STATE OF HARYANA & ORS.

v.

LAL CHAND & ORS.

May 2, 1984

[D.A. DESAI, A.P. SEN AND V. BALAKRISHNA ERADI, JJ.]

Constitution of India 1950, Article 299(1) Condition to be satisfied before a binding contract between the Union or State comes into existence—What are. Contracts executed in exercise of statutary power and contracts which are statutory in nature—Existence of distinction indicated—Article 299(1) inapplicable when Union or State enters into a contract which is statutory in nature.

Excise Contract—A statutory contract—Requirements of Article 299(1) cannot be invoked.

Punjab Excise Act 1914, Section 60 & Punjab Liquor Licence Rules 1956, Rules 32(2), 36(22), 36(23), and 36(23A).

Excise Contract—Reauction—Recovery of difference between bid amount in original auction and that fetched in reauction—State whether entitled to recover the differential amount from the original licencee.

Indian Contract Act 1872. Commercial Contract—Performance of—Definite time fixed and mode of payment specified—Time essence of such contract—Excise contract—Time whether essence of contract.

The Deputy Excise & Taxation Commissioner held an auction for granting the right to sell country-Liquor for liquor vend. The respondents offered the highest bid which was provisionally accepted and they were declared the highest bidder under Rule 36(2) of the Punjab Liquor Licence Rules 1956. Subsequently, the Excise and Taxation Commissioner accepted the bid as required Rule 36(22). The respondents however failed to deposit the security amount as required under Rule 36(22A) and thereby contravened conditions No. 15(1) of the conditions of auction and Rule 36(23). The Deputy Excise & Taxation Commissioner therefore served the respondents with a notice to show-cause why the licence for country liquor vend, should not be re-auction under Rule 36(23A) and the deficiency in price and all expenses of such re-auction recovered from them under Section 60 of the Punjab Excise Act, 1914. The respondents represented that before the auction it was announced that no wine shop would be opened within a radius of three miles of the liquor vend but across the border the State Government of Punjab had sanctioned the establishment of

a liquor shop which was hardly 2-1/2 miles from the border and this would mean that there would be two country liquor shops one in the State of Haryana and the other in the State of Punjab and this was in breach of condition No. 13(iii) read with Rule 37(88) of the Rules. The Deputy Excise and Taxation Commissioner rejected the representation and directed the re-sale of the licence for retail vend of the country-liquor shop under Rule 36(23). The shop was re-auctioned. At the time of re-auction there were 52 bidders and the shop was re-sold at the highest bid of Rs. 6.65 lakhs. The respondents were served with a notice of demand of Rs 3.46 lakhs representing the loss on re-sale.

In their writ petitions to the High Court the respondents assailed the notice of demand. Following the decision in *Kanhiya Lal Bhatia & Co.* v. *State of Haryana & Ors.* the High Court held that the State had no authority to demand the amounts for failure of which the vends were put to re-auction on the ground that the licence fee levied was in the nature of excise duty.

In the Appeals to this Court, on the question whether the State Government was entitled to realise the difference which the respondents had agreed to pay under the terms of auction of a liquor vend and the amount realized on re-auction of the vend, as also the defaulted instalments of the licence fee payable in respect of a liquor vend :

Allowing the appeals,

HELD : 1. (i) There is a distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. Under Art.299 (1), three conditions have to be satisfied before a binding contract by the Union or the State in exercise of the executive power comes into existence : (1) The contract must be expressed to be made by the President or the Governor, as the case may be. (2) It must be executed in writing. And (3) the execution thereof should be by such person and in such manner as the President or the Governor may direct or authorize. There can be doubt that a contract which has to be executed in accordance with Art. 299(1) is nullified and becomes void if the contract is not executed in conformity with the provisions of Art. 299(1) and there is no question of estoppel or ratification in such case. Nor can there by any implied contract between the Government and another person. [726C-E]

Smt. Nanhibai v. *The Excise Commissioner, M.P. & Ors.*, AIR (1963) MP 352, referred to.

Ram Rattan Gupta v. *State of M.P.*, AIR (1974) MP 101. *Ajodhya Prasad Shaw & Anr.* v. *State of Orissa & Ors.*; AIR (1971) Ori., 158, *M/S Shree Krishna Gyanoday Sugar Ltd. & Anr.* v. *State of Bihar & Anr.*, AIR (1975) Pat. 123, approved.

(ii) Art. 299(1) applies to a contract made in exercise of the executive power of the Union or the State. but not to a contract made in exercise of statutory power. Art. 299(1) has no application to a case where a particular statutory authority as distinguished from the Union or the States enters into a contract which is statutory in nature. Such a contract. even though it is for

securing the interests of the Union or the States. is not a contract which has been entered into by or on behalf of the Union or the State in exercise of its executive powers. [726F-G] A

K.P. Chowdhary v. *State of M.P.*, [1966] 3 SCR 919, *Mulamchand* v. *State of M.P.*, [1968] 3 SCR 214, *State of M.P.* v. *Rattan Lal*, [1967] MPLJ 104, *State of M.P.*, v. *Firm Gobardhan Dass Kailash Nath*, AIR [1973] SC 1160, referred to. B

(iii) In an excise contract, the Collector acting as Deputy Excise & Taxation Commissioner conducting the auction under Rule 36(22) and the Excise Commissioner exercising the functions of the Finanical Commissioner accepting the bid under Rule 36(22A) although they act for and on behalf of the State Government for raising public revenue, have the requisite authority to do so, under the Act and the rules framed thereunder and therefore such a contract which comes into being an acceptance of the bid, is a statutory contract falling outside the purview of Article 299(1) of the Constitution. In such a contract the requirements of Article 299(1) cannot be invoked. [727B-E] C

A. Damodaran & Anr. v. *State of Kerala & Ors.*, [1976] 3 SCR 780; referred to, D

In the instant case, there was unconditional acceptance of the highest bid of the respondents by the Deputy Excise & Taxation Commissioner at the time of the auction on March 11, 1969, and also by the Excise & Taxation Commissioner on March 21, 1969 as required under Rule 36(22A). The respondents could not unilaterally by their letter dated April 12, 1969 rescind the contract on the pretext that the State Government of Punjab had opened a new liquor shop across the State border. Even though this may have been in breach of the inter-state agreement between the State Govdrnments of Punjab and Haryana, the opening of such a liquor vend by the State Government of Punjab could not justify the respondents in not making the security deposit. This would not amount to a breach of the conditions on the part of the State Government of Haryana or furnish a ground absolving the respondents of their liability to pay the shortfall. [730E-G ; 731A-B] E F

2. Persons who offer their bids at an auction to vend country liquor with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Article 226 of Constitution. [731G]

Har Shanker & Ors. v. *The Deputy Excise & Taxation Commissioner & Ors.*, (1975) 3 SCR 255, *State of Haryana & Ors* v. *Jage Ram & Ors.*, (1980) 3 SCR 746, *State of Pujab* v. *M/s Dial Chand Gian Chand & Co.*, [1983] 2 SCC 303 : referred to. G

3, (i) In a commercial contract for the performance of which a definite time has been fixed and the contract specifies the mode of payment. i.e. specifies the dates on which the instalments of the licence fee are to be paid. time is of the essence of the contract. [732H] H

(ii) Rule 36(23)(1) of the Rules specifically makes time of the essence. It therefore follows that payment of the instalments on the due dates was a condition pre-requisite to the performance of the contract. [733A]

In the instant case, the failure of the respondents to make payments relieved the State Government of their obligations. The Excise & Taxation Commissioner would have been justified if he had cancelled the licence under Rule 36(23) and put the liquor vend to reauction for the remaining period of the financial year. Instead of taking this drastic step of cancellation of the contract, the Deputy Excise & Taxation Commissioner served the respondents with the impugned notice of demand for payment of the first fortnightly instalment. The respondents were bound to pay the defaulted instalment on the due date. [733B-C]

4. The decision of the High Court in *Kanhiyalal Bhatia &.Co.* v. *State of Haryana & Ors.* has been reversed by this Court in *State of Haryana* v. *Jage Ram & Ors.*, [1983] 4 SCC 556. [720G]

CIVIL APPELLATE JURISDCITION : Civil Appeal Nos. 154 & 155(N) of 1971.

From the Judgment and Order dated the 11th November, 1969 Civil of the Punjab & Haryana High Court in writ Nos. 1207 and 1607 of 1969 respectively.

Harbans Singh, I.S. Gujral, C.V. Subbarao and *R.N. Poddar* for the Appellants in both the appeals.

G.K. Arora for the respondents in C.A. 154/71.

T.S. Munjral and *Mrs. Urmila Kapoor* for the Respondent in CA 155/1971.

The Judgment of the Court was delivered by

SEN, J. These appeals on certificate are directed against the Judgment and orders of the Punjab High Court dated November 19, 1969 allowing the writ petitions filed by the respondents and quashing the impugned notices of demand for recovery of the difference between the amount which they had agreed to pay under the terms of auction of a liquor vend and the amount realized on re-auction of the vend as also the defaulted instalments of the licence fee payable in respect of a liquor vend issued under s. 60 of the Punjab Excise Act 1914 ('Act' for short).

Put very shortly, the essential facts are these. On March 11, 1969, the Deputy Excise & Taxation Commissioner, Hissar held an

auction for granting the right to sell country liquor for Mandi Dabwali for the year 1969-70 at the Collectorate. At the commencement of the auction, the Deputy Excise & Taxation Commissioner had read out the auction announcements and conditions of auction as required under r. 36(4) of the Punjab Liquor Licence Rules, 1956 ('Rules' for short). The respondents Messrs Lal Chand Bal Raj etc. offered the highest bid of Rs. 10,11,000 and their bid was provisionally accepted by the Deputy Excise & Taxation Commissioner and they were declared to be the highest bidder as required under r. 36(2) of the Rules. Subsequently, the bid was accepted by the Excise & Taxation Commissioner exercising the powers of the Financial commissioner on March 21. 1969 as required under r. 36(22) of the Rules. The respondents however failed to deposit Rs. 50,550 as security amount as required under r. 36(22A) and thereby contravened condition No. 15(i) of the conditions of auction and r. 36(23) of the Rules. They were accordingly served with a notice dated April 9, 1969 by the Deputy Excise & Taxation Commissioner requiring them to show cause why the licence for country liquor vend, Mandi Dabwali should not be put to re-auction under r. 36(23A) of the Rules and the deficiency in price and all expenses of such re-auction recovered from them in the manner laid down in s. 60 of the Punjab Excise Act, 1914. in response to the same, the respondents by their letter dated April 12, 1969 tried to wriggle out of their contractual obligations by saying that before the auction it was announced that no wine shop shall be opened within a radius of three miles of liquor vend, Mandi Dabwali, but across the border the State Government of Punjab had sanctioned the establishment of a liquor shop at village Killianwali which was hardly 2-1/2 miles from the State border and this would mean that there would be two country liquor shops-one at Mandi Dabwali in the State of Haryana and the other at village Killianwali in the State of Punjab and this was in breach of condition No. 13(iii) read with r. 37(8B) of the Rules, as applicable to the State of Haryana. Upon this basis, the respondents represented that before requiring them to deposit the security amount, they should be given an assurance that no other liquor shop would be opened.

A B C D E F G

Although in the show-cause notice, the respondents were intimated that in case they desired to be heard in person, they should appear before the Deputy Excise & Taxation commissioner at Chandigrah on April 14, 1969, but none of them turned up on

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A that date. On the same day, the Deputy Excise & Taxation Commissioner rejected the representation of the respondents and directed re-sale of the licence for retail vend of the country liquor shop at Mandi Dabwali for the year 1969-70 under r. 36(23) of the Rules. The respondents have purposely kept back the reply that they received from the Deputy Excise & Taxation commissioner B conveying the rejection of their representation which intimated to them that the licence for retail vend of country liquor shop at Mandi Dabwali would be re-auctioned on April 23, 1969 at the Collectorate, Hissar. By his letter dated April 15, 1969 addressed to all the Excise & Taxation Officers in the State, the Deputy Excise C & Taxation commissioner forwarded the notice of re-auction asking them to give wide publicity to the notice along with the announcements to be made at the time of re-auction. Copies of the circular-letter and the notice of re-auction were sent not only to the commissioner, Ambala and all the Deputy Commissioners in the State but also to the Chief Secretaries and the Excise Commissioners of diffe- D rent States and they were also requested to give wide publicity in their States regarding the re-auction of the licence. At the time of re-auction held on April 23, 1969, there were as many as 52 bidders and ultimately the liquor vend, Mandi Dabwali was re-sold at the highest bid of Rs. 6,65,000 for the remaining part of the financial year. On May 8, 1969, the respondents were served with a notice E of demand of Rs. 3,46,000 representing the loss on re-sale. The High Court by the judgment under appeal quashed the notice of demand following the decision in *Kanhiya Lal Bhatia &Co.* v. *State of Haryana & Ors*(1).

The High Court following its decision in *Kanhiya Lal's* case, supra, held that the State Government had no authority to demand F the amounts for failure of which the vends were put to re-auction on the ground that the licence fee levied was in the nature of excise duty. Recently, this Court has in *State of Haryana* v. *Jage Ram & Ors.*(2) reversed the decision of the High Court in *Kanhiya Lal's* case, supra, and held that the amounts which the State Government had charged to the respondents were neither in the G nature of a tax nor in the natnre of an excise duty but were in the nature of a price which the State Government were entitled to charge as consideration for parting with its privilege in favour of the licensees. That being so,the appeals must succeed on this short ground alone. Normally, this would have entailed remitting the H writ petitions to the High Court for a decision on merits but looking

(1) C.W. No. 343 of 1969 decided on July 23, 1969.
(2) [1983] 4 S.C.C. 556.

to the fact that the demands raised were for the financial year 1969-70,we felt that no useful purpose would be served in remitting the matter to the High Court and heard the parties on merits.

Apart from the question of validity of the charge which is common to both the appeals, the questions raised in the two appeals are distinct and separate and they will have to be dealt with separately.

It is convenient at this stage to set out the relevant statutory provisions. s.27 of the Punjab Excise Act, 1914 empowers the State Government to 'lease' no such conditions and for such period as it may deem fit the right of selling by wholesale or retail any country liquor or intoxicating drug within any specified local area. On said lease being granted the Collector, under sub-s.(2) thereof, has to grant to the lessee a licence in the from of a lease. S.34 of the Act provides *inter alia* that (1) Every licence granted under the Act shall be subject to payment of such fees, if any, as the Financial Commissioner may direct ; and (2) The authority granting such licence may require the licensee to give such security for the observance of the terms of his licence, or to make such deposits by way of security. as he may think fit. s.58(1) of the Act confers power on the State Government, by notification, to make rules for the purpose of carrying out the provisions of the Act. In particular and without prejudice to the generality of s.58(1), sub-s. (2) thereof provides that the State Government may make rules with respect to matters enumerated therein. Under cl.(f) the State Government may make rules regulating the manner of holding auctions of liquor shops. S.59 provides that the Financial Commissioner may, by notification, make rules by cl. (a) to regulate the manufacture, supply, storage or sale of any intoxicant, cl.(d) prescribing the scale of fees or the manner of fixing fees payable in respect of any such licence and by cl.(f) prescribing the authority by, the restrictions under, and the conditions on which, any licence may be granted. The licences, in a large measure, owe their existence to the rules framed by the Financial Commissioner under S.59. S.60 of the Act, insofar as material, reads :

"60. (1) *Recovery of dues*—The following moneys namely :—

(a) all excise revenue ;

(b) * * * * * * * * *

(c) 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), by distress and sale of his moveable property or by any other process for the recovery of arrears of land revenue due from land holders or from farmers of land or their sureties."

The Punjab Liquor Licence Rules, 1956 framed by the Financial Commissioner in exercise of his powers under s.59 of the Act make detailed provisions regulating the manner in which a licence for the retail vend of country liquor shall be granted by public auction, and the conditions to which it shall be subject. R.36(22A) of the Rule provides that a person to whom a country liquor shop has been sold shall deposit by way of security an amount equivalent to one-twenty-fourth of the amount of licence fee determined under r.36(16) within a period of seven days of the date of auction. R.36(23)(2) provides that a person to whom country liquor shop is sold shall pay the amount of licence fee so calculated in 22 equal instalments, each instalment being payable on tho 10th and 26th of each month starting from the month of April. In the event of failure to pay the instalment by the due date, his licence may be cancelled. R.36(23A) interdicts that any person whose bid has been accepted at the auction fails to make the deposit of the amount of security equivalent to one-twenty-fourth of the total licence fee as required under r.36(22A), the Collector may resell the licence by public auction and deficiency in licence fee and all expenses for such resale shall be recoverable from the defaulting bidder in the manner laid down in s.60 of the Punjab Excise Act, 1914.

In *Har Shanker & Ors.* v. *The Deputy Excise & Taxation Commissioner & Ors.*,(1) this Court held that the writ jurisdiction of the High Courts under Art.226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purpose of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle

(1) [1975] 3 SCR 255

out of the contractual obligations arising out of the acceptance of his bid. Chandrachud, J. (as he then was) interpreting the provisions of the Punjab Excise Act, 1914 and of the Punjab Liquor Licence Rules, 1956 and speaking for the Court, said: A

> "The announcement of conditions governing the auction were in the nature of an invitation to an offer to those who were interested in the saleof country liquor. The B bids given in the auctions were offers made by the prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a C binding agreement came into existence between them.
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> The powers of the Financial Commissioner to grant liquor licence by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned D by those who, had their vendure succeeded, would have relied upon those very powers to found a legal claim. Reciprocal right and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a E binding force."

To the same effect are the decisions of this Court in *State of Haryana & Ors.* v. *Jage Ram & Ors.*(1) and the *State of Punjab* v. *M/s Dial Chand Gian Chand & Co.*(2) laying down that persons who offer F their bids at an auction to vend country liquor with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of and acceptance of their bids by a petition under Art. 226 of the Constitution.

The observations in *Har Shanker's* case, supra, did not G touch upon the question whether such a contract must be in compliance with Art. 299 (1) of the Constitution. The question whether the process of licensing by public auction of liquor vend involves a contract at all or is merely the grant of a privilege and the bidding at a public auction is with a view merely to fix the price for the purchase of the privilege, has been engaging the H

(1) [1980] 3 SCR 746.
(2) [1983] 2 SCC 503.

attention of the High Courts for quite some time. In *Smt. Nanhibai* v *The Excise Commissioner, M.P. & Ors.*(1) the Madhya Pradesh High Court held that the State Government has the exclusive privilege of manufacturing, selling and possessing intoxicants which it has power to lease for consideration under s. 18 of the M.P. Excise Act, 1915 and that every auction of excise contract for sale of intoxicants is a leasing of the Government's right of selling intoxicants. P.V. Dixit, C.J. speaking for the Court made following observations on this point which are pertinent :

> "The principle that the State Government has exclusive right of manufacturing, selling or possessing intoxicants or any country liquor intoxicating drug runs through ss. 13 to 18 of the Act.
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> The important condition that must be satisfied before any licence can be granted to a person for manufacture or sale of any country liquor intoxicating drug is that the person must first obtain the privilege or the right of manufacturing or selling the intoxicating drug.
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> In every auction sale of a liquor shop at which liquor is sold in wholesale or retail, there is a sale of the lease of the Government's right of selling country liquor intoxicating drug. On the acceptance of a bid of a person at an auction sale, a contract for the demise of the Government's interest is brought into existence and this is followed by the grant of a licence to the person whose bid has been accepted."

These observations of the learned Chief Justice have since been approved of by a Full Bench of the High Court in *Ram Rattan Gupta* v. *State of M.P.*(2) The other two cases on the point which we must notice are : *Ajodhya Prasad Shaw & Anr.* v. *State of Orissa & Ors.*(3) and *M/s Shree Krishna Gyanoday Sugar Ltd. & Anr.* v. *State of Bihar & Anr.*(4)

(1) A.I.R. [1963] M.P. 352.
(2) A.I.R. [1974] M.P. 101.
(3) A.I.R. [1971] Ord. 158.
(4) A.I.R. [1975] Pat. 123.

In *Ajodhya Prasad Shaw's* case, the Orissa High Court and in *M/s. Shree Krishna Gyanoday's* case, the Patna High Court interpreting like provisions of the Bihar & Orissa Excise Act, 1915 held that where the State Government in exercise of its powers under s. 22 of that Act grants exclusive privilege to any person on certain conditions under s. 22 (1) and a licence is received by that person under s. 22 (2), it cannot be contended that it amounts to a contract made in exercise of the executive power of the State within the meaning of Art. 299 (1) of the Constitution. R.N. Misra, J. speaking for the Court in *Ajodhya Prasad Shaw's* case tried to highlight the problem in these words:

> "Law is well settled and parties before us do not seek to canvass that this constitutional requirement is not mandatory. In the field it covers it is a pre-requisite to bring into existence a valid contract. The question for examination in the present case is, however, different. Is there a contract at all and in case it involves a contract is it one purported to be made in exercise of the executive power of the State Government is the question for examination."

The learned Judge went on to say :

> "In case the result of our investigation is that it is not a contract in exercise of the executive power of the State in terms of the language used in the Article, it would follow that this constitutional requirement has no application. I have already indicated that the settlement of the shop, the collection of the fee and the grant of the licence are all statutory acts by the prescribed authority. The intention of the Constitution is not to extend the principles in Art. 299 (1) to cover all possible contracts. This is why specific reference has been made to contracts "in exercise of the executive power". It is not necessary for the present purpose to examine whether the licensing process involves a contractual agreement. Possibly there is an element of contract in the settlement, but certainly it is not one entered into in the executive power of the State but is regulated by the statute or the rules made thereunder. In the circumstances in the case of a statutory licence even based upon a contract the requirements of this Article cannot be invoked."

A In *M/s. Shree Krishna's* case, supra, N.P. Singh, J. speaking for the Court rightly observed that when the State Government in exercise of its powers under s 22 of the Act grants the exclusive privilege of manufacturing, or supplying or selling any intoxicant like liquor to any person on certain condition, there comes into existence a contract made in exercise of its statutory B powers and such a contract does not amount to a contract made by the State in exercise of the executive powers.

There is a distinction between contracts which are executed in exercise of the executive powers and contracts which are C statutory in nature. Under Art. 299(1), three conditions have to be satisfied before a binding contract by the Union or the State in excercise of the executive power comes into existence : (1) The contract must be expressed to be made by the President or the Governer, as the case may be. (2) It must be executed in writing. And (3) The execution thereof should be by such person D and in such manner as the President or the Govenor may direct or authorize. There can be no doubt that a contract which has to be executed in accordance with Art. 299(1) is nullified and becomes void if the contract is not executed in conformity with provisions of Art. 299(1) and there is no question of estoppel or ratification in such cases. Nor can there be any implied contract between the E Governmet and another person : *K.P. Chowdhary* v. *State of M.P.*,[1] *Mulamchand* v. *State of M.P.*,[2] *State of M.P.* v. *Rattan Lal*[3] and *State of M.P.* v. *Firm Gobardhan Dass Kailash Nath.*[4]

It is well settled that Art. 289(1) applies to a contract made in exercise of the executive power of the Union or the State, but not F to a contract made in exercise of statutory power, Art. 299(1) has no application to a case where a particular statutory authority as distinguished from the Union or the States enters into a contract which is statutory in nature. Such a contract, even though it is for securing the interests of the Union or the States, is not a contract G which has been entered into by or on behalf of the Union or the State in exercise of its executive powers. In respect of forest contracts which are dealt with by this Court in *K.P. Chowdhary's*, *Mulamchand's*, *Rattan Lal's* and *Firm Gobardhan Dass's* cases, supra,

H (1) [1966] 3 S.C.R. 919
(2) [1968] 3 S.C.R. 214
(3) [1967] M.P.L.J. 104
(4) A.I.R. [1973] S.C. 1160

there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed thereunder for entering into a formal deed between the forest contracter and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Art. 299(1), whereas under the Punjab Excise Act, 1914 ; like some other State Excise Acts, once the bid offered by a person at an auction-sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. It is settled law that contracts made in exercise of statutory powers are not covered by Art. 299(1) and once this distinction is kept in view, it will be manifest that the principles laid down in *K.P. Chowdhary's, Mulamchand's, Rattan Lal's* and *Firm Gobardhan Dass'* cases are not applicable to a statutory contract. In such a case, the Collector acting as the Deputy Excise & Taxation Commissioner conducting the auction under r. 36(22) and the Excise Commissioner exercising the functions of the Financial Commissioner accepting the bid under r. 36(22A) although they undoubtedly act for and on behalf of the State Government for raising public revenue, they have the requsite authority to do so under the Act and the rules framed thereunder and therefore such a contract which comes into being on acceptance of the bid, is a statutory contract failing outside the purview of Art. 299(1) of the Constitution.

We are clearly of the opinion that in the case of a statutory contract like the one under the Excise Act, the requirements of Art. 299(1) cannot be invoked. In *A. Damodaran & Aur.* v. *State of Kerala & Ors*(1)., the Court interpreting s.28 of the Kerala Abkari Act, 1967 which was in *pari materia* with s.60 of the Punjab Excise Act, 1914 held that even if no formal deed had been executed as required under Art.299(1), still the liability for payment of the balance of the licence amount due could be enforced by taking recourse to s.28 of the Act. The Kerala High Court rejected the contention of the appellants by holding that the liability to satisfy the dues arising out of a bid was enforceable under s.28 quite apart from any contractual liability and this view was upheld by this Court on the ground that the word 'grantee' in s.28 has a wide connotation to mean a person who had been granted the privilege by acceptance of his bid. It was further held that the statutory duties and liabili-

(1) [1976] 3 S.C.R. 780.

ties arising on acceptance of the bid at a public auction of a liquor contract may be enforced in accordance with the statutory provisions and that it was not a condition precedent for the recovery of an amount due under s.28 of the Act, that the amount due and recoverable should be under a formally drawn up and executed contract. This is in recognition of the principle that the provisions of Art.299(1) of the Constitution are not attracted to the grant of such a privilege to vend liquor under the Act.

In *Kishori Lal Minocha's* case, supra, there was reauction of a liquor vend on the highest bidder's failure to deposit one-sixth of the bid amount as security deposit and the question was whether the State was entitled to recover in a suit the deficiency on reauction. The decision in *Minocha's* case is clearly distinguishable for two reasons: first, there was nothing to show that the bid had been accepted by the Excise Commissioner under r. 359(2) of the U.P. Excise Manual. Further, r. 357 under which the excise authorities put the vend to reauction had not been published in the official gazette as required by s.77 of the U.P. Excise Act, 1910 and thus had no statutory force. No such question arises in these cases as the liability that is sought to be enforced against the respondents by the impugned notices of demand is a statutory liability in terms of condition 15(1) of the conditions of auction read with r.36(23) of the Rules and the amount is recoverable from them in the manner laid down in s.60 of the Act.

The short question that falls for determination in these appeals is whether the State Government was entitled to realise the difference which the respondents had agreed to pay under the terms of auction of a liquor vend and the amount realized on reauction of the vend, as also the defaulted instalment of the licence fee payable in respect of a liquor vend. The first of these questions arises in Civil Appeal No.154(N) of 1971 while the second in Civil Appeal No.155(N) of 1971. We will deal with them in that order.

Civil Appeal No. 154 (N) of 1971

There is no substance in the contention that the respondent were not served with a notice under r.36(3) of the Rules. The date of reauction was fixed by the Excise & Taxation Commissioner under r.36(2). On April 14, 1969, the Deputy Excise & Taxation Commissioner rejected the representation made by the respondents and directed resale of the licence for retail vend of country liquor shop,

Mandi Dabwali for the year 1969-70. It is accepted before us that the Deputy Excise & Taxation Commissioner had conveyed to the respondents that their representation had been rejected and that the licence for retail vend for Mandi Dabwali shop would be reauctioned on April 23, 1969, at the Collectorate, Hissar. The respondents have withheld the document and an adverse inference must necessarily be drawn against them. It is quite obvious that the respondents were duly given notice of re-auction as under r.36(3). It is evident from the return filed by the State Government that copies of circular letter dated April 15, 1969 by the Deputy Excise & Taxation Commissioner and the notice of re-auction of even date issued by him were sent not only to the Commissioner, Ambala but to all the Deputy Commissioners as well as to all the Excise & Taxation Officers in the State but also to the Chief Secretaries and the Excise Commissioner of different State. From this, it is quite apparent that wide publicity was given throughout the State of Haryana as well as in other States regarding the date and place of re-auction as enjoined by r.36(3) of the Rules. As already stated, there were as many as 52 bidders present at the time of re-auction. The decision in *Jage Ram's* case, supra is clearly distinguishable on facts. There, the Court on a consideration of the material on record found that there was no substantial compliance either in the letter or in spirit with the requirements of r.36(3) of the Rules. Since the re-auction in that case did not conform to the rules, the Court held that the defaulting bidders could not be held liable to make good the difference between the amount which was payable by them and the amount which was fetched at the re-auction. The principle laid down in *Jage Ram's* case, supra is clearly not attracted in the facts and circumstances of the present case. The first contention regarding the invalidity of re-auction held on April 23, 1969 based on r.36(3) of the Rules must therefore fail.

Equally futile is the contention that the respondents had withdrawn their bid and therefore they could not be mulcted for the difference between the amount which they were liable to pay and the amount realized by re-sale of the vend. This is not a case of the type reported in *Union of India & Ors.* v. *M/S. Bhim Sen Walaiti Ram*(1) which laid down the well-settled principle that an offer can always be withdrawn before it is finally accepted and that a conditional acceptance is not an acceptance in law. In *Bhim Sen Walaiti*

(1) [1970] 2 SCR 594.

Ram's case, supra, the 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 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 re-sale. It was observed :

> "It is not disputed that the Chief Commissioner has 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."

It is urged on the strength of these observations that the respondents were entitled to withdraw their bid by declining to make the security deposit. The contention cannot be accepted. For onething, this was not a case where there was mere conditional acceptance of the highest bid of the respondents by the Deputy Excise & Taxation Commissioner at the time of the auction on March 1, 1969, but their bid was also accepted by the Excise & Taxation Commissioner on March 21, 1969 as required under r. 36(22A).

The respondents could not unilaterally by their letter dated April 12, 1969 rescind the contract on the pretext that the State Government of Punjab had opened a new liquor shop at village Killianwali across the State border which was contrary to condition No. 13(iii) of the conditions of auction read with r. 37(8B) of the Rules. Even though this may have been in breach of the inter-State agreement between the State Governments of Punjab and Haryana, the opening of such a liquor vend by the State Government of Punjab at village Killianwali could not justify the respondents in not making the security deposit of Rs. 50,550. It appears from the return filed by the State Government that although condition No.13(iii) had been read out before the auction began as required under r. 36(4), there was no mention that there was an inter-State agreement between the two State Governments and that

it was a condition of sale that the State Government of Punjab would not open a liquor vend within a radius of three miles from the State border. Nor would this amount to a breach of the conditions on the part of the State Government of Haryana or furnish a ground absolving the respondents of their liability to pay the shortfall. The second contention that the respondents had withdrawn their bid and were therefore not liable for the loss on re-auction of liquor vend at Mandi Dabwali cannot be sustained.

In *Har Shanker's* case, supra, this Court held that the writ jurisdiction of the High Courts under Art. 226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purposes of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. In dealing with the question, Chandrachud, J. said :

> "The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could even have a binding force."

To the same effect are the decisions of this Court in *State of Haryana & Ors.* v. *Jage Rame & Ors*[1], and the *State of Punjab* v. *M/s. Dial Chand Gian Chand & Co.*[2] laying down that persons who offer their bids at an auction to vend country liquor with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Art. 226 of the Constitution.

(1) [1980] 3 SCR 746.
(2) [1983] 2 SCC 503.

Civil Appeal No. 155 (N) of 1971

A

At an auction for the licence of retail vend for Butana in the Rohtak district for the financial year 1968-69 held by the Deputy Excise & Taxation Commissioner on March 11, 1968 at the Collectorate, Rohtak, the respondents Messrs Ram Kishan Pritiam Singh & Co. offered the highest bid of Rs. 1,40,000. The Deputy Excise & Taxation Commissioner accepted their bid at the conclusion on the auction. On the same day, the respondents deposited Rs. 5,811 equivalent to one-twentieth of the licence fee representing the security amount and started operating the said licence w.e.f. April 1 1968. It appears that they drew their supplies by making applications to the Excise & Taxation Officer, Rohtak for the issuance of challans for deposits of still-head duty in the treasury, and after crediting into the treasury a sum equivalent to the excise duty payable on the strength of permits issued by him. Admittedly, the respondents worked the contraet throughout the period without making any payment of Rs. I,40,000 towards the licence fee which was payable in 23 fortnightly instalments. The respondents on being served with a notice of demand for payment of Rs. 13,000 representing the first of such fortnightly instalmants filed a writ petition in the High Court and the High Court following its decision in *Kanhiya Lal's* case, supra, struck down the notice of demand. It is accepted at the bar that the respondents have not paid anything towards the licence fee of Rs. 1,40,000 due and payable by them.

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Upon these facts, the Excise & Taxation Commissioner would have been justified in cancelling the licence in terms of r.36(23)(2) of the Rules which is in these terms :

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> "A person to whom a country spirit shop is sold shall pay the annual licence fee in 23 equal instalments, each instalment being payable on the 10th and 26th of each month starting from the month of April. In the event of failure to pay the instalment by the due date, his licence may be cancelled."

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There was a fundamental breach of an essential condition by the respondents. In a commercial contract of this nature, for the performance of which a definite time has been fixed and the contract specifies the mode of payment i.e. specifies the dates on which the instalments of the licence fee are to be paid, time is of the essence

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of the contract. R.36(23)(1) of the Rules specifically makes time of the essence. It therefore follows that payment to the instalments on the due dates was a condition pre-requisite to the performance of the contract, and that the failure of the respondents to make such payments relieved the State Government of their obligations. The Excise & Taxation Commissioner would therefore have been justified if he had cancelled the licence under r. 36(23) and put the liquor vend to reauction for the remaining period of the financial year. Instead of taking this drastic step of cancellation of contract, the Deputy Excise & Taxation Commissioner served the respondents with the impugned notice of demand for payment of the first fortnigtly instalment of Rs. 13,000. The respondents were bound to pay the defaulted instalment on the due date but without complying with the notice of demand moved the High Court under Art. 226 of the Constitution challenging the demand on the ground that the licence fee partakes of the nature on an excise duty. As already stated, the High Court following its decision in *Kanhiya Lal's* case struck down the notice of demand. The result has been that the respondents enjoyed the privilege of retail vend of country liquor, Butana for the entire period without payments of any licence fee. On merits, learned counsel appearing for the respondents had nothing to urge against the impugned notice of demand.

The result therefore is that the appeals succeed and are allowed with costs throughout. The judgment and orders of the High Court dated November 11, 1969 quashing the impugned notice of demand served on the respondents are set aside and the writ petitions filed by the respondents are dismissed.

N.V.K. *Appeals allowed.*