist at a particular rate. As per the decision rendered by the High Court in the writ petition filed by the petitioner himself, it has been observed that he was not entitled to any remission. However, the Government had issued G.O., regarding remission of proportionate Kist. As per the G.O., it was for the Department to workout the proportionate Kist, which was done by the Department after giving opportunity to the petitioner. Whether any remission would be given or not, obviously was a matter for the Department and it cannot be said that the petitioner had a legal right to claim that Kist as per the agreement was not payable by him.

11. The next contention of the petitioner is to the effect that even assuming that some amount is payable, such amount is not recoverable under the Tamil Nadu Revenue Recovery Act, 1864 because such Act is not applicable regarding recovery of Kist amount.

12. Rule 20 of the Tamil Nadu Toddy and Arrack Shops (Disposal in Auction) Rules, 1981, which has been made in exercise of power conferred under Section 54 of the Tamil Nadu Prohibition Act, 1937, provides for settlement of shops on the basis of auction. Rule 20 relates to confirmation of sale by the Collector and issuance of licence. It also envisage the power of cancellation. Rule 21 relates to resale of any shop on the failure of any person to make a deposit or to apply for a licence or to comply with any requisition or to execute any bond. In the case of resale of shops, the deposit already made by the defaulting bidder is to be forfeited and adjusted against the amount, and the loss arising from the resale, if any, is recoverable in the same manner as if it were an arrear of land revenue. As per the provisions of the Rules, the licensee is required to execute an agreement in a stamp paper. As per such agreement, any amount due is recoverable as if it is an arrear of land revenue. In such view of the matter, it is futile on the part of the petitioner to contend that the amount payable by the licensee is not recoverable as an arrear of land revenue.

13. In 100 L.W. 150 (already cited) relied upon by the petitioner, it is observed in paragraph 9 as follows :-

"9. The further question requiring consideration is regarding the power of the State to recover damages as arrears of land revenue under the Revenue Recovery Act. The Full Bench has taken the view that the State is not entitled to recover damages as arrears of land revenue because damages for breach of conditions will not amount to "money due under the contract". The Full Bench has relied upon a decision of this Court in Divisional Forest Officer V. Mool Chand in support of its view. This decision cannot be an authority for the view taken by the Full Bench because it has been rendered with reference to facts which are entirely different. What fell for consideration in that case was whether a tender amount could be recovered from a defaulting forest contractor as arrears of land revenue when S.75 of the Forest Regulation and Rule 10 of the Rules made thereunder did not provide for such realisation. We are, however, concerned with the agreement entered into between the Government and the private persons which specifically provides for recovery of damages as arrears of land revenue. What the Full Bench has failed to notice is that even though the damages become payable on account of breach of conditions of the contract, the liability to pay damages does not fall outside the terms of the contract but within the terms of the contract. The words "any amount that may become due or payable by the first party to the second party under any part of this agreement" have to be read conjunction with the earlier portion of the clause stipulating liability on the party contracting with the State to pay damages for breach of conditions. Therefore, it follows that though damages become payable on account of breach of conditions of the agreement they nevertheless constitute amounts payable under the contract, i.e., under, one of the terms of the contract imposing liability to pay damages for breach of conditions. To illustrate the position if the agreement provides for a liquidated sum being paid as damages for breach of conditions instead of a sum to be assessed by the Deputy Commissioner, it cannot be said that the specified damages will not be money due under the contract and hence the damages cannot be recovered under the Revenue Recovery Act. What applies to specified damages will likewise apply to damages which are quantified after assessment...." (Emphasis added)

14. In my opinion, the ratio of the aforesaid decision, as reflected in the above quoted portion, is squarely applicable. Therefore, such contention is not acceptable.

15. The last contention of the petitioner relates to the question of limitation. It is the contention of the petitioner that even though the

amount was payable for the period during 1984-85, proceedings were started only in the year 1997. This contention also is unacceptable, because it is apparent that Article 112 of the Limitation Act providing for a period of 30 years is applicable. It is contended that Section 58 of the Revenue Recovery Act excludes the jurisdiction of the Civil Court, and, therefore, Article 112, which relates to suits, is not applicable. The exclusion contemplated under Section 58 of the Tamil Nadu Revenue Recovery Act, 1864 is relating to question as to rate of land revenue and is not at all relevant.

16. Accordingly, the writ petitions are dismissed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dpk

To

1. The Commissioner and
The Secretary to the Govt. of Tamil Nadu,
Department of Prohibition & Excise,
Fort St. George, Chennai 9.
 2. The District Collector,
Tiruvannamalai Sambuvarayar District.
 3. The Excise Officer, Vandavasi
 4. The Divisional Excise Officer, Cheyyar.
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 6. The Divisional Excise Officer, Tiruvannamalai.
 7. The Excise Officer, Cheyyar.
- + 5 CCs to M/s.Sarvabhauman Associates, Advocate SR NO 32052

COMMON JUDGMENT IN W.P.NOs.
10355 to 10359 OF 1997
29-07-2005

sgr(co)
gp/5.8.

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