

Panna Lal and Others

Vs

State of Rajasthan and Others

Civil Appeals Nos. 1213-1220, 1353, 1354, 1385-1386, 1387-1388, 1564, 1566-1567, 1579-1581, 1608, 1622, 1623-1624, 1626, 1630, 1947, 1764, 1862, 1432, 1433 and 1871 of 1974

(CJI A. N. Ray, M. H. Beg, Y. V. Chandrachud JJ)

01.08.1975

JUDGMENT

RAY, C.J. –

1. These appeals by certificate turn on the question as to whether the excise license granted to the appellants rendered them liable to pay the stipulated lump sum mentioned in the license.
2. These appeals relate to country liquor licenses (a) for the year 1962-63 and 1963-64; (b) for the years 1967-68, and (c) for the years 1968-69, 1969-70 and 1970-71.
3. For the years 1962-63 and 1963-64 licenses for sale of country liquor were given to contractors under a guaranteed system. There was a total guaranteed amount. Where the contractors failed to fulfil the guaranteed amount and there was a shortfall, demand notices were issued for the total shortfall.
4. For the years 1967-68, 1968-69 and 1969-70 the liquor contractors obtained licenses for sale of country liquor at a stipulated amount of license fee under the exclusive privilege system. Where the contractors failed to pay the granted amount there was a demand for a shortfall.
5. The appellants who were the liquor contractors challenged the demand for shortfall of the guaranteed amount. The liquor contractors contended that what was being demanded as shortfall amounted to levy of excise duty. The State, on the other hand, contended that what was being realised from the liquor contractors was the guaranteed amount in the license for the exclusive privilege of selling country liquor.
6. It may be stated here that there was no levy of excise duty prior to March 6, 1964. After the imposition of excise duty, the licenses during the year 1967-68 and thereafter were issued for a guaranteed sum under the exclusive privilege system. The State contended that what was being demanded as shortfall was the stipulated guaranteed amount which was excise revenue.
7. The licenses granted upto the year 1967-68 contained the following principal conditions :
  - (1) The licensee guarantees to the Governor of Rajasthan State that, he, in the year, concluding on . . . . March . . . . shall receive from the Government and sell such quantity of wine of which issue price shall not be less than Rs. . . . . (hereinafter known as the "guaranteed price" which are prevailing on . . . . . March. ....).

(2) The liquor shall be supplied to the licensee at the prevailing issue price, but the difference between such issue price and the issue price calculated at the prevailing rate on March 31, . . . shall not be included in the guarantee amount.

(3) The licensee will have to pay the shortfall, if any, between the price of the liquor obtained by him upto the end of any month at the issue price of March 31, . . . and the amount of guarantee multiplied by the months, which have passed and divided by eleven at the godown by the tenth of the next month.

(4) In case of non-payment, the license will be cancelled and when cancelled this way, the abovementioned difference shall be recovered from security cash deposits and remnant, if any, shall be recovered from the licensee and surety jointly and severally.

8. From 1968-69 the licenses contained, inter alia the following principle conditions :

(1) The licensee will have to deposit Rs. . . . as license fee under Section 24 of the Rajasthan Excise Act, 1950 for his exclusive privilege as fixed by the Excise Commissioner. From it the amount of excise duty will be adjusted towards the payment of the amount for the exclusive privilege but this adjustment will be limited to the payment of the amount for the exclusive privilege. The licensee will have to deposit the aforesaid amount in 12 equal instalments and will have to deposit the monthly instalments by the 10th of the next month in Government Treasury. The fees deposited by the license-holder in that month in the form of the component of the issue price will be treated as excise duty under the instalment of the license fee.

(2) If the license-holder does not deposit the instalments for any two months as laid down in the aforesaid condition within the prescribed period then the officer issuing the license will have the right to realise the amount of that instalment from the cash security of the license-holder or from this surety. In addition to this, he will also have the right to conceal the license of the licensee.

9. The appellants repeated the contention which had been advanced before the High Court that when the State Government wanted to enforce the guaranteed sum it amounted to recovery of excise duty by license. The appellants contended that the issue prices in the license are exclusive of prices of container but inclusive of excise duty levied under the government notification and therefore, enforcement of the guaranteed amount meant realisation of excise duty.

10. The appellants contended that unfulfilled guarantee amount which is sought to be recovered from the appellants is not balance of lump sum payment as price of exclusive privilege because the government license sanctioning guarantee system stated. That the licensee shall guarantee in respect of the year . . . income to the Government on account of the issue price of country liquor issued for sale at his shop during the year . . .

It was, therefore, said by the appellants that a promise to give income to the Government by purchasing a minimum quantity of liquor from the government warehouse was not equivalent to the payment of sum of money in consideration of grant of such privilege within the meaning of Section 30 of the Rajasthan Excise Act.

11. The appellants contended that the amounts of money sought to be recovered from the licensee

under the exclusive privilege system introduced from the year 1968 as well as under the guarantee, system prevalent prior to the year 1968 are nothing but demands for excise duty on unlifted liquor. The reasons advanced by the appellants are that under the exclusive privilege system of licensing introduced in 1968 the amount was agreed to be paid and deposited specifically towards excise duty given as a component of the issue price for the supply of country liquor and was agreed to be adjusted in the amount of the exclusive privilege.

12. The appellants also submitted that the word 'issue price' was a composite name for 'cost price of liquor' and 'excise duty leviable thereon' and therefore, an agreement by the licensees under the guarantee system to pay 'issue price' was tantamount to an agreement to pay 'cost price' and 'excise duty' as distinct items though described as issue price.

13. The appellants contended that licenses under both systems of guarantee and exclusive privilege contain a term about the payment and adjustment of excise duty and under both system 'excise duty' is a distinct item agreed to be paid as such in terms of the licenses.

14. The licenses were granted under the Rajasthan Excise Act, 1950 (referred to as the Act).

15. Section 24 of the Act confers power on the Excise Commissioner to grant any person a license for the exclusive privilege

(1) of manufacturing or supply by wholesale, or of both, or

(2) of selling by wholesale, or by retail, or

(3) of manufacturing or of supply by wholesale, or of both, and of selling by retail,

any country liquor or intoxicating drug within any local area of those parts of the State of Rajasthan to which the Act extends.

16. Section 28 of the Act provides that an excise that an excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government shall direct, may be imposed either generally or for any specified area, on any excisable article imported or exported, or transported or manufactured, cultivated or collected under any license granted under the Act, or manufactured in any distillery; post-still or brewery established or licensed under the Act. The explanation to Section 28 provides that duty may be imposed under this section at different rates according to the places to which any excisable article or intoxicating drug is to be removed for consumption or according to the varying strength and quality of such article.

17. Section 29 of the Act provides that subject to such rules regulating the time, place and manner of payment, as the State Government may prescribe such duty may be levied in such one or more ways as the State Government may by notification in the Official Gazette direct.

18. Section 30 of the Act provides that instead of or in addition to any duty leviable under Chapter V (which contains Section 28, 29 and 30), the Excise Commissioner may accept payment of a sum in consideration of the grant of the license for exclusive privilege under Section 24.

19. The Rajasthan Excise Rules, 1956 provides in Rule 67I, 67J, 67K and 67L the different forms of procedure for grant of exclusive privilege. Rule 67I provides that license for exclusive privilege of selling by retail of country liquor within any local area under Section 24 of the Act may be granted

on condition of payment of such lump sum instead of, or in addition to excise duty, as may be determined by the Excise Commissioner and subject to such other terms and conditions as may be laid down by him. Rule 67J provides that a license under Rule 67J may be granted by way of allotment by negotiation in accordance with the procedure laid down in sub-rules 2 to 4 of Rule 67J. Rule 67K provides that subject to such general or special directions as may be issued by the Excise Commissioner from time to time, the District Excise Officer may put the license under Rule 67I to auction for any area. In such an auction the Presiding Officer shall call upon for lump sum payment for exclusive privilege payable instead of or in addition to excise duty as may be directed by the Excise Commissioner. Rule 67L provides that the Excise Commissioner may at his discretion grant license under Rule 67I for any area by negotiation with any third party. There is a proviso that highest bidder or highest tenderer if any shall be given a chance to make a higher offer unless he has been debarred from holding license or has rejected the offer under Rule 67(2).

20. The license fee stipulated to be paid by the appellants is the price or consideration or rental which the Government charges from the licensees for parting with its privilege in stipulated lump sum payment and is a normal incident of a trading or business transaction. This Court in the recent decision in *Nashirwar v. State of M. P.* ((1975) 1 SCC 29) and the unreported decision dated January 21, 1975 in Civil Appeal No. 365 of 1969 *Har Shanker v. Deputy Excise and Taxation Commissioner* held that the State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. The nature of trade is such that the State confers the right to vend liquor by farming out either by auction or by private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government.

21. The licenses in the present case are contracts between the parties. The licensees voluntarily accepted the contracts. The fully exploited to their advantage the contracts to the exclusion of others. The High Court rightly said that it was not open to the appellant to resile from the contracts on the ground that the terms of payment were onerous. The reasons given by the high Court were that the licensees accepted the license by excluding their competitors and it would not be open to the licensees to challenge the terms either on the ground of inconvenient consequence of terms or of harshness of terms.

22. The legal position is also correctly stated in *Madhavan v. Assistant Excise Commissioner, Palghat* (1969 ILR 2 Ker 71) where it is said that the rental charged by the State of licenses is the consideration for the privilege of vending liquor. The licensees in the present appeals voluntarily contracted to pay the guaranteed sum of the stipulated lump sum for the exclusive privilege to vend liquor.

23. In the *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* case (In the matter of the *C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, 1939 FCR 18 : AIR 1939 FC 1), it has been said that in several Acts by which excise duties are imposed it is provided that the duty is to be paid by the manufacturer or producer on the issue of the excisable articles from the place of manufacturer or production and there is no provision for the imposition of an excise duty on retail sales. Many Acts provide for lump sum payments in certain cases by manufacturers and retailers, which may be described as payments either for privilege or as consideration for the temporary grant of a monopoly, but these are clearly not excise duties or anything like them. (See at pp. 53 and 54).

24. This Court in *M/s. Guruswami & Co. v. State of Mysore* ((1967) 1 SCR 548 : AIR 1967 SC 512) considered the question whether the payment of shop rent for the exclusive privilege of sale of liquor in a specific shop is an excise duty. In *Guruswami's case* (*supra*) the petitioners paid shop rent or the 'kist' for a group of toddy shops amounting to Rs. 3,61,116 a month. The 'kist' amount was determined at the auctions of exclusive privilege of vending toddy in the shops. The notification for auction mentioned rates of duty, price, etcetera on the several kinds of excisable articles. The notification also mentioned that health cess at a certain rate shall also be payable on the shop rent and tree tax on toddy and other duties of excise levied. The petitioners challenged the authority of the State to levy and collect health cess. The main ground was that the health cess was in reality a tax and not a mere cess. This Court said that the true character or nature of levy in *Guruswami's case* was that it was a payment for the exclusive privilege of selling toddy. The payment had no close relation to the production or manufacture of toddy. The only relation the levy had to production or manufacturer was that it enabled the licensee to sell it. The excise duty is paid on toddy in the form of tree tax. He also keeps toddy pays tree tax. The privilege of selling toddy was auctioned well before the goods came into existence. In view of these characteristics the health cess was found not to be excise duty. The taxable event in regard to the health cess was not the manufacture or production of goods but the acceptance of the license to sell the goods.

25. A Bench decision of this Court in *State of Orissa v. Harinarayan Jaiswal* ((1972) 3 SCR 784 : (1972) 2 SCC 36) considered the grant of exclusive privilege of manufacture and sale of country liquor by licensees. This Court held that the power given to the Government to sell the exclusive privilege in such manner as it thinks fit is a very wide power. In *Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner, Ajmer* (1954 SCR 873 : AIR 1954 SC 220) this Court held that an important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of State revenues. The power of the government to sell the exclusive privilege is by public auction or by negotiation. The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale is a made of raising revenue.

26. The decisions of this Court establish that the lump sum amount voluntarily agreed to by the appellants to pay to the State are not levies of excise duty but are in the nature of lease money or rental or lump sum amount for the exclusive privilege of retail sales granted by the States to the appellants.

27. There is no levy of excise duty in enforcing the payment of the guaranteed sum or the stipulated lump sum mentioned in the licenses, for these reasons. First, the licenses were granted to the appellants after offer and acceptance or by accepting their tenders or auction bid. The appellants stipulated to pay lump sum amounts as the price for the exclusive privilege of vending country liquor. The appellants agreed to pay what they considered to be equivalent to the value of the right. Second, the stipulated payment has no relation to the production or manufacture of country liquor except that it enables the licensee to sell it. The country liquor is produced by the distilleries. Under Section 28 of the Act and under the relevant duty notifications the excise levy is not on the manufacture and not on the sale or retail of liquor. Under the duty notifications no excise duty is levied or collected from the liquor contractors who are liable only to pay the price of liquor. The taxable event is not the sale of liquor to the contractors but the manufacture of liquor. What the liquor contractors pay in consideration of the license is a payment for the exclusive privilege for selling country liquor. The liability for excise is on the distillery and the liquor contractors are not concerned with it. Before 1965 there was no excise duty. The appellants were required to pay the guaranteed amount. After the imposition of excise duty the position is not altered because the

privilege of selling is granted by auction or by offer and acceptance before the goods came into existence. Excise contracts are settled in the preceding year. Third, the stipulated amounts payable by the appellants have relation only to what the appellants fore-saw they could recoup by the sale of country liquor from the liquor shops licensed to them. There are several varieties of country liquor and rates of excise levy on these varieties are different. The appellants are not bound to take any particular quantity or any particular quality of any variety. Without reference to any quantity or quality, it is impossible to predicate the alleged levy of excise duty.

28. Before imposition of excise duty in 1965, the issue price did not have even a notional component of excise duty under Issue Price Rules. Therefore, no excise duty could be attributed to the contractual amounts payable by the appellants. The references to excise duty in licenses under the guarantee system or exclusive privilege system prevalent subsequent to the year 1965 are only for the purposes of adjustment or concession as a unit of measure. It is not an excise duty currently imposed or levied in the year of the license that is being collected with regard to undrawn liquor because the adjustment of issue price is with reference to the issue price prevailing in the preceding year. Rule 67A of the Rajasthan Excise Rules, 1966, defines value as the price current on January 1, preceding the financial year to which the guarantee relates. Under Rule 67A licenses for retail shops of country liquor under the guarantee system may be guaranteed to persons guaranteeing to draw from a government warehouse and sell in a financial year or part thereof, country liquor of a specified value, called the 'amount of guaranteed. The explanation to Rule 67A is the 'value' for the purpose of that rule shall be the total issue price at a government warehouse calculated at the rate of such price current on the first day of January preceding the financial year to which the guarantee relates. The licenses under the guarantee system are granted either by inviting tenders or by auction or by negotiation. The amount of guarantee under Rule 67A shall be (a) where a license is granted by inviting tenders the amount of the tender accepted for the grant of the license; (b) where a license is granted by auction the amount of the bid accepted for the grant of the license; and (c) where a license is granted by auction or negotiation, the amount of guarantee shall be the amount determined by the Excise Commissioner and accepted by the licensee.

29. The lump sum amount stipulated under the agreement is not to be equated with issue price. The issue price is payable only when the contractors take delivery of a particular quantity of specified value of country liquor. The issue price rates only to liquor drawn by the contractors and does not pertain to undrawn liquor. No excise duty is or can be collected on undrawn liquor. The issue price is the price at which country liquor is sold to the liquor contractors. So far as the liquor contractors are concerned, they pay the price of the liquor even though that price may include the component of excise duty in respect of which they have no direct liability. Illustrations may be found in case of a person buying a matchbox or a motor car or a refrigerator. When the purchaser pays the price of a matchbox, or a motor car or a refrigerator the price includes excise duty levied and collected on the manufacture of these goods. The price of goods necessarily includes different components but the price a buyer pays is different from duties and taxes paid or payable by the manufacturers. The incidence of all the components of cost and taxes is inevitably passed on to the consumer. What the consumer pays is the price of the goods and not the antecedent components as such.

30. The licenses after stipulating an agreed sum of money which is payable by the licensees under the licenses provides a scheme of remission. The liquor contractor is given a remission in the matter of his obligation to pay the stipulated amount to the extent of the excise duty component of the issue price paid by him. The excise duty component of the issue price is, therefore, only a measure of the quantum or extent of the concession or the remission to be given to the liquor contractor. The concession is not what is paid by the contractor to the State but it is a remission or a reduction in the

stipulated amount for exclusive privilege allowed by the State to the contractor. The lump sum amount payable for the exclusive privilege is not to be confused with the issue price. In essence what is sought to be recovered from the liquor contractors is the shortfall occasioned on account of failure on the part of liquor contractor to fulfil the terms of license.

31. The contractual obligation of the appellants to pay the stipulated amounts is not dependent on the quantum of liquor sold by them which is relevant only for the purpose of remission to be earned by them under the license. No excise duty is charged or chargeable on undrawn liquor under the license. To suggest that the license obliges the contractors to pay excise duty on undrawn liquor is totally misreading the conditions of the license. The excise duty is collected only in relation to the quantity and quality of the country liquor which is drawn. No excise duty can be predicated in respect of undrawn liquor.

32. Adjustment by way of reduction in the contractual liability of the appellants to the extent of a specific and quantified portion of the issue price is purely a measure of concession or remission and is a method of calculation. The question of adjustment arises only when liquor is drawn, otherwise the formula of remission does not come into the picture at all.

33. The appellants relied on the decision of this Court in *Bimal Chandra Banerjee v. State of M. P.* ((1971) 1 SCR 844 : (1970) 2 SCC 467) in support of the contention that the attempt on the part of the State to enforce the full guaranteed amount or stipulated sum is collecting excise duty. In *Bimal Chandra Banerjee's* case (supra) a levy of excise duty on undrawn liquor was imposed in terms by the State Government by a notification amending the Rules and by an alternation in the conditions of the license. It was provided that certain minimum quantity of liquor would have to be withdrawn by each contractor who was to be liable to make goods every months the deficit monthly average of the total minimum duty on or before the 10th of each month following the months to which the deficit duty relates. The decision there was that in imposing the excise duty on undrawn liquor by the impugned notification, the State Government was exercising powers which it did not possess. In the present case, the State Government has not imposed any excise duty on the licensee. On the contrary, the license only takes into account the excise duty component of the issue price for the purposes of giving a concession or remission to the contractors. In *Bimal Chandra Banerjee's* case the impugned notification was assailed on the ground that it exceeded the legislative competence of the State. No such question arises here. The scheme of remission in the present case is that if the liquor contractor purchased liquor of the value, the excise duty whereof equalled the price of the exclusive privilege, the liquor contractor is to be given credit therefor.

34. The agreements give the liquor contractors an exclusive privilege to sell country liquor in specified area for the period fixed for a stipulated sum of money for enjoying the privilege. If the contractors do not sell any liquor they are yet bound to pay the stipulated sum. If they sell liquor they are given the benefit of remission in the price of the exclusive privilege. The measure for this remission is the excise duty leviable to the extent that the liquor contractors can neutralise the entire amount of exclusive privilege in the excise duty payable by them. If the contractors fail to lift adequate quantity of liquor and thereby fail in neutralising the entire price of exclusive privilege the contractors are not called upon to pay excise duty.

35. For these reasons the contentions of the appellants fail. The appeals are dismissed save dismissed save what follows hereinafter in Civil Appeal No. 1433 of 1974 and Civil Appeal No. 1871 of 1974. Parties to pay and bear their own costs as they did in the High Court.

36. In Civil Appeal No. 1433 of 1974 there is a short supply of liquor in respect of the year 1963-64. In Civil Appeal No. 1871 of 1974 there is a short supply of liquor in respect of the year 1967-68. In these appeals for these two years, the order will be the same as order dated August 29, 1974 in Civil Appeals Nos. 1170, 1171 and 1176 of 1974, with the modification that if there has been any interim stay in these matters, the interim stay will stand vacated.

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