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**ALLAHABAD HIGH COURT (LUCKNOW BENCH)**

PRAMOD AWASTHI — Appellant

Vs.

STATE OF U.P.& ORS. — Respondent

( Before : S.N.Shukla, J )

Writ Petition No. 1638 of 2007

Decided on : 19-09-2008

- Uttar Pradesh Excise (Settlement of Licences Country for Retail Sale of Country Liquor) Rules, 2002 - Rule 21
- Uttar Pradesh Excise Act, 1910 - Section 34

**A. Excise Law — U.P. Excise Act, 1910 — Sections 34, 36, 39 — Uttar Pradesh Excise (Settlement of licences for Retail Sale of Country Liquor) Rules, 2002 — Rules 2(d), 2(m), 6, 12, 13, 19, 21 — Country Liquor Licence — Recovery of Licence Fee as Arrears of Land Revenue — Cancellation of Licence — Validity — Petitioner granted retail country liquor licence but failed to deposit full licence fee and applied for surrender — Licence cancelled and remaining fee sought to be recovered as arrears of land revenue — Petitioner argued non-liability for balance fee as liquor was not lifted after cancellation — Held, licence fee is consideration for State's privilege to trade in liquor, not dependent on lifting quota — It is a contractual obligation and price for privilege, not excise duty — Since petitioner failed to pay full licence fee, cancellation and recovery as arrears of land revenue upheld under Section 39 of the Act and Rule 21 of the Rules — Supreme Court precedents distinguish licence fee (price for privilege) from excise duty (tax on production/manufacture) — Petitioner's liability is not excise duty on unlifted liquor but contractual payment for the privilege. (Paras 3, 4, 5, 17, 18, 19, 20, 21, 22, 24, 25)**

**B. Contract — Liquor Licence — Nature of Obligation — State's Privilege — The grant of a liquor licence is a contractual arrangement where the State, having a monopoly over intoxicants, parts with its privilege for a consideration (licence fee) — This fee is the price for the privilege and is not a tax or excise duty — The licensee's obligation to pay this fee is independent of the quantity of liquor lifted, unless explicitly stated otherwise — Failure to pay the agreed licence fee constitutes a breach of contract, allowing the State to cancel the licence and recover the outstanding amount. (Paras 5, 19, 20, 21, 22, 24)**

**C. Interpretation of Statutes — Excise Enactments — "Privilege" — The term "privilege" in excise enactments refers to the licence or permit granted by the State for trade in intoxicating liquors — The State has the inherent right to regulate, prohibit, or permit such trade under specific conditions, including charging a price (licence fee) for the privilege. (Para 22)**

#### JUDGMENT

1. Heard Shri Sushil Kumar Singh, learned counsel for the petitioner and learned Standing Counsel for the opposite parties.
2. The petitioner has challenged the order dated 20th of June, 2003, passed by the Collector, Kheri, whereby a direction has been issued to recover the amount of Rs. 112,685/due upon the petitioner against the licence fee and the order dated 21st of September, 2004, passed by the Appellate Authority as well as the order dated 6th of February, 2007, passed by the State Government in revision. The petitioner has challenged the orders impugned inter alia that the excise duty is not recoverable as arrears of land revenue, therefore, the recovery notice itself is bad in law.
3. Briefly the facts of the case are that the petitioner was granted the licence for retail shop of country liquor in the excise year 20022003 by the opposite party No. 2 i.e. Collector Kheri. Under the terms of licence, the petitioner was under obligation to deposit the licence fee as well as the security money. He deposited the security money amounting to Rs. 39,360/ and further a sum of Rs. 4,800/ towards licence fee. The petitioner run the shop till the month of October, 2002, but it appears that he could not deposit the licence fee amounting to Rs. 93,334/ till 26th of October, 2002, rather he submitted the application for surrender of shop on 26th of October, 2002. The Licensing Authority in exercise of power provided under Section 34 of the U. P. Excise Act, 1910 read with Rule 21 of Uttar Pradesh Excise (Settlement of licences for Retail Sale of Country Liquor) Rules, 2002 (hereinafter referred to as the Rules, 2002) cancelled the petitioner's licence and issued direction to adjust the amount deposited against the security i.e. Rs. 39,360/ against the licence fee and to recover the remaining amount of licence fee i.e. Rs.53,974/ as arrears of land revenue. Being aggrieved with which the petitioner preferred the appeal under Section 11(1) of the

U. P. Excise Act, 1910 before the Excise Commissioner, who dismissed the same. Thereafter he preferred a revision before the State Government. The State Government also rejected the revision by upholding the order passed by the appellate authority as well as the licensing authority.

4. The learned counsel for the petitioner submitted that since after the date of cancellation i.e. 3112002 the petitioner did not lift any quantity of liquor for the remaining period of licence, he is not liable to pay the balance amount of licence fee. In support of his contentions the learned counsel for the petitioner has relied upon some decisions, which are as under:

(1) Har Shankar and others v. The Dy. Excise and Taxation Commissioner and others (1975) 1 SCC 737 : (AIR 1975 SC 1121).

(2) State of Andhra Pradesh v. Y. Prabhakara Reddy AIR 1987 Supreme Court 933.

(3) State of Haryana and others v. Jage Ram and others AIR 1980 Supreme Court 2018.

(4) State of Orissa and others v. Narain Prasad and others (1996) 5 SCC 740 : (AIR 1997 SC 1493).

(5) Excise Commissioner U. P. Allahabad etc. etc. v. Ram Kumar etc. etc. AIR 1976 SC 2237.

(6) Bimal Chandra Banerjee v. State of Madhya Pradesh etc. AIR 1971 SC 517.

5. On the other hand the opposite parties have contested the matter by filing the counter affidavit with the averments that in the trade of liquor the State maintains its monopoly and privilege. The State Government has right to charge some fee for parting with the privilege. That has been termed as licence fee. To control and regulate the business of trade in the different kind of liquor the State Government has framed relevant Rules and the present case is governed under the U. P. Excise Act, 1910 read with the Uttar Pradesh Excise (Settlement of licenses for Retail Sale of Country Liquor) Rules, 2002. The petitioner is governed under the provisions of the Act and Rules framed thereunder as the licence granted to the petitioner is a purely contractual in nature and in violation of any of the terms of contract the State Government or the Excise authorities have right to take action under the law.

6. The learned Standing Counsel submitted that the cases cited by the petitioner do not support his case, rather they support the case of the opposite parties. The attention of this court has also been drawn towards the provisions of the Act as well as the Rules, which are necessary to be discussed in the matter.

7. Powers to govern the licence is derived from Section 34(1), which is reproduced hereunder:

"34(1) Subject to such restrictions as the (State Government) may prescribe, the authority granting any licence, permit or pass under this Act may cancel or suspend it

(a) if any duty or fee payable by the holder thereof be not duly paid; or

(b) in the event of any breach by the holder of such licence, permit or pass or by his servants, or by any one acting on his behalf with his express or implied permission of any of the terms or conditions of such licence, permit or pass; or

(c) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and nonbailable offence, or of any offence punishable (under the Dangerous Drugs Act, 1930, or) under the Merchandise Marks Act, 1880, or of any offence punishable under sections 482 to 489 (both inclusive) of the Indian Penal Code; or

(d) where a licence, permit or pass has been granted on the application of the grantee of an exclusive privilege under this Act, on the requisition in writing of such grantee; or

(e) if the conditions of the licence or permit provide for such cancellations or suspension at will."

8. Section 36 of the Act is also relevant to reproduce hereunder:

"36. Any holder of a licence to sell by retail under this Act may surrender his licence on the expiration of one month's notice in writing given by him to the Collector of his intention to surrender the same and on payment of the fee payable for the licence for the whole period for which it would have been current but for such surrender:

Provided that, if the Excise Commissioner is satisfied that there is sufficient reason for surrendering such a licence, he may remit to the holder thereof the sum so payable on surrender, or any portion thereof;"

9. Section 39 empowers the licensing authority to recover the excise revenue due to the defaulter as arrears of land revenue, which is reproduced here under:

"39. All excise revenue including all amounts due to (the Government) by any persons on account of any contract relating to the excise revenue, may be recovered from the person primarily liable to pay the same, or from his surety (if any), as arrears of land revenue or in the manner provided for the recovery of public demands by any law for the time being in force. In case of default made by a holder of a licence the Collector may take the grant, for which the licence has been given, under management at the risk of the defaulter, or may declare the grant forfeited and resell it at the risk and loss of the defaulter. When a grant is under management under this section, the Collector may recover as excise revenue any moneys due to the defaulter by any lessee or assignee:

Provided that no licence for an exclusive privilege granted under section 24 shall be

forfeited or resold without the sanction of the authority granting the licence."

10. Rule 2(d) of the Rules defines the basic licence fee as under:

"2(d) "Basic Licence fee" means that part of consideration for the grant of licence for the exclusive privilege of retail sale of country liquor under Section 24 of the Act, payable by the person selected as licensee before the licence is granted to him, for the whole excise year or part thereof on such rates as notified by the Excise Commissioner in consultation with the State Government from time to time:

Provided that if such shop is settled after 30th September the basic licence fee shall be half of the amount so fixed as basic licence fee for the year;"

11. Licence fee has been defined under Rule 2(m) which is reproduced as under.

"2 (m) "licence fee" means the remaining part of consideration for grant of licence for exclusive privilege of retail sale of country liquor under Section 24 of the Act, payable by the licensee, in addition to the basic licence fee. Thus sum shall be equal to the excise duty leviable on the annual minimum guaranteed quantity fixed for the shop;"

12. Rule 6 of the Rules speaks that the licence shall be granted on payment of basic licence fee and deposit of the security amount in accordance with the provisions of these rules.

13. Rule 12 provides the mode of payment of licence fee and security amount as under:

"12. Payment of basic licence fee and security amount In case an applicant is selected as licensee, he shall deposit the entire amount of basic licence fee within 3 working days of being informed of his selection. He shall be required to deposit half the security amount within 10 working days of information of his selection and balance of security amount within 20 days of information of his selection. If he fails to deposit the amount of basic licence fee or security amount within prescribed period, his selection shall stand cancelled and his earnest money and the basic licence fee and security amount if deposited by him shall be forfeited in favour of the State government and the said shop shall be resettled forthwith.

14. Rule 13 provides that the licensee under these rules shall obtain supplies of country liquor from any wholesale licensee of the district after making full payment of cost price of country liquor including all taxes, duties and cess as levied from time to time.

15. Rule 19 provides that the licensee may surrender his licence after giving at last one month's notice in writing to the Licensing Authority under provisions of Section 36 of the Act. On receipt of such application the Licensing Authority will take steps for recovering all outstanding excise dues from his security deposit and refund the balance amount after obtaining orders of the Excise Commissioner. The Licensing Authority shall also proceed for resettlement pf the shop without delay for the remaining period of the excise year.

16. Rule 21 relates to suspension and cancellation of licence and penalties, the same is also reproduced hereunder:

"21. Suspension and cancellation of the licence and penalties.(1) Licensing Authority may suspend or cancel the licence

(a) if any bottle or container of country liquor is found in the licenced premises on which duty has not been paid and which does not carry security hologram duly approved by the Excise Commissioner as a proof of payment of duty;

(b) if any bottle or container of any other kind of liquor or intoxicating drug (for which licence is not granted) is found in the licenced premises;

(c) if any liquor or intoxicating drug is found in the possession of the licensee against the provisions of the Act or rules;

(d) if the affidavit submitted by the licensee at the time of application is found incorrect and assertions made therein are found to be false;

(e) if it is found that the licence has been obtained in a false name or the licensee is holding the licence on behalf of some other person.

(f) if the licensee fails to deposit monthly installment of licence fee or replenish the deficit in security amount within prescribed period;

(g) if the licensee is convicted of an offence punishable under the Act or of any cognizable and nonbailable offence, or any offence punishable under Narcotics Drugs and Psychotropic Substances Act, 1985 or of any offence punishable under Sections 482 to 489 of the Indian Penal Code.

(2) The Licensing Authority shall immediately suspend the licence and issue a show cause notice for cancellation of licence and forfeiture of security the licensee shall submit his explanation within 7 days of the receipt of notice. Thereafter the Licensing Authority shall pass suitable orders after giving due opportunity of hearing to the licensee.

(3) In case the licence is cancelled the basic licence fee, licence fee deposited by him shall stand forfeited in favour of the Government and the licensee shall not be entitled to claim any compensation or refund. Such licensee may also be blacklisted and debarred from holding any other excise licence."

17. As is evident from the aforesaid subrule (f) gives the power to cancel the licence if the licensee fails to deposit monthly instalment of licence fee or replenish the deficit in security amount within prescribed period.

18. The case i.e. The Excise Commissioner U. P. Allahabad v. Ram Kumar etc.: (AIR 1976 SC 2237) (supra) is not relevant in the matter as it was the case of payment of excise duty

on unlifted quantity, in which the Hon'ble Supreme Court relied upon the case of Bimal Chandra Banerjee v. State of Madhya Pradesh (1971) 1 SCR 844: AIR 1971 SC 517 (supra), in which it has been held that:

"No tax can be imposed by any byelaw or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition. In the present case the Legislature has levied excise duty or countervailing duty on the excisable articles which have been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under Section 13, or manufactured in any distillery or brewer established or licensed under the Act; and the State Government has not been empowered to levy any duty on liquor which the contractors failed to lift. Therefore, the State Government was exercising a power which it did not possess and hence the rule imposing the condition in the licences and the demand notices are invalid."

19. In the case of Har Shankar and others v. the Dy. Excise and Taxation Commissioner and others : (AIR 1975 SC 1121) (supra) the Hon'ble Supreme Court held that since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. By Article 298 of the Constitution, the executive power of the State extends to the carrying on of any trade or business and to the making of contracts for any purpose.

20. In the case of State of Andhra Pradesh v. Y. Pratap Gaur etc. (supra) the Hon'ble Supreme Court relied upon the case of State of Haryana v. Jage Ram : (AIR 1980 SC 2018) (supra). The relevant paragraphs 13, 14 and 15 are reproduced hereunder:

"13. Thus we see that in Bimal Chandra Banerjee's case (AIR 1971 SC 517) and Gappulal's case (AIR 1976 SC 633), what was ought to be recovered, was excise duty and in Ram Kumar's case (AIR 1976 SC 2237) also what was sought to be recovered was excise duty, though disguised as compensation. Such excise duty on unlifted liquor was not leviable. Referring to these cases, Chandrachud, C. J. observed in State of Haryana v. Jage Ram (1980 3 SCR 746: (AIR 1980 SC 2018).

"In Bimal Chandra Banerjee's case, it was held by this court that the levy of excise duty on undrawn liquor was beyond the power of the State Government and that therefore, the rule imposing the condition to that effect was invalid. That decision was followed in State of Madhya Pradesh v. Firm Gappulal (AIR 1976 SC 633) where also the licensees were required to pay what was described as 'Pratikar' which was nothing but excise duty on undrawn liquor. The same situation obtained in Excise Commissioner v. Ram Kumar (AIR 1976 SC 2237) because the real nature of the payment which the licensees were required to pay there was excise duty on undrawn liquor.

"These decisions cannot help the respondents because the true position, as we stated earlier, is that 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 bid at the auction of the vend

which they wanted to conduct."

14. The learned counsel for the State of Andhra Pradesh relied on *Har Shankar v. Dy. Excise and Taxation Commissioner* (AIR 1975 SC 1121), *Panna Lal v. State of Rajasthan* (AIR 1975 SC 2008) (supra) and *State of Haryana v. Jage Ram* (AIR 1980 SC 2018), (supra). In *Har Shankar's* case, it was held by a Constitution Bench of the Court (Chandrachud, J. speaking for the Court) that since rights in regard to intoxicants belonged to the State, it was open to the government to part with those rights for a consideration. In a scheme providing for the parting of the right for a consideration, it was not of the essence whether the amount charged to the licenses was predetermined or whether it was left to be determined by bids offered in auctions. The power of the Government to charge a price for parting with its rights and not the mode of fixing that price was constituted the essence of the matter. Nor indeed did the label affixed to the price determine either the true nature of the charge left by the Government or its right to levy the same. The amount charged was neither a fee properly so-called nor indeed a tax but was in the nature of a price of the privilege which the purchaser had to pay in any trade or business transaction. Once it was appreciated that the auctions were only a mode or medium for ascertaining the best price obtainable for the grant of a privilege to sell liquor, there would be no further contradiction in them.

15. In *Panna Lai's* case (AIR 1975 SC 2008) the court held (at p.2016 of AIR):

"The agreements gave 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 contractor can neutralise the entire amount of exclusive privilege in the excise duty payable by them and the contractors fail to lift adequate quantity of liquor and thereby fail in neutralising the entire price of exclusive privilege, the contractors are not called upon to pay excise duty.

It was held that there was no leviable excise duty in enforcing the payment of the guaranteed sum or the stipulated lump sum mentioned in the license. We have already referred to the references made to 'rental' and 'issue price'. We finally come to the *State of Haryana v. Jage Ram* (AIR 1980 SC 2018) (supra) which we may now take to be the last word on the subject. Chandrachud, C.J. spoke on the Court and said (at p.2024 of AIR)"

"The amount which the respondents agreed to pay to the State Government under the terms of the auction is neither a fee properly so-called which would require the existence of quid pro quo, nor indeed is the amount in the nature of excise duty, which by reason of some constitutional constraints has to be primarily a duty on the production or manufacture of goods produced or manufactured within the country. The respondents cannot therefore complain that they are being asked to pay "excise duty" or wellhead duty on quota of liquor

not taken, and or purchased by them. 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 installments. 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 given the facility of paying the amount by installments 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."

21. In the case of *State of Haryana and others v. Jage Ram and others*, (AIR 1980 SC 2018) (supra) the Hon'ble Supreme Court held that since the rights in regard to the manufacture and sale of intoxicants are vested in the State, it is open to it to part with those rights for consideration; that the amounts which are charged to the licensees who offer their bids in auction sales of vends are neither in the nature of a tax nor in the nature of excise duty; and that, the true nature levies in such cases is that it is a price which the State charges as a consideration for parting with its privileges in favour of the licensee. Such a charge is a normal incident of a trading or business transaction. What the State could itself do in the exercise of its privilege, it authorizes another to do by charging a price for parting with its privilege. A price can neither be a tax nor excise duty. Paragraph 20 is also relevant to reproduce hereunder:

"20. In *Panna Lal v. State of Rajasthan* (1976) 1 SCR 219: (AIR 1975 SC 2008) it was held by this court that the licence fee stipulated to be paid by the licensees was the price or consideration or rental which the Government charged them for parting with its privilege and that it was a normal incident of trading or business transaction. It is true that the Court also said that no excise duty could be collected on undrawn liquor but it held that while enforcing the payment of the guaranteed sum or the stipulated sum mentioned in the licences, the Government was not seeking to levy or recover excise duty on undrawn liquor. In the instant case too, what the Government is trying to recover from the respondents is in essence the price of the privilege with which it has parted in their favour and not excise duty on undrawn liquor."

22. In the case of *State of Orissa and others v. Narain Prasad and others* : (AIR 1997 SC 1493) (supra), the Hon'ble Supreme Court held that a person who enters into certain contractual obligations with his open eyes and works the entire contract, cannot be allowed to turn round. The Hon'ble Supreme Court further held that in the context of excise enactments, the expression 'privilege' really means the licence or permit granted by the

State. 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'.

23. Thus the aforesaid decisions do not support the case of the petitioner, rather they help the opposite parties.

24. After reading the provisions of Section 34 of the Excise Act read with Rule 21 and the decisions discussed hereinabove, I am of the view that the licensing authority is empowered to cancel the licence on the default of licensee to fulfil the conditions prescribed in the licence. Since the licence fee is a consideration for parting with the privilege by the State Government, its payment does not depend on the eventuality of lifting the quota of liquor, it has to be paid by the petitioner, whether he lifts the minimum guaranteed quota or not it is well settled view that the licence fee is not the excise duty, which is payable on the event of lifting of quota of wine.

25. Indisputedly the petitioner has failed to deposit the whole licence fee in terms of the licence whereas he is liable to pay the same, in default of which I am of the view that the licensing authority has rightly passed the order of cancellation of licence and for recovery of balance licence fee. After perusal of the provisions of Section 39 of the Act, it is also obvious that the excise revenue is recoverable as arrears of land revenue. Therefore, I do not find any error in the recovery notice issued by the Licensing Authority.

26. In view of the facts and circumstances of the case and the law laid down by the apex court in the cases, referred to hereinabove, the impugned recovery notice does not warrant interference of this court.

27. The writ petition is hereby dismissed.

28. No order as to costs.