

ORISSA HIGH COURT

Ajodhya Prasad Shaw

Vs

State of Orissa

O.J.C. Nos. 329 and 357 of 1970

(G.K. Misra, C.J. and R.N. Mishra, J.)

15.05.1970

JUDGMENT

R.N. Misra, J.

1. These two applications under Articles 226 and 227 of the Constitution which involve common questions of fact and law. Parties are also common. In O. J. C. No. 329 of 1970 the petitioner is one Ajodhya Prasad Shaw who is opposite party No. 5 in O. J. C. No. 357 of 1970. The petitioner in 357 of 1970 on his own application has come to intervene in O. J. C. No. 329 of 1970. The other four opposite parties of the first case are also the first four opposite parties in the second case. In such background we propose to dispose of both the writ applications by one common judgment.

2. Ajodhya Prasad Shaw, the petitioner in O. J. C. No. 329 of 1970, filed the writ application on 6-4-70. According to him the Collector of Mayurbhanj issued a sale notice on 3-2-70 for the year 1970-71 in Form G. L. 10. The said notice contained, amongst others, 70 outstill shops to be auctioned, and the date of auction was 20-2-70 at Baripada in the district of Mayurbhanj. Sale was held on the appointed day by the Collector of Mayurbhanj (opposite party No. 3). The petitioner turned out to be the highest bidder for a group of 7 shops auctioned in one lot, for Rs. 34,000/- per month. The petitioner's bid was accepted and his name as the highest bidder was duly entered in the bid register maintained in Form G. L. 12. In token of acceptance of the same the petitioner as also the Collector of Mayurbhanj signed the bid register. Rs. 68,000/- representing two month's fees in advance for the licenses as contemplated under Rule 103(2) of the Board's Excise Rules, 1965 were collected from the petitioner and a receipt for the said amount in the prescribed form G. L. 23 was issued to him. The intervenor in this writ application and petitioner in the connected matter who was the unsuccessful bidder carried an appeal against the aforesaid settlement. The Excise Commissioner in appeal Case No. 3 of 1970 by order dated 16-3-70 dismissed the appeal. A further move before the Board of Revenue was unsuccessful.

3. The petitioner awaited the receipt of the licenses for the shops in question and made arrangements for the opening of the shops and carrying on of the business with effect from 1-4-70. It is alleged that he invested about Rs. 1,50,000/- for the purpose. As the licenses were not

issued though in the normal course they were already expected to be so issued, the petitioner called upon the Collector as also the Superintendent of Excise personally with a request that the licenses may be issued at an early date. He also informed them that his arrangements for the opening of the shops with effect from 1-4-70 were complete. On 1-4-70, the petitioner approached the Superintendent of Excise to receive the monthly fee of Rs. 34,000/- for the month of April, 1970, but the said Superintendent did not pass the challan and consequently the petitioner could not make the deposit. At that point of time the petitioner came before this court on the allegation that the Collector was not acting in accordance with law and the petitioner understood that the State Government, opposite party No. 1 had issued instructions to the Collector not to issue the licenses. The petitioner, therefore, wanted a writ of mandamus to be issued directing that the licenses in question may be issued and to quash orders of the State Government asking the Collector not to issue the licenses in question. Subsequently an application was made to amend the writ petition as in the meantime the Collector of Mayurbhanj had issued a notice for reauction. That order dated 15-4-70 was to the following effect :-

"Notice is hereby given for the information of all that the Government has been pleased to order for the reauction of the following outstill liquor shops with their branches. The reauction will be held on 1-5-70 at 9 A.M. in the chamber of the Collector, Mayurbhanj, Baripada.

The conditions of settlement will remain the same as in G. L. 10.

x x x x"

The petitioner asked for quashing the aforesaid order also.

4. Opposite parties 1 to 4 filed a counter-affidavit. The Deputy Secretary to Government in the Excise Department came to state that the revenue from these shops was not sufficient and in the interest of revenue the State Government had passed orders not to accept the bids of the petitioner. Two paragraphs in the counter-affidavit may be extracted for convenience :-

"4. That under the Excise Laws, on payment of fees, licenses granting special privilege to sell intoxicants is granted. Such a grant is a contract. As such it is regulated by Article 299 of the Constitution of India. Article 299 of the Constitution of India gives an overriding power to Government in all matters of contract. A contract under the Excise Laws therefore is subject to overriding power of revision, acceptance, refusal or modification by Government. Only when Government is satisfied that a contract is proper and acceptable, execution of the contract is authorized by Government under Article 299 of the Constitution of India.

x x x x"

7. In the present case the Damodarpur (Baripada) and its group of shops were auctioned at Rs. 34,000/- in one lot. But the monthly fee payable in respect of each of the other shops has not

been mentioned in the settlement register and the Presiding Officer has not signed in token of the fact of fixation of monthly license fee payable in respect of each shop in a lot. These are the irregularities that have taken place in the auction under dispute." On 13-4-70, the application for intervention was made on behalf of the unsuccessful bidder. We did not pass any formal orders on the said application as the writ application (O. J. C. No. 357 of 1970) was also directed to be heard analogously. The said intervenor has been heard in the writ application with the consent of the parties and has also filed an affidavit placing his allegations in the case.

5. The stand taken by the intervener need not be discussed here. Suffice it to say that the affidavit in this case makes the self-same allegations which form the basis of the independent writ application on his behalf.

6. Several contentions were raised before us. But before we formulate the questions that fall to be adjudicated by us in these cases, we propose to deal with the statute and the rules that are applicable to the facts of the case. The Bihar and Orissa Excise Act, 1915 (2 of 1915) (hereinafter referred to as the Act) is the statute under which grant of an excise license for the retail vend of liquor is provided for. The said Act contemplates two sets of rules to be made for specified purposes by two named agencies. Under Section 89 of the Act rule-making power has been conferred on the State Government for the purposes of carrying out the objects of the Act and certain specified matters have also been referred to in the various clauses appearing under sub-section (2) of that section for the purpose. Similarly the Board of Revenue has also been authorized to make rules for particular purposes specified in clauses (1) to (14) of Section 90 of the Act. Two sets of rules have actually been made by the two named agencies under the aforesaid two sections. Apart from these statutory rules, a set of instructions have been issued from the Board of Revenue which have gathered the reputation of being called the Board's instructions. The State Government have brought out the law applicable to this branch in four separate volumes of the Excise Manual. The 3rd volume seeks to compile the Board's Instructions while the 4th volume contains the statutory forms and other miscellaneous forms prescribed by the Board of Revenue.

7. Section 7(2) of the Act authorizes the State Government by notification to delegate its powers to the Board, the Commissioner of a division, or the Excise Commissioner, and also to permit the delegation by the Board, the Commissioner of a division, the Excise Commissioner or the Collector, to other authorities. Section 8 of the Act deals with control, special and revision and stipulates that the Collector in all proceedings under the Act shall be subject to the control of the Excise Commissioner and in such matters as the State Government may direct he shall be subject also to the control of the Commissioner of the division. The Board has been given power to revise any orders passed by the Collector, the Excise Commissioner or the Commissioner of a division.

8. There are various statutory provisions contained in the Act which go to show that the State Government is intended to be bound by the Act. Detailed procedure has been laid down even in relation to exercise of power by the State Government. The State Government's power has been circumscribed by certain conditions, precedent, and restrictions have been imposed on the exercise of such power.

9. Chapter V deals with the imposition of duty while Chapter VI deals with licenses, permits and

passes. Section 27 under Chapter V provides for imposition of duty on import, export, transport or manufacture of excisable articles and Sections 28 lays down the manner of levy of such duty. Section 38 provides for grant of license, permit or pass on payment of fees. Sub-section (2) of that section provides

"Every license, permit or pass under this Act shall be granted for such period (if any) as may be prescribed by rule made by the State Government under Section 89, clause (e)." Sections 30 to 35 lay down the procedure which has to be followed before the Collector undertakes the settlement of liquor shops for any particular year. These are to be satisfied before the next period of settlement ensues. A set of rules have similarly been framed by the State Government which supplement these requirements.

10. Under the Act or even the rules made by the State Government there is no clear indication that settlement of the excise shops dealing in liquor has to be by auction. Section 90 (7) of the Act authorizes the Board to make rules and runs thus :-

"The Board may make rules-

x x x

(7) for prescribing the scale of fees or the manner of fixing the fees payable in respect of any exclusive privilege granted under Section 22 or any license, permit or pass granted under this Act, or in respect of the storing of any intoxicant."

In exercise of this power Rule 103 of the Board's Rules is said to have been made. That Rule, as far as relevant may be quoted.

103 (1). The fees for licenses for the retail vend of country spirit, fermented Tari, Pachwai, Ganja and Bhang as well as for the retail sale (hereinafter referred to as 'off sale or 'off' vend) of foreign liquor for consumption 'off' the premises of the vendor shall be fixed by auction, subject to a reserved fee sanctioned in each case by the Commissioner."

This is the only statutory rule which indicates the mode of settlement of the fee for the license. Various instructions for the manner of carrying on the auction are indicated in the Board's instructions. These instructions are not statutory.

11. It is not disputed that in February 1970 the sale notice issued by the Collector was in form G. L. 10 which is a form adopted for the purposes of Rule 103. The Collector under Chapter VI of the Act is authorized to grant the license in question.

12. At the hearing several contentions were raised on behalf of the petitioner, the State Government and the intervener. In view of the averments in the writ petition and the counter-affidavit and the contentions raised by the Bar the following questions arise for adjudication :-

(1) Is the petitioner entitled to the issue of the licenses for the seven shops ?

(2) Has the State Government any power to direct withholding of the issue of licenses and the re-auction in question ?

(3) Is the petitioner entitled to the reliefs prayed for ?

That there was a sale notice in February 1970 for the shops in question and on 20-2-70 the auction took place are not disputed. It is also not disputed that the petitioner and the intervener took part in such auction and that the petitioner gave the highest bid of Rs. 34,000/-. In the counter-affidavit filed on behalf of the opposite parties it was disputed that the Collector had not signed the bid sheet. It is pertinent to notice that in this case the Collector has not filed any counter-affidavit though in view of the allegations made it was expected that the Collector as a public officer should have placed all the facts clearly to assist the Court for disposing of this case. We called upon the opposite parties to produce the material registers and papers and from the documents placed we are satisfied that there is a bid sheet in which the petitioner has signed for the shops in question and a consolidated list has been prepared and appended to the bid register or all the shops within the district specifying clearly the names of the shops and the particulars of the highest bidders in respect of each such shop and the Collector has signed such list. The assertion of the petitioner that he has paid the license fee of two months in advance and has obtained a receipt there for is not disputed. It has, therefore, to be held that there was an auction, the petitioner gave the highest bid for Rs. 34,000/- a month for the shops in question and deposited a sum of Rs. 68,000/-with the Collector under the receipt in question. It is not disputed that the appeal and the revision filed by the intervener were not entertained. The remedies prescribed under Section 8 of the Act were exhausted. Thus the right created in favor of the petitioner had become final so far as the Act is concerned. Mr. Mohanty for the intervener has canvassed that there is no valid provision for settlement of the license fee by auction, which I shall examine at length in the connected writ application, and a final determination as to whether the petitioner had a right validly created in his favor would depend upon the ultimate determination of the said question. It would suffice for the present purpose to indicate that the right created under the auction in question had become final in favour of the petitioner so far as the statutory process is concerned.

13. Now I proceed to examine the validity of the contention of the State Government that under Article 299 of the Constitution a power inheres in the State not to accept the settlement made by the Collector. This contention on behalf of the State proceeds on the basis that the settlement of shops under the Act are contracts and such contracts are governed by the provisions of Article 299 of the Constitution.

14. I have already indicated that under Chap. VI of the Act a license for sale of liquor is to be granted by the Collector. The Act imposes an embargo on import, export and transport as also manufacture, possession and sale of the intoxicants as detailed therein and stipulates grant of licenses by prescribed authorities for all such purposes. Section 20 deals with license for sale and as far as material provides as follows :-

"No intoxicant shall be sold except under the authority and subject to the terms and conditions of a license granted in that behalf by the Collector. Section 38 provides,
"(1) Every license, permit or pass granted under this Act -
(a) shall be granted -
(i) on payment of such fees (if any), and
(ii) subject to such restrictions and on such conditions, and
(b) shall be in such forms and contain such particulars, as the Board may direct."

It is not disputed by any of the parties before us that the Collector is the licencing authority and that a fee for such purpose is leviable. Chapter III of the rules made by the State Government deals with sale of intoxicants and Chapter VIII of the Board's Rules deals with fees, conditions and restrictions of licenses under the Act settled by auction. Thus it is manifest that the license in question is a statutory one.

15. Article 299 of the Constitution provides,

"(1) All contracts made in the exercise of the executive power of the Union or a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.

xx xx xx"

Law is well settled and parties before us do not seek to canvass that this constitutional requirement is not mandatory. In the field it covers it is a pre-requisite to bring into existence a valid contract. The question for examination in the present case is, however, different. Is there a contract at all and in case it involves a contract is it one purported to be made in exercise of the executive power of the State Government is the question for examination. In case the result of our investigation is that it is not a contract in exercise of the executive power of the State in terms of the language used in the Article, it would follow that this constitutional requirement has no application. I have already indicated that the settlement of the shop, the collection of the fee and the grant of the license are all statutory acts by the prescribed authority. The intention of the Constitution is not to extend the principles in Article 299 (1) of the Constitution to cover all possible contracts. That is why specific reference has been made to contracts "in the exercise of the executive power". It is not necessary for the present purpose to examine whether the licensing process involves a contractual agreement. Possibly there is an element of contract in the settlement, but certainly it is not one entered into in the executive power of the State but is regulated by the statute or the rules made thereunder. In the circumstances in the case of a statutory license even based upon a contract the requirements of this Article cannot be invoked.

16. A Division Bench of the Mysore High Court was called upon to examine this aspect of the case in (*State of Mysore v. Dasappa Naidu*¹). One of the questions which the Division Bench posed for answer was "Is the contract unenforceable for the reason that it is against Article 299 of the Constitution ?". Indisputably the contract that was referred to in the said case was one under the Mysore Excise Act and was almost similar to the one we are dealing with. Adverting to this aspect of the matter, Chandrasekhar, J., who delivered the judgment of the Division Bench stated,

"The other contention of Mr. Ramdas is a more substantial one. Article 299 (1) expressly mentions of contracts made in exercise of the executive power of the State. If a contract is made on behalf of the State in exercise of a statutory power, Article 299 (1) has no application."

I find a Division Bench of Punjab High Court in a recent case has also taken a similar view. Their Lordships have stated in (*Ram Chander v. State of Punjab*²) :

"It is futile in the circumstances to urge that Article 299 (1) of the Constitution, by which all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor and shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize', puts the transaction of 1961 outside the pale of consideration as the constitutional instrument had not been executed in due form. The transference was made under the statute itself, this being the Displaced Persons (Compensation and Rehabilitation) Act, 1954, and it seems to us that the provisions of Article 299 (1) would not be applicable in a transaction of this nature."

The Supreme Court case which was cited by the learned Advocate-General was for a different purpose. In (*Karamshi v. State of Bombay*³) (now Maharashtra) their Lordships of the Supreme Court were examining a case under the Bombay Irrigation Act. By two letters written by the Superintending Engineer to one Karale, a firm agreement had been entered into between the State Government and Karale in respect of supply of water to Karale's land to the extent of 100 acres, on the tail-outlet of Distributory No. 17 of the Godavari Right Bank Canal. These letters showed that there was previous correspondence between the Engineering Department and Karale and that the Minister of Public Works Department had intervened and settled the terms of the agreement and the terms had been communicated to Karale who had accepted the same. The terms of agreement were (1) Karale was allowed to concentrate all his cane irrigation to the extent of 100 acres on the tail outlet of Distributory No. 17 by February 15, 1940 and to continue it permanently if he so wished; (2) Karale agreed to take water by measurement of volumetric basis of 112" at the outlet head and to pay water rates that might thereafter be sanctioned by the Government in that respect; (3) the said area was to be excluded from the Sugar factory area while fixing the boundaries of the allotted sugar factory area of Changdeo Sugar Factory, and (4) the terms were to apply to new cane plantation from February 15, 1940 onwards. When a dispute arose in the matter the point raised was

as to the validity of the agreement in the absence of compliance with the provisions of Section 175 (3) of the Government of India Act, 1935 which contained the corresponding provision of Article 299 (1) of the Constitution. Their Lordships of the Supreme Court examined the aforesaid four terms of agreement and found that under the Bombay Irrigation Act these terms were not contemplated and in substance there was an agreement the terms whereof fell outside the provisions of the Act. They, therefore, held that a contract in compliance with Section 175 (3) of the Government of India Act, 1935 was necessary and the agreement which had been raised by Karale as the basis of his right was void. An analysis of the aforesaid judgment would clearly show the recognition given to the principle indicated in the Mysore and Punjab decisions that if the agreement was within the purview of the statute Section 175 (3) of the Government of India Act 1935 had no application. Relying on the aforesaid decisions and the terms of Article 299 (1) of the Constitution, I would conclude that Article 299 (1) of the Constitution has no application to the present case, and the license in question was a statutory act which did not require compliance with the constitutional form of agreement. In the circumstances, the sole

defence raised on behalf of the State fails.

17. The learned Advocate-General contended that the State was not bound by the statute and as such it was open to it to direct re-auctioning. In support of his proposition he placed reliance on a decision of the Supreme Court in (*V. S. R. and Oil Mills v. State of Andhra Pradesh*⁴), Chief Justice Gajendragadkar who spoke for the court clearly indicated,

"The question as to whether the State Government would be bound by the provisions of legislative enactments passed by the State Legislature have sometimes led to difference in judicial opinion; but decision of this court in the *Director of Rationing and Distribution v. Corporation of Calcutta*⁵, must be taken to have settled this question. The effect of the majority decision rendered in that case is to recognize the validity of the rule of interpretation of statutes enunciated by the Privy Council in *Province of Bombay v. Municipal Corporation of the City of Bombay*⁶, and that rule is that the State is not bound by a statute unless it is so provided in express terms or by necessary implication. In applying this rule, it is obviously necessary that the Court must attempt to ascertain the intention of the Legislature by considering all the relevant provisions of the statute together and not concentrating its attention on a particular provision which may be in dispute between the parties. If, after reading all the relevant provisions of the Statute, the Court is satisfied that by necessary implication the obligation imposed by the statute should be enforced against the State, that conclusion must be adopted. If there are express terms to that effect, there is of course, no difficulty. In dealing with this vexed question, sometimes it is necessary also to enquire whether the conclusion that the State is not bound by the specific provision of a given statute, would hamper the working of the statute, or would lead to the anomalous position that the statute may lose its efficacy, and if the answer to either of these two questions indicates that the obligation imposed by the statute should be enforced against

the State, the Court would be inclined to infer by necessary implication that the State, in fact, is bound by the Statute."

An examination of the provisions of the Excise Act in question goes to indicate that the legislative intention was that the State would be bound by the provisions. In fact various provisions have been made in the Statute to regulate the conduct of the State Government in performance of the statutory acts and it has not been left unbound or unfettered by the statute in discharging its statutory functions. I may make it clear that in the two cases which came up before their Lordships of the Supreme Court for examination, namely, the first one reported in AIR 1960 SC 1355 and the second one in the decision just extracted the point for determination arose in a very different setting. On the first occasion the court was called upon to find out whether criminal liability accrued to the State for its failure to comply with the statutory provision contained in the Calcutta Municipal Act (33 of 1951), which prescribed that no premises would be used for certain specified purposes without or otherwise than in conformity with the terms of a license to be granted by the Corporation of Calcutta. The court rules,

Wanchoo, J., (as he then was), dissenting, that the State Government was not bound in terms of the Act for liabilities created for violation of the Statute. The second case arose when after the birth of the State of Andhra Pradesh the new born State issued notifications enhancing the rates for supply of electricity energy to the appellant company. The State Government of Madras had entered into agreements with several consumers within the State including the appellant for supply of energy in bulk at specified rates which were called tariffs. These agreements were to be in operation for ten years and did not contain any provision authorising the Government to vary the rates by increase during the period of contract. Chief Justice Gajendragadkar while delivering the judgment of the Court adopted the principle that the State was not bound by the provisions of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949.

18. The Excise Act has created a hierarchy of authorities and has given them wide powers for enforcing the provisions in the statute. Appeals and revisions have also been prescribed and control has been indicated. Section 7 (1) of the Act provides,

"The administration of the Excise Department and the collection of the excise-revenue within a district shall ordinarily be under the charge of the Collector."

Sub-section (2) thereof provides that the State Government may by notification appoint an officer to be in charge of control of the Administration of the Excise Department. Further provision has also been made therein for certain specified purposes. As has already been indicated, Section 8 says that the Collector shall be subject to the control of the Excise Commissioner and the Board of Revenue has power to revise orders of the Collector and the Excise Commissioner. The use of the word 'ordinarily' in sub-section (1) of Section 7 appears to be only with reference to what is indicated in Section 3, namely, he (the Collector) is subject to the control of the Excise Commissioner in certain specified matters. Thus under the scheme of the Statute, Government has not any residual power left in it in matters which are by statute vested in the Collector. Three named authorities in the hierarchy have been prescribed being the Commissioner of Excise, the Commissioner of the division and the Board of Revenue. The State Government is not another prescribed authority having overall control over all the authorities under the Statute. The scheme of the Act is such that if an overall jurisdiction is spelt out to vest in the State Government it would run counter to the spirit of the Act and would yield scope for interference where under the statute there is no scope for it. Following the rule indicated by Chief Justice Gajendragadkar in the aforesaid reported decision namely "In dealing with this vexed question, sometimes it is necessary also to enquire whether the conclusion that the State is not bound by the specific provision of a given statute, would hamper the working of the statute, or would lead to the anomalous position that the statute may lose its efficacy", I would hold that if a residual power in the State is spelt out not only would it be contrary to the statutory spirit, but it would lead to an anomalous position and the statute may also lose its efficacy. I would, therefore, conclude that the State is bound by the provisions of the Bihar and Orissa, Excise Act, 1915.

19. A dispute was raised before us on behalf of the petitioner that the order made by the State Government directing resettlement was a mala fide one while on behalf of the State and the intervener it was contended that the auction price was against the interest of the State revenue and a higher bid was available. An affidavit was filed on behalf of the petitioner challenging the stand of the State Government that a higher bid was obtained in all other shops of the district in

the settlement for the year. When we perused the original file containing the order of the Minister in matter of re-auction we found that there was reference to a higher rate in respect of only some shops and not all shops of the district as indicated in the counter affidavit filed on behalf of the State. That, however, is a point with which we are not directly concerned. If the State Government has power to intervene in the matter, it is not for us normally to examine the correctness of the order as we do not sit in appeal. What, however, we are concerned in this case is whether the State Government has the residuary power under the Statute to interfere in the matter or has a position been reached under the statutory scheme which excludes interference of the State Government in the matter and requires a mandamus to issue to the Collector to perform function under the statute unaffected by any unauthorized direction of the State Government.

20. I have already indicated that the defense under Article 299 (1) of the Constitution is wholly inapplicable. I have also found that the State is bound by statute and under the statute no power inheres in the State to interfere with the action of the Collector after it has become final in appeal and revision. The point for examination now is as to whether it is open to the State Government to direct re-auction. Under the Statute the grant of the license is the function of the Collector. Under Rule 103 of the Board's Rules the determination of the fee has to be reached by auction which is conducted by the Collector. The Collector is the prescribed authority and pursuant to the sale notice issued by him the auction takes place. A contractual relationship emerges. The bidder has performed his part. The Collector has progressed to a considerable extent in performing his part. What remained in this case was only the license to be issued. Left to himself the Collector would have certainly performed his part of the statutory function. That has not been done on account of fetter put by the State Government. The Collector while directing re-auctioning has clearly indicated that he was not doing it as his act, but was doing so as directed by the State Government. It is well settled that if a statute inheres jurisdiction in a prescribed authority that act has to be of the statutory authority and not at the behest of the administrative superior. The Collector in this case, as I have already noticed, though a party, did not come to file a return to the rule nisi and did not choose to place material facts to help us in disposing of this case. The only conclusion which can follow out of such a set of facts is that the State Government has unauthorisedly intervened in the present case and has brought to bear upon the Collector executive pressure to withhold the grant of license to the petitioner and to have the shops resettled. Such a power the State Government does not have, and therefore, the conclusion to be reached on this aspect of the matter would be that the State Government had no authority to direct re-auction.

21. Normally on the aforesaid findings a writ of mandamus as asked for would have issued commanding the Collector to perform his part of the statutory function, namely, issue of the licenses to the petitioner and to quash the direction of the State Government for re-auctioning of the shops. But we are left with another important question to be considered which has been raised in the connected writ application. The process of auctioning itself is questioned and the vires of the statutory Rule 103 in the matter of auction is also disputed. At this stage I think it would be proper to proceed to examine the contentions in the connected case. If the petitioner's contentions in the connected case are to succeed, that is the process of auctioning is to be declared without authority of law, the conclusion to follow would be that the petitioner would not be entitled to the writ in spite of what has been found already, because infructuous writ does not issue. I would, therefore, leave the matter here and proceed to examine the contentions of the present intervener and petitioner in the connected case.

22. The petitioner in O. I. C. 357 of 1970 was the unsuccessful bidder at the auction. He filed an appeal before the Excise Commissioner which was dismissed. His revision application before the Board was not entertained. Thereafter he approached the State Government. The auction in favor of Ajodhya Prasad Shaw was cancelled by the State Government at the instance of the petitioner. It is against this interference of the State Government that Ajodhya Prasad Shaw has filed O. J. C. No. 329 of 1970. Normally there would be no scope for the present application of Raghunandan Saha as he has already succeeded in obtaining an order for re-auction. This writ application, has however, been filed challenging the appellate and revisional orders of the Excise Commissioner and the Member, Board of Revenue respectively to overcome the difficulty which might arise on account of want of authority of the State Government to direct re-auctioning.

23. The main contention in the writ petition is that Rule 103 of the Board's Rule is ultra vires the Act and it is not open to the State Government to raise a tax in the garb of a license fee.

24. Opposite parties 1 to 4 have not filed any counter affidavit, but opposite party No. 5 who is the petitioner in the connected writ petition has filed an affidavit in opposition. The learned Advocate-General stated before us during the hearing that there was no need for a counter-affidavit in this case as the matter involved pure questions of law.

25. I have already indicated that Section 27 of the Act authorizes the imposition of a duty or countervailing duty, and Section 36 stipulates that licenses, permits or passes may be granted under the Act on payment of a prescribed fee. Manner of prescription of the fee has not been specifically provided for either under the Act or under the Rules made by the State Government, Rule 103 of the Board's Rules directs that the fee for the licenses of retail vend of country spirit, fermented Tari, etc. shall be fixed by auction, subject to a reserved fee sanctioned in each case by the Commissioner. This rule made by the Board of Revenue is by exercise of rule making power conferred on it under Section 90 (7) of the Act. For convenience that sub-section may be requoted :-

"90. The Board may make rules -

xx xx xx

(7) For prescribing the scale of fees or the manner of fixing the fees payable in respect of any exclusive privilege granted under Section 22 or any license, permit or pass granted under this Act....."

It is conceded at the Bar by all the parties that the fee for the grant of an exclusive privilege under Section 22 may be determined by auction. In view of the concession made, I do not propose to examine the correctness of the concession. But it would be necessary to determine as to whether the settlement of the excise shops with opposite party No. 5 was one under Section 22 of the Act or licenses were contemplated to be granted to him under the provisions of Sections 20 and 38 of the Act. If it is a case of privilege, on the concession of the parties auctioning is permitted and the present writ application is bound to fail. If, however, it is not a case of the grant of an exclusive privilege various other questions would arise, such as, (1) Can fee for a license be fixed by Auction ? (2) Is the license fee fixed by auction a tax ? and (3) Has the State Legislature competency to provide or make provision for the realisation of a tax on the sale of liquor ?

26. It is, therefore, pertinent to first embark on an investigation as to whether what was intended to be granted under the auction notice of 3-2-1970 by the Collector was exclusive privileges contemplated under Section 22 of the Act or licenses under the Act.

27. It has already been noticed that the sale notice as made by the Collector in form G. L. 10 Rule 103 of the Board's rules does not deal with the grant of an exclusive privilege. The form G. L. 10 at its top refers to Rule 103 of the Board's rules. The contents of the form G. L. 10 clearly indicate that what is contemplated is the grant of a license for the retail vend of the named excisable articles. Section 22 (1) of the Act provides,

"The State Government may grant to any person, on such conditions and for such period as it may think fit, the exclusive privilege -

xx xx xx

(c) of selling, wholesale or retail

xx xx xx

any country liquor or intoxicating drug within any specified local area :

Provided that public notice be given of the intention to grant any such exclusive privilege, and that any objections made by any person residing within the area affected shall be considered before an exclusive privilege is granted."

Sub-section (2) of that Section runs thus :-

"No grantee of any privilege under sub-section (1) shall exercise the same unless or until he has received a license in that behalf from the Collector or the Excise Commissioner."

Section 29 makes provision for payment for grant of exclusive privilege, and provides :-

"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."

28. There is no serious dispute at the Bar that the benefit available under a license for retail vend of country liquor or intoxicant drug is also on monopoly basis. There is, however, some provision in the conditions in the form G. L. 10 that the Collector may open additional shops for the year or for a part thereof even during the currency of the license. An exclusive privilege under Section 22 cannot comprehend exercise of such power once it is granted for a specified period. This may reasonably be used as an indication as to whether the license under G. L. 10 can be taken to be an exclusive privilege. I do not propose to express any final view as to whether the license can be an exclusive privilege on account of the fact that in the present case on the materials placed before us there is little scope to find that what was intended to be given was an exclusive privilege under Section 22 of the Act.

29. Section 22 empowers the State Government to grant the exclusive privilege. It is conceded that that power of the State Government has been delegated by a notification made under Section 7 (2) of the Act to the Board of Revenue, but the Collector of the district has no jurisdiction to exercise under Section 22 (1) of the Act. The sale notice and even the notice for re-auction clearly make reference to the form G. L. 10. It is also pointed out to us that the public notice contemplated under the proviso to Section 22 (1) of the Act was never given and since that notice is a condition precedent to the exercise of the power under sub-section (1) of Section 22, it cannot be said that what was purported to be given under the sale notice in question was the grant of an exclusive privilege. On the aforesaid analysis I would conclude that the sale notice in question did not relate to the grant of an exclusive privilege under Section 22 (1) of the Act. It, therefore, becomes necessary to determine the other three questions which I have already posed above.

30. Section 38 of the Act provides that every license under the Act shall be granted on payment of such fees (if any) as the Board may direct. I have already indicated that Section 90 (7) of the Act authorizes the Board to prescribe the scale of fees or the manner of fees payable in respect of any license. Thus the statute enables the realization of a fee for the grant of a license and power is vested in the Board to make rules for prescription of the scale of fee or the manner of fixing the fee. A scale of fees has obviously not been fixed. Rule 103 of the Board's Rules has been made by exercise of the power conferred under Section 90 (7) for prescribing the manner of fixing the fees and that manner is by putting it to auction.

31. Mr. Mohanty's contention that what is realized at an auction under the garb of fee is in reality a tax is not disputed. As a matter of fact the State of Orissa conceded before their Lordships of the Supreme Court in (*Laxmikanta Sahu v. Superintendent of Excise, Berhampur*⁷), that the charge made in similar circumstances is a tax. In paragraph 3 of that judgment it is stated,

"Section 2 read with Section 2 (12) (a) of the Act requires a license for sale of any liquor, and Section 38 empowers the Board to prescribe the fees for such a license. On behalf of the State of Orissa it is conceded that the charge for the grant of a privilege for the 'off' vend of foreign liquor under the system of auctioning is a tax and not a fee. Section 38 does not empower the Board to levy a tax. It follows that the amended Rule 103 (1) is not authorized by Section 38."

It was further stated in another part of the judgment,

"Under Section 90 (7) the Board could prescribe that the payment for the grant of the exclusive privilege for the sale of any country liquor or intoxicating drug should be fixed by auction under Section 22. But Section 90 (7), read with Section 22 does not empower the Board to levy a tax in the form of a payment for the grant of a license for the retail vend of foreign liquor or to direct that such duty should be fixed by auction. We therefore hold that the amended Rule 103 (1) in so far as it directs that the fee for retail sale (referred to as 'off' sale or 'off' vend) of foreign liquor shall be fixed by auction is beyond the rule-making authority of the Board and is invalid."

The aforesaid reasoning's are equally applicable to the present case. What has been decided by their Lordships of the Supreme Court otherwise stated is that Section 38 of the Act does not authorize the realization of a tax.

32. The distinction between a 'fee' and a 'tax' is clear and by a series of decisions of the Supreme Court the two concepts have been clarified. The learned Advocate-General, therefore, did not make an attempt before us to contend that the charge collected for the license by the process of auction is a fee simpliciter and not a tax. Without further discussion and on the authority of the aforesaid decision of their Lordships of the Supreme Court I would conclude that the charge for the license fixed by auction is a tax and such a tax is not contemplated under Section 38 of the Act.

Rule 103 (1) of the Board's Rules which is the only provision for settling the fee by auction is not authorized by the Act and is, therefore, in excess of the rule-making power of the Board.

33. The learned Advocate-General placed reliance on a decision of their Lordships of the Supreme Court in (*Cooverjee v. Excise Commr*⁸). Mahajan, C. J., speaking for the court had stated,

"The next contention that the charge of fee by public auction is excessive and is not in the nature of a fee but a tax ignores the fact that, that license fee described as a license fee is more in the nature of a tax than a license fee. One of the purposes of the regulation is to raise revenue. By the provision of Section 24, duties can be imposed on the manufacture, import, export and transport of liquor and other excisable articles. Revenue is also collected by the grant of contracts to carry on trade id liquor and these contracts are sold by auction. The grantee is given a license on payment of the auction price. The regulation specifically authorizes this. It is not a fee levied without authority of law as was the situation in AIR 1950 SC 163."

These observations of their Lordships of the Supreme Court are conveniently pressed into service by the learned Advocate-General for his contention that even a tax can be collected when a fee is prescribed. The observations of their Lordships of the Supreme Court can certainly not be extended to support such a general proposition. In the aforesaid decision they were dealing with the Ajmer Excise Regulation (1 of 1915). The attack in the said case was mainly on the basis that the scheme of the regulation provided unreasonable restriction on the fundamental right of carrying on trade. Their Lordships were not examining the constitutionality or even the legality of the levy otherwise.

34. Legislative competence for the provision to realise excise duty so far as the State is concerned is to be found in Entry 51 of List II of the Seventh Schedule of the Constitution. That entry is to the following effect :-

"Duties of exercise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India -

(a) alcoholic liquors for human consumption;

xx xx xx"

Entry 51 in the State List covers the field which is excluded under Entry 84 of List I of the Seventh Schedule so far as Parliament's competency to legislate is concerned. Mr. Mohanty contends that under Entry 51 it is open to the State Government to realise duties. He conceded that there may be cases where distinction between 'duty' and 'tax' may not be drawn and one may merge in the other. But according to him the legislative entry does not authorise realisation of a set of duties and thereafter a tax. He placed reliance on a decision of the Supreme Court in (*Shinde Brothers v. Commr., Raichur*⁹), on this aspect of his contention. Their Lordships were

considering a case arising out of the Mysore Health Cess Act, determination of which required the examination at length of the provisions of the Mysore Excise Act (5 of 1901). The majority judgment in that case was delivered by Sikri, J., and his Lordship the present Chief Justice and Bachawat, J., wrote dissenting judgments. Therein it was indicated,

"The duty must be closely related to production or manufacture of goods. It does not matter if the levy is made not at the moment of production or manufacture but at a later stage. If a duty has been levied on an excisable article but this duty is collected from a retailer it would not necessarily cease to be an excise duty . . . if a levy is made for the privilege of selling an excisable article and the excisable article has already borne the duty and the duty has been paid, there must be clear terms in the charging section to indicate that what is being levied for the purpose of privilege of sale is in fact a duty of excise."

Admittedly in the present case on the liquor which is available for sale within the State of Orissa a duty under Section 27 of the Act is collectable at some point. Therefore, in the absence of any indication that the license fee determined by auction is also a duty of excise, its collection is open to question.

35. In another part of the judgment their Lordships proceeded to examine the true character or nature of the levy under the Excise Act. They stated,

"First it is a payment for the exclusive privilege of selling toddy from certain shops. The licensee pays what he considers to be equivalent to value of the right. Secondly, it has no close relation to the production or manufacture of toddy. Thirdly, the only relation it has to the production or manufacture of toddy is that it enables the licensee to sell it. But he may sell little, less or more than he anticipated, depending on various factors. Fourthly, toddy has already paid one excise duty in the form of tree-tax. If the petitioner taps toddy he pays tree tax, but he need not tap himself. Fifthly, the duty is not uniform in incidence because the amount collected has no relation to the quantity or quality of the product but has only relation to what the petitioner thought he could recoup by the sale of the excisable articles. What he recoups would depend upon the amount of sales and the conditions prevailing during the licensing year. Sixthly, there are no express words showing that what is being realised from the petitioner is an excise duty. In fact what Section 16 of the Mysore Excise Act says is that a privilege has been granted to him for selling by retail. Section 28 refers specifically to an amount due to the Government by

any grantee of the privilege and the legislature apparently did not think that this would be covered by the expression 'all duties, taxes, fines and fees payable to the Government' occurring in Section 28. Seventhly, the privilege of selling is auctioned well before the goods come into existence. In this case it would be noticed that the second notification dated April 27, 1964, was for the sale during the next two years. In view of these characteristics, can it be said to be an excise duty ? In our opinion the answer is in the negative. The taxable event is not the manufacture or production of goods but the acceptance of the license to sell. In other words, the levy is in respect of the business of carrying on the sale of toddy. There is no connection of any part of the levy with any manufacture or production of any goods. To accept the contention of the State would mean expanding the definition of 'excise duty' to include a levy which has close relation to the sale of excisable goods. It is now too late in the day to do so."

Examining the matter further, the majority judgment again indicated,

"It must be shown in every case that the duty has been levied on goods which have been produced or manufactured, the taxable extent being production or manufacture of goodsThere is no presumption that if no other taxable event has intervened, the levy must be treated to be connected with production or manufacture. This, as we have said above, must depend upon the facts of each case. But it must be positively shown that the taxable event for the duty which has been levied is manufacture or production of the article."

There is no scope to dispute adopting the reasons of their Lordships of the Supreme Court that what is collected by way of a license fee at the auction is not an excise duty. There is scope for levy of duty at some point, but it must be correlatable to a point of manufacture or production of the liquor. The fee settled by auction can, however, have no such correlation. Besides there is no indication that what is collected is also excise duty. I would, therefore, conclude that what is collected as a license fee is not by any means an excise duty as contemplated under Entry 51 of List II of the Seventh Schedule of the Constitution.

36. His Lordship the present Chief Justice in his dissenting judgment referred to the prevailing legislative practice and dealt with the question as to whether the amount for which the exclusive privilege of selling liquor is sold by auction can be said to be a duty of excise. His Lordship stated,

"This brings me to the main question whether the amount for which the exclusive privilege of selling liquor is sold by auction can be said to be a duty of excise. In this connection I must bring to the fore and emphasize certain matters which must not be lost sight of. The persons who bid at these auctions are themselves the producers and manufacturers. They bid for the exclusive privilege of selling which in so far as Government is concerned, is a means of collecting the anticipated excise duty at one go from a producer or manufacturer before the goods become a part of the general stock of goods in the country. In other words, the person who is charged is the producer and

manufacturer and the duty is levied from him before he can sell or obtains liquor which has not borne excise duty so far. The short question is : Is this a duty of excise ? My emphatic answer is that it is, whether the matter is considered in the light of economic theory, legislative practice or judicial authority."

His Lordship again stated,

"The whole of the power to levy excise duty on alcoholic liquors for human consumption was passed on to the Provinces. The subject of excise duties was thus plenary in so far as alcoholic liquors were concerned and this power was no whit less than the power conferred by the Devolution Rules and no limitation could be read into it. Excise duty on alcoholic liquors could be collected at all stages from production till they were parted with to the consumer. The present Constitution has repeated the entries and the same classification of excise duties as in the Constitution Act of 1935 except for a few changes with which we are not concerned. It would thus appear the legislative practice is entirely in support of collection of excise duty by the contract system. I am reminded of the dictum of Lord Blackburn in *Trustees of Clyde Navigation v. Laird and Sons*¹⁰, in which a departmental practice extending there over 18 years was said to raise a strong prima facie ground for thinking that there must be some legal ground on which it could be rested. Here the practice is over a century old and has not been questioned under three different constitutional documents till today."

His Lordship examined the case of AIR 1954 SC 220 (already referred to) and the subsequent decision in (*Abdulkadir v. State of Kerala*¹¹) and ultimately concluded,

"These two cases are binding. I was a party to the second case and on reconsidering it in the light of arguments now advanced, I find that it furnishes a complete answer and is indistinguishable on the slender ground that the expression 'excise revenue' or 'duty' have been used and not the expression 'excise duty'. To hold otherwise is to depart from this and the earlier case and overrule them."

37. Bachawat, J., in a separate judgment stated his conclusions in the following manner :-

"My conclusion may be stated briefly. A charge for a license to sell an excisable article may be a fee or a tax. If it is a tax, it can satisfy the test of a duty of excise, when it is so connected with the manufacture or production of the article to be, in effect, a tax on the manufacture or production. Otherwise such a tax does not fall within the classification of a duty of excise."

On the authority of the aforesaid decision of the Supreme Court it is contended, and rightly in my opinion, that it cannot be held that the license fee by auction is an excise duty authorized under Entry 51 of List II of the Seventh Schedule of the Constitution. I have already held that Section

38 of the Act contemplates only a fee and Section 90 (7) of the Act authorizes the Board to make rules prescribing the scale of fees or the matter of settling the fees. A rule compliance with which leads to levy of a tax, is certainly not contemplated under Section 38 of the Act. In the circumstances, I would conclude that the State of Orissa is entitled to collect a fee only for the license to be issued under the Act and not a tax under the garb of a fee. The license fee is not open to be determined by auction as in that process that fee for the license cannot be determined and the auction price cannot represent license fee. I would also conclude that the auction price for a license is not excise duty within the meaning of Entry 51 of List II of the Seventh Schedule of the Constitution. It, therefore, follows that it is not open to the Collector to follow the process of auctioning for determining the license fee. It also follows that Rule 103 (1) of the Board's Rules is incompetent and ultra vires the Act.

38. The petitioner Raghunandan Saha had asked for a declaration that Rule 103 (1) of the Board's rules is ultra vires and for a writ of mandamus to direct opposite parties 1 to 4 to settle the shops with him. On the analysis made by me above the first relief asked for is to be granted. It is not for this Court to give a direction in the matter of settlement of the shops in the facts and circumstances of the case and he is not entitled to that relief.

39. It now remains to determine as to what reliefs the petitioner Ajodhya Prasad Shaw would be entitled to. I have already found that the State Government has no authority to direct re-auctioning and the present finding is that the process of auctioning for the determination of the license fee is not the valid process. To that extent the direction for re-auctioning which has been published by the Collector under orders of the State Government on 15-4-1970 is bound to be quashed. He would, however, not be entitled to a mandamus directing the Collector to issue the license to him in view of my finding that the process of auctioning is not open to be adopted for the purpose.

40. The following reliefs would, therefore be granted in these cases.

In O. T. C. No. 329 of 1970 :-

- (1) The direction for re-auctioning as contained in the order dated 15-4-1970 is quashed. A writ of certiorari be issued quashing the direction for re-auction.
- (2) The petitioner is not entitled to any other relief as prayed for.

In O. J. C. No. 357 of 1970 :-

- (1) Rule 103 (1) of the Board's Excise Rules in so far as it directs that the fees for license for the retail vend of excisable articles shall be fixed by auction is ultra vires the Act.
- (2) The petitioner Raghunandan Saha is not entitled to any other relief as prayed for in his writ application.

We direct that all the parties would bear their own costs of these proceedings.

G.K. Misra, C. J.

41. I agree.

Order accordingly.

Cases Referred.

¹(1968) 1 Mys LJ 69

² AIR 1969 Pun 4

³ AIR 1964 SC 1714

⁴ AIR 1964 SC 1781

⁵ AIR 1960 SC 1355

⁶ AIR 1947 PC 34

⁷1968 SCD 14

⁸ AIR 1954 SC 220

⁹ AIR 1967 SC 1512

¹⁰(1883) 8 AC 658

¹¹ AIR 1962 SC 922