

State of Orissa and Others

Vs

Narain Prasad and Others

Civil Appeals Nos. 11509-11512 of 1996 with Nos. 11513-14, 11518-25 of 1996

(B. P. Jeevan Reddy, K. S. Paripoornan JJ)

03.09.1996

JUDGMENT

B. P. JEEVAN REDDY, J. –

1. Leave granted.

2. Having voluntarily entered into contracts with the Government of Orissa, undertaking to lift a particular quantity of liquor every month and also to remit the monthly excise duty in two equal instalments on the fifth and fifteenth of the month, the respondents-licensees committed default on both counts and when the amount of excise duty is sought to be recovered from them, they have turned round and are contending that the said undertaking in the contract is not enforceable in law. They invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution for the purpose. The High Court has upheld their contention. Hence, these appeals by the State of Orissa.

3. The grant of excise licences in the State of Orissa is governed by the Bihar and Orissa Excise Act, 1915 (2 of 1915) (the Act) and the rules made thereunder. Section 22 provides for grant of exclusive privilege of sale of country liquor, whether wholesale or retail. Section 27 empowers the State Government to impose excise duty or countervailing duty, as the case may be, at such rate as it may direct on any of the activities specified therein. It would be appropriate to set out sub-section (1) of Section 27 :

"27. Power to impose duty on import, export, transport and manufacture. - (1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on -

(a) any excisable article imported, or

(b) any excisable article exported, or

(c) any excisable article transported, or

(d) any excisable article (other than tari) manufactured under any licence granted in respect of clause (a) of Section 13, or

(e) any hemp plant cultivated, or any portion of such plant collected, under any licence granted in respect of clause (b) or clause (c) of Section 13, or

(f) any excisable article manufactured in any distillery or brewery licensed, established, authorized, or continued under this Act.

Explanation. - Duty may be imposed on any article under this sub-section at different rates according to the places to which such article is to be removed for consumption, or according to the varying strengths and quality of such article."

4. Section 28 empowers the levy of excise duty/countervailing duty in any of the several ways provided therein. Section 28, insofar as is relevant, reads :

"28. Ways of levying such duty. - Subject to any rules made under Section 90, clause (12), any duty imposed under Section 27 may be levied in any of the following ways :

* *##

(c) on an excisable article transported, -

##(i) * * *##

(ii) by payment upon issue for sale from a warehouse established, authorized or continued under this Act;"

5. Section 29 is particularly relevant to the controversy herein. It reads :

"29. Payment for grant of exclusive privilege. - (1) Instead of or in addition to, any duty leviable under this Act, the State Government may accept payment of a sum in consideration of the grant of any exclusive privilege under Section 22.

(2) The sum payable under sub-section (1) shall be determined as follows :

(a) by auction or by calling tenders or otherwise as the State Government may, in the interest of excise revenue, by general or special order direct; and

(b) by such authority and subject to such control as may be specified in such order.

(3) The sum determined under sub-section (2) shall be final and shall be binding on the party making the offer by way of tender, bid or otherwise once such offer is accepted by the authority referred to in clause (b) of that sub-section."

6. A reading of Section 29 shows that the State Government may accept payment of a sum in consideration of the grant of any exclusive privilege under Section 22. This may be instead of or in addition to any duties leviable under the Act. Sub-section (2) clarifies that the sum payable under sub-section (1) shall be determined by auction or by calling for tenders or otherwise; sub-section (3) declares that the sum determined under sub-section (2) shall be final and binding upon the party making the offer once the offer is accepted by the appropriate authority.

7. Section 89 empowers the State Government to make rules to carry out the objects of the Act. Sub-section (2) specifies the several heads in respect of which rules can be made. Clause (i) of sub-section (2) empowers the State Government to make rules "for regulating the procedure to be followed and prescribing the matters to be ascertained before any licence for the wholesale or retail vend of any intoxicant is granted for any locality".

8. In exercise of the power conferred by Section 89, the Government of Orissa has made rules governing the grant of licences, viz., the "Orissa Excise Exclusive Privilege Rules, 1970". Rule 6 of these Rules prescribes the manner in which the consideration determined for grant of exclusive privilege shall be paid. Rule 6-A, as substituted by SRO No. 215 of 1989, provides for monthly minimum guaranteed quota, the obligation of the licensee to lift it before the end of the month and the further obligation to remit the monthly excise duty in two equal instalments, i.e., on the 5th and 15th of every month. Clauses (1), (2), (3) and (4) of the said Rules read thus :

"6-A. (1) Minimum guaranteed quantity of country spirit. - Every successful bidder of country spirit shop shall, before obtaining licence, guarantee the sale of the minimum guaranteed quantity of country spirit as fixed by the Collector. The bidder shall before obtaining licences submit monthly distribution of statement to the Collector concerned. The licensee before the 30th June, may revise and resubmit the monthly distribution statement for the portion of the excise year from August to March. The Collector shall be competent to revise and approve such revised statement. There shall be no further changes in the distribution statement so approved.

(2) The licensee shall lift the monthly minimum guaranteed quantity approved for that month before 5.00 p.m. on the last working day of that month. The right to lift the monthly minimum guaranteed quantity approved for that month and left unlifted if any by 5.00 p.m. on the last working day of the month shall be forfeited, unless specially permitted to be lifted in the subsequent month or months by the Collector :

Provided that :

(i) The Collector may for any special reasons permit the licensee to lift the short-drawn minimum guaranteed quantity of the previous month in the succeeding month except for the months of February and March. The Collector shall however, obtain the order of the Commissioner of Excise in case of default and for any special reasons if the period exceeds over one month.

(ii) The Commissioner, may, wherever if he deems it necessary, permit the licensee to lift the short-drawn minimum guaranteed quantity of any month other than that month of March in any subsequent month or months.

(iii) No unlifted quantity of the country spirit shall be permitted to be lifted beyond the last day of February.

(3) Subject to provisions of sub-rule (1) no licensee shall lift less than the specified minimum guaranteed quantity of country spirit in any month. The excise duty of country spirit for the month as approved in the distribution statement under sub-rule (1) shall be remitted in two equal instalments by the licensee into the government

treasury of the district in which the shop is situated. The first instalment shall be remitted by fifth of the month and the second instalment by fifteenth of that month. Where due date or subsequent day happens to be a holiday the instalment shall be remitted on the next working day. If in any month, the first or second instalment of the excise duty of country spirit for that month is not remitted as required above, the excise duty to the extent of deficit payment without prejudice to any other mode of recovery shall be deducted first from the bank guarantee, if any, and the balance from the advance deposits furnished or paid under Rule 6 and the licensee shall be called upon to indemnify the amounts so adjusted in the case of first instalment by fifteenth of that month and that month and in the case of second instalment by twenty-fifth of that month in which deficit payment of instalment of excise duty had expired.

(4) Where a licensee fails to indemnify the advance amount adjusted under sub-rule (3) in the case of first instalment of fifteenth of that month and in the case of second instalment by twenty-fifth of that month, the licence is liable for cancellation and the right acquired by the defaulting licensee shall be liable for redisposal subject to provisions of sub-section (1) of Section 22 of the Act."

9. A reading of Rule 6-A makes the following matters clear : the licensee shall have to undertake to lift the M.G.Q. of liquor every month. Clause (3) of the Rules, read with clauses (1) and (2) means that the obligation to lift the M.G.Q. of liquor and the obligation to remit the excise duty payable for the month are two distinct obligations. While the obligation to lift the M.G.Q. is to be discharged before the end of the month, the obligation to remit the excise duty for the month is to be discharged in two equal instalments viz., first instalment by the fifth and the second instalment by the fifteenth of the month. The consequences of not remitting the excise duty in the manner specified are set out in clauses (3) and (4), which make the said obligation mandatory and emphatic. The rule also makes it clear that if in a given month, the full M.G.Q. is not lifted, the Collector can permit the deficit to be lifted in the subsequent month but this has nothing to do with the obligation to remit excise duty for the month on the dates specified. It is relevant to point out that the several consequences provided in clauses (3) and (4) follow the non-deposit of excise duty on specified dates - and not the non-lifting of M.G.Q. which is an independent obligation. It is necessary to bear this aspect in mind.

10. Every person whose bid/tender has been accepted is required to execute an agreement/contract in the prescribed form. Under this agreement, the contractor/licensee agrees to abide by the rules and conditions relating to retail vend of country spirit (liquor) as stipulated in the licence as also the general conditions of licence. The said conditions shall be treated as part of the agreement. Clause (2) obliges the contractor to draw a particular quantity of liquor every month from the specified warehouse. Under clause (3) the contractor "undertakes to pay the duty at the prescribed rate at the warehouse prior to lifting the stock". This condition provides that excise duty shall be remitted prior to lifting; it does not say it shall be remitted at the time of lifting. Under clause (7), the contractor-licensee agree to abide by all the provisions of the Act and the Rules and instructions as may be issued from time to time.

11. Conditions 1 and 2 of the licence, as amended in 1989, repeat and reiterate the provisions contained in Rule 6-A aforesaid in their entirety.

12. The respondents were the highest bidders in respect of the various liquor shops in Orissa. Their bids were accepted. They executed agreements in the prescribed form and were issued licences. Each of them had undertaken under the agreement/contract to lift a particular specified quantity of

liquor every month during the relevant excise year (1990-1991) as well as to remit the excise duty as specified in the Rules. They did the business under the said licences for the entire excise year. They failed to lift the agreed M.G.Q. They also failed to remit the excise duty as provided by Rule 6-A. And when notices were served calling upon them to remit the appropriate amount, they rushed to the Orissa High Court by way of writ petitions questioning the demand notices.

13. The main contention of the respondents (writ petitioners) was that the demand for payment of excise duty on unlifted quantity of arrack amounts to levy of duty and that such levy is not warranted by the Act. They submitted that Rule 6-A(3) is ultra vires the rule-making power of the Government and is outside the purview of the Act. They submitted that if there is a sale of liquor, duty can be collected on the liquor sold but that seeking to the provisions of the Act. They placed reliance upon the decisions of this Court in *Bimal Chandra Banerjee v. State of M.P.* [(1970) 2 SCC 467 : (1971) 1 SCR 844] and the subsequent decisions following it. According to them, their case did not fall within the ration of the decisions of the Court in *Panna Lal v. State of Rajasthan* [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008 and *State of A.P. v. Y. Prabhakara Reddy* [(1987) 2 SCC 136 : (1987) 2 SCR 513].

14. The State of Orissa disputed the several contentions of the writ petitioners. In particular, they relied upon the agreement and the undertakings contained therein. Their case is set out in the impugned judgment in the following words :

"It is further contended that the fixation of M.G.Q. was made considering the potentiality of sale and by taking other relevant factors into consideration, and the petitioner and other contractors were aware of the M.G.Q. at the time when they participated in the auction-cum-tender ... the petitioner having accepted the contract cannot now turn around and challenge the fixation of M.G.Q. for the year 1991-92 ... the demand was justified being the duty towards shortfall of the M.G.Q., the challenge of the petitioner to Annexure 3 is untenable. Sub-rule (3) of Rule 6-A of the Orissa Excise (Exclusive Privilege) Rules, 1970 ... is valid and has been framed in exercise of powers under sub-section (1) of section 89 of the Bihar and Orissa Excise Act, 1915 which empowers the State Government to make rules to carry out the objects of the Act, or any other law for the time being in force relating to the excise revenue and also by Section 89(2) of the Act which empowers the State Government to make rules for regulation the import, export or transport of any intoxicant ... Under section 22(1) of the act, an exclusive privilege can be granted to any person of such terms and conditions and for such period as the State Government may think fit. The M.G.Q. being one of the conditions for grant of a licence, the Government was fully empowered in framing rules which related to fixation of M.G.Q. and also for providing the consequences which would follow on reach of such condition. This power ... flows from a combined reading of Sections 22, 27, 29 and 89 if the Act ... the provision relating to the M.G.Q. ought to be considered as a condition of licence, and that being a condition subject to which the licence was issued and accepted by the petitioner, the petitioner cannot, after operating the licence, challenge the same. He is bound by the conditions and is, therefore, liable to pay the amount demanded to compensate the State for the loss sustained by it for failure on the part of the petitioner to lift the M.G.Q. The petitioners having entered into an agreement for sale of country liquor and having been granted an exclusive privilege on certain terms and conditions, cannot now, after entering into a

contract, wriggle out of their contractual obligation and contend that the amount demanded for shortfall of M.G.Q. is invalid ... the sum sought to be realised is damages for breach of contract namely, failure to lift M.G.Q. It is in the granting of damages being the duty on the shortfall, and as such, is in the nature of a penalty and can be realised on a breach being committed. Strong reliance is placed on Har Shankar v. Dy. Excise & Taxation Commr. [(1975) 1 SCC 737 : AIR 1975 SC 1121], Panna Lal v. State of Rajasthan [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008] and State of Haryana v. Jage Ram [(1980) 3 SCC 599 : 1982 SCC (Tax) 130 : AIR 1980 SC 2018]."

15. The High Court, however, accepted the contentions of the respondents-writ petitioners and quashed the demand notices impugned in the writ petitions.

16. It is evident from the contentions urged by both the sides that while the respondents-licensees look at the impugned demand as an instance of levy of excise duty, the State looks at it as a case of enforcing the undertakings contained in the agreement/contract executed by the licensees. According to the licensees, no excise duty can be levied unless there is a sale. Demand for excise duty where there is no sale of liquor, according to them, is unsustainable in law. The State's case, however, is that the licence/privilege was granted to the respondents in consideration of payment of several items of money, all of which together constitute the consideration for the grant of licence. The State says that it is merely seeking to recover the amount due to it under the contract and that such a course does not amount to levy of excise duty. Both sides rely upon certain decisions of this Court in support of their respective points of view. It would be appropriate to notice them.

17. In *Bimal Chandra Banerjee v. State of M.P.* [(1970) 2 SCC 467 : (1971) 1 SCR 844] one of the conditions of the licence stipulated that : (SCC p. 468, para 2)

"The minimum quantity for taking issues from the warehouse for sale is fixed at 3213 p. litres spiced spirit and 25940 p. litres plain spirit. You shall be liable to make good every month the deficit of monthly average of the total minimum duty on or before the 10th day of each month following the month to which the deficit duty relates."

18. Since the licensee failed to remit the duty as stipulated, the State made a demand for the same. The contention of the licensee was that the excise duty is a tax, that it can be levied only on the basis of a valid law and that no tax can be levied on the basis of a contract or pursuant to executive orders. Tax, it was submitted, can be levied only by the legislature. It was contended that the aforesaid condition of licence is ultra vires the power of the Government. In other words, the contention was that the Government had no power to amend the Rules so as to include the aforesaid clause in the conditions of licence. Section 25 of the Madhya Pradesh Act provided for the levy of duty on any of the events specified therein, namely, import, export, transport, manufacture and cultivation while Section 26 provided for levy of duty inter alia on liquor issued from distillery or warehouse. No provision of the Act, however, empowered levy of duty even where there was no issue of liquor from distillery or warehouse. This Court upheld the licensee's contention on the following reasoning : (SCC p. 471-72, paras 12-14)

"Neither Section 25 or Section 26 or section 27 or section 62(1) or clauses (d) and (h) of Section 62(2) empower the rule-making authority viz., the State Government to levy tax on excisable articles which have not been either imported, exported,

transported, manufactured, cultivated or collected under any licence granted under Section 13 or manufactured in any distillery established or any distillery or brewery licenced under the Act. The legislature has levied excise duty only on those articles which come within the scope of Section 25. The rule-making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of Section 25. Therefore it is not necessary to consider whether any such power can be conferred on that authority. Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to exercise a power which it did not possess.

No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorise the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it.

We are to opinion that the impugned rule as well as the demands are not authorise by law."

19. The ratio of the said decision is that inasmuch as the Act does not empower levy of excise duty on unlifted liquor, no such levy can be created by a rule made under the Act. It was also observed that inasmuch as the Act does not empower the rule-making authority to impose tax on unlifted liquor, the rule-making authority (the Government of Madhya Pradesh) has no power to add the aforesaid clause in the conditions of the licence. It is significant to notice that this decision approached the question from the point of view of levy of excise duty. No argument appears to have been put forward - as was done in later decisions - that the state is merely seeking to recover the consideration for the grant of privilege/licence as per the terms and conditions of, and as undertaken in, the agreement. The decision, therefore, does not advert to that aspect at all - an aspect which came to be highlighted in some of the later decision. This decision was followed in *State of M.P. v. Firm Gappulal* [(1976) 1 SCC 791 : 1976 SCC (Tax) 71 : (1976) 2 SCR 1041 and in *Excise Commr. v. Ram Kumar* [(1976) 3 SCC 540 : 1976 SCC (Tax) 360 : 1976 Supp SCR 532]. *Gappulal* [(1976) 1 SCC 791 : 1976 SCC (Tax) 71 : (1976) 2 SCR 1041] was again a case from Madhya Pradesh. In this case, an attempt was no doubt made by the State to bring its case within the ratio of *Panna Lal v. State of Rajasthan* [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008] (which was decided meanwhile), but it was repelled by the Court holding that the facts of the case before them placed the case within the ratio of *Bimal Chandra Banerjee* [(1970) 2 SCC 467 : (1971) 1 SCR 844] and not within the ratio of *Panna Lal* [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008]. In *Ram Kumar* [(1976) 3 SCC 540 : 1976 SCC (Tax) 360 : 1976 Supp SCR 532], a case arising under the U.P. Excise Act, 1990 (14 of 1910) one of the conditions of the licence provide that in case the licensee failed to lift the minimum guaranteed quota, : (SCC p. 543, para 11)

"he shall be liable to pay compensation to the State Government at the rate equal to the rate of stillhead duty per litre of spiced spirit ..."

In this case too, the State tried to bring its case within the ratio of *Panna Lal* [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008] but the Court did not agree. It preferred to apply the ratio of *Bimal Chandra Banerjee* [(1970) 2 SCC 467 : (1971) 1 SCR 844]. It held that non of the

provisions of the U.P. Act authorised the levy of the duty even where there was no sale. The Court held further that though disguised as compensation, the demand is in reality a demand for excise duty on the unlifted quantity of liquor, which is not authorised by the provisions of the Act.

20. The licensees-respondents submit that the present cases, having regard to the language of the enactment, Rules and condition of the licence fall within the ratio of the above decisions while the State of Orissa submits that these cases properly fall within the ratio of the decisions in Panna Lal [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008 and Prabhakara Reddy [(1987) 2 SCC 136 : (1987) 2 SCR 513]. Before referring to these decisions, it would be appropriate, in our opinion, to refer to the decision of the Constitution Bench in Har Shankar v. Dy. Excise and Taxation Commr. [(1975) 1 SCC 737 : AIR 1975 SC 1121]. In Har Shankar [(1975) 1 SCC 737 : AIR 1975 SC 1121] one of the objections raised by the State to the maintainability of the writ petitions filed by the licensees was that the writ petitioners were seeking to enforce contractual rights thereby. This was denied by the writ petitioners therein. They said, they were merely seeking to vindicate their legal rights. The contention of the writ petitioners was repelled by this Court in the following words : (SCC p. 747, para 21)

"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."

The Court further observed : (SCC p. 748, para 22)

"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 fee 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."

21. The approach adopted in this decision has to be borne in mind in every such case. It is also to be kept in mind that while the decisions referred to hereinbefore are by smaller Benches, this decision is by a Constitution Bench. A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round, according to this decision, and question the validity of those obligations or the validity of the Rules which constitute the terms of the contract. The extraordinary jurisdiction of the High Court under Article 226, which is of a discretionary nature and is exercised only to advance the interests of justice, cannot certainly be employed in aid of such persons. Neither justice nor equity is in their favour.

22. Panna Lal [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008] arose under the Rajasthan Excise Act, 1950 (2 of 1950). The licences were given to contractors under a guaranteed system; there was a total guaranteed amount. When the contractors failed to pay the guaranteed amount as per the contract, demand notices were issued. The contention urged by the licensees was

that the demand for shortfall in truth amounted to levy of excise duty on unlifted quantity whereas the State's case was that they were demanding the mount guaranteed by the contractor and payable in accordance with the agreement. Another argument of the contractors was that the demand for issue price of unlifted quantity was in effect a demand for excise duty inasmuch as one of the components of issue price was excise duty. This Court rejected relying upon the decisions of this Court in *Nashirwar v. State of M.P.* [(1975) 1 SCC 29 : (1975) 2 SCR 861] and *Har Shankar* [(1975) 1 SCC 737 : AIR 1975 SC 1121]. It was held that rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor, that rental is neither a tax nor excise duty and that it is the consideration for grant of privilege by the Government. The Court referred to the decision of the Federal Court in the *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, Re* [1939 FCR 18 : AIR 1939 FC 1] and observed : (SCC p. 638, para 23)

"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 FCR at pp. 53 and 54.)"

23. After referring to certain other decisions of this Court it was held : (SCC pp. 639-40, paras 26 and 27)

"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 State to the appellants.

There is no levy of excise duty in enforcing the payment of the guaranteed sum or the stipulated lump sum mentioned in the licences, for these reasons. First, the licences 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 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 licence 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."

24. Dealing with the argument that recovery of issue price is in effect a recovery of excise duty for the reason that excise duty forms a component of the issue price, this Court observed : (SCC p. 641, para 30)

"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 licence."

25. Having regard to the particular stipulations and conditions of the contracts concerned therein, the Court observed further : (SCC p. 642, para 34)

"The agreements give the liquor contractors an exclusive privilege to sell country liquor in a 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 there by fail in neutralising the entire price of exclusive privilege the contractors are not called upon to pay excise duty."

26. The decision in Har Shankar [(1975) 1 SCC 737 : AIR 1975 SC 1121] was followed in State of Haryana v. Jage Ram [(1980) 3 SCC 599 : 1982 SCC (Tax) 130 : AIR 1980 SC 2018]. This Court observed : (SCC p. 606, para 18)

"In view of these decisions, the preliminary objection raised by the learned solicitor General to the maintainability of the writ petitions filed by the respondents has to be upheld. We hold accordingly that the High Court was in error in entertaining the writ petitions for the purpose of examining whether the respondents could avoid their contractual liability by challenging the Rules under which the bids offered by them were accepted and under which they became entitled to conduct their business. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business."

27. Dealing with the nature of the amounts payable by the licensee in respect of a liquor contract, the Court observed : (SCC pp. 607-8, paras 22-25)

"The respondents agreed to pay a certain sum under the terms of the auction and the Rules only prescribe a convenient mode whereby their liability was spread over the entire year by splitting it up into fortnightly instalments. The Rules might as well have provided for payment of a lump sum and the very issuance of the licence could have been made to depend on the payment of such sum. If it could not be argued in that event that the lump sum payment represented excise duty, it cannot be so argued in the present event merely because the quota for which the respondents gave their bid is required to be multiplied by a certain figure per proof litre and further because the respondents were give the facility of paying the amount by instalments while lifting the quota from time to time. What the respondents agreed to pay was the price of a privilege which the State parted with in their favour. They cannot therefore avoid their liability by contending that the payment which they were called upon to make is truly in the nature of excise duty and that no such duty can be imposed on liquor not lifted or purchased by them.

* *##

These decisions cannot help the respondents because the true position, as stated earlier, is the amount which the respondents are called upon to pay is not excise duty on undrawn liquor but is the price of a privilege for which they offered their bid at the auction of the vend which they wanted to conduct."

28. Finally, we may refer to the decision in Y. Prabhakara Reddy [(1987) 2 SCC 136 : (1987) 2 SCR 513]. Rule 15 of the Andhra Pradesh (Arrack Retail vend Special Conditions of Licences) Rules, 1969 read as follows : (SCC p. 144 para 4)

"15. Minimum guaranteed quantity of arrack. - (1) No Licensee shall purchase arrack less than the specified minimum guaranteed quantity in any month, quantity less than the minimum guaranteed quantity fixed for that month is drawn, at the end of that month issue price to the extent of deficit purchase shall be deducted from the advance money paid by the licensee under the minimum quantity of arrack guaranteed by him, and the licensee shall be called upon to indemnify the amount so adjusted by the end of the succeeding month in which short-drawn quantity had occurred :

Provided that the Excise Superintendent may permit the licensee to lift the short-drawn minimum guaranteed quantity of the previous month in the succeeding month for special reasons except for the month of September, unless the licensee has committed default in lifting the minimum guaranteed quantity for two successive months :

Provided further that where the Commissioner deems it necessary to permit a shopkeeper to draw the deficit quantity short-drawn in any month in the subsequent months, he shall obtain the prior approval of the Government for granting such permission.

(2) Where a licensee fails to lift the arrack as permitted by the Excise Superintendent or to indemnify the advance amount so adjusted by the end of the succeeding month in which the short-drawal of quantity had occurred, the right acquired by the defaulting licensee shall be reauctioned forthwith."

29. Rule 17 provided that "every licensee shall be bound by the provisions of the Andhra Pradesh Excise Act, 1968 (17 of 1968), and the rules and orders made thereunder from time to time".

30. Inasmuch as the licensee failed to lift the minimum guaranteed quota, the total issue price of the unlifted quantity was sought to be recovered from him, which was questioned by the licensee in a writ petition. The argument of the licensee based upon Bimal Chandra Banerjee [(1970) 2 SCC 467 : (1971) 1 SCR 844] was that the State is really levying excise upon certain observation in Panna Lal [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008] it was contended by the licensee that issue price can only relate to liquor drawn by the contractor and that it cannot pertain to undrawn liquor. This Court repelled the contention based upon observations in Panna Lal [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008] in the following words : (SCC p. 147, para 7)

"There can be no question that issue price must generally relate to liquor which is drawn by the contractors but it does not follow therefrom that issue price cannot be adopted by agreement between the parties as the measure of compensation to be paid

in the case of undrawn liquor. In fact, it may not be quite correct even to view it as compensation as we shall presently see. It is no more and no less than the price which the contractor agrees to pay for the grant of the privilege to sell liquor, drawn or undrawn."

31. The Court then referred to the provision of the A.P. Excise Act and the Rules made thereunder and observed that according to these provisions : (SCC p. 148, para 8)

"the privilege of selling liquor ... and the licence to sell liquor herein may be granted by the State by public auction subject to (1) payment of rental being the highest bid at the auction ... (2) the requirement that the licensee shall purchase arrack at a issue price, and (3) the further requirement that the licensee shall purchase a minimum guaranteed quantity of arrack, which he has to make good in case of shortfall. The consideration for the grant of the privilege to sell liquor is not merely the rental to be paid by the lessee but also the issue price of the arrack supplied or treated as supplied in case of shortfall, which is also to be paid by the lessee-licensee. There is no question of the lessee-licensee having to pay the excise duty though it may be that the issue price is arrived at after taking into account the excise duty payable."

32. The above statement of law was based upon the reading Sections 17 and 23 of the A.P. Excise Act and Rules 3, 7 and 15 of the A.P. (Arrack Rental Vend Special Condition Supply Service) Rules as also the definition of 'rental' in the A.P. (Lease of Right to Sell Liquor in Retail) Rules, 1969. The provision of the Orissa Act and Rules are no different. Section 22 of the Orissa Act corresponds in material particulars to Section 17 of A.P. Act whereas Section 29 of the Orissa Act corresponds to Section 23 of the A.P. Act. Rule 6-A of the Orissa Rules corresponds to the Rules 15 of the A.P. Rules while Rule 3 of the Orissa Rules corresponds to the Rule 3 of the A.P. Rules. The only difference is that while Rule 15 of the A.P. Rules provide for payment of issue price in case of failure of the licensee to lift the M.G.Q., the payment of excise duty under the Orissa Rules is made an independent obligation unrelated to the lifting of M.G.Q. It is, in truth and effect, the consideration for the grant of privilege/licence along with the amounts specified in Rule 6. In this sense, the Orissa Rules are clearer on the point that the rental and excise duty (payable under Rules 6 and 6-A) together constitute the consideration for the grant of licence.

33. A review of the decided cases of this Court on the subject indicates a clear shift in the matter has been looked at. Initially, the matter was looked at from the point of view of the levy of excise duty. On that basis, it was held that unless there is a sale, no duty can be collected (Bimal Chandra Banerjee [(1970) 2 SCC 467 : (1971) 1 SCR 844], Gappulal [(1976) 1 SCC 791 : 1976 SCC (Tax) 71 : (1976) 2 SCR 1041] and Ram Kumar [(1976) 3 SCC 540 : 1976 SCC (Tax) 360 : 1976 Supp SCR 532]. But then a different viewpoint emerged with the Constitution Bench decision in Har Shankar [(1975) 1 SCC 737 : AIR 1975 SC 1121] which was carried forward in Panna Lal [(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008], Jage Ram [(1980) 3 SCC 599 : 1982 SCC (Tax) 130 : AIR 1980 SC 2018] and Y. Prabhakara Reddy [(1987) 2 SCC 136 : (1987) 2 SCR 513]. These decisions look at the matter from the point of view of the several payments being, in truth and effect, consideration for the grant of privilege/licence. They point out that the excise duty is a duty on manufacture and production and not on sale. It was a case, they said, where the duty was being passed on to the licensee who in turn passed it on to the consumer. What all the licensee paid, they held, is nothing but consideration for the grant of licence and the mere fact that the total consideration fixed comprises several elements (including excise duty), it cannot be said that excise duty is levied upon the licensee. In our opinion, the Orissa matters falls under the ratio of Panna Lal

[(1975) 2 SCC 633 : (1976) 1 SCR 219 : AIR 1975 SC 2008] and Y. Prabhakara Reddy [(1987) 2 SCC 136 : (1987) 2 SCR 513] and not under the ratio of the Bimal Chandra Banerjee [(1970) 2 SCC 467 : (1971) 1 SCR 844], Gappulal [(1976) 1 SCC 791 : 1976 SCC (Tax) 71 : (1976) 2 SCR 1041] and Ram Kumar [(1976) 3 SCC 540 : 1976 SCC (Tax) 360 : 1976 Supp SCR 532]. The amounts mentioned in Rules 6 and 6-A, as also the undertakings contained therein, together constitute the consideration for grant of privilege/licence, determined by auction, as contemplated by Section 29 of the Act. As explained hereinbefore, the obligation to remit the excise duty is independent of the sale/purchase of liquor; it is payable on or before the specified dates every month; it is an addition to the monthly instalment payable under Rule 6; its remittance is not tied up to the purchase of M.G.Q. except to the extent that the licensee has to pay the prescribed instalment of excise duty prior to the lifting of the liquor. It, therefore, cannot be said that there is any levy of excise duty upon the licensee. The concept here is altogether different. It is a case where the consideration payable by the licensee for grant of licence is made up of monthly rental plus excise duty besides the obligation to purchase the M.G.Q. The licensee pays the excise duty and rental as undertaken by him under the agreement/contract executed by him and as required by conditions of the licence under which he is doing business, i.e., as and by way of consideration. Indeed, the Rules could have provided that the entire amount provided under Rules 6 and 6-A should be paid in advance before the issuance of the licence in which event it could not have been contended that it is not in consideration of the grant of licence. Merely because the Rules provide a concession and provide for collection of the said amounts in convenient instalments spread over the year, the nature and character of the payment cannot change.

34. Mr Sorabjee, the learned counsel for the respondents-licensees then contended that the theory of 'privilege' has been exploded in the decision of this Court in Synthetics and Chemicals Ltd. v. State of U.P. [(1990) 1 SCC 109] and can no longer be invoked. In support of his submission, Mr Sorabjee relied upon certain observations in the concurring opinion of G. L. Oza, J. at page 164 of the Report. The learned Judge referred to Article 47 of the Constitution and observed : (SCC p. 164, para 107)

"This article appears in the chapter of Directive Principles of State Policy. Inclusion of this article in this chapter clearly goes to show that it is the duty of the State to do what has been enacted in Article 47 and in fact this article starts with the phrase 'Duty of the State' and the duty is to improve public health and it is further provided that this duty to improve public health will be discharged by the State by endeavouring to bring about prohibition. It sounds contradictory for a State which is duty-bound to protect human life, which is duty-bound to improve public health and for that purpose is expected to move towards prohibition claims that it has the privilege of the manufacture and sale of alcoholic beverages which are expected to be dangerous to the human life and injurious to human health, transferring this privilege of selling this privilege on consideration to earn huge revenue without thinking that this trade in liquor ultimately results in degradation of human life even endangering human life and is nothing but moving contrary to the duty cast under Articles 21 and 47 and ideal of prohibition enshrined in Article 47. In view of Articles 21 and 47 with all respect to the learned Judges who so far accepted the privilege doctrine it is not possible to accept any privilege of the State having the right to trade in goods obnoxious and injurious to health."

35. It is difficult to agree with Mr Sorabjee. Firstly, these observations are found in the opinion of Oza, J. alone. The majority opinion does not express any opinion on this aspect. Secondly, what

does the expression 'privilege' mean in the context of intoxicating liquors ? The expression is not defined in the Act. In the context of excise enactments, the expression 'privilege' really means in the licence or permit granted by the State. We may explain : the State is entitled to prohibit the trade in intoxicating liquors altogether; it can impose a total ban; no citizen can claim any fundamental right to manufacture or to trade in these liquors; it is, however, open to the State to lift the ban partially and allow the trade in liquor to be carried on in the manner prescribed; the State says that a citizen can trade in liquor only under a licence to be granted by it for the consideration specified in that behalf and that the trade therein can be carried on only in accordance with the regulatory provisions prescribed by it in that behalf. It is this grant of licence/permit, which is called or is described sometimes as grant of 'privilege'. We do not think that the observations of Oza, J. relied upon by Mr Sorabjee can be understood as disabling the State from granting licences and permits for trading in and/or manufacture of intoxicating liquors for a consideration. Nor can they be understood as precluding the State from carrying on the trade or manufacture of the said liquors by itself or its agents. The learned Judge seems to have looked at the matter from an idealistic and moralistic angle. The learned Judge observed that in the light of Articles 21 and 47 : (SCC p. 164, para 107)

"it is not possible to accept any privilege of the State having the right to trade in goods obnoxious and injurious to health".

36. Lastly, we may also invoke the holding in Har Shankar [(1975) 1 SCC 737 : AIR 1975 SC 1121] and Jage Ram [(1980) 3 SCC 599 : 1982 SCC (Tax) 130 : AIR 1980 SC 2018] that the writ petitioners, have entered into agreements voluntarily, containing the conditions aforesaid and have done the business under the licences obtained by them, cannot be allowed to either wriggle out of the agreements nor can they be allowed to challenge the validity of the Rules which constitute the terms of the contract. The High Court should not have exercised its extraordinary discretionary jurisdiction under Article 226 of the Constitution in aid of such licensees.

37. For the above reasons, the appeals are allowed, the judgments and orders of the High Court under appeal are set aside and the writ petitions filed by the respondents-writ petitioners are dismissed with costs. Advocate's fee is Rs. 5000 in each appeal.

38. Before parting with these matters, we may refer to an additional argument in Civil Appeal No. 11518 of 1996 (arising out of SLP (C) No. 1122 of 1996). It is submitted that there was a default on the part of the Government in supplying the liquor and that the non-lifting of M.G.Q. was not on account of any default on the part of the licensee. Firstly, we have held hereinabove that the obligation to remit the excise duty is independent of the obligation to lift the M.G.Q. every month and that the remitting of excise duty is not dependent upon or correlated to lifting of M.G.Q. Secondly, the judgment of the High Court does not refer to this submission. In the circumstances, we decline to express any opinion on this submission.