

SUPREME COURT OF INDIA

Har Shankar

Vs.

Deputy Excise and Taxation Commissioner

(A. N. Ray, C.J.I., K. K. Mathew, Y. V. Chandrachud, A. Alagiriswami and A. C. Gupta, JJ.)

21.01.1975

JUDGEMENT

CHANDRACHUD, J :-

1. This is a group of appeals founded on certificates of fitness granted by the High Court of Punjab and Haryana under Articles 132 (1) and 133 (1) (a) and (c) of the Constitution. The appeals arise out of a common judgment dated November 18, 1968 rendered by the High Court in a batch of 152 writ petitions under Article 226 of the Constitution. Those petitions were filed by liquor contractors and hoteliers to challenge the demands made upon them by the Department of Excise and Revenue, Government of Punjab.

2. The appellants are mostly retail vendors of country liquor holding licenses for the sale of liquor in specified vends. Those licences were granted to them on acceptance of their bids in the auctions held by the Excise Department, Government of Punjab. The 'licence fees realised through bids made in the auctions are said to be in.the neighbourhood of Rs. 29 crores.

3. In Civil Appeals Nos. 485 and 2205 of 1969, the appellants held licences for the retail sale of foreign liquor for consumption on the premises of their respective establishments.

4. Civil Writ No. 2646 of 1968 out of which Civil Appeal No. 365 of 1971 arises, may be taken to be typical of the petitions filed by retail vendors of country liquor. For understanding the points in controversy it would be enough to refer to the facts of that petition.

5. Auctions for granting the right to sell country liquor for the year 1968-69 were initially held in various districts of Punjab on or about 8-3-1968 in pursuance of conditions of auction framed on February 19, 1968. Those auctions became ineffective by reason of a judgment, D/- 12-3-1968 of a Division Bench of the High Court of Punjab and Haryana in Civil Writ No, 1376 of 1967 (Jage Ram v. State of Haryana) Following an earlier judgment in Bhajan Lal v. State of Punjab (Civil Writ No. 538 of 1966 decided on 6-2-1967) = (1967 Cur LJ 460) the High Court took the view that the licence fee realised through the medium of auctions was really in the nature of "still-head duty" and that the licensees could not be called upon by the Government to pay still-head duty on the liquor quota which, under the terms of auctions, they were bound to lift but which in fact was not lifted by them.

6. On March 21, 1968 a meeting of the State Excise Officers was held under the chairmanship of the Financial Commissioner to evolve a new formula for leasing the right to sell liquor so as to meet the judgment in Jage Ram's case. The new policy containing fresh terms and conditions of auction was announced on the 22nd and the impugned auctions in pursuance of that policy were held immediately thereafter.

7. On March 23, 1968 the first respondent - the Deputy Excise and Taxation Commissioner, Jullunder - held an auction for granting the right to sell country liquor at the 'Town Hall Vend' and the 'Kailash Cinema Chowk Vend', Ludhiana. The appellants gave bids in the sum of Rs. 34,01,000 and Rs. 12,02,000 respectively for the two vends and those bids were duly accepted by the first respondent. The appellants were then granted licences in Form L, 14-A of the Punjab Liquor Licence Rules, 1956 (herein called "the Rules"). Form L, 14-A is prescribed under the Rules for the grant of licences for "retail vend of country spirit for consumption off the premises."

8. The conditions governing auctions were notified through announcements made at the time of auctions. Condition No. 1 provides that all licences for sale of country spirit, foreign liquor, Beer, etc. shall be granted subject to the provisions of the Punjab Excise Act, 1 of 1914, (hereinafter called "the Act") and the rules framed thereunder. By Condition 14 (i), licences for retail vend of country spirit are granted on the basis of "licence fee" fixed by auction. Condition 14 (ii) requires that the quota of country liquor fixed for each vend must be announced before the vend is put to auction. Under Condition 15 (i) the successful bidder has to deposit security equivalent to 1/24 th of the amount of the annual licence fee within the stated period. The security is refundable to the licensee at the end of the year unless it is liable to be forfeited or adjusted against any amount due from him in respect of the licence. Clause (ii) of Condition 15 requires the successful bidder to pay the whole amount of licence fee in 24 equal instalments spread over the year. Clause (iii) of Condition 15

authorises the Collector to resell the vend if the successful bidder fails to deposit the security or refuses to accept the licence. In the event of such resale, any deficiency in the licence fee is recoverable from the defaulter in the manner laid down in Section 60 of the Act which provides by clauses (a) and (c) that all " excise revenue" and all amounts due to the Government on account of any contract relating to the excise revenue may be recovered from the person liable to pay the same by any process for the recovery of arrears of land revenue. By Condition 15 (iv) similar right is conferred on the Collector to resell the vend in the event of the cancellation of a licence. By condition 17, the still-head duty on ordinary spiced country spirit is leviable at the rate of Re. 0.64 per proof litre. Condition 18 (i) entitles the licensee to the refund of the proportionate part of the licence fee if there is a shortfall in the supply of liquor to him but he is not entitled to any compensation or damages for the short supply. By Condition No. 24, the maximum price at which the spiced country liquor may be sold by the licensee, is fixed at Rs. 10.00 per quart, Rs. 5.25 per pint and Rs. 2.75 per Nip.

9. The Town Hall Vend was auctioned on the basis of the fixed quota of 1,50,560 proof litres which is equivalent to 4,01,000 bottles per year. The Kailash Cinema Chowk Vend was auctioned on the basis of the fixed quota of 50,506 proof litres which is equivalent to 1,34,685 bottles per year.

10. The appellants deposited Rupees 1,41,708 for the Town Hall Vend and Rupees 50,091 for the Kailash Cinema Chowk Vend being 1/24 th of the licence fee required to be deposited by way of security. They were however, unable to meet their obligations under the conditions of auction, and fell in arrears. The State Government, demanded the payment, threatened to cancel the licences granted to the appellants and declared its intention to resell the vends at the risk of the appellants.

11. On August 22, 1968 the appellants filed their writ petition in the High Court of Punjab and Haryana. They prayed for three reliefs out of which only two were pressed at the hearing. .They asked for a direction quashing the auctions held on March 23, 1968 and secondly they asked that the respondents be restrained from enforcing the obligations arising under the terms and conditions of the auctions. The Deputy Excise and Taxation Commissioner, Jullundur, is the first respondent to the petition; the Excise and Taxation Commissioner, Punjab, Patiala, is the second respondent; and the State of Punjab is the third respondent. The relief sought against the fourth respondent - a private firm - was not pressed.

12. Though several contentions - factual and legal - were raised in the petitions, the appellants restricted their challenge in the High Court, to the following points:

(1) The Excise and Taxation Commissioner (who in the Punjab exercised the powers of a Financial Commissioner under the Act) had no jurisdiction to determine the method of disposal of the country liquor vends;

(2) The power conferred on the Financial Commissioner, under section 34 of the Act to grant a licence, permit or pass on payment of such fees , if any, as he may direct did not extend to disposing of the country liquor vends by auction ;

(3) The impugned auctions conducted under the amended Rule 36 on the basis of estimated quota in proof litres was in substance founded on the same system which had been struck down by the High Court in Jage Ram's case where it was held that the levy imposed through the medium of auctions was a tax and not a licence fee;

(4) The State Government alone was competent to impose a tax or an excise duty under the Act; that power could not be delegated to the Financial Commissioner or any other officer;

(5) Section 34 of the Act which empowered the Financial Commissioner to levy fees was not a charging section; but if it is construed as containing a delegation to him of the power of the State to levy taxes, no guidelines were laid down and thus the delegation was excessive.

(6) The fee which could be imposed by the Financial Commissioner under Section 34 of the Act could only be justified if it had a reasonable relation to the services rendered to the licensees. If it was imposed solely or mainly for the purpose of collecting revenue, it was outside the ambit of Item 66 of List II of the Seventh Schedule of the Constitution. The amounts realised in the auctions in the guise of licence fees were so exorbitant that they could not possibly be justified under item 66.

(7) The rule fixing the maximum price at which a licensee could sell a bottle of liquor was ultra vires of the rule-making powers of the Financial Commissioner under Section 59 of the Act.

13. The High Court negated all of these contentions. It held that the State Legislature was competent to regulate the business of vending intoxicating liquors, that various provisions of the Act showed that the State Government had the exclusive right to manufacture or sell intoxicants, that the Financial Commissioner had the jurisdiction to determine the method of disposal of country liquor vends, that the rules under which the impugned auctions were held are substantially different from those under which the auctions challenged in Jage Ram's case were held, that Section 34 of the Act is not an instance of delegated legislation and that the fixation of the maximum price of country liquor was a part of the power to regulate the trade in liquor. On the main contention that the levy in the shape of licence fee was unconstitutional, the High Court held that licences granted for regulating trade in intoxicating liquors stand in a class by themselves and that the consideration which governs licence fees charged in return for services rendered cannot apply to licences issued to

the successful bidders at auctions of liquor vends. The High Court further held that Entry 66 in the State List is not confined to fees levied for services rendered but extends to all kinds of fees and therefore the imposition of the licence fee was within the ambit of that Entry.

14. Before us, the controversy was limited to the following contentions :

1. The Financial Commissioner has no power to frame rules so as to authorise the grant of liquor licences by holding auctions;

2. Under Section 34 of the Punjab Excise Act, 1914, the Financial Commissioner has no right to authorise the levy or collection of any amount which, strictly, is not a fee; an auction bid for fixing 'fees' is a contradiction in terms;

3. The licence fee bears no relationship with the services rendered to the licensees and is therefore not a 'fee' in the true sense. Nor can the licence fee be justified as an 'excise duty' as it is not levied on the manufacture or production of liquor;

4. The real character of the levy imposed on licensees through the medium of auctions is that it is in the nature of a tax; and the Financial Commissioner who is an independent statutory authority having powers which are distinct and different from those of the Government, has no authority to impose the tax; nor indeed, has the State Government the power to impose such a tax.

5. The Government cannot under a contract impose a levy which it has no power to impose by law;

6. The new terms and conditions of auctions are, basically and in substance, similar to those which were struck down by the Punjab High Court in Jage Ram's case Civil Writ No. 1376 of 1967, D/- 12-3-1968 (Punj and Har) and which decision was affirmed in appeal by the Supreme Court and

7. The demand made by the Government for payment of large sums of money by hoteliers and bar-keepers who supply foreign liquor for consumption on their premises is arbitrary, without the authority of law and otherwise illegal.

15. Learned counsel for the respondents raised a preliminary objection to the maintainability of the

writ petitions filed by the appellants and to the grant of reliefs claimed by them. He contends that such of the appellants who offered their bids in the auctions did so with a full knowledge of the terms and conditions attaching to the auctions and they cannot, by their writ petitions, be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids. This objection is well founded and must be accepted.

16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by 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 binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. 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 ever have a binding force.

17. In *Lekhraj Satramdas Lalvani v. Deputy Custodian-cum-Managing Officer, Bombay*, (1966) 1 SCR 120 = (AIR 1966 SC 334) the appellant who was removed from the managership of certain evacuee properties filed a petition in the Kerala High Court under Article 226 of the Constitution praying for a Writ of Mandamus against the Deputy Custodian and others. This Court held that the appellant's appointment was contractual in its nature and the duties or obligations arising out of contract could not be enforced by the machinery of a writ under Article 226.

18. There was some discussion before us as to whether Fundamental Rights could be waived and in answer to the preliminary contention of the respondents it was urged on behalf of the appellants that they are entitled to enforce their fundamental rights, no matter whether they agreed to waive those rights while entering into contracts with the Government. In support of the contention that there can be no waiver of fundamental rights, reliance was placed by the appellants on the well-known decision of this Court in *Bashesar Nath v. Commr. of Income-tax, Delhi and Rajasthan*, (1959) Supp 1 SCR 528 = (AIR 1959 SC 149).

19. The writ petitions filed by the appellants in the High Court are wholly directed to showing that the Financial Commissioner lacked the power to grant liquor licences through auctions and to levy through the medium of auctions a sum was not a 'fee' in the strict sense of the term. The two reliefs which the appellants asked for in the writ petitions are that the auctions held by the Government for granting liquor licences and the bids offered therein by the prospective licensees should be quashed and secondly that a direction should be issued to the respondents restraining them from enforcing the obligations arising under the bids. It is interesting that except in the title of the petition showing that it was filed "Under Article 226 of the Constitution of India", the representative Writ Petition (No. 2646 of 1968) does not even refer to so much as any provision of the Constitution much less to the infringement of any Constitutional rights. Apart from this, in the view which we are disposed to take on the main contention, no question of the waiver of a "fundamental right" can arise.

20. The appellants objected to the preliminary contention of the respondent's on the ground that in their counter affidavit filed in the High Court, respondents had not pleaded that there was any contract between the parties or that the writ jurisdiction of the High Court was inappropriate for the enforcement of contractual rights. This submission overlooks the material averments contained in the respondents' counter affidavit. This is what the respondents say :

"The allegations with respect to the policy are not relevant inasmuch as the petitioner's liability arises from the terms and conditions of the Excise contract granted in his favour.

I further submit that the petitioners voluntarily and of their own free volition offered themselves as bidders at the time of auction. The petitioners were aware of the business that they were likely to do as a result of grant of licence in their favour. Since theirs was the highest bid they were also aware of the cost that they were likely to incur for obtaining a bottle of country liquor.

I submit that the conditions regarding the sale price of country liquor were duly announced before the commencement of the auction of the vend. The petitioners gave bid of their own accord knowing all the implications thereof. The petitioners having taken the licence with open eyes and understanding the law on the subject have no cause of action. No constitutional provision has been infringed."

Towards the end of the counter affidavit it is stated that the appellants had made contradictory allegations "with a view to, confusing the real issue in an attempt to wriggle out of their contractual obligations." It is thus clear that in the High Court, the respondents had raised the contention which is taken before us by their counsel in the form of a preliminary objection.

21. On the preliminary objection it was finally urged by the appellants that the objection was misconceived because there was in fact, no contract between the parties and therefore they were not attempting to enforce any contractual rights or to wriggle out of contractual obligations. The short answer to this contention is that the bids given by the appellants constitute offers and upon their acceptance by the Government a binding agreement came into existence between the parties. The conditions of auction become the terms of the contract and it is on those terms that licences are granted to the successful bidders in Form L. 14-A of the Rules. As stated in Cheshire and Fifoot's 'Law of Contract' (Eighth Edn., 1972; p. 24).

"In order to determine whether, in any given case, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance. In other words, the court examines all the circumstances to see if the one party may be assumed to have made a firm "offer" and if the other may likewise be taken to have "accepted" that offer. These complementary ideas present a convenient method of analysing a situation, provided that they are not applied too literally and that facts are not sacrificed to phrases."

Analysing the situation here, a concluded contract must be held to have come into existence between the parties. The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations.

22. In Civil Appeals Nos. 485 and 2205 of 1969, filed respectively by Northern India Caterers (P) Ltd., and M/s. Green Hotel, Bar and Restaurant and others, the appellants hold licences in Form Nos. L-3, L-4 and L-5 for the retail vend of foreign liquor in a hotel, restaurant and in a bar attached to a restaurant. No auctions were held for granting these licences and therefore the reasoning that acceptance of bids brought into existence a concluded contract between the successful bidders and the Government will not apply to the cases of these appellants. But they also accepted the licences subject to the provisions of the Punjab Excise Act. 1914 and the Punjab Liquor Licence Rules, 1956. By Section 34 of the Act a licence under the Act has to be granted, inter alia, on payment of such fees and subject to such restrictions and on such conditions as the Financial Commissioner may direct. Section 59 (d) of the Act confers power on the Financial Commissioner to make rules prescribing the scale of fees in respect of any licence. Rule 24 provides that the fees payable in respect of licences shall be either (a) fixed fees or (b) assessed fees or (c) auction fees. By amendments made on February 22, 1968 and March 30, 1968, the fixed fees were substantially enhanced and the appellants were called upon to pay those fees. Just as country liquor contractors offered bids voluntarily on terms and conditions governing the auctions, so in these two appeals the appellants voluntarily applied for and accepted the licences knowing fully well that the Financial Commissioner had the power to frame rules governing the licences. Whether the amendments made to the Rules after the appellants' licences were renewed are applicable is another matter but the appellants cannot question the power of the Financial Commissioner to frame those rules. The licences, in a large measure, owe their existence and validity to the rule-making power of the Financial Commissioner. One of the reliefs which the appellants ask for is that Rules 27-A, 30 and 31 be declared ultra vires and unconstitutional and consequently the respondents be directed to refund the assessed fees already recovered. By attempting to exploit the licences without the burden

of assessed fees originally attaching to them under the rules framed by the Financial Commissioner, the appellants are seeking to work the licences on such terms as they find convenient. The writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred. That, however will not estop the appellants from contending that the amended Rules are not applicable as their licences were renewed before the amendments were made.

23. Though this is the true position, we do not propose to dismiss the appeals on the narrow ground that the reliefs, or some of them, sought by the appellants cannot be awarded in the writ petitions brought by them. We have heard the appeals fully and since the points involved are of general public importance, we would like to deal with the appeals on merits.

24. The main and the real focus of controversy is the power of the Government to levy and realise large licence fees either through the medium of auctions or on scales fixed under the rules. The country liquor contractors offered incredibly high bids in the auctions which on the whole netted a revenue of rupees twenty-nine odd crores to the State Government. Licensees like the Northern India caterers and M/s. Green Hotel, who run hotels, restaurants or bars were asked under the amended rules to pay, besides assessed fees, fixed fees varying between Rs. 7,500 and Rs. 20,000 for the year. Apprehending that it was fruitless to do business on these terms and fearing the resort by the Government to coercive measures for the recovery of the amounts due to it, the appellants filed writ petitions in the High Court soon after the commencement of the term of their respective licences.

25. Liquor licensing has a long history. Prior to the passing of the Indian Constitution, the licensees mostly restricted their challenge to the demands of the Government as being in excess of the conditions of the licence or on the ground that the rules in pursuance of which such conditions were framed were themselves beyond the rulemaking power of the authority concerned. This conflict took a new shape after the enactment of the Constitution. The challenge now is generally based on the ground that there is no quid pro quo between the fees imposed on the licensees and the services rendered to them; that the fees are in the nature of a tax which there is no authority to impose; that the levy is beyond the legislative competence of the State Government; or that the terms and conditions of the licence constitute an unreasonable restriction on the fundamental right of the citizen to carry on business for the sale of liquor. The appeals before us require consideration of both sets of points.

26. The provisions of the Punjab Excise Act 1914, like the provisions of similar Acts in force in other States, reflect the nature and the width of the power which the State Governments are empowered to exercise in the matter of liquor licensing. We will notice first the relevant provisions of the Act under consideration.

27. Section 5 of the Act empowers the State Government to regulate the maximum or minimum quantity of any intoxicant which may be sold by retail or wholesale. Section 8 (a) vests the general superintendence and administration of all matters relating to excise in the Financial Commissioner, subject to the control of the State Government. Section 16 provides that no intoxicant shall be imported, exported or transported except after payment of the necessary duty or execution of a bond for such payment and in compliance with such conditions as the State Government may impose. Section 17 confers upon the State Government the power to prohibit the import or export of any intoxicant into or from Punjab or any part thereof and to prohibit the transport of any intoxicant. By Section 20 (1) no intoxicant can be manufactured or collected, no hemp plant can be cultivated, no tari-producing tree can be tapped, no tari can be drawn from any tree and no person can possess any material or apparatus for manufacturing an intoxicant other than tari except under the authority and subject to the terms and conditions of a licence granted by the Collector. By subsection (2) of S. 20 no distillery or brewery can be constructed or worked except under the authority and subject to the terms and conditions of a licence granted by the Financial Commissioner. Section 24 provides that no person shall have in his possession any intoxicant in excess of such quantity as the State Government declares to be the limit of retail sale, except under the authority and in accordance with the terms and conditions of a licence or permit. Sub-section (4) of Section 24 empowers the State Government to prohibit the possession of any toxicant or restrict its possession by imposing such conditions as it may prescribe. Section 26 prohibits the sale of liquor except under the authority and subject to the terms and conditions of a licence granted in that behalf.

28. Section 27 of the Act empowers the State Government to "lease" on such conditions and for such period as it may deem fit the right of manufacturing or of supplying, or selling by wholesale or retail, any country liquor or intoxicating drug within any specified local area. On such lease being granted the Collector, under sub-section (2), has to grant to the lessee a licence in the form of his lease.

29. Section 34 (1) of the Act provides that every licence, permit or pass under the Act shall be granted (a) on payment of such fees, if any, (b) subject to such restrictions and on such conditions, (c) in such form and containing such particulars, and (d) for such period as the Financial Commissioner may direct. By Section 35 (2), before any licence is granted for the retail sale of liquor for consumption on any premises the Collector has to ascertain local public opinion in regard to the licensing of such premises. Section 36 confers power on the authority granting any licence to cancel or suspend it if, inter alia, any duty or fee payable thereon has not been duly paid.

30. Section 56 of the Act empowers the State Government to exempt any intoxicant from the provisions of the Act. By Section 58 the State Government may make rules for the purpose of carrying out the provisions of this Act. Section 59 empowers the Financial Commissioner by clause (a) to regulate the manufacture, supply, storage or sale of any intoxicant. By clause (d) of Section 59 the Financial Commissioner is authorised to make rules "prescribing the scale of fees or the manner of fixing the fees payable in respect of any licence, permit or pass or in respect of the storing of any intoxicant." Section 60 (1) provides that "all excise revenue", any loss that may accrue, by reason of the resale of a grant and all amounts due to the Government on account of any contract relating to

the excise revenue may be recovered by any process for the recovery of arrears of land revenue.

31. In pursuance of Section 59 (d) the Excise and Taxation Commissioner on whom the powers of the Financial Commissioner are conferred by the State Government framed the Punjab Liquor Licence Rules, 1956. Since the appellants have challenged the legality of some of these rules and as the rules also indicate the large powers which are attempted to be exercised under the Act, it is essential to set out the relevant rules.

32. Rule 1 contains a Table which is divided into six parts, the first two of which are called "Foreign Liquor" and "Country Spirit." The classes of licences, their mode of grant and the authorities who can grant and renew the licences are specified in the Table. Part I of the Table dealing with Foreign Liquor refers, inter alia, to licences in Forms L-3, L-4 and L-5 which relate respectively to (i) retail vend of foreign liquor in a hotel or dak bungalow, (ii) retail vend of foreign liquor in a restaurant and (iii) retail vend of foreign liquor in a bar attached to a restaurant. Northern India Caterers (P) Ltd., and M/s. Green Hotel, Bar and Restaurant, who are appellants in Civil Appeals Nos. 485 and 2205 of 1969 respectively hold licences in Form Nos. L-3, L-4 and L-5. The Collector is designated as the authority to grant and renew these licences.

33. Prior to March 22, 1968 licences in Forms L-3, L-4 and L-5 used to be granted on assessed fees only as provided in Rule 28. The assessed fees were quantified in accordance with the scale of fees prescribed under Rules 30 and 31. The scale of fees was raised in 1965 by a Notification dated April 13, 1963. Under the revised rates the following fixed fees were prescribed. _

"Indian made spirit	...	Rs. 25	}	
Imported spirit	...	Rs. 31.2	}	
Wine	...	Rs. 6.25	}	5 per bulk litre
Indian Beer	...	Rs. 0.68	}	
Imported Beer	...	Rs. 1.25"	}	

On March 22, 1968 the second respondent (the Excise and Taxation Commissioner) issued a notification in the exercise of powers conferred by Section 39 of the Act whereby a new Rule 30 was substituted for the old Rule 30. By this notification, the Table under Rule 1 was amended so as to, provide for the levy of both 'Fixed Fee' and 'Assessed Fee' on those licences. Under the new Rule 30 the licensees in Forms L-3, L-4 and L-5 became liable to pay, in addition to assessed fees, fixed annual fees at the following rates:

"(a) For a licence in a town with population not exceeding 50,000 ... Rs. 5000 .

(b) For a licence in a town with population exceeding 50,000 but not exceeding one lac ; ...
Rs. 7,500

(c) For a licence in a town with population exceeding one lac but not exceeding two lacs; ...
Rs. 10,000

(d) For a licence in a town with population exceeding 2 lacs ... Rs. 15,000 "

The amendments made by this notification are called "the Punjab Liquor Licence -(First Amendment) Rules, 1968."

34. On March 30, 1968 another notification was issued by the second respondent introducing the Punjab Liquor Licence (Second Amendment) Rules, 1968. Under these rules a new rule - Rule 27-A - was introduced whereby licensees in Forms L-3, L-4 and L-5 became liable to pay a fixed annual fee of Rs. 10,000.

35. The second part of the Table under Rule 1, which deals with country spirit, refers, inter alia, to licences in Form L. 14-A for "Retail vend of country spirit for consumption off the premises." Barring the two appellants referred to above the other appellants hold licences in Form L. 14-A. The Table describes the mode of grant of the licence as by "Auction."

36. Rule 36 prescribes the procedure for the grant of licences by auction. Before the annual auctions are held the Collector is required to determine the quantum of probable sales during the period for which the licence is to be auctioned. The quota of country liquor thus fixed for each vend is then to be announced by the Collector before the vend is put to auction. The notice of auction has to specify, among other things, the conditions to, which the auction is subject and the prices for retail vend of country Liquor. Rule 23 provides for the payment of security deposit and Rule 24 for the resale of licence on the cancellation of an existing licence. The conditions of auction which we have set out at the beginning of our judgment are in fact in terms of the rules framed under Section 59 (d) of the Act.

37. The Prohibition and Excise Laws in force in other States contain provisions substantially similar to those contained in the Punjab Excise Act. Several Acts passed by State Legislatures contain provisions rendering it unlawful to manufacture, export, import, transport or sell intoxicating liquor except in accordance with a licence, permit or pass granted in that behalf. The Bombay Abkari Act 1878; the Bombay Prohibition Act 1949; the Bengal Excise Acts of 1878 and 1909; the Madras

Abkari Act 1886; the Laws and Rules contained in the Excise Manual, United Provinces; the Eastern Bengal and Assam Excise Act 1910; the Bihar and Orissa Excise Act, 1915; the Cochin Abkari Act as amended by the Kerala Abkari Laws Act 1964; and the Madhya Pradesh Excise Act 1915, are instances of State legislations by which extensive powers are conferred on the State Government in the matter of liquor licensing.

38. The power of the State Government under Section 17 of the Act to prohibit absolutely the import, export or transport of any intoxicant; its power under Section 20 to prohibit the manufacture or collection of an intoxicant or the construction or working of a distillery or a brewery except under the authority and subject to the terms and conditions of a licence granted in that behalf, its power under Section 24 (4) to prohibit the possession of any intoxicant; and its power under S. 27 to lease on such conditions and for such period as it may deem, fit, the right of manufacturing, supplying or selling an intoxicant are only in conformity with the ancient and hoary rights which governments in all countries have exercised in matters concerning intoxicants. The rationale of such rights has been explained in several cases to some of which we may now refer.

39. In *Cooverjee B. Bharucha v. Excise Commr. and the Chief Commr., Ajmer*, 1954 SCR 873 = (AIR 1954 SC 220), it was contended that the citizen had an unfettered right to carry on trade and business in liquor under Article 19 (1) (g) of the Constitution and therefore the provisions of the Ajmer Excise Regulation 1 of 1915 which conferred discretion on the Excise Commissioner to restrict the number of liquor shops and to licence them by auction to the highest bidder were void as creating a monopoly in liquor trade. The recovery of large licence fees through public auctions was also attacked on the ground that the amount was not a fee but was in the nature of a tax and the same could not be recovered by resorting to legislative powers saved by Article 19 (6) of the Constitution.

40. Mahajan, C. J., delivering the unanimous judgment of a Constitution Bench observed :

"It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation."

This position was not disputed but it was urged that the sale of intoxicating liquors by retail in small quantities should be without restriction because every person had a right which inhered in him, that is, a natural right to carry on trade in intoxicating liquors and that the State had no right to create a monopoly in them. This contention was repelled on the reasoning contained in the judgment of Field, J. in *Crowley v. Christensen*, (1890) 34 Law Ed 620 at p. 623. Field, J. observed:

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore, been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a licence be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business -to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications or permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only."

After citing this passage the learned Chief Justice said : "These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitioner. The provisions of the Regulation purport to regulate trade in liquor in all its different spheres and are valid."

41. The contention that the effect of some of the provisions of the Regulation was to enable Government to confer monopoly rights on one or more persons to the exclusion of others and that the creation of such monopoly rights could not be sustained under Article 19 (6) was repelled on the ground that:

"Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all could carry. The provisions of the regulation cannot be attacked merely on the ground that they create a monopoly. Properly speaking, there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor."

42. Lastly, the argument that the fees recovered by public auction were excessive was rejected on the ground that one of the purposes of the Regulation was to raise revenue, that the licence fee though described as a 'fee' was more in the nature of a tax, that revenue could be collected by the grant of contracts to carry on trade in liquors and that these contracts could be sold by auction.

43. In *State of Assam v. A. N. Kidwai*, 1957 SCR 295 = (AIR 1957 SC 414) Das, C. J., speaking for a Constitution Bench, observed while rejecting a challenge to some of the provisions of Assam Act No. 4 of 1948 that a perusal of the Act and the rules framed thereunder made it clear that:

"no person has any absolute right to sell liquor and that the purpose of the Act and the rules is to control and restrict the consumption of intoxicating liquors, such control and restriction being obviously necessary for the preservation of public health and morals, and to raise revenue."

44. In *The State of Bombay v. F. N. Balsara*, 1951 SCR 682 = (AIR 1951 SC 318) the constitutional validity of the Bombay Prohibition Act, 1949 was challenged. On the question of legislative competence of the State legislature to enact the statute, reliance was placed upon Entry 1 of List II which relates to "Public Order." Fazal Ali, J., speaking for a Constitution Bench, observed that though at first sight it may appear to be far-fetched to bring the subject of intoxicating liquor under

"Public Order", yet it had to be noted that there was a tendency in Europe and America to regard alcoholism as a menace to public order. The learned Judge then referred to the decision in *Russel v. The Queen*, (1882) 7 AC 829 in which the Canada Temperance Act, 1878, was held to be a law relating to the "peace, order, and good government" of Canada. Reference was also invited to a passage in the *Encyclopaedia Britannica*, 14th Edition, Vol. 14, page 191, to the following effect :-

"The dominant motive everywhere, however, has been a social one, to combat a menace to public order and the increasing evils of alcoholism in the interests of health and social welfare. The evils vary greatly from one country to another according to differences in climate diet, economic conditions and even within the same country according to differences in habits, social customs and standards of public morality. A new factor of growing importance since the middle of the 19th century has been the rapid urbanisation, industrialization, and mechanization of our modern every day life in the leading nations of the world, and the consequent wider recognition of the advantages of sobriety in safeguarding public order and physical efficiency."

This passage was treated as lending some support to the contention of the State Government that the Prohibition Act fell within the subject of "Public Order" but the matter was not pursued further as the particular Entry had a remote bearing on the object and scope of the Act.

45. In *Nagendra Nath v. Commr, of Hills Division*, 1958 SCR1240 = (AIR 1958 SC 398), the decisions in *Cooverjee's case* 1954 SCR 873 = (AIR 1954 SC 220) and *Kidwai's case* 1957 SCR 295 = (AIR 1957 SC 414) were cited by a Constitution Bench as laying down the proposition that there was no inherent right in a citizen to sell liquor and that the control and restriction over the consumption of intoxicating liquors was necessary for the preservation of public health and morals and to raise revenue.

46. In *Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura*, (1973) 1 SCR 533 = (AIR 1972 SC1863) a Constitution Bench of this Court had to consider the question whether Section 43 of the Bengal Excise Act, 1909 under which the licence of a liquor contractor was withdrawn, violated Articles 14 and 19 (1) (g) of the Constitution. The contention in regard to the violation of Article 14 was repelled by this Court with the observation :

"Trade or business in country liquor has from its inherent nature been treated by the State and the society as a special category requiring legislative control which has been in force in the whole of India since several decades. In view of the injurious effect of excessive consumption of liquor on health this trade or business must be treated as a class by itself and it cannot be treated on the same basis as other trades while considering Article 14."

The contention as regards the violation of Article 19 was rejected on the ground that in dealing with reasonable restrictions, no abstract standard or general pattern could be laid down and that in each case regard had to be had to the nature of trade or business and the other circumstances. In the case of country liquor, according to the Court, due weight had to be given to the increasing evils of excessive consumption of country liquor in the interests of health and social welfare. For:

"Principles applicable to trades which all persons carry on free from regulatory controls do not apply to trade or business in country liquor; this is so because of the impact of this trade on society due to its inherent nature."

47. These unanimous decisions of five constitution Benches uniformly emphasized after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to the health and welfare of the public, that elimination and exclusion from business is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by themselves by all civilized communities. The contention that the citizen had either a natural or a fundamental right to carry on trade or business in liquor thus stood rejected.

48. But, in spite of the weight of this authority, a Constitution Bench struck a different note in

Krishna Kumar v. State of Jammu and Kashmir, (1967) 3 SCR 50 = (AIR 1967 SC 1368). The appellant therein who was doing business in liquor in a hotel under an annual licence issued under the Jammu and Kashmir Excise Act 1958, challenged an order of the Excise and Taxation Commissioner asking him to shift the licensed premises to some other approved locality. Four contentions were raised in that case on behalf of the appellant, the first of which was that if Section 20 of the Act of 1958 was construed as conferring an absolute discretion on the Excise and Taxation Commissioner in the matter of granting licences to do business in liquor, it was void on the ground that it infringed Article 19 of the Constitution. This point was not allowed to be raised in this Court on the ground that the constitutional validity of Section 20 was not challenged in the High Court. It would, however, appear that the learned Judges of the High Court had differed on the question whether the appellant had a fundamental right to do business in liquor and this Court desired "to make the position clear" in order to "avoid further confusion in the matter." The decisions in Cooverjee's case, Kidwai's case and Nagendra Nath's case were cited before the Court but it took the view that they did not support the contention that dealing in liquor was not business or trade or that a right to do business in liquor was not a fundamental right. Subba Rao, C. J, speaking for the Court expressed the conclusion thus :

"We, therefore, hold that dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make a law imposing reasonable restrictions on the said right, in public interests."

Since, however, the constitutional validity of Section 20 was not challenged in the High Court, this Court assumed without deciding that Section 20 did not infringe Art, 19 (1) (g).

49. In the State of Bombay v. R. M. D. Chamarbaugwala, 1957 SCR 874 = (AIR 1957 SC 699) one of the contentions raised was that the restrictions imposed by the Bombay Lotteries and Prize Competition Control and Tax Act, 1948, on the trade or business of the respondents contravened the fundamental right guaranteed to them under Article 19(1). (g) of the Constitution. It was urged that even if the prize competitions constituted gambling transactions they were nevertheless trade or business activities. On the other hand it was contended on behalf of the State of Bombay that as prize competitions were opposed to public policy there could be no trade or business of promoting a prize competition and therefore the question of infraction of the respondents' fundamental right under Article 19 (1) (g) did not arise. This contention was described by the Court as raising a question "of a very far-reaching nature." Speaking for the. Constitution Bench, Das, C. J. after examining several Australian and American cases observed :

"We have no doubt that there are certain activities which can under no circumstances be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities, from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words."

Referring to the Directive Principles of State Policy contained in Part IV of the Constitution the learned Chief Justice posed the question whether the Constitution-makers who set up such an ideal of a welfare State could possibly have intended to elevate betting and gambling to the level of country's trade or business or commerce and to guarantee to its citizens, the right to carry on the same. It was said that "there can be only one answer to the question" and the answer was that the prize competition being of a gambling nature could not be regarded as trade or commerce and therefore the respondents could not claim any fundamental right under Article 19 (1) (g) in respect of such competitions. It was observed :

"It will be abundantly clear from the foregoing observations that the activities which have been condemned in this country from ancient times appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia in the cases referred to above. We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Article 19 (1) (g). We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Article 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the words "trade", "business", or "intercourse." We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts. 19 (1) (g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra- commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Article 19 (1) (g) or Art. 301 of our Constitution."

50. This decision was also cited before the Court in Krishna Kumar's case but it said : "This decision only lays down that gambling is not business or trade. We are not concerned in this case with gambling." With great respect, the reasons mentioned by Das C. J. for holding that there can be no fundamental right to do trade or business in an activity like gambling apply with equal force to the alleged right to trade in liquor and those reasons may not be brushed aside by restricting them to gambling operations.

51. In *State of Orissa v. Harinarayan Jaiswal*, (1972) 3 SCR 784 = (AIR 1972 SC 1816) the highest bidder in an auction held for granting the exclusive privilege of selling country liquor filed a writ petition to challenge an order rejecting his bid. It was contended that the power retained by the Government to accept or reject any bid without assigning any reason was an arbitrary power and was violative of Articles 14 and 19 (1) (g) of the Constitution. After referring to the decisions in *Cooverjee's case* 1954 SCR 873 = (AIR 1954 SC 220) and *Krishna Kumar Narula's case* (1967) 3

SCR 50 = (AIR 1967 SC 1368) it was observed that one of the important purposes of selling the exclusive right to vend liquor was to raise revenue and since the Government had the power to sell exclusive privileges there was no basis for contending that the owner of the privileges could not decline to accept the highest bid if it thought that the price offered was inadequate. Hegde, J., speaking for the Division Bench observed :

"The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19 (1) (g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights."

52. In a recent judgment delivered on November 27, 1974 (Nashirwar etc. v. State of Madhya Pradesh, Civil Appeals Nos, 1711-1721 and 1723 of 1974) = (reported in AIR 1975 SC 360) it was held on a review of various authorities including the decision in Krishna Kumar Narula's case (1967) 3 SCR 50 = (AIR 1967 SC 1368) that the State had the exclusive right or privilege of manufacturing and selling liquor, that it had the power to hold a public auction for granting the right or privilege to sell liquor, that traditionally intoxicating liquors were the subject matter of State monopoly and that there was no fundamental right in a citizen to carry on trade or business in liquor. One of us, the learned Chief Justice, observed while speaking on behalf of the 3-Judge Bench that:

"There are three principal reasons to hold that there is no fundamental right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise law shows that the State has the exclusive right or privilege of manufacture or sale of liquor."

53. In our opinion, the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decisions of this Court in Balsara's case 1951 SCR 682 = (AIR 1951 SC 318); Cooverjee's case 1954 SCR 873=(AIR 1954 SC 220); Kidwai's case 1957 SCR 295 = (AIR 1957 SC 414); Nagendra Nath's case 1958 SCR 1240 = (AIR 1958 SC 398); Amar Chakraborty's case (1973)1 SCR 533 = (AIR 1972 SC 1863) and the R. M. D. C. case 1957 SCR 874 = (AIR 1957 SC 699) as interpreted in Harinarayan Jaiswal's case (1972) 3 SCR 784 = (AIR 1972 -SC 1816) and Nashirwar's AIR 1975 SC 360. There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no

effective regulation of various forms of activities in relation to intoxicants. In "American Jurisprudence", Volume 30 it is stated that while engaging in liquor traffic is not inherently unlawful, nevertheless it is a privilege and not a right, subject to governmental control. (page 538). This power of control is an incident of the society's right to self-protection and it rests upon the right of the State to care for the health, morals and welfare of the people. Liquor traffic is a source of pauperism and crime. (pp. 539, 540, 541).

54. It was unnecessary in Krishna Kumar Narula's case (1967) 3 SCR 50 = (AIR 1967 SC 1368) to examine the question from this broader point of view, as the only contention bearing on the constitutional validity of the provision impugned therein was not permitted to be raised as it was not argued in the High Court. The discussion of the question whether a citizen has a fundamental right to do trade or business in liquor proceeded in that case, avowedly, from a desire to clear the confusion arising from the "different views" expressed by the two judges of the High Court. This may explain why the Court restricted its final conclusion to holding that dealing in liquor is business and the citizen has a right to do business in that commodity. The court did not say, though such an implication may arise from its conclusion, that the citizen has a fundamental right to do trade or business in liquor. If we may repeat, Subba Rao, C. J, said :

"We, therefore, hold that dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make a law imposing reasonable restrictions on the said right, in public interests." .

It is significant that the judgment in Krishna Kumar Narula's case does not negate the right of the State to prohibit absolutely all forms of activities in relation to intoxicants. The wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants on such terms of general application as the State deems expedient.

55. Since rights in regard to intoxicants belong to the State it is open to the Government to part with those rights for a consideration. By Article 298 of the Constitution, the executive power of the state extends to the carrying on of any trade or business and to the making of contracts for any purpose. As observed in Harinarayan Jaiswal's case, "if the Government is the exclusive owner of those privileges, reliance on Article 19 (1) (g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights." Section 27 of the Act recognises the right of the Government to grant a lease of its right to manufacture, supply or sell intoxicants, Section 34 of the Act read with Section 59 (d) empowers the Financial Commissioner to direct that a licence, permit or pass be granted under the Act on payment of such fees and subject to such restrictions and on such conditions as he may prescribe. In such a scheme, it is not of the essence whether the amount charged to the licensees is pre-determined as in the appeals of Northern India Caterers and of Green Hotel or whether it is left to be determined by bids offered in auctions held for granting those rights

to licensees. The power of the Government to charge a price for parting with its rights and not the mode of fixing that price is what constitutes the essence of the matter. Nor indeed does the label affixed to the price determine either the true nature of the charge levied by the Government or its right to levy the same.

56. The distinction which the Constitution makes for legislative purposes between a 'tax' and a 'fee' and the characteristics of these two as also of excise duty are well known. "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered". Per Latham, C. J. in *Mathews v. Chickory Marketing Board*, 60 CLR 263, 276. A fee is a charge for special services rendered to individuals by some governmental agency and such a charge has an element in it of a quid pro quo. *Commr. H. R. E. Madras v. Lakshmindra Thirtha Swamiar*, 1954 SCR 1005, 1041 = (AIR 1954 SC 282 at p. 295). Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. *M/s. Guruswamy and Co. v. State of Mysore*, (1967) 1 SCR 548 = (AIR 1967 SC 1512). The amounts charged to the licensees in the instant case are, evidently, neither in the nature of a tax nor of excise duty. But then, the 'Licence fee' which the State Government charged to the licensees through the medium of auctions or the 'Fixed fee' which it charged to the vendors of foreign liquor holding licences in Forms L-3, L-4 and L-5 need bear no quid pro quo to the services rendered to the licensees. The word 'fee' is not used in the Act or the Rules in the technical sense of the expression. By 'licence fee' or 'fixed fee' is meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the State can carry on a trade or business, such a charge is the normal incident of a trading or business transaction.

57. While on this question, we may with advantage cite a passage from "American Jurisprudence" (Vol. 30 pages 642, 645) which is based on the decisions in *Gundling v. Chicago*, (1899) 44 Law Ed 725; *Phillips v. Mobile*, (1907) 52 Law Ed 578 and *Richard V. Mobile*, (1907) 52 Law Ed 581. It says :

"the familiar principle that the imposition of license fees on useful and honourable occupations must not exceed the cost of issuing the license, plus the expense of inspecting and regulating the business licensed, is not necessarily applicable to a liquor license. The liquor traffic is not something which is licensed for the purpose of promoting it. Indeed, license fees may be exacted in amounts intended to discourage participation in the business. The courts have quite generally refused to hold that the license fee imposed, merely because it is large, is a tax, where the object is to control, regulate, and restrict, and not to encourage the liquor traffic, the revenue being the result of the system and not the motive for its adoption. The higher the fee imposed for a license, it is sometimes said, the better the regulation, as the effect of a high fee is to keep out of the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it."

58. In the view we have taken, the argument that the Government cannot by contract do what it

cannot do under a statute must fail. No statute forbids the Government from trading in its own rights or privileges and the statute under consideration, far from doing so, expressly empowers it by Sections 27 and 34 to grant leases of its rights and to issue the requisite licences, permits or passes on payment of such fees as may be prescribed by the Financial Commissioner.

59. The argument that in Cooverjee's case 1954 SCR 873 = (AIR 1954 SC 220) the impugned power having been exercised in respect of a centrally administered area, the power was not fettered by legislative lists loses its relevance in the view we are taking. It is true that in that case it was permissible to the court to find, as in fact it did, that the fee imposed on the licences was "more in the nature of a tax than a licence fee." As the authority which levied the fee had the power to exact a tax, the levy could be upheld as a tax even if it could not be justified as a 'fee', in the constitutional sense of that term. But the 'Licence fee' or 'Fixed fee' in the instant case does not have to conform to the requirement that it must bear a reasonable relationship with the services rendered to the licensees. The amount charged to the licensees is not a fee properly so-called nor indeed a tax but is in the nature of the price of a privilege, which the purchaser has to pay in any trading or business transaction.

60. This answers the main and the more important arguments urged on behalf of the appellants. What remains to be considered is the contention in regard to the scope and extent of the powers of the Financial Commissioner and the legality, otherwise of the demand for the payment of 'Fixed Fees' made on vendors of foreign liquor holding licences in Forms L-3, L-4 and L-5.

61. Before advertng to these contentions it is necessary to refer to two decisions on which the appellants laid some stress. In *Laxmikant Sahu v. Supdt, of Excise, Behrampur*, (C. A. No. 1415 of 1966 decided on 10-4-1967) = (reported in 1968 SCD 14) it was held by this Court that Section 38 of the Bihar and Orissa Excise Act, 1915 did not empower the Board to levy a tax and since the charge for the grant of a privilege for the retail 'off' vend of foreign liquor under the system of auctioning introduced by the amended Rule 103 (1) was a tax, the rule was beyond the scope of Section 38 and therefore void. It was expressly conceded in that case on behalf of the State of Orissa that the charge for the want of a privilege for the 'off' vend of foreign liquor under the system of auctioning was a tax and not a fee. The decision, being based on a concession, does not involve determination of the point whether the levy was truly in the nature of a tax. Besides, the question as to whether the word 'fee' was used in Section 38 in the technical sense was not canvassed in that case. The finding that the State Government had no power under the Act to levy duty in the form of a payment for the grant of a licence for retail vend of foreign liquor was based on a "combined reading of Sections 22, 27, 28 and 29" of the Bihar Act Section 22 empowered the Government to make a grant of the exclusive privilege of selling by retail country liquor or intoxicating drugs only.

62. The second decision on which the appellants laid stress was rendered by the High Court of Punjab and Haryana in *Jage Ram v. State of Haryana*, (C. W. No, 1376 of 1967 decided on 12-3-68). The argument is that this decision is based on the earlier decision of the High Court in *Bhajan*

Lal v. State of Punjab, (C. W. No. 538 of 1966 decided on 6-2-67) = (reported in 1967 Cur LJ 460) that the decision in Bhajan Lal's case was confirmed in appeal by this Court (C. A. Nos. 1642 and 1643 of 1968 decided on 21-8-1972 (SC)), that there is no material difference between the rules and the procedure adopted in the instant cases and those which were struck down in Bhajan Lal's case and therefore the rules and the procedure followed herein must also be struck down for the same reasons. This argument overlooks the significant difference between the rules struck down in Bhajan Lal's case and in Jage Ram's case, and the amended Rules now in force. Under the old Rule 36 (23-A) stiff-head duty which was admittedly in the nature of excise duty was payable by the licensee even on quota not lifted by him. The Rule and condition No. 8 founded on it were therefore struck down in Bhajan Lal's case as being beyond the scope of entry 51 of List II, the taxable event under the impugned Rule being the sale and not the manufacture of liquor. Rule 36 was amended on March 31, 1967 in order to meet the judgment in Bhajan Lal's case but the High Court found in Jage Ram's case that even under the amended Rule, still-head duty which was in the nature of excise duty was payable on unlifted quota of liquor. The position obtaining under the Rules as amended on March 22, 1968 which are relevant for our purposes is in principle different as the still-head duty is now only 0.64 paise as against Rs. 17.60 per litre. which was in force under the old Rules and excise-duty as such is no longer payable on unlifted quota. The principle governing, the decisions in Bhajan Lal's case and Jage Ram's case cannot, therefore, apply any longer.

63. As the amount payable by the licensees on the basis of the bids offered by them in auctions and on the basis of 'Fixed and Assessed Fees' is neither a fee in the technical sense nor a tax but is in the nature of the price of a privilege, there is no question of the Financial Commissioner lacking power to organize auctions so as to authorize the recovery of any amount which is not a fee properly so-called. The Financial Commissioner, under Section 34 of the Act read with Rule (sic) (Section) 59 (d), has the power to direct that licences may be granted on payment of such fees, that is, such consideration as he may by rules prescribe. It is open to him to frame a rule, as he has in fact framed Rule 35, directing that any class of licences may be granted on payment of fees fixed by auction. Once it is appreciated that auctions are only a mode or medium for ascertaining the best price obtainable for the grant of privilege to sell liquor, there would be no 'contradiction in terms' in directing as Rule 35 does, that a class of "licences may be granted on the fee fixed by auction."

64. The demands for the payment of Fixed Fees made on vendors of Foreign Liquor holding licences in Forms L-3, L-4 and L-5 were challenged on the additional ground that they were contrary to the terms of Rule 12 and therefore illegal. Under Rule 11, applications for renewal of licences for the following year have to be made before the end of October. By Rule 12 the Excise Inspector has to lay before the Collector by the 7th January each year a list of licences requiring, renewal, together with a certificate of sales as provided by Rule 30, to facilitate the determination of assessed fee. No order for renewal can be made after January 20 in respect of licences to be valid for the following financial year, except with the special sanction of the Financial Commissioner. The appellants holding licences for sale of Foreign Liquor applied duly for renewal of their licences and orders granting renewals were passed before January 20. Later the Rules were amended on March 22 and March 30, 1968 under which the appellants holding licences in Form Nos. L-3, L-4 and L-5 became liable to pay fixed fees up to Rs. 20,000 per annum in addition to fees assessed under Rule 31. The grievance of those appellants is that since their licences were renewed in January 1968, the amendments made in March 1968 cannot apply to them and therefore the demand

made on the basis of amended rules is illegal.

65. It is true that the amendments under which the appellants have been called upon to pay fixed fees were made after the licences were renewed. But the licences, though renewed in January 1968, were to be effective from April 1, 1968. The amendments having come into force before April 1 would govern the appellants licences and they are, therefore, liable to pay the fixed fees under the amended Rules. Licences are granted under Section 34 of the Act subject to the payment of such fees as the Financial Commissioner may direct. The rules made under Section 59 (d) authorize the imposition of additional fees and such authorization would operate on all Licences to be effective thereafter.

66. We are accordingly of the opinion that the payments demanded from the appellants are lawfully due to the State Government. Such payments are "excise revenue" within the meaning of Section 60 (1) (a) of the Act. Section 3 (9) of the Act defines "excise revenue" to mean "revenue derived or derivable from any payment, duty, fee, tax, confiscation or fine, imposed or ordered under the provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs, but does not include a fine imposed by a court of law." The payments due from the appellants holding licences in Form L-14A are also due to the Government "on account of any contract relating to the excise revenue" as provided in Section 60 (1) (c) of the Act. It is therefore open to the Government to recover its dues in the manner authorized by Section 60.

67. In the result all the appeals stand dismissed but in view of the circumstance that observations in Krishna Kumar Narula's case (1967) 3 SCR 50= (AIR 1967 SC 1368) may have led the appellants to embark upon this litigation, there will be no order as to costs.

Appeals dismissed.