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RAJA MALLAIAH AND ANR.

v.

ANIL KISHORE AND ORS.

April 25, 1980

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[O. CHINNAPPA REDDY AND A. P. SEN, JJ.]

Andhra Pradesh (Lease of Right to sell Liquor in Retail) Rules, 1969—Rule 12 read with Rules 3 and 4 and administrative instruction thereunder, scope of—Whether regrouping of 78 shops as a single lot for auctioning at the postponed auction, without recording reasons therefor and holding of such an auction within half an hour of the decision regarding regroup is contrary to Rule 12.

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Under Rule 4 of the Andhra Pradesh Excise (Lease of Right to sell Liquor in Retail) Rules, 1969, made in exercise of the powers conferred upon the Government by section 72 read with section 17, 29, 31 and 64 of the Andhra Pradesh Excise Act, 1968, a notification dated August 20, 1979 was published in the District Gazette, Hyderabad, by the Commissioner of Excise Andhra Pradesh, giving a notice of a proposal to hold an auction from September 1, 1979 to September 3, 1979, of the right to sell arrack, in retail in respect of 78 arrack shops in the twin cities of Hyderabad and Secunderabad during the Abkari year October 1, 1979 to September 30, 1980. The notification mentioned that 22 out of 78 shops would be auctioned in ten groups of two and three shops, while the remaining 56 shops would be auctioned individually. This was according to the pattern which obtained for the year 1978-79 for which year the auction fetched an aggregate monthly rental of Rs. 32,99,537-72 np. On account of some representations made by Excise Contractors in regard to some conditions regarding the bottling of arrack, the auction was postponed to September 7, 1979. Auction was sought to be held on September 7, 1979 and September 12, 1979 but there were no bids. On September 21, 1979, the Collector (the auctioning authority) followed a peculiar procedure. First he auctioned 34 arrack shops in Hyderabad City individually and the bids fetched an aggregate of Rs. 6,49,700 (monthly rental). Then he put the 34 shops to auction as a single lot but there was no bid. Similarly he auctioned the 44 arrack shops of Secunderabad city individually and they fetched an aggregate bid of Rs. 6,02,100 (monthly rental). He then put the 44 shops to auction as a single lot, but there was no bid. Thereafter he put the entire lot of 78 shops to auction as a single lot. There was no bid. The auction was postponed to September 22, 1979 and on that day the same peculiar procedure was repeated. The highest bid for all the 78 shops in one lot was Rs. 24,00,000/-, while there were two tenders for Rs. 15,11,111/11 ps and Rs. 25,55,555/55 ps. Therefore, the tender for Rs. 25,55,555/55 ps. was accepted.

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Seventeen persons who were lessees of the arrack shops in the twin cities during the year 1978-79 filed two writ petitions in the High Court of Andhra Pradesh questioning the auction held on September 21, 1979 and September 22, 1979 on the ground that the Collector had no jurisdiction to auction the 78 shops as one lot, thereby altering the entire pattern of the auction as

notified earlier. It was pleaded that the action of the Collector was contrary to rule 12 of the A.P. (Lease of Right to sell Liquor in Retail) Rules, 1969 and the administrative instructions issued by the Excise Commissioner by which the Collector was bound. A learned single Judge allowed the writ petitions and directed a reauction to be held within a period of fifteen days. The present appellants and some others, as well as the State of Andhra Pradesh preferred appeals under clause 15 of the Letters Patent. The Division Bench dismissed them on the ground that there was a contravention of Rule 12 of the Rules as the auctioning authority failed to record reasons for grouping the 78 shops in one lot.

Dismissing all the appeals by special leave, the Court

HELD : 1. The scheme of the Andhra Pradesh Excise Act shows that the Commissioner is at the apex, as it were, of the Excise Administrations of the State. He is the Chief Controlling Authority for all matters connected with the administration of the Excise Act and has the control of the administration of the Excise Department. The Collector who is invested with the power to perform various functions under the Act is also subject to the control of the Commissioner. Having regard to the scheme of the Act, it may be presumed that such functions as are directly assigned to the Commissioner under the Rules are considered by the Legislative delegate to be important functions for the purposes of the Act and if the Commissioner is authorised to issue instructions, those instructions are meant to be obeyed by the other authorities constituted under the Act. [803 A-C]

Under Rule 3 it is the Commissioner that is invested with the power to fix the number of shops to be established in an area, their location and the minimum guaranteed quantity that should be sold in each shop. These matters are required to be determined by the Commissioner before the auction notice is published under R. 4 so that the details may be incorporated in the auction notice. The auction notice has to specify, among other particulars, the shop or group of shops in respect of which the lease to sell liquor is proposed to be granted by public auction. The advance notice is obviously meant to enable the intending bidder and tenderers to make the necessary preparations including vital arrangements regarding finance, since the successful bidder has to deposit one month's rental and two percent of the annual rental forthwith on acceptance of the bid or tender and an additional two months rental within fifteen days from the date of auction.

[803 D-F]

The fixation of number of shops, the location of the shops and their grouping is considered so important a matter that the power in regard to it is vested in the apex authority, the Commissioner. If some changes have to be made, as a measure of emergency such changes also can only be made in accordance with the administrative instructions issued on the subject by the Commissioner. Even so, the emergency exercise can only be undertake if reasons are recorded in writing. The freedom of the auctioning authority to regroup and rearrange shops is thus deliberately circumscribed. It is not for the auctioning authority to make ad-hoc experiments on the spot if he decides to regroup the shops. If he desires to regroup the shops, he has (1) to act in accordance with the administrative instructions issued on the subject by the Commissioner, and (2) to record in writing the reasons for the change.

[803 G-H, 804 A]

- A** It is true that the Collector, as per the administrative instructions issued on June 10, 1975, sought instructions from the Commissioner on September 20, 1979 over the phone and the Commissioner did give certain instructions on September 21, 1979. All that was said in the instructions dated September 21, 1979 was that regrouping might be done to get maximum revenue. It did not mean that the instructions previously in force were to be ignored or thrown overboard or that complete freedom was given to the auctioning authorities to act at their discretion. All that it meant was that regrouping might be done, if necessary, to get maximum revenue, but such regrouping was naturally to be in accordance with the instructions already given from time to time. In the earlier instruction dated June 10, 1975, the Commissioner pointed out that the shops and groups approved by the Board of Revenue (Commissioner of Excise) and notified for auction should be auctioned without disturbing the approved pattern. Bigger groups could be split into smaller groups and auctioned if the highest rental offered was lower than the current rental for the bigger group. It was strictly stipulated that *approved groups should not be enlarged under any circumstances* and where groups were re-formed reasons should be recorded in detail. The emphasis throughout was on the splitting of bigger groups into smaller groups but was never in the opposite direction *i.e.* forming bigger groups in the place of smaller groups. The instructions were definitely against creation of monopoly. The instructions dated August 3, 1979 also emphasised this aspect and expressly mentioned that monopoly should be broken as that would fetch better Revenue. The specific instructions given on September 20, 1979, *i.e.* on the eve of the adjourned auction were that two to four groups might be formed in the case of the arrack shops of the twin cities.

[806 F-H, 807 A-C]

- E** In the instant case, the regrouping of all 78 shops into a single group was clearly opposed to the instructions issued by the Commissioner of Excise particularly the specific instruction issued on September 20, 1979 with respect to the very shops in the twin cities of Hyderabad and Secunderabad. It was opposed to the earlier general instruction that 'approved groups should not be enlarged under any circumstances' and monopoly should be avoided. The accident that the regrouping fetched a higher bid is not sufficient justification of the departure from the administrative instructions which aim at breaking a monopoly in regard to lease of excise shops. The result could well have been otherwise and the bids lower.

[807D-E]

- G** The question whether a provision is mandatory or directory is not to be resolved merely by reference to the emphatic or gentle language employed in the provision, nor even by the presence or absence of an express stipulation regarding the consequences of a breach of the provision. These are circumstances of importance which naturally have to be considered. But one must give greater consideration to the statutory design and the importance of the provision in the context of that design. Generally one may say a provision which insists upon recording of reasons before an action is taken must *prima facie* be considered to be mandatory, as it is aimed at preventing arbitrariness. Where the rights of citizens are involved there can be no question that such a provision should be regarded as mandatory. Where the provision involves the public interest also the provision must be regarded as mandatory. Examined in that light the Andhra Pradesh Excise Act is an Act intended to raise and secure revenue to the State, without at the same time sacrificing the public interest involved which requires the regulation of

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trade in intoxicants. The administration of the Act is, therefore, vested primarily and centrally in the Commissioner of Excise who is expected to take a decision on all vital matters. The fixation of the number of shops, their location and grouping are considered by the legislative delegate to be matters of such vital importance in Excise administration that the power in regard to these matters is vested in the Excise Commissioner. In that setting, the object of the rule is clearly seen to be to secure strict compliance with the arrangement already made by the Commissioner of Excise, the highest authority, and to permit no departure from the arrangement save in exceptional cases, on the clearest of grounds. What is involved is the protection of revenue and what is to be prevented is *ad hoc* improvisation which jeopardises the revenue. That a particular improvisation yielded better results may be the exception which proves the rule. The public interest is thus seen to be served in two ways by the recording of reasons, first by protecting the public revenue and next by making public authorities not to function arbitrarily and also not appear to function arbitrarily. [807 G-H, 808 A-E]

It is true that the Government is the exclusive owner of all rights and privileges in regard to intoxicants and no citizen has any right in regard to them. Here, the question is whether the Government having invited members of the public to participate in a public auction on certain terms and conditions, it is open to the officer entrusted with the task of conducting the auction to vary the terms and conditions publicly announced earlier, without assigning any reasons when the statutory rules require the recording of reasons. Departure from the rules and failure to record the reasons is impermissible merely because no citizen has any right in the sale of intoxicants. The situation changes as soon as statutory provision and rules are made and the public is invited to participate in the auctions to be held as provided by rules. Therefore, the requirement regarding recording of reasons contained in Rule 12 of the Andhra Pradesh Excise (Lease of Right to Sell Liquor in Retail) Rules, 1969 is mandatory. [808 E-H, 809 A]

To record the reasons contemporaneously, that is to say, soon after the auction was held is not proper. The object of the insistence upon the recording of reasons is to eliminate arbitrariness. Reasons, if given, substitute objectivity for subjectivity. When reasons are set down in writing greater thought goes into it and greater objectivity is attained. Where the action to be taken involves a departure from what has already been decided by the apex authority and the public interest is involved, the reasons required to be recorded must be recorded *before* and *not after* the action is taken. [809 A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3427—3432 of 1979.

From the Judgment and Order dated 22-11-1979 of the Andhra Pradesh High Court in Writ Appeal Nos. 367, 368, 397 and 398/79 respectively.

V. M. Tarkunde, P. N. Ramalingam and A.T.M. Sampath for the Appellants in CA Nos. 3429—3432/79.

K. K. Venugopal and B. Parthasarathy for the Appellants in CA Nos. 3427—3428/79 and for the State in CA Nos. 3429—3432/79.

A *S. N. Kacker, P. R. Mridul, R. Satish, V. K. Pandita and E. C. Aggarwal* for the Respondents 1, 3, 4 and 7 in CA Nos. 3427—3432/79.

The Judgment of the Court was delivered by

B CHINNAPPA REDDY, J.—Apparently there is big money in the liquor business. When, at the close of the hearing on Friday 18th April, 1980, we asked M/s. Kacker and Mridul whether their clients were prepared to deposit or furnish security in a sum of Rs. 35 lakhs in order to guarantee that the bids at a reauction, if so ordered, would so start that their aggregate would be not less than Rs. 35 lakhs, they agreed with alacrity. We asked the question as we wanted to satisfy ourselves about their *bonafides*. On a request made on April 21, 1980, we have given them a week's time to give security to the satisfaction of the Commissioner of Excise, Hyderabad.

D On August 20, 1979, a notification was published in the District Gazette, Hyderabad, by the Commissioner of Excise, Andhra Pradesh, giving notice of a proposal to hold an auction, from September 1, 1979 to September 3, 1979, of the right to sell arrack in retail in respect of 78 arrack shops in the twin cities of Hyderabad and Secunderabad during the Abkari year, October 1, 1979 to September 30, 1980. The notification was published under Rule 4 of the Andhra Pradesh Excise (Lease of Right to Sell Liquor in Retail) Rules, 1969, made in exercise of the powers conferred upon the Government by s. 72 read with ss. 17, 29, 31 and 64 of the Andhra Pradesh Excise Act, 1968. The notification mentioned that 22 out of the 78 shops would be auctioned in ten groups of two and three shops, while the remaining 56 shops would be auctioned individually. This was according to the pattern which obtained for the year 1978-79 for which year the auction fetched, an aggregate monthly rental of Rs. 32,99,537.72 ps. On account of some representations made by excise contractors in regard to some conditions regarding the bottling of arrack, the auction was postponed to September 7, 1979. The first auction was held on September 7, 1979, when no bids were received for the arrack shops. A second auction was held on September 12, 1979 and again there were no bids. On September 19, 1979, no auction could be held as all the bidders walked out. On September 21, 1979, the Collector (the auctioning authority) followed a peculiar procedure. First he auctioned 34 arrack shops in Hyderabad city individually and the bids fetched an aggregate of Rs. 6,49,700 (monthly rental). Then he put the 34 shops to auction as a single lot but there was no bid. Similarly he auctioned the 44 arrack shops of Secunderabad city individually and they fetched an aggregate bid of Rs. 6,02,100 (monthly rental). He then put the

44 shops to auction as a single lot but there was no bid. Thereafter he put the entire lot of 78 arrack shops to auction as a single lot. There was no bid. There was a tender but the tender had to be rejected as the tenderer was not present in the auction hall even after an announcement was made on the microphone and the auctioning authority waited for a considerable time. The auction was then postponed to September 22, 1979 and on that day, the same peculiar procedure was repeated. The 34 shops of Hyderabad city when auctioned individually fetched bids aggregating to Rs. 6,75,000. There were also tenders. The aggregate of the highest bid or tender for the different shops came to Rs. 7,78,060/55 ps. The 44 shops in Secunderabad city were then auctioned individually. The aggregate of the bids came to Rs. 8,30,000. There were tenders also. The aggregate of the highest bid or tender for the different shops came to Rs. 10,82,885.27. Thereafter 34 shops of Hyderabad city were auctioned as one lot and there was a bid for Rs. 8,00,000 and a tender for Rs. 10,55,229. Similarly the 44 shops in Secunderabad city were auctioned as one lot and the maximum bid was Rs. 13,50,000 while two tenders were received, the highest of which was Rs. 14,11,111. The Collector then auctioned all the 78 shops as one lot. The highest bid was Rs. 24,00,000 while there were two tenders for Rs. 15,11,111/11 and Rs. 25,55,555/55. The tender for Rs. 25,55,555/55 for all 78 shops was accepted.

17 persons who were lessees of the arrack shops in the twin cities during the year 1978-79 filed two Writ Petitions in the High Court of Andhra Pradesh questioning the auction held on September 21, 1979, and September 22, 1979 on the ground that the Collector had no jurisdiction to auction the 78 shops as one lot, thereby altering the entire pattern of the auction as notified earlier. It was pleaded that the action of the Collector was contrary to R. 12 of the Andhra Pradesh (Lease of Right to Sell Liquor in Retail) Rules, 1969, and the administrative instructions issued by the Excise Commissioner by which the Collector was bound.

Amareswari, J., who heard the Writ Petitions in the first instance, in a careful and well-considered judgment held : 1. The action of the auctioning authority grouping all the 78 shops into one group was opposed to the administrative instructions issued by the Excise Commissioner and hence contrary to R. 12 ; (2) the action of the auctioning authority was contrary to the rule also because the auctioning authority failed to record reasons, as he was required to do under the rule before he could regroup the shops; and, (3) the petitioners were not given sufficient time to make preparations to bid at the auction of 78 shops as a single lot since half an hour's time only was given to them.

- A** On those findings Amareswari J., allowed the Writ Petitions and directed a reauction to be held within a period of 15 days.

The present appellants and some others, as well as the State of Andhra Pradesh preferred appeals under Clause 15 of the Letters Patent. The Appellate Bench consisting of Kuppuswamy and P. A. Chaudhary, JJ., did not agree with Amareswari J's view that the auction was contrary to R. 12 read with the administrative instructions or that the petitioners in the Writ Petition were not given sufficient time to make preparations for participating in the auction of the 78 shops as a single lot. They, however, upheld the judgment of Amareswari J., on the ground that there was a contravention of R.12 of the Rules as the auctioning authority failed to record reasons for grouping the 78 shops into one lot.

It was argued by Shri V. M. Tarkunde, learned counsel for the successful bidder—appellants and Shri K. K. Venugopal, learned counsel for the State of Andhra Pradesh that the rule requiring recording of reasons was not mandatory and, in any case, recording of reasons was not a condition precedent. The rule was sufficiently complied by reasons being recorded immediately after the auction. Shri Kacker and Shri Mridul, learned counsel for the respondents, urged that the rule was mandatory and that recording of reasons was a condition precedent to regrouping of shops. They also contended the view expressed by Amareswari J., on the other two questions was the better view.

A brief reference to some of the provisions of the Andhra Pradesh Excise Act and the Andhra Pradesh Excise (Lease of Right to Sell Liquor in Retail) Rules, 1969, is necessary here. S.3 of the Act provides for the appointment of the Commissioner of Excise for the State who is to be the Chief Controlling authority in all matters connected with the administration of the Act. He is to have the control of the administration of the Excise Department. S. 4 provides that the Collector shall exercise the powers and perform the functions assigned to him under the Act, subject to the general control of the Commissioner. Chapter IV of the Act deals with the manufacture, possession, and sale of liquor. S. 17 in particular empowers the Government to grant leases for the supply, manufacture or sale of any intoxicant. Chapter VI deals with licences and permits. Chapter IX deals with 'Appeals and Revisions'. S. 63 provides that any person aggrieved by an order passed by any Officer other than the Commissioner or Collector may appeal to the Deputy Commissioner and any person aggrieved by an order passed by the Deputy Commissioner or Collector may

appeal to the Commissioner. S. 72 empowers the Government to make rules for carrying out all or any of the purposes of the Act.

In exercise of the powers vested in the Government under s. 72 of the Act, the Government has made the Andhra Pradesh Excise (Lease of Right to Sell Liquor in Retail) Rules. R. 2(vi) defines "Excise Year" as a period of 12 months commencing from 1st October of a year and ending with the 30th September of the succeeding year. R. 2 (viii) defines "Highest Bidder" as the person who offers the highest price by bid or tender. R. 2(ix) defines "Rental" as rent payable in respect of a shop or group of shops in consideration of the grant of lease for the sale of liquor. R. 3(1) prescribes that every lease of right to sell liquor in retail shall be granted by auction ordinarily for a period or one excise year. The Commissioner is, however, empowered to grant a lease in any other manner, with the prior approval of the Government if he considers it necessary to do so. R.3(2) is important and it is as follows :

"3(2) The Commissioner shall be, before the publication of auction notice under rule 4, competent to fix the number of shops to be established in an area, their location, the total number of excise trees to be earmarked to each shop, the assignment of trees for tapping, and the minimum guaranteed quantity that should be sold in the case of the arrack shops in every excise year".

R. 4 is also important. It is as follows :

"4. Auction Notice:—(1) Whenever it is proposed to grant the lease for sale of liquor in retail in respect of a shop or a group of shops, a notice of the proposed auction containing the particulars mentioned in sub rule (2) shall be published, atleast ten days in advance of the date of auction, by the Collector of the district in the Andhra Pradesh Gazette or in the District Gazette or in such other manner as the Collector may deem fit :

(Provided that the time limit of 10 days shall not be applicable in the case of postponed auctions).

(2) The auction notice shall contain the following particulars, namely—

- (i) the name or locality of a shop or group of shops which sell liquor in the area;
- (ii) the place of auction with time and date;
- (iii) the last date, time and place for receipt of tenders;

- A** (iv) the conditions governing the auction;
(v) the period of lease; and
(vi) any other matter which may be considered by the auctioning authority necessary for the information of bidders and tenderers”.
- B** R. 10 empowers the Collector or any other Gazetted Officer not below the rank of a Deputy Collector authorised by the Collector in that behalf to conduct the auction. There are some provisos with which we are not concerned. R. 12 is vital for the purposes of these appeals and it is as follows :
- C** “12. Auction of Shops:—(1) The right to sell liquor may ordinarily be auctioned shopwise or groupwise according to the list of shops approved by the Commissioner of Excise under Rule 3. The auctioning authority may for reasons to be recorded in writing, either regroup any shop or split any group of shops and re-arrange them in accordance with the administrative instructions issued on the subject by the Commissioner at the commencement of the auction or at any time before the sale is knocked down.
- D** (2) The Commissioner may withdraw any shop from the auction before the auction is commenced.
- (3) The auctioning authority may, for sufficient cause, postpone the date of auction of a shop or group of shops.”
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- R. 13 regulates the manner of submission of tenders and bids. A tender is to be opened only if the auctioning authority decides that the highest bid offered for a shop or group of shops is satisfactory. The tender may then be considered alongwith the highest bid offered. If the auctioning authority considers that the bid is not satisfactory and decides to postpone the auction the tender is to be opened at the postponed auction after the bidding is over. It shall be at the discretion of the auctioning authority to accept or reject any tender or bid but he shall record his reasons therefor. R. 16 stipulates that the auction purchaser shall pay two per cent of the annual rental as earnest money together with one month’s rental on the day of the auction immediately after the acceptance of the tender or bid as the case may be. The earnest money and one month’s rental are to be in addition to the further deposit, required to be made by R. 18, of two months’ rental in cash or any fixed deposit certificates within fifteen days from the date of auction. R. 17 enables the Commissioner
- G** *suo moto* or on an application made by an aggrieved party within seven days from the date of acceptance of bid or tender, for reasons to be recorded by him in writing, and after giving an opportunity to the
- H**

party concerned, to cancel the auction of any shop or group of shops and order a reauction.

The scheme of the Act shows that the Commissioner of Excise is at the apex, as it were, of the Excise Administration of the State. He is the Chief Controlling Authority for all matters connected with the administration of the Excise Act and has the control of the administration of the Excise Department. The Collector who is invested with the power to perform various functions under the Act is also subject to the control of the Commissioner. Having regard to the scheme of the Act, we may presume that such functions as are directly assigned to the Commissioner under the Rules are considered by the legislative delegate to be important functions for the purposes of the Act and if the Commissioner is authorised to issue instructions, those instructions are meant to be obeyed by the other authorities constituted under the Act.

Now under R. 3 it is the Commissioner that is invested with the power to fix the number of shops to be established in an area, their location and the minimum guaranteed quantity that should be sold in each shop. These matters are required to be determined by the Commissioner before the auction notice is published under R. 4 so that the details may be incorporated in the auction notice. The auction notice has to specify, among other particulars, the shop or group of shops in respect of which the lease to sell liquor is proposed to be granted by public auction. The auction notice with all these particulars has to be published in the Andhra Pradesh Gazette or in the District Gazette atleast ten days in advance of the date of the auction. The advance notice is obviously meant to enable the intending bidders and tenderers to make the necessary preparations including vital arrangements regarding finance, since the successful bidder has to deposit one month's rental and two percent of the annual rental forthwith on acceptance of the bid or tender and an additional two months' rental within fifteen days from the date of auction.

From the scheme of the Act and the rules it appears that the fixation of the number of shops, the location of the shops and their grouping is considered so important a matter that the power in regard to it is vested in the apex authority, the Commissioner. If some changes have to be made, as a measure of emergency such changes also can only be made in accordance with the administrative instructions issued on the subject by the Commissioner. Even so, the emergency exercise can only be undertaken if reasons are recorded in writing. The freedom of the auctioning authority to regroup and rearrange shops is thus deliberately circumscribed. It is not for the auctioning authority to make

A *ad hoc* experiments on the spot if he decides to regroup the shops. If he desires to regroup the shops, he has (1) to act in accordance with the administrative instructions issued on the subject by the Commissioner, and (2) to record in writing the reasons for the change. The case of the respondents is that both these conditions were not fulfilled by the auctioning authority in the present case.

B We may now refer to the administrative instructions issued by the Commissioner from time to time in connection with the grouping and regrouping of arrack shops. The earliest of the instructions was issued on June 10, 1975 and it is common ground that it is still in force. It will be useful to extract these instructions in their entirety.

C The instructions were as follows :

“Collectors are being advised every year of the policy of Government regarding formation of groups of toddy and arrack shops. Accordingly, Collectors are submitting proposals for approval of the Commissioner. After scrutiny of their proposals, approval is being communicated to them for notification and auction accordingly.

D But it has been noticed that at times some changes in the grouping of shops, are being made by the Collectors without assigning reasons, on the eve of auction, apparently, in exercise of the powers given in Rule 12 of Andhra Pradesh Excise (Lease of Right to Sell Liquor in Retail) Rules 1969. This procedure is not in keeping with the instructions.

E In many cases this exercise of power has only led to formation of bigger groups, thereby encouraging monopolistic tendencies, loss in revenue and defeat of the policy aims of the Government. Such an exercise of powers under Rule 12 of Andhra Pradesh Excise (Lease of Right to Sell Liquor in Retail) Rules, 1969 with the object of obtaining higher rentals, has also received severe criticism on the floor of the Legislative Assembly.

F The following instructions are therefore, renewed once again for strict compliance :

G (1) The shops and groups approved by the Board of Revenue and notified for auction should be auctioned without disturbing the approved pattern.

H (2) The rentals offered or tenders received should be compared with the current rentals. If the auctioning authority is satisfied that there is no collusion among bidders for the slightly and lower bid than that of last year the bid

ultimately received is regarded as the best available one, the auction should be finalised recording the reasons.

- (3) In case the highest rental offered is considerably lower than the current rental and the auctioning authority has reasons to believe that extraneous factors are influencing the bids he may exercise the discretion vested in him under Rule 12 and split any group of shops or rearrange them into smaller groups and auction them.

It may be noted for strict compliance that approved groups should not be enlarged under any circumstances. Where approved groups are re-formed otherwise, the reasons for such action must be recorded in detail and the facts of the case reported to the Commissioner within 10 days from the date of auction.

- (4) In spite of splitting the notified groups and re-arranging them as discussed at (3) above the bids offered for them are lower than the current rentals they may be disposed of on the best available bid. Auctions should not be postponed beyond September of the year in which auctions are held.

Sd/- Anil De

Commissioner of Excise".

On August 3, 1979 the Excise policy for the Excise year 1979-80 was announced and the grouping policy was enunciated in these terms :

"Grouping of toddy and arrack shops :

The grouping policy for toddy and arrack shops followed for the Excise Year 1978-79 shall continue for the ensuing Excise Year 1979-80 with the following modifications.

The arrack shops which have been monopolised by certain persons, if they are fetching low rentals and are contiguous, may be grouped together provided the shops are located within a radius of 8 kms. The auctioning authority after recording reasons may split a group, re-arrange groups or regroup any shops at the time of auction under Rule 12 of the Auction Rules with a view to breaking monopoly and to achieving more revenue or for other administrative reasons. Under no circumstances should the groups be split or regrouped or re-arranged and auctioned if there is any likelihood of loss of rentals hitherto

- A** secured. No shops given to existing Tappers Cooperative Society and under Trees for Tapper Scheme shall be clubbed with the Group shops even if they are within 8 Kms. radius".

On September 20, 1979, the District Collector appears to have sought, on the telephone, specific instructions with regard to the auction of arrack shops in the twin cities. The instructions received were noted in the note-file and they are as follows : "Received certain instructions from the Commissioner of Excise for regrouping of entire twin city arrack shops into two to four groups. As per the above instructions groups may be formed". On September 21, 1979 the Commissioner of Excise addressed a communication, apparently to all the Collectors in the State, to the following effect :

"The Government in the reference first cited have informed that the auctions of arrack and toddy shops should be completed by 27th instant positively as 29th and 30th happen to be Public holidays. The Government have further directed that the remaining shops should be disposed off at the best available bids.

Regarding auction of shops, where bottling is proposed to be introduced, where contractors are not offering reasonable bids inspite of Government having given them maximum concessions the auctioning authorities may regroup the shops, if necessary, to get best available bids".

Now, it will be seen that in the instructions dated June 10, 1975, the Commissioner of Excise expressly drew attention to the circumstance that changes in the grouping of shops were being made by the Collectors without assigning reasons and that such a procedure was not in keeping with the instructions given. He pointed out that the shops and groups approved by the Board of Revenue (Commissioner of Excise) and notified for auction should be auctioned without disturbing the approved pattern. Bigger groups could be split into smaller groups and auctioned if the highest rental offered was lower than the current rental for the bigger group. It was strictly stipulated that *approved groups should not be enlarged under any circumstances* and where groups were re-formed reasons should be recorded in detail. The emphasis throughout was on the splitting of bigger groups into smaller groups but was never in the opposite direction i.e. forming bigger groups in the place of smaller groups. The instructions were definitely against creation of monopoly. The instructions dated August 3, 1979 also emphasised this aspect and expressly mentioned that monopoly should be broken as that would fetch better Revenue.

The specific instructions given on September 20, 1979, i.e. on the eve of the adjourned auction were that two to four groups might be formed in the case of the arrack shops of the twin cities. Some argument was advanced to the effect that the instructions dated September 21, 1979 altered the position and that liberty was given to the auctioning authorities to regroup the shops in any manner they liked to get maximum revenue. The instructions do not warrant any such conclusion. All that was said in the instructions dated September 21, 1979 was that regrouping might be done to get maximum revenue. It did not mean that the instructions previously in force were to be ignored or thrown overboard or that complete freedom was given to the auctioning authorities to act at their discretion. All that it meant was that regrouping might be done, if necessary, to get maximum revenue, but such regrouping was naturally to be in accordance with the instructions already given from time to time.

In the instant case the regrouping of all 78 shops into a single group was clearly opposed to the instructions issued by the Commissioner of Excise particularly the specific instruction issued on September 20, 1979 with respect to the very shops in the twin cities of Hyderabad and Secunderabad. It was opposed to the earlier general instruction that "approved groups should not be enlarged under any circumstances" and monopoly should be avoided. The accident that the regrouping fetched a higher bid is not sufficient justification of the departure from the administrative instructions which aim at breaking a monopoly in regard to lease of excise shops. The result could well have been otherwise and the bids lower.

Shri Tarkunde and Shri Venugopal argued that the object of the requirement that reasons should be recorded under R. 12 was to enable the Commissioner of Excise to exercise appropriate supervisory powers over the auctioning authority. It was not intended to vest any right in the contractors participating in the auction and so, if reasons were not given the contractors could not complain. They urged that the Government is the exclusive owner of all rights and privileges in regard to intoxicants and no citizen had any justiciable right in them. Viewed in that light, they submitted, the rule had been sufficiently complied with as reasons were recorded first on the 21st and again after the auction on the 22nd September, 1979.

We are unable to agree with the submission that the requirement regarding the recording of reason is directory. The question whether a provision is mandatory or directory is not to be resolved merely by reference to the emphatic or gentle language employed in the provision, nor even by the presence or absence of an express stipulation regarding

- A** the consequences of a breach of the provision. These are circumstances of importance which naturally have to be considered. But one must give greater consideration to the statutory design and the importance of the provision in the context of that design. Generally one may say a provision which insists upon recording of reasons before an action is taken must *prima facie* be considered to be mandatory,
- B** as it is aimed at preventing arbitrariness. Where the rights of citizens are involved there can be no question that such a provision should be regarded as mandatory. Where the provision involves the public interest also the provision must be regarded as mandatory. Examined in that light the Andhra Pradesh Excise Act is an Act intended to raise and secure revenue to the State, without at the same time sacrificing the
- C** public interest involved which requires the regulation of trade in intoxicants. The administration of the Act is, therefore, vested primarily and centrally in the Commissioner of Excise who is expected to take a decision on all vital matters. The fixation of the number of shops, their location, and grouping are considered by the legislative delegate to be matters of such vital importance in Excise administration that the
- D** power in regard to these matters is vested in the Excise Commissioner. In that setting, the object of the rule is clearly seen to be to secure strict compliance with the arrangement already made by the Commissioner of Excise, the highest authority, and to permit no departure from the arrangement save in exceptional cases, on the clearest of grounds. What is involved is the protection of revenue and what
- E** is to be prevented is *ad hoc* improvisation which jeopardises the revenue. That a particular improvisation yielded better results may be the exception which proves the rule. The public interest is thus seen to be served in two ways by the recording of reasons, first by protecting the public revenue and next by making public authorities not to function
- F** arbitrarily and also not appear to function arbitrarily. It is true that the Government is the exclusive owner of all rights and privileges in regard to intoxicants and no citizen has any right in regard to them. That is not in question here. The question is whether the Government having invited members of the public to participate in a public auction on certain terms and conditions, it is open to the officer entrusted with the task of conducting the auction to vary the terms and conditions
- G** publicly announced earlier, without assigning any reasons when the statutory rules require the recording of reasons. We do not see how a departure from the rules and failure to record the reasons is permissible merely because no citizen has any right in the sale of intoxicants. The situation changes as soon as statutory provision and rules are made
- H** and the public is invited to participate in the auctions to be held as provided by rules. We do not doubt that the requirement regarding recording of reasons contained in R. 12 of the Andhra Pradesh Excise

(Lease of Right to Sell Liquor in Retail) Rules, 1969, is mandatory. It was argued that even if the recording of reasons was mandatory it was not a condition precedent. It was said that the reasons could be recorded contemporaneously, that is to say, soon after the auction was held. We have grave doubt about the propriety of such a procedure. The object of the insistence upon the recording of reasons is to eliminate arbitrariness. Reasons, if given, substitute objectivity for subjectivity. It is common experience that when reasons are set down in writing greater thought goes into it and greater objectivity is attained. Where the action to be taken involves a departure from what has already been decided by the apex authority and the public interest is involved, we cannot but hold that the reasons required to be recorded must be recorded before and not after the action is taken. The language of the rule also supports this conclusion.

Let us examine if any reasons have been recorded at all. The note file has been produced before us. On September 20, 1979, the note file refers to a telephone message to the effect that the Commissioner was appraised of the situation and that he had instructed that the twin city arrack shops should be grouped into two to four groups. There is then a note that viable groups may be formed as per the guidelines given by the Commissioner. On September 21, 1979 the note file begins with the statement that 'viable groups are formed as per the guidelines given by the Commissioner of Excise'. There is then a narration of events that took place that day, written by the Excise Superintendent, signed by him and countersigned by the Collector. The note refers to the fact that the arrack shops were first put to auction individually, then in two and then in a single lot. The aggregate of the bids is noted. It is then mentioned that the auction is adjourned to September 22, 1979. There is nothing to indicate why a departure was made from the grouping that was announced in the original notice of auction. The note made on September 22, 1979 was admittedly written (it is typed) after the auction on September 22, 1979. This note also merely narrates what took place. It is mentioned that the shops were put to auction first individually, then in two groups, and finally as one group. The last paragraph of the note is as follows :

"As the prospects to achieve reasonable bids on small ten groups and (56) individual shops and also on 2 groups called Hyderabad and Secunderabad were not foreseen then all the (78) shops were grouped in one group and called as Twin Cities group. The bids amount offered was Rs. 24,00,000/- and the 2 tenders received offered Rs. 15,11,111/11 and of Rs. 25,55,555/55. The highest tender of Rs. 25,55,555/55 is considered as the

- A** best available bid and the auction of the Twin Cities Group consisting (78) shops is finalised by me in favour of Sri Rajamalliah and others on 22-9-1978".

- B** Thus it is seen that no reasons at all were mentioned on September 21, 1979 and even on September 22, 1979, such reason as had been given was *ex-post facto* and was not in accordance with the administrative instructions issued by the Commissioner of Excise. The general instructions given earlier on June 10, 1975 and August 3, 1979 that 'approved groups should not be enlarged under any circumstances' was flouted. The instruction given on September 20, 1979, with express reference to the arrack shops of the twin cities though mentioned in the note file both on September 20, 1979 and September 21, 1979 that the shops may be grouped into two to four groups' was ignored on September 22, 1979.

- C** We also notice that the allegation of the respondents that they were given but half an hour's time on September 22, 1979, to prepare for the auction of the shops as a single group was not controverted. Having regard to the fact that the rules required large deposits to be made it is impossible to hold that half an hour's time could be considered sufficient by any stretch of imagination.

- D** We have already recorded the undertaking given by the respondents that they would give security of Rs. 35 lakhs within one week from April 21, 1980 and that they would start the bids at the re-auction in such a way that the aggregate of the bids would not be less than Rs. 35 lakhs.

- E** For the aforesaid reasons we confirm the decision of the Andhra Pradesh High Court and dismiss all the appeals with costs. The re-auction will be held within three weeks from today and until the new auction purchasers take over the present appellant will continue to run the shops.

F S.R.

Appeals dismissed.