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Present : Wood Renton C.J. and Shaw J.

DE SOYSA *v.* THE ATTORNEY-GENERAL.

223—D. C. Colombo, 35,374.

Sale of arrack rents—Notification to prospective buyers that renters would be given licenses to distil their own arrack—No mention of the fact in the conditions of sale—Does notification form part of the contract? —Evidence Ordinance, s. 91—Action against the Government for breach of contract—Not granting license in terms of contract—Ordinance No. 10 of 1844, s. 9.

The plaintiff purchased, on March 25 and April 19, 1912, the arrack rents for the Negombo and Anuradhapura Districts, respectively, for the year 1912-13.

On March 4, 1912, a circular letter was issued by the Government to prospective purchasers of arrack rents (including the plaintiff), which stated, *inter alia*, that renters would be allowed licenses to distil their own arrack for the use of their own rents; but the conditions of sale did not provide for this.

Held, that section 91 of the Evidence Ordinance was no bar to the plaintiff proving the circular as a part of his contract.

Held, further, that the contract contained in the notification (circular was entirely distinct from the provisions of Ordinance No. 10 of 1844, relating to the grant of licenses for distilling arrack, and that consequently section 9 of that Ordinance was not a bar to an action against the Government for damages for breach of contract, by reason of the Government refusing to issue a license as stated in the circular.

APPEAL from a judgment of the Acting District Judge of Colombo (G. S. Schneider, Esq.)

Elliott and *Hayley*, for the plaintiff, appellant.

Bawa, K.C. (with him *Fernando*, C.C.), for the Crown.

Cur. adv. vult.

November 4, 1915. WOOD RENTON C.J.—

In this case the plaintiff, Mr. R. E. S. de Soysa, sues the defendant, the Attorney-General for the recovery of a sum of Rs. 300,000 as damages for an alleged breach of contract by the Government of Ceylon in regard to the issue of certain distillery licences. The subject-matter in dispute between the parties, and their respective contentions on the law and on the facts, are embodied in the pleadings and in numerous issues which were framed at the trial, and which have themselves formed the subject of previous appeal to this Court. I shall endeavour, however, to consider the case as a whole, in the light in which both sides clearly regarded it at the trial itself.

The nature of the arrack-renting system, as it has existed in Ceylon for about half a century, has been explained by the learned District Judge in language equally admirable in point of accuracy and of expression. I would merely refer to his observations on that subject, without repeating or attempting to paraphrase them. On February 27, 1912, a notification (P 22) was issued that a board appointed by His Excellency the Governor would sit on several named days at the Council Chamber for the purpose of opening and considering tenders for the purchase of certain arrack rents, for a period of twelve months from July 1, 1912, to June 30, 1913. The rents just mentioned included those for the Negombo District in the Western and for the Anuradhapura District in the North-Central Provinces. The notification contained the following material passage:—"Attention is drawn to the fact that the privilege which will be sold under the conditions is the right to sell only arrack by retail, and does not include the right to sell toddy."

Appended to it was a further notice, that Government would grant no license to distil arrack "in any but stills already established or used in Ceylon, *i.e.*, that no license to establish fresh still would be granted." The admitted reason for the prohibition of the erection of new stills was that the whole of the excise system of the Colony was in process of re-organization, the intention of Government being to take the distillation of arrack and toddy entirely under its own control. On 24th March a circular (P 24) was issued by the Controller of Revenue to the prospective purchasers of arrack rents, including Mr. de Soysa. The fifth paragraph in the circular is in these terms:—"In the event of your purchasing any arrack rents you will be allowed licenses to distil your own arrack for the use of your own rents; and no license will be granted to distil arrack in any but stills already established or used in Ceylon, *i.e.*, no license to establish fresh stills will be granted, as already notified."

On March 25 and April 19, 1912, Mr. de Soysa became the purchaser of the Negombo and Anuradhapura arrack rents respectively. The conditions of the sale (P 25 and P 26) purport to deal with "the privilege of selling arrack by retail" in the districts to which they severally relate. Clause 9 is important:—"Licenses to sell arrack by retail at the taverns enumerated in the list hereto annexed ..... shall be granted on the application of the purchaser to such persons as he may desire, provided that the sites be approved by the Government Agent. The purchaser shall also be allowed to establish storehouses at the under-mentioned places, but such storehouses should be used exclusively for supplying taverns, and the purchaser shall not be at liberty to sell in quantities of less than three gallons at a time at any such storehouse. In addition to the above storehouses, the purchaser shall be permitted to sell arrack wholesale in not more than four places selected by him and approved by the Government Agent on obtaining a separate license in

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respect of the storehouses or storehouse situated at each of the said places under the provisions of the Ordinance No. 10 of 1844; but he shall not be at liberty to sell by retail at any of these storehouses unless he shall have obtained a special license for that purpose from the Government Agent."

Mr. de Soysa's contention was that the joint effect of the notification of February 27, 1912 (P 22), the circular (P 24) of 24th March, 1912, and the conditions of sale (P 25, P 26) was to confer on him a right, not merely to the retail licenses disposed of by the conditions of sale and the wholesale licenses, for the issue of which by the Government Agent they provided, but to an unlimited, liberty of distillation for the purpose of his own "rents," that is, within the whole area of his farm. The contention of Government, on the other hand, was that Mr. de Soysa was entitled to nothing but the licenses expressly dealt with by the conditions of sale, and a restricted liberty, which it was willing to concede under proper safeguards, of distillation for the purpose of his own arrack taverns. The whole case depends on what the real contract between the parties was, and, in particular, upon the scope of the term "rents" in the circular of 24th March, 1912. The learned District Judge held in effect that the contract between Mr. de Soysa and Government was embodied in the conditions of sale, that Mr. de Soysa was precluded by section 91 of the Evidence Ordinance from proving the circular of March 4, 1912, by which a right of distillation was promised to the purchaser of arrack rents, that no breach of contract on the part of Government had been established, and that the action must, therefore, be dismissed. The District Judge further held that as Mr. de Soya's application for the licenses in question was made under the old Ordinance—No. 10 of 1844—his action failed on another ground, viz., that by section 9 of that Ordinance, as amended by section 7 of Ordinance No. 13 of 1905, the only remedy against the refusal of such an application by the Government Agent was an appeal to the Governor in Executive Council. If any damages were due, he estimated them at Rs. 136,800. I do not see that there is anything in section 91 of the Evidence Ordinance to preclude Mr. de Soysa from proving the notification (P 24) as a part of his contract. It held out an inducement to intending purchasers to become actual purchasers of the arrack rents, and contains a promise in no way inconsistent with the conditions of sale. I am unable also to accept the argument of Mr. Bawa, that an application to the Government Agent, not followed up by an appeal to the Governor in Executive Council, is not an "application" within the meaning of the relevant provisions of Ordinance No. 10 of 1844 at all. Nor do I agree with the learned District Judge that the proviso to section 9 of Ordinance No. 10 of 1844 is fatal to the present action, inasmuch as the application ultimately made by Mr. de Soysa was an application under the Ordinance, and was not

founded on the special contract embodied in the notification (P 24). The contract contained in that notification was entirely distinct from a license under the Ordinance, and Government could not, in my opinion, be heard to contend that the question whether or not there had been a breach of it was one to be finally determined by an appeal to the Governor in Executive Council. The evidence, documentary and *viva voce*, shows, however, to my mind beyond all doubt, that Mr. de Soysa at no time applied for, or was willing to accept, the only licenses which Government was ready, or bound, to grant. There was, therefore, no *consensus ad idem* between the parties, and as there was no contract there could be no breach of a contract that did not exist.

[His Lordship then proceeded to discuss the facts at length, and held that the plaintiff never applied for and was never willing to accept the license to which he was entitled under the contract, namely, a license trammelled with the condition that all arrack distilled should be used for the purposes of his own rents. The appeal was dismissed, with costs.]

SHAW J.—

[His Lordship set out the facts, and continued]:—

I will first deal with two points taken on behalf of the respondent. First, that the clause in the circular letter of March 4. 1912 (P 24), saying that renters would be allowed licenses to distil their own arrack for the use of their own rents, cannot be looked at as part of the contract which was subsequently reduced into writing by the conditions of sale and the signature thereof. Second, that the appellant had no cause of action, because under the Ordinance No. 10 of 1844 the person to grant licenses for stills is the Government Agent, and the only appeal from his decision is to the Governor in Council.

With regard to the first point, I do not think that section 91 of the Evidence Ordinance prevents the inducement, held out in the circular to persons tendering, from forming part of the contract; and the conditions of sale, which were already in existence at the time of the circular (see P 22), were never intended or looked upon by the parties as containing the whole of the bargain. Illustration (*a*) of section 91 clearly shows that the written contract referred to in the section may be contained in several documents, and in the present case it is, in my opinion, contained in the notification for applications for tenders (P 24), in the tender by the appellant, and in the conditions of sale (P 25). Even if this were otherwise, it would, in my view, be a collateral contract which the appellant would be entitled to enforce.

With regard to the second point, the contract to grant the distillery license for the purposes mentioned in the circular is a matter altogether apart from an ordinary application for a distiller's

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license contemplated by the Ordinance, and I do not think the Government can be heard to say that the only remedy, in case the Government refused to carry out the contract, was an appeal to itself.

In my opinion, however, the appellant never applied for and was never willing to accept the license that he was entitled to under his contract, namely, a license trammelled with the condition that all arrack distilled should be used for the purposes of his own rents. The license for 1911-12 was applied for and granted for the purposes of the rent only, and licenses having been granted for this purpose in the ordinary form of a distiller's license, he, or perhaps, to speak more correctly, his manager, Mr. Weigel, turned round and snapped his fingers at the Government, and failed to carry out the condition on which the licenses were granted.

When the time came for applications for tenders for the following year the Government made quite clear, by the circular (P 24), the condition of the licenses they were prepared to grant, and in my opinion the appellant never applied for or was willing to take such a restricted license, and never had an intention to abide by the condition specified by the circular, his construction of the contract being that as the conditions of sale gave him a right to apply for and obtain separate licenses for four wholesale stores in the area of his rents, he was therefore entitled to sell any arrack distilled by him at these wholesale stores for retail sale outside his rents. This contention was, in my opinion, wrong. Arrack rents are not a creation of Statute, but have been customary in Ceylon for the last hundred years. They are the right to a monopoly of the sale by retail of arrack and toddy within certain specified districts, the Government making its excise revenue from the sale of the rents, and not from an excise duty on the spirit itself. A very good account of the system is given by the District Judge in his judgment. A rent gives no monopoly for sale by wholesale in the district of the rent, and although the conditions of sale give a right to the renter to apply for and obtain not more than four separate licenses within his district, these are not, in my opinion, any part of the rent itself but an ancillary privilege granted to the renter, just as was the right to a conditional distillery license given by the circular. As to the meaning of the word "rent," some light is thrown upon it by Ordinance No. 18 of 1905. where it is said to be "the exclusive privilege of selling arrack or toddy in any part of the Island." This appears to confine its meaning to retail sale, as it has never been suggested that a rent gives a wholesale monopoly within the district to which it applies.

It appears to me, from the correspondence and evidence in the case, that the appellant having originally obtained a license on the understanding that it was to be for the purposes of his retail monopoly only, has, acting on the advice of his manager, Mr. Weigel,

whose interest was in the distillery and not in the rent, attempted to force the Government into giving him an unrestricted distillery license, and has failed to do so. At first he attempted to dissociate the distillery from the rents by an attempt to get the license in the name of a company, so as to endeavour to perpetuate its existence beyond the life of the rents, and having failed in this, he attempted, for the second year in succession, to obtain a license in form unhampered with restrictions, intending to sell, as he had done during the first year, in breach of the condition under which the license was granted.

It was strenuously argued towards the end of the hearing of the appeal that there was no issue before the Judge as to whether the appellant was entitled only to a license limited to distillation for sale by retail only, or whether the condition in the circular restricted the license to be granted to that purpose, and whether or not the appellant applied for and was refused such a license, the issue being merely whether he was entitled to licenses "for the use of his own rents."

In my view there was never any doubt at the trial what the real dispute between the parties was, and although the issues are not very definite, it is sufficiently raised by issue 7.

[His Lordship then discussed the question of damages and dismissed the appeal.]

Appeal dismissed.