

M/s Farinni Eleven Up and Others Vs State of Jharkhand and Others

Court: Jharkhand High Court

Date of Decision: April 3, 2012

Acts Referred: Bihar and Orissa Excise Act, 1915 " Section 10, 11(2), 12(1), 12(3), 13
Constitution of India, 1950 " Article 14
Councils Act, 1894 " Section 5

Citation: (2012) 192 ECR 108 : (2012) 3 JCR 55 : (2012) 3 JLJR 169

Hon'ble Judges: Prakash Tatia, C.J; P.P. Bhatt, J

Bench: Division Bench

Advocate: Jitendra Singh, Satyabir Bharti and Prabhat Kumar Sinha, for the Appellant; Indrajit Sinha, Niranjana Prasad, Srivastava and Ajay Sah, for the Respondent

Final Decision: Dismissed

Judgement

Prakash Tatia, C.J.

The appellants are aggrieved against the judgment and order dated 30th August, 2011 passed by the learned Single

Judge in W.P.(C) Nos.1400, 1909 & 2003 of 2011, by which the learned Single Judge has allowed the writ petitions of the petitioner respondent

and set aside the Notice Inviting Tender for grant of exclusive privilege of manufacture and supply of country liquor and spiced country liquor after

bottling/sacheting on the wholesale basis for a period commencing from 1st April, 2011 to 31st March, 2014, which NIT was issued under the

order of Member, Board of Revenue, who issued two impugned Notice Inviting Tenders to initiate selection process for grant of above exclusive

privilege and the respondent State was directed to initiate fresh NIT for grant of said exclusive privilege in accordance with the provisions and after

framing rules at the behest of the State Government. The learned Single Judge held that the Member Board of Revenue had no authority to issue

such NITs as the power has not been delegated to the Board of Revenue and it could only be exercised by the State Government. It will be

appropriate to take account of the background facts first.

To amend and reenact the Excise law in the Bihar and Orissa Excise Act, 1915 was enacted after previous sanction of the Governor General u/s 5

of the Indian Councils Act, 1894 relating to the import, export, transport, manufacture, possession and sale of certain kinds of liquor and

intoxicating drugs. In the year 1985, by Act 6 of 1985, name of that Act has been changed to Bihar Excise Act, 1915. By this Act, provisions

have been made to control and regulate the import, export, transport, manufacture, possession and sale of certain kinds of liquor and intoxicant

drugs. With coming into force of the said Act of 1915, by Sections 9 and 10, certain restrictions were imposed on import, export and transport

and for manufacture, possession and sale and license was made compulsory for certain purposes under the Act of 1915 under Chapter IV. For

general trade in liquor/intoxicating drugs, licenses are granted under Sections 13 to 16 and 20 of the Act of 1915. Section 13 provides that no

intoxicant shall be manufactured, no hemp plant shall be cultivated, no portion of the hemp plant from which an intoxicating drug can be

manufactured or produced shall be collected, no liquor shall be bottled for sale, no distillery or brewery shall be worked, and no person shall use,

keep or have in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other

than Tari, except under the authority and subject to the terms and conditions of a license granted in that behalf by Collector. For Tari also provision

was made under the proviso to Section 13 as well as u/s 14, Section 15 provides for provisions of establishment of distilleries, breweries or

warehouses and it says that no distillery, brewery or warehouse as mentioned in sub-section (1) of Section 15 shall be established, except by or

under the authority of the Excise Commissioner. On removal from distillery, brewery, warehouse or other place of storage of intoxicant, the

licensee is required to pay duty as provided by Section 17. Further, by Section 18, it has been provided that no person shall have in his possession

any intoxicant which has not been obtained from a licensed vendor of the same, subject to exception given under sub-section (2) of Section 18.

Section 20 require for obtaining license for sale and under sub-section (4) of Section 20, requirement of license has been dispensed with for the

persons falling in subclause (a) to (e) thereof. The above are the provisions related to subject referred above and in the year 1982, by Act 17 of

1982, Section 22 was substituted, which is relevant for the purpose of deciding these Letters Patent Appeals.

2. In the year 1995, in the undivided State of Bihar, in exercise of powers u/s 22(1) grant of privilege in a specified local area of manufacture as

well as wholesale supply was granted to more than one person and license fee was charged and collected from each of such grantees of the

privilege in each of the specified local area. The State Government sought to recover license fee of equal amount from all persons who have been

granted license u/s 22(1) for one year, meaning thereby if there are more than one grantee of such licensee in a zone then all were asked to deposit

the entire amount of the licensee fee, resulting into charging of the license fee more than the license fee prescribed for the zone and, that too, by

multiplying number of the grantees with the license fee fixed for the entire zone. This condition, as indicated above, was challenged by preferring

writ petitions before the Patna High Court, wherein it has been held that liability of the grantee is to deposit proportionate license fees only and not

each individual is required to pay the entire license fee, fixed for the zone. The said order of the High Court was upheld by the Hon'ble Supreme

Court. Then the State Government came up with an Amending and Validating Act, 1998 and Amending Act, 1999 and inserted Section 22D to

22G after Section 22 of the Act, enabling the State Government to levy and recover license fee at the rate of Rs.1/per LPL from each grantee of

the zone as well as provided for grant of special privilege for wholesale supply of country liquor after bottling/sacheting it.

3. According to the appellant, Section 22 as it stood amended provides for both grant of exclusive privilege as well as special privilege whichever

deemed appropriate by the granting authority i.e., the State Government or the Member Board of Revenue, thus are a class sui generis and either

can be resorted to and not one being a class more special than the other. By sub clause (e) of sub-section (2) of Section 7, it has been provided

that the State Government may delegate to the Revenue Board, the Commissioner of a Division or the Excise Commissioner all or any of the

powers conferred upon the State Government by or under this Act, except the power conferred by Section 89 to make rules. Therefore, the

subject which are covered by Section 89, except those subjects the State delegated his power to the above referred authority.

4. In exercise of power conferred by clause (e) of sub-section (2) of Section 11, by notification dated 15th January, 1919, the State Government

delegated to the Board of Revenue the power conferred on the then provisional Government with respect to the subject given under clause (III) of

the Notification. Since it is a challenge to the delegated authority of Board of Revenue by the writ petitioners which have been upheld by the

learned Single Judge, therefore, clause (III) of the Notification dated 15th January, 1919 is required to be considered, which is as under :

Clause-III

Under clause(e) of sub-section (2) of Section 7, to delegate to the Board the powers conferred on the Provincial Government by the provisions of

the Act specified below.

(1) Power to appoint Inspectors of excise by direct appointment only [Clause (c) of sub-section (2) of section 7],

(2) section 9(1), clause(a) (power to give permission for the import of an intoxicant).

(3) section 12, sub-section (1) (except the proviso thereto) so far as it relates to transport (power to prescribe in respect of an intoxicant the

quantity thereof, no quantity in excess of which shall be transported except under a pass)

(4) section 22, sub-section (1), clause (a) and (b) (power to grant the exclusive privilege of manufacturing or supplying wholesale or of

manufacturing and supplying wholesale country liquor or any intoxicating drug),

5. By this notification of 1919, the State Government delegated Board of Revenue the power conferred upon the State u/s 22, sub-section (1),

clause (a) and (b). It is not in dispute that before present Notice Inviting Tender, the Board of Revenue was prescribing conditions of the NIT and

that procedure was challenged.

6. The present controversy cropped up because of the reason that by a Notification dated 11th October, 2010, Jharkhand State Beverage

Corporation Ltd. (in short "JSBCL") was constituted, which was conferred exclusive rights/ manufacturing rights for wholesale supply of all forms

of liquor to the retail licensee. In view of the constitution of the JSBCL, the present tenders are confined to manufacture and supply of the liquor to

only JSBCL, which was only empowered to wholesale supply to retailers. In view of this decision of the Government, accordingly the license fee

as well as form of license was also amended and so has been done by the Member Board of Revenue as delegate by virtue of subclause(4) of

Clause III of the notification dated 15th January, 1919.

7. Four writ petitioners, who were also aspirant for getting the exclusive privilege, therefore, challenged the NIT on various grounds. The learned

Single held that grant of exclusive privilege could only be conferred u/s 22D it being a special provision and power to grant of privilege u/s 22D

and to prescribe condition and period had not been delegated to the Board of Revenue, therefore, it could have been exercised only by the State

Government and, therefore, the impugned NITs invited by the Board of Revenue was without any authority of law. Learned Single Judge also held

that Board of Revenue u/s 22D has no authority to fix terms and conditions and the period of grant which could be exercised only by the State

government in exercise of its rule making power. Learned Single Judge further held that changes brought about in the terms and conditions of the

notice inviting tenders were without any reasonable cause and are, therefore, vitiated on account of the reason that it tends to arm the respondents

with ample opportunity of arbitrariness and unbridled powers. In addition, the learned Single Judge further held that tender was for ""wholesale

supply of liquor and spiced country liquor"" after sacheting/bottling it and rejected the contention of the State as well as the appellants that the

present tender is for ""manufacture and supply of country liquor and spiced country liquor"" respectively to JSBCL, which is a wholesaler.

8. Learned counsel for the appellants vehemently submitted that notice inviting tender is one for grant of exclusive privilege in a specified local areas

for manufacture of country liquor/spiced country liquor and it is supplied to the godown of JSBCL alone. However, by clause 3(kha) of the notice

inviting tender, it has been provided that in exceptional situation, on account of unforeseen reasons by special order the said liquors/spiced country

liquor may be supplied by grantee to the retailers. However, because of this clause 3(kha), the basic nature of the privilege to be granted under the

notice inviting tender of only purpose of supply to the godown of JSBCL has not or cannot change. Therefore, according to the learned counsel for

the appellants, the finding of the learned Single Judge that tender is for wholesale supply of country liquor/spiced country liquor and no manufacture

and supply takes place is absolutely wrong and contrary to the condition of the notice inviting tender. The learned counsel for the appellant

submitted that the contention of the appellant is fortified by the comparison to earlier license in Form no.27 with the present license intended to be

granted in Form no.27(ga). It is also submitted that the learned Single Judge misinterpreted Section 5 of the Excise Act, 1915 and, according to

the learned counsel for the appellants, the definition of retailer and wholesaler has been misinterpreted. It is submitted that definition of retail and

wholesale prescribed under sub-section (1) of Section 5 and declaration that the sale of any intoxicant in any quality in excess of the quality

declared in sub-section (1) shall be deemed to be wholesale, but that applies to the sale by wholesaler to retailer and have no application to the

cases where manufacturers are to supply the said liquor to the wholesaler, who, in turn, would be selling to the retailers. Assailing the observation

of the learned Single Judge that JSBCL has not become functional and hence the NIT is a tender notice for grant of wholesale license to sell to the

retailers, it is submitted that view is against the materials on record of the writ applications and contrary to the statements made on affidavit by the

respondent-State of Jharkhand and ignoring the fact that JSBCL was constituted as a Corporation and vested with monopoly right of wholesaler

by decision taken by the State Government vide notification dated 11th October, 2010. The Board of Directors of the Corporation was also

constituted on 3rd March, 2011 and corpus fund of Rs.5.00 crores was vested with the Corporation and a notice was already published for

procuring of the godowns after framing of the godowns manual in the various districts of the State and the various districts of State have already

been communicated not to appoint any wholesaler for Indian Made Foreign Liquor as the Corporation is the exclusive wholesaler in the entire

State of Jharkhand. The license fee has also been fixed by the Corporation. The learned counsel for the appellants submitted that Section 22D

came to be inserted under the Excise Act, 1915 by Amending and Validating Act in the year 1998 to cure the defect pointed out by the Hon"ble

Courts as well as to provide for special privilege as opposed to exclusive privilege and not to denude or deprive the Board of Revenue to grant

exclusive privilege delegated upon it u/s 22 of the Act and therefore Section 22D or Section 22G does not supplant the provisions of Section 22,

the provisions of Section 22(1)(a) or annuls the said provision for its delegation to the Member, Board of Revenue and the effect is that both the

provisions for grant of privilege exists for being invoked by the competent authority, namely, recourse u/s 22(1) by the State Government or the

delegated Member, Board of Revenue u/s 22D and Section 22G by the State Government. Learned counsel for the appellant relied upon the

judgment of the Hon"ble Supreme Court, delivered in the case of Krishnamurthi and Co. etc. Vs. State of Madras and Another, . It is also

submitted that present grant is for manufacture and supply of country liquor to JSBCL and not for wholesale supply of liquor after

sacheting/bottling it, Section 22 of the Act would prevail and would be deemed to be the provision under which the tenders could be awarded.

Learned counsel for the appellant relied upon judgment of this Court, delivered in the case of Nand Kishore Jaiswal & Ors. Vs. State of

Jharkhand & Ors.(2003(4) JLJR 51), wherein, according to the learned counsel for the appellants, after considering the Notification dated 15th

January, 1919 this Court held that power has been delegated with the Board to grant exclusive privilege and the present NIT is for grant and

manufacture and supply of country liquor to JSBCL and not for wholesale supply of liquor after sacheting/bottling it. Learned counsel for the

appellant also assailed the finding of the learned Single Judge that the Board of Revenue had no authority to fix the terms and conditions and the

period of grant which could be exercised only by the State Government in exercise of its rule making power and that has not been done by the

State Government. Learned counsel for the appellant submitted that the delegation must be held to authorize not only the powers mentioned therein

but also of duties and functions which are incidental to the exercise of powers and are integrally connected therewith and the word delegation is

generally used to imply not parting with powers by the person who grants delectation to points rather to the conferring of an authority to do things

which otherwise but for the delegation, the delegator would have to do himself. For this legal proposition, the counsel for the appellants relied upon

the decisions of the Hon'ble Supreme Court, delivered in the cases of State of Bombay (Maharashtra) Vs. Shivbalak Gourishanker Dube and

Others, & Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others, .

9. In view of the above, it is submitted that Section 22 and other provisions under the Excise Act is complete Code in itself, which provides not

only for grant of exclusive privilege but also for fixation of the terms and conditions and period for such grant and consequential grant of license in

pursuance to such grant. It is also submitted that in exercise of the aforesaid powers conferred upon the Board of Revenue, all NIT's in the past

including the present one had been floated by the Board of Revenue after fixing the terms and conditions and period of grant by the Board of

Revenue itself. Learned counsel for the appellants submitted that the Rule of Contemporanea Expositio which provides that an accepted practice

which has been followed for so long a period should not lightly be disturbed unless there are compelling reasons and if two interpretations of the rules

are possible, the interpretation which favours the practice which was being followed for a long period should be ordinarily preferred unless it is

clearly in violation of the Rules. It is also submitted that NIT was not only published in the daily newspapers on 22nd February, 2011 but was also

published in the official gazette and posted on the website of the department. In this connection, learned counsel for the appellants relied upon the

judgments of the Hon'ble Supreme Court, delivered in the cases of Nair Service Society Vs. Dr. T. Beermasthan and Others, & Desh Bandhu

Gupta and Co. and Others Vs. Delhi Stock Exchange Association Ltd., , it is also submitted that the finding of the learned Single Judge that grant

of privilege by creating zones of supply by the present tender is contrary to the earlier decision of the State Government, which is approved by the

Cabinet and at present the procedure was not followed and the decision of the Board of Revenue was only approved by the Minister Incharge.

Learned counsel for the appellants and State both stated that as per the norms and before this also decision was never taken at the level of Cabinet

or Council of Ministers. Learned counsel also assailed the finding of the learned Single Judge and submitted that the learned Single Judge failed to

appreciate the reason for inviting tender zone wise, which was that, the State Government found less realization of the revenue in some areas and

by clubbing the districts, the Government can get the better revenue for all areas. Certain figures have also been pointed out to justify the

Government decision to create zones. It is also submitted that award of a contract, whether it is by a private party or by a public body or the State,

main thrust has been given with respect to commercial transaction and in arriving at a commercial decision, considerations which are of paramount

importance are commercial consideration and State can choose its own method to arrive at a decision and can fix its own terms of invitation to

tender and that is not open to judicial scrutiny. The State can enter into negotiations before finally deciding to accept one of the offers made to it.

Public interest in such matter is to safeguard the State's revenue interest. It is submitted that the Hon'ble Supreme Court in number of cases held

that it is for tender granting authority to lay down terms and conditions for eligibility and the Courts does not act as a court of appeal and for this

proposition, the learned counsel for the appellants relied upon several judgments of the Hon'ble Supreme Court.

10. The learned Advocate General submitted that the exclusive privilege was basically for manufacture and since the wholesale supplier to retailer

is only the Jharkhand State Beverages Corporation Ltd., which has an exclusive right to supply on wholesale basis and it is submitted that since

exclusive privilege is only for manufacture and for wholesale supply not to retailer and only to JSBCL, therefore, the price is proportionately

reduced from Rs.4/to Rs.2/per LPL on the Minimum Guarantee Quota(MGQ) and additional license fee @ Rs.2/per LPL on the excess quantity

can be levied in the event, wholesale supply exceeds MGQ. As per the procedure laid down in the NIT, the bid could be finalized on the basis of

negotiations as well. The learned Advocate General justified the process of negotiations with next lowest bidder for awarding contract on

economical viable price bid. By relying upon the judgment of the Hon'ble Supreme Court delivered in the case of West Bengal State Electricity

Board Vs. Patel Engineering Co. Ltd. and Others, , the learned Advocate General submitted that NIT was not opened to judicial scrutiny, since it

is an exclusive realm of contract of the Government and relied upon the judgment of the Hon'ble Supreme Court, delivered in the case of Tata

Cellular Vs. Union of India, . Learned Advocate General further submitted that the Board of Revenue used to proscribe the conditions and this

practice is going on since 1919 and in view of the earlier decision to have the business of the commodity covered under the Excise Act, a

Corporation was duly constituted, a corpus fund was already allocated and the Board of Director has already been constituted and, therefore, it

was necessary to invite tender from the parties, who may exclusively supply the above said liquors to one Corporation i.e., JSBCL. The grantee

under the tender is not entitled to sell liquor to anybody else and in exception and unavoidable circumstances, if liquor cannot be supplied to the

Corporation then provision has been made for supply of liquor to the retailers by the grantee, but that will not change the basic character of the

contract. It is submitted that it is essential to provide such condition so that unforeseen difficulty can be met with and loss to the State exchequer

can be avoided, but that will not change the nature of the contract to be given under the NIT. Learned Advocate General further submitted that the

learned Single Judge has not taken into account the reasons given by the state for creation of the five zones, whereas full justification was given for

creation of the zones indicating how the more revenue could have been obtained by the State and this formula was evolve because of the past

experience of the State which caused lose to the State in terms of revenue because of the involvement of small bidder who could not work under

the license properly, resulting into revenue loss to the State.

11. Supporting the impugned judgment, learned counsel for the respondent no.4 submitted that in the present process wherein Notice Inviting

Tenders were floated for the purpose of grant of exclusive privilege of country liquor, the State of Jharkhand has been divided into five zones,

whereas for spiced country liquor, it has been divided into two zones. According to the learned counsel for the private respondent, impugned

notice inviting tenders had heading which indicate that these NITs were issued for grant of exclusive privilege of wholesale supply of country liquor

and spiced country liquor after bottling and sacheting and it is not a grant for manufacture. It is submitted that under the instant NIT the successful

tenderer would pay license fee calculated on the basis of sale/supply and not on the capacity to manufacture. Had the intention of the impugned

NIT been to make an invitation to offer for grant of exclusive privilege of manufacturing of country liquor/spiced country liquor, as contended by

the appellants, the license fee would have been determinable and payable in respect of manufacturing capacity, but in the instant case, license fee is

being sought to be charged only on the basis of wholesale supply. Further, it is submitted that as per the definition of the wholesale and retail supply

given in Section 5, and since the supply/ sale to the JSBCL is beyond 1.2 bulk litres and, therefore, it is wholesale supply u/s 5(2) of the Act. The

Act contemplates only two supply i.e., retail and another, wholesale. It is submitted that the impugned NIT do seek grant of exclusive privilege of

supply of country liquor/spiced country liquor and supply/sale can either be retail or wholesale and in the present transaction, there can be only

wholesale supply. Further the successful tender is not required to manufacture spirit, be it rectified spirit or silent spirit or rectified spirit grade-I for

spiced country liquor. The only requirement which is to be fulfilled before the supply of country liquor is made on wholesale basis is that the grantee

and licensee will have to reduce the rectified spirit by adding water and the rafter bottle/sachet it. For spiced country liquor, it may involve process

of reduction of silent spirit or rectified grade-I colouring and flavouring agents are added to it. Bottling and sacheting of country liquor before any

kind of sale or supply necessarily involves the above process and again it has been submitted that the tender has been issued only for supply of the

above said mentioning without there being any obligation to manufacture it. Learned counsel for the respondent submitted that successful bidder

will have to obtain license in Form 22(ga) and 22(gha) and will not be granted license in Form 28 which is to manufacture spirit in a distillery. The

grantee will be required to receive license under Sectional 13 to enable him to make country liquor and manufacture it in bottle or sachet spiced

country liquor and also a license u/s 20 to supply country liquor or spiced country liquor on wholesale basis. Therefore, in view of clause (d) of

sub-section (1) of Section 13 of the Act, no liquor can be bottled for sale without license. and in view of that matter it had become necessary for a

grantee of exclusive privilege of wholesale supply of country spirit in sachet/bottle to receive a license under the provisions of the Section 13 of the

Act. Therefore, pursuant to policy decision of the State Government to grant a person(persons) the exclusive/special privilege of supply of country

liquor on wholesale basis after sacheting and bottling it in a zone of supply comprising several districts, Form 27 was amended vide notification

dated 30th June, 1995 and for exclusive privilege of supply of country liquor in sachet and bottle on whole sale basis, license in Form 27 was

amended under the provisions of Section 13 and 20 of the Act. Therefore, according to the learned counsel for the respondents, NIT does not

seek to grant an exclusive privilege of manufacturing spirit in distillery and, in fact, it seeks to grant exclusive privilege of supply of country liquor on

wholesale basis after sacheting/ bottling it. Therefore, only manufacturing license is not enough, inasmuch as grantee receives a license u/s 20 of the

Act for wholesale vend of country liquor or spiced liquor, he cannot supply the same either to the Corporation or to the retail vendors and in

absence such a wholesale license the entire exercise of issuing notice inviting tender would be rendered infructuous. The learned counsel for the

respondent supported the finding recorded by the learned Single Judge with respect to interpretation of Section 22D and as well as the

interpretation made by the learned Single Judge with respect to the interpretation given to Section 5 of Act of 1915 for the purpose of finding out

whether the present transaction will fall in the wholesale and retail sale by comparing it in terms of the quantity of the commodity to be supplied by

the appellant, in case, they are granted the privilege under the NIT as well as supported the other reasons given in the judgment.

12. We have considered the submissions of the learned counsel for the parties and perused the facts of the case and the reasons given by the

learned Single Judge in the impugned judgment dated 30th August, 2011.

13. It will be appropriate to recapitulate that Section 22 provides for grant of exclusive privilege of manufacture and sale of country liquor or

intoxicant drugs or denatured spirit or any other intoxicant and provides that the State may grant to any person on such condition and for such

period, as it may think fit, the exclusive privilege:

(a)(i) of manufacturing or supply of wholesale, or

(ii) of manufacturing and supplying wholesale, or

(iii) of selling wholesale or retail, or

(iv) of manufacturing or supplying wholesale and selling retail, or

(v) of manufacturing and supplying wholesale and selling retail; any country liquor or intoxicant drug with any specified local, or

(b) of manufacturing, storing, using, processing, exporting, importing including wholesale or retail sale of liquor which after manufacture is

denatured to render it unfit for human consumption and is thereby termed as denatured spirit and any other intoxicant:

14. By notification no. 470 F dated 15th January, 1919, the State Government delegated the powers conferred by Section 22, sub-section (1)

clause(a) & (b) and made it clear in said clause itself about the delegation of powers to grant exclusive privilege of manufacturing or supplying

wholesale or of manufacturing and supply wholesale country liquor or any other intoxicating drug. The learned Single Judge was of the view that

Section 22D and 22G have been inserted in the Act of 1915 after notification of 1919 in the year 1998/1999 respectively. Therefore, the

delegation as made by the notification of the 1919 cannot be delegation of power of the State Government u/s 22D and 22G, which are

independent sections providing for grant of exclusive/special privilege for bottling and sacheting and wholesale supply of country liquor u/s 22D and

for grant of special privilege of manufacturing and/or wholesale supply of spiced country liquor and grant of exclusive/special privilege of

manufacture and/or wholesale supply of spiced country liquor u/s 22G.

15. In our considered opinion, It cannot be disputed that the State Government has delegated this power which are available to the State under

sub-section (1)(a)(b) of Section 22 to the Board of Revenue. Section 22 provides for grant of exclusive privilege for manufacturing or supplying

wholesale liquor. The NIT is for manufacture the liquor by reducing the strength by adding water and in the case of spiced liquor, by adding flavour

etc. and thereafter, they have to supply it to the newly constituted Corporation (JSBCL) in bottles or in sachets. Learned counsel for the contesting

respondents though could not dispute that in the process under consideration, the manufacture will be there and admitted that under the NIT if the

contract is given then the grantee is required to reduce the strength of the intoxicant and in the case of spiced liquor, is required to add something in

the liquor and, therefore, it is a process of manufacturing in terms of the definition as given under sub-section (15) of Section 2 of 1915.

16. Section 22 as well as Section 22D and Section 22G, all deal with subject of grant of exclusive privilege for wholesale supply of the liquor.

Though the word used in Section 22, 22D and 22G is ""supply"" but it cannot be a free supply, therefore, for consideration is within the word

supply"". In Section 22D, the word "manufacture" has not been used; whereas in Section 22G word " manufacture" has been used. However, so

far as supply is concerned that is common in all the Sections and, that too, wholesale supply. The State had power to grant the exclusive privilege

for wholesale supply under sub clause(i) of clause (a) of sub-section (1) of Section 22 and this power has been delegated vide notification dated

15th January, 1919 to the Board of Revenue. If it is held that Board of Revenue is not delegatee of the State Government in the matter covered by

Section 22D and 22G then we will be holding contrary to the notification dated 15th January, 1919, merely because the provision for wholesale

supply of a country liquor and spiced country liquor, under exclusive and special privilege has been made u/s 22D and 22G and inspite of the fact

that in wider term, power has been delegated by the State Government to the Board of Revenue in the matter of (i)manufacturing or (ii) supplying

the wholesale country liquor then simply because for regulating the particular sort of the wholesale supply of the country liquor, other provisions

have been made, which, in our opinion, cannot be held that, that power which was delegated by the State Government by exercising power

Section 7(2)(e) for supply of country liquor, though mentioned in Section 22 will not apply because subsequent to delegation u/s 7(2) (e) of the

Act to frame erms and conditions for tender and it's period will remain confined to Section22(a)(i) & (ii) only and condition for same wholesale

supply in Section 22D and Section 22G will be different and delegation u/s 22 shall stand withdrawn.

17. Liquor can be manufactured by following the process as mentioned in sub-section (15) of Section 2 of the Act of 1915 and grantee is required

to reduce the strength of the country liquor/spirit by adding the water and in case of spiced liquor, by adding flavour etc. in the liquor, therefore, the

tender is for manufacture and for supply of the liquor, that too, to only to the one Corporation, therefore, in fact, in wider term the grantee"s

activity under the NIT will be of manufacturing or supplying the liquor. Such grant mentioned in Section 22D and Section 22G and that activity will

be governed by sub clause (a)(i) & (ii) of sub-section (1) of Section 22 and is not independent to the activity under sub-section (1), clause(a) of

Section 22 of the Act.

18. In the impugned judgment, it has been held that "..... since admittedly, Jharkhand State Beverage Corporation has not yet become functional

and, therefore, the successful grantee is for supply of liquor to the retailers and would be on a wholesale basis." Learned Single Judge also

observed that because of this reason, the licensee/exclusive privilege will be granted in Parpatra(Ga) as provided in the schedule of the NIT, which

is for wholesale vend to the retail vendors after bottling and sacheting and rejected the contention of the respondents that NIT for grant of exclusive

privilege of manufacture of country liquor or spiced country liquor alone and thereafter held that the tender relates to grant of exclusive privilege for

supply of country liquor after bottling and sacheting which is a grant made Section 22D of the Excise Act and the spiced country liquor after

bottling and sacheting is a grant u/s 22G. Therefore, the contention of the appellants that grant is a grant simplicitor u/s 22D cannot be accepted.

For this, conditions of the tenders are important. In the heading, it is mentioned that tender is for wholesale supply of country liquor in bottle/sachet

and for special privilege. In column (Ga) of NIT, it has been required that an applicant for NIT is required to submit complete project report of

plant and infrastructure of factory of bottling and sacheting. It is very specifically provided that in project report the applicant is required to give

source for the supply of the liquor. Then it is also required that applicant will give the estimated rate of expenditure in the project report and will

explain under what different heads expenditure will be for bottling and sacheting of the liquor and specifically it is to be mentioned about such

expenditure in manufacture of country liquor. In Clause (Gha) the applicant is required to disclose the details of the source from where he will get

the money for the Plant and in support thereof he will annex the necessary documents. Clause 4(Ka) requires from applicant to submit his

experience certificate of, at least, six years in the field of "manufacture of country liquor" in the State or in any other State of the country. This

certificate of experience of "manufacture" is required of competent officer of the Government certifying the applicant's six year "manufacture". As

per Clause 10, the successful bidder is required to provide within the factory premises bottling and sacheting plant, necessary storage facility and

other equipment and machineries and obtain permission of Commission of Excise to establish Plant. The successful bidder is required to give his

Project report with respect to his place of manufacture with details of his production capacity and expenditure to be incurred for manufacturing of

the country liquor and after bid he is to supply the country liquor to the Corporation. The exceptional circumstances, the grantee may be allowed to

supply the liquor to the retailers. But that liberty does not make the main condition of the tender redundant, so as to hold it that the licence sought

to be given under the NIT is only for supply of liquor to the retailers on wholesale basis and is not exclusive privilege of manufacture of country

liquor or spiced country liquor for supply to JSBCL.

19. It appears that the learned Single Judge, influenced by the condition of obtaining license prescribed in Form 27, which is required for sale of

intoxicant and might held that if it was the only license to manufacture then there was no necessity of obtaining license in Form 27. This requirement

of obtaining license for sale in Form 27 was necessary because of reason that any exceptional circumstance may come up during the period of

license, which may require sale of the country liquor to retailers and for that purpose successful bidder is required to obtain license in wholesale for

sale of liquor in prescribed form 27. If the respondents thought it fit that instead of obtaining license on "as and when required" basis, to obtain

license once for all times to meet with those eventuality, the nature of exclusive/special privilege of manufacturing the above liquor and it's supply to

one Corporation has not changed, nor it can be changed and the license in Form 27 is subject to condition that liquor will be supplied only to the

Corporation and in exceptional circumstances, with the permission of the respondent-State, the liquor can be sold to the retailers. Exception

cannot destroy the main purpose for which exclusive/special privilege is to be given.

20. Another ground given by the learned Single Judge for rejecting contention of the appellants is that JSBCL has not yet become functional and,

therefore, the grant is for supply of liquor to the retailer and would be on a wholesale basis.

21. Firstly, this important fact cannot be ignored that the JSBCL has newly been constituted. It's Board of Director is already there. The corpus

fund of Rs.5.00 Crore has already been made available and as per condition of the NIT the successful bidder would require to supply its entire

product to the JSBCL. Therefore, the very foundational fact JSBCL has not yet become functional is wrong because of the plain and simple

reason that the said Corporation certainly can become functional only when it will be supplied the country liquor in bottle and sachets as well as the

spiced country liquor. At this stage, when after constitution of the corporation, the first bid has been notified to make the Corporation workable

and how it can be expected that corporation will start working without there being supply of liquor. Therefore, we do not agree with the finding

that the exclusive privilege is not for manufacturer and wholesale supply of the said country liquors to the JSBCL.

22. Learned Single Judge was also of the view that the provisions made u/s 22 are of general nature and provisions of Section 22D and 22G are

independent and specific. It is true that Section 22D and Section 22G are special provision for special subject but at the same time they are the

provisions for grant of exclusive and special privilege of either manufacturing in Section 22G or for supplying u/s 22D, which is covered u/s 22(1)

(a)(i)& (ii) and Section 22D and Section 22G have not taken away delegatee power of the Board of Revenue which had been delegated by the

notification dated 15th January, 1919 and this delegation cannot be held to be withdrawn for the purpose of grant of exclusive/special privilege for

bottling and sacheting and wholesale supply of country liquor u/s 22D and for grant of exclusive or special privilege of manufacture and/or

wholesale supply of country liquor. In general principle, of exclusion privilege of general law, by special law cannot be applied in the facts of this

case because of the reason that State never intended to withdraw delegation of power on rule making power of the Board with respect to subject

covered by Section 22 by enacting Sections 22D and 22G and since 1998/99 the State has not framed any rules to give effect to the provisions of

Section 22D and Section 22G, therefore, the conditions prescribed by Board is not in conflict with any other rules. Merely not making the rules u/s

22D and 22G or mere admission of the State, the State has not withdrawn delegated power of the Board of Revenue for the subject covered by

Section 22D and 22G may not be sufficient to interpret law but it support the view taken by us that State found it appropriate to carve out some

transaction and cover them u/s 22D and 22G but without having intention of withdrawing such transaction from the purview of exclusive privilege

of manufacturing or wholesale supply of country and spiced country liquor, for which the provision is u/s 22 and State has delegated the power to

the Board of Revenue by notification dated 15th January, 1919.

23. We do not agree with the findings of the learned Single Judge that since Section 22D and 22G added by subsequent amendment, therefore,

there has to be specific delegation for making rules. Therefore, we hold that NIT is for inviting bids from the interested party for manufacturing and

wholesale supply of country liquor and spiced country liquor in bottle/sachet, as this NIT is for supply of the country liquor and spiced liquor in

bottle and sachet to only the Jharkhand State Bravery Corporation and sale of such liquor to retailer is exception without destroying it's main

purpose of supply of said liquor to only the Corporation. The Corporation is the only body, who can sale the said liquor to the wholesaler and

retailer. The State has delegated power to make rules to the Board of Revenue by notification dated 15th January, 1919 and, therefore, the Board

of Revenue has power to law down the condition for grant of exclusive and special privilege u/s 22D and 22G. Therefore, prescribing of the tender

condition by the Board of Revenue was within jurisdiction of the Board of Revenue. The State Government also delegated power to the Board of

Revenue to prescribe a period for which such grant or exclusive and special privilege may be granted. Such delegation is not in conflict with rule

making power of the State Government u/s 89. Holding Section 22D and Section 22G absolutely independent and unconnected with Section 22

will result into holding that for the common subject of manufacturing and supplying wholesale or manufacturing and supplying wholesale country

liquor (including spiced country liquor), there will be three provisions, one u/s 22 and another u/s 22D and 3rd u/s 22G whereas wider term has

been used in Section 22 covering both the situations of grant of absolute privilege of manufacturing or supplying wholesale or of manufacturing and

supply wholesale and same is the provisions u/s 22D and 22G which also shows exclusive/special privilege for supply of country liquor u/s 22D

and exclusive/special privilege of manufacturing and or supplying wholesale in spiced country liquor.

24. Sub clause (I) (a) of Section 22 covers either of manufacturing or supplying wholesale country liquor in grant of exclusive privilege whereas

both are involved i.e., of manufacturing and supply wholesale under exclusive privilege then it falls under subclause (ii) of clause(a) of Section 22

and Section 22D is the provision for wholesale supply and 22G applies for privilege of manufacturing and/or wholesale supply. Therefore,

harmonious reading of Sections 22, 22D and 22G can be reading Section 22D and 22G as inseparable part of Section 22 for the purpose of

prescribing procedure and in view of the delegation of power to the Board of Revenue for prescribing " conditions and period" for grant of

exclusive privilege for manufacturing or supplying wholesale or of manufacturing and supply wholesale, the condition prescribed u/s 22 covers the

grant of exclusive/special privilege u/s 22D and 22G.

25. In view of the above, finding of the learned Single Judge that the Board of Revenue has no authority to fix terms and conditions and the period

of grant and it could be exercised only by the State Government in exercise of its rule making power u/s 89 cannot be sustained. The finding of the

learned Single Judge that Section 22D and Section 22G are being special provision for grant of privilege under both Sections, therefore, the

general provision of Section 22 cannot be applied, also cannot be sustained and admittedly no rules u/s 22D and 22G has been framed by the

State Government, who otherwise in addition to delegation of power to the Board of Revenue may have the power to prescribe terms and

conditions within a period of grant. Therefore, only condition available for grant is available in the notification dated 15th January, 1915, which is

not in conflict with any of other law. The NITs are for manufacture and supply of country liquor and spiced country liquor and mainly it supplied to

JSBCL which being only a wholesaler has right to sell the country liquor to the further wholesaler and the retailers. Except in exceptional

circumstances, country liquor and spiced country liquor can be sold by the grantee under the NIT in question, but will not change the main

character of the grant under the NIT, which is of supply of country liquor in wholesale to the JSBCL.

26. We are of the considered view that what should be the policy of the State in getting the maximum return of the present tender is exclusively in

the domain of the State Government or the rule making authority and the decision taken by the Government or such authority cannot be lightly

interfered. However, in present fact of the case, it appears that the reason for taking decision itself has not been taken into account of creation of

zone for the purpose of grant. In the impugned judgment, it has been observed that learned Advocate General has admitted that NIT grant of

exclusive privilege by creating zones of supply is in supersession of the earlier decision of the State Government, as approved by the Cabinet,

whereas, in fact, so was not the case of even the writ petitioners and, in fact, in the year 2005, to award exclusive privilege districtwise, decision

was also taken by the Board of Revenue, as approved by the Minister In-charge and not at the level of the Council of Minister (Cabinet). The

same procedure was followed for prescribing the terms and conditions in the present grant in question and these terms and conditions for grant

were framed by the Member Board of Revenue and was placed before the Minister Incharge, who accorded approval of such terms and

conditions. Therefore, finding of the learned Single Judge firstly proceeded on admission made by the counsel for the State which may be

erroneous admission and, that too, without there being pleading of the petitioners and now has been controverted by the State of affidavit and

hence the said finding recorded in the impugned judgment also cannot be sustained.

27. Whether the terms and conditions of the tender notice are arbitrary, create monopoly in favour of a chosen few is concerned? Though in the

impugned judgment, it has been recorded that State tried to justify the insertion of terms and conditions and statement to that effect has been

mentioned in paragraphs-15 to 18 of their counter affidavit. In the impugned judgment, it also has been noticed that the main reason assigned by

the State government is their past experience and further factual foundation of their past experience has been mentioned in para 17 of their counter

affidavit wherein they have also stated that the earlier grantee in the district of East Singhbhum and Dhanbad had failed to perform their obligations

and as such a decision was taken to club districts into single zone, so that none of the districts remained unsettled. In the impugned judgment,

exception to this argument was recorded that so far spiced country liquor is concerned, the said justification of the State Government is not

available to them as earlier also spiced country liquor was settled zone wise and no complaint has been brought on record with regard to the same

in their counter affidavit.

28. We are of the considered opinion that in the matter of prescribing terms and conditions of a tender in commercial transaction, normally the

decision of the grantor is required to be accepted, unless it is manifestly arbitrarily and has been incorporated to create monopoly in favour of

chosen few. Normally the terms of NIT are not open to judicial scrutiny. If there is some justification for condition which are challenged, then

justification in favour of the condition is required to be accepted, subject to, as held it should not be arbitrary and to create monopoly. Here, in

these cases, the fact could not have been ignored that if tenders are awarded districtwise then there is an unequal distribution of the prescribed

quota fixed for supply. If the same procedure which was tested in past would have been followed then, according to the state, that would lead to

fixation of license fee as high as Rs.24.00 lacs for one district and as low as Rs.34,000/for another district and, therefore, district like Dhanbad

which had the highest license fee and quota and license fee remained unsettled in the last tender as intending tenderers opted for district having a

lower quota and has lesser license fee and thus effecting the State exchequer. The authority laying down the condition thought it proper that by

creating five zones, having equivalent amount of license fee and intending applicants shall have no option but to choose one or other zones as all

zones are equally placed in terms of the quota and the license fee. Though, in the impugned judgment, this fact was taken into account that tender in

the past except for the year 200508 were invited for the grant of special privilege zone wise and after experiment with an option to grant exclusive

privilege districtwise in the interest of revenue, a decision was taken to award exclusive privilege zone wise and hence the said decision appears to

have been taken in the interest of revenue and this cannot create monopoly in favour of few tenderers. It is not clear how by this mode, any

monopoly can be created in favour of only a few tenderers when these terms and conditions applies to all the bidders. Therefore, finding of the

learned Single Judge that material change made in process of grant by creating five zones for country liquor on wholesale basis has no object

sought to be achieved, cannot be sustained nor the decision of the authority can be declared unreasonable, arbitrary and violative of Article 14 of

the Constitution of India. In fact, from the judgment it is not clear on what count the terms and conditions of the NIT may tend to arm the

respondents with ample opportunity of arbitrariness, unbridled power to authorities. In view of the above reasons, these Letters Patent Appeals

are allowed. The judgment and order dated 30th August, 2011 passed by the learned Single Judge in W.P.(C) Nos.1400, 1909 & 2003 of 2011

is set aside.

The writ petitions of the writ petitioners are dismissed with costs.