

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.10.2016

CORAM

THE HONOURABLE Dr.JUSTICE G.JAYACHANDRAN

Second Appeal No.262 of 2008

1.The District Collector,
Salem.

2.The Assistant Commissioner,
(Excise), Salem.

3.The Additional Divisional Excise
Officer, Salem. ... Appellants/Appellants/Defendants

-Vs.-

S.S.Mani ... Respondent/Respondent/Plaintiff

PRAYER: Appeal filed under Section 100 C.P.C., against the judgment and decree dated 31.08.2007 made in A.S.No.72 of 2006 on the file of the 1st Additional District Judge, Salem confirming the judgment and decree dated 18.11.2005 made in O.S.No.240 of 1997 on the file of Subordinate Judge, Athur.

For Appellants : Mr.T.Jayaramaraj
Govt. Advocate (CS)

For Respondents : Mr.N.Damodaran

JUDGMENT

This appeal arises out of the judgment and decree passed in A.S.No.72 of 2006 on the file of the First Additional District Judge, Salem dated 31.08.2007 confirming the judgment and decree made in O.S.No.240 of 1997 on the file of the Subordinate Judge, Athur dated 18.11.2005.

2. The appellants herein are the defendants before the Trial Court. The respondent herein is the plaintiff before the Trial Court. The suit filed by the respondent herein for recovery of money was allowed by the Trial Court and the same was confirmed by the Appellate Court. Aggrieved by the judgment and decree passed by the Courts below, the present appeal has been preferred by the appellants.

3. For the sake of convenience, wherever required, the parties are described as per the litigative status in the plaint.

4. The brief facts of the case is, as follows -

The plaintiff, Mr.S.S.Mani was the successful bidder for the licence to run the Arrack Shop No.69/81-82, Attur Town Shop IV, Salem District and he was the highest bidder by quoting a sum of Rs.16,500/-. According to the plaintiff, he had paid 2½ months kist of Rs.41,250/- as advance to the defendants and commenced the business during the month of August 1981. However, due to illicit sale of arrack in that locality, he could not run the business. He explained his inability to the Government to run the shop and he stopped the business by September 1981. The defendants re-auctioned the shop and allotted the licence to one Sethumadhavan who was the successful bidder for Rs.16,525/-. It so happened that the subsequent bidder was also not able to run the shop which forced the Government to re-auction the shop to another person subsequently. The subsequent bidder one K.V.Balakrishnan s/o Velu quoted bid amount of Rs.6,500/- which was confirmed by the appellants herein on 03.03.1982 by allotting the shop to him till the end of excise year, i.e. 1981 to 1982. The defendants, applying Rule 21 of Tamil Nadu Toddy and Arrack Shops (Disposals and Auction) Rules, forced the plaintiff to pay Rs.1,26,539/- as notional loss incurred to the Government. Challenging the said claim and recovery by the defendants, suit was filed by the plaintiff in O.S.No.240 of 1997.

5. Based on the pleadings, the trial Court framed the following issues-

1. Whether the plaintiff is liable to pay notional loss incurred to the Government ?
2. Whether the plaintiff is entitled for the money claimed ?
3. What is the relief the plaintiff is entitled to ?

6. During trial, on the side of the plaintiff, he was examined as P.W.1 and sixteen documents were marked as Exs.A.1 to A.16. On the side of the defendants, One Mr.Mohan Ram was examined as D.W.1 and four documents were marked as Exs.B.1 to B.4. Considering the above evidence, the trial Court answered all the issues in favour of the plaintiff and allowed the suit. Challenging the same, the defendants preferred an appeal in A.S.No.72 of 2006 before the First Appellate Court which also

confirmed the judgment and decree of the Trial Court. Aggrieved over the same, the defendants have come forward with this Second Appeal.

7. This Court put the respondent on notice regarding admission. The respondent/plaintiff appeared before this court and put forth his contention as to why the Second Appeal should not be dismissed.

8. On behalf of the appellants, the learned Special Government Pleader pointed out the substantial questions of law listed in the grounds of appeal and contended that as the successful bidder failed to honour his bid, the respondent/plaintiff is liable to compensate the loss incurred to the Government and a sum of Rs.1,26,529/- was collected from the respondent in accordance with Rule 21 of Tamil Nadu Toddy and Arrack Shops (Disposal of Auction) Rules, 1981.

9. The substantial questions of law raised in the grounds of appeal are as follows:-

(i) Whether the respondent is estopped from claiming refund of the amount paid to the appellant-Government towards the notional loss without making any protest ?"

(ii) Whether Rule 21 of Tamil Nadu Toddy and Arrack Shops (Disposal of Auction) Rules, 1981 does not authorize the appellant to recover the notional loss from the respondent who had closed down the arrack shop without any intimation to the appellant ?"

10. The specific averment of the plaintiff is that he was forced to remit Rs.1,26,539/- in eight instalments between 27.01.1992 to 29.09.1993 as he was under threat of revenue recovery. For the said allegation, the only defence taken by the defendants in the written statement is that what they have collected is as per law and the plaintiff is not entitled to refund of the amount as he has caused revenue loss to the Government.

11. This court, on perusal of the records could not find a piece of evidence to show that under what procedure, the defendants recovered the said amount of Rs.1,26,539/- from the plaintiff. Except Ex.B3 which appears to be a communication by the Government addressed to the Commissioner of Prohibition which is very general in nature, there is no other document to

show that how a sum of Rs.1,26,539/- was ascertained as notional loss and penalty payable by the respondent/plaintiff. Therefore, this Court has no second opinion but to accept the plaintiff's plea that the amount was recovered from him only under threat of revenue recovery action and not in accordance with any other provision established under law. Just because the plaintiff tendered the amount of Rs.1,26,539/- without protest, it cannot be pre-concluded that the same was made without protest and the person who has paid the amount is estopped to claim refund. Principles of Estoppel does not apply when the act is done out of fear of coercion.

12. Rule 21 of the Tamil Nadu Toddy and Arrack Shops (Disposal of Auction) Rules, 1981 reads as follows -

21. Resale of shop - (1) On the failure of any person to make a deposit or apply for a licence or to comply with any requisition or to execute any bond, deed or agreement under these rules the shop may be resold under the orders of the Collector or, on a report from the Assistant Commissioner, the Sale Officer, the Collector may otherwise dispose of the shop. Resales under this rule shall be at the risk of the defaulting bidder, who shall forfeit all gain, if any, that may secure by the resale and in the event of a loss by resale, the defaulting bidder shall be required to make good the deficiency between the total amount payable for the whole period under the terms of the original sale and by the total amount payable by the successful bidder at the resale. In the latter case, the deposits already made by defaulting bidder, excluding the amount of earnest money deposit, if any, forfeited to the State Government under rule 15 shall be forfeited and deducted from the loss arising from the resale and the balance of the loss, if any, shall be recoverable in the same manner as if it were an arrear of land revenue. Should, however, the deposits be greater than the loss by resale, only such part of the deposits as is necessary to cover loss by resale shall be forfeited and the balance refunded to the defaulter. The defaulting bidder shall be similarly liable if the shop is disposed of otherwise than by resale and such disposal results in loss to the State Government as compared with the original sale.

Explanation- For the purpose of this rule, 'Disposal otherwise than by resale' includes closure.

(2) Where the successful bidder discontinues the privilege during the period for which it was granted or his privilege is cancelled, the shop shall be resold for the remainder of the period and the provisions of sub-rule (1) shall apply mutatis mutandis to such resale.

13. The plaintiff was the first successful bidder for Arrack Shop at Athur Town in the auction held on 29.05.1981. According to Rule 16 of Tamil Nadu Toddy and Arrack Shops (Disposals and Auction) Rule, 1981, the plaintiff paid 2½ months kist of Rs.41,250/- as advance and was running the shop from 16.07.1981 to 19.10.1981. However, due to huge loss, the plaintiff stopped the business on September 1981. After conducting enquiry, the defendants have taken necessary steps to re-auction the shop and have found a successful bidder by name Sethumadhavan. The bid amount of Sethumadhavan was in fact higher than the bid amount of the plaintiff. At the most, the loss to the Government could have been only for three months, for which, the respondent was holding the licence. It is not disputed by the defendants that the plaintiff had already paid three months kist in advance and also paid rent of Rs.16,500/- for the first month licence, i.e. August 1981. Therefore, after re-auctioning the shop to Sethumadhavan, it is only the said Sethumadhavan to be considered as defaulting bidder under Rule 21 of Tamil Nadu Toddy and Arrack Shops (Disposals and Auction) Rules to pay the loss, whether notional or otherwise, if any to the Government and not the plaintiff.

14. Both the Courts below have categorically held that as per Rule 21, the loss, if any, can be recovered only from the subsequent successful bidder, i.e. Sethumadhavan in this case and not the first bidder, i.e. S.S.Mani, the plaintiff. This Court also concurs with the above view.

15. Thus, both the substantial questions of law framed in this second appeal are answered against the appellants. I do not find any ground to interfere with the decree of the courts below.

16. In the result, the second appeal fails and accordingly, the same is dismissed with costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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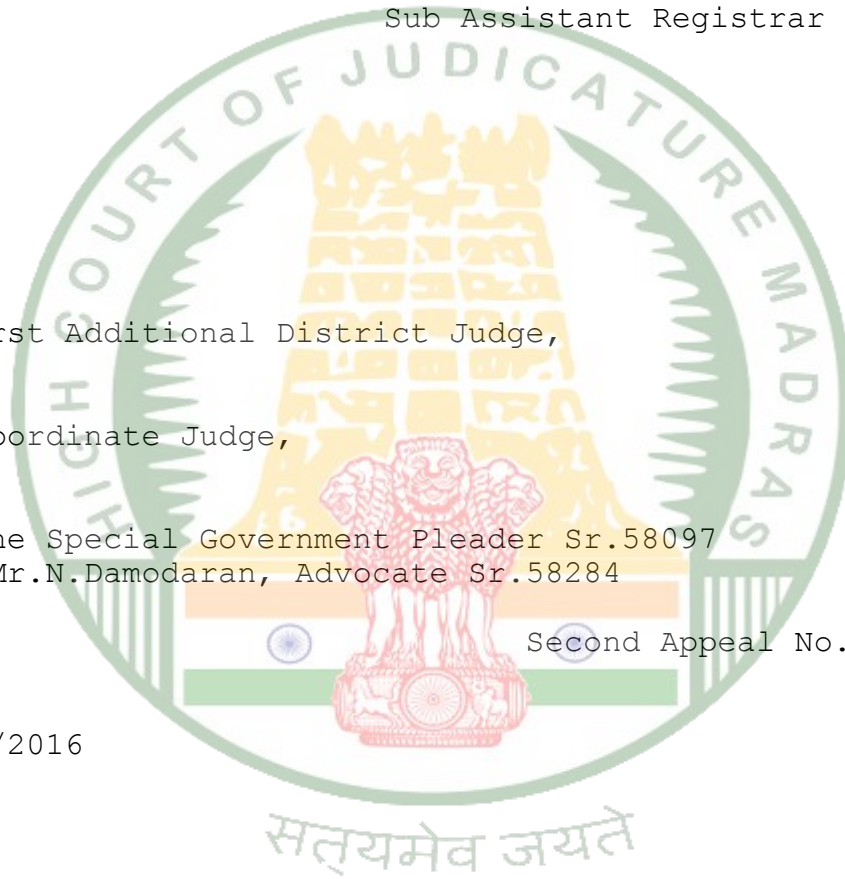
1. The First Additional District Judge,
Salem.

2. The Subordinate Judge,
Athur.

+1cc to the Special Government Pleader Sr.58097
+1c c to Mr.N.Damodaran, Advocate Sr.58284

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