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High Court Of Kerala

Case No: W.A. No"s. 1300, 1308, 1310 etc. of 1993, 18, 33, 59 and 252 of 1994 and O.P. No"s. 11853, 11923 etc. of 1993

State of Kerala — APPELLANT

Vs

Ajit Kumar — RESPONDENT

Date of Decision: March 30, 1994

Acts Referred:

- Constitution of India, 1950 - Article 14
- Kerala Abkari Act, 1077 - Section 10, 11, 17, 18, 18(3)
- Kerala Abkari Shops (Disposal in Auction) (Amendment) Rules, 1993 - Rule 8, 8(1)
- Kerala Abkari Shops (Disposal in Auction) Rules, 1974 - Rule 5A(3), 6(28), 8, 8(1), 8(11)

Hon'ble Judges: M. Jagannadha Rao, C.J; T.L. Viswanatha Iyer, J; K.G. Balakrishnan, J

Bench: Full Bench

Advocate: Kapil Sibil and V.K. Beeran, A.A.G, for the Appellant; P.C. Chacko O.V. Radhakrishnan and K. Radhamoney Amma, for the Respondent

Final Decision: Allowed

Judgement

T.L. Viswanatha Iyer, J.

The main question arising for consideration in the writ appeals is the validity or otherwise of the levy and collection made under Rule 8(1) of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 (to which we shall hereinafter refer as the Disposal in Auction Rules), as amended in March 1993, on the designated quantum of rectified spirit permitted to be imported from outside the State by licensees of the privilege of vending arrack in independent shops in the State. The learned Single Judge held that the levy was void. He allowed the writ petitions filed by the abkari contractors, and directed refund of the duty so levied and collected. The State and its officers in the Commissionerate of Excise are in appeal before us.

2. The law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor in the State is the Abkari Act 1 of 1077 M.E. (The Act, in the further discussion), which was in force in the erstwhile Cochin area of the State and was extended to the whole of Kerala with effect from May 11, 1967 by the Cochin Abkari (Extension and Amendment) Act, 10 of 1967, and the various rules and notifications framed or issued thereunder. Section 6 of the Act provides that no liquor shall be imported unless permission of the Government or any officer authorised by the Government in this behalf is obtained for the importation and unless the duties, taxes, fees and such other sums as are due to the Government under the Act in respect of such liquor, have been paid. The permission so granted for import shall be subject to such conditions and restrictions as may be specified by the Government by notification in the gazette. Section 10 mandates that no liquor, exceeding the quantity notified in the gazette, shall be transported except under a permit issued under the provisions of Section 11. Section 17 empowers Government to levy a duty of excise inter alia on all liquor permitted to be imported u/s 6. Section 18 provides the procedure for imposition of the duty of excise, which may be in the shape of import, export or transport duties in such manner as the Government may direct. Sub-section (3) provides that the said duty of excise may be levied at such rates as may be fixed by the Government from time to time by notification in the gazette, but not exceeding the rates specified in the subsection, which in the case of liquors (Indian made) is Rs. 20/- per proof litre. The rate of duty for Indian made rectified spirit is Rs. 15.50/- per proof litre, with effect from April 1, 1966 as per notification issued by Government in the year 1961, as amended in 1966. Section 18A which was introduced by Presidential Act I of 1964 relates to the grant of exclusive or other privilege for the manufacture or sale of liquor. It makes it lawful for the Government to grant to any person or persons on such conditions, and for such period as they deem fit, the exclusive or other privilege, among Ors., of selling by retail any liquor within any local area on his or their payment to the Government of an amount as, rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or any other method as may be determined by the Government, from time to time, and may be collected to the exclusion of, or in addition to, the duty leviable under Sections 17 and 18. Section 29 empowers Government to make rules for the purpose of carrying out the provisions of the Act. The Disposal in Auction Rules have been framed in exercise of the powers under sections 18A and 29 of the Act.

3. Till and inclusive of the Abkari year 1992-93, (which so far as this State is concerned is the financial year), the State was having the monopoly in the matter of supply of arrack. The licensees of the privilege of vending arrack had to get their supply only through the State owned or controlled distilleries. They were not allowed to import any arrack or rectified spirit from outside. But a drastic change was brought about in the Abkari year 1993-94 commencing on April 1, 1993 by which the State withdrew from its obligation to supply arrack to the licensees, and the policy was liberalised to permit import of rectified spirit from outside by the licensees themselves. The policy as enunciated in G.O. (Ms.) No. 18/93/TD dated February 8, 1993 effected the following modifications in the abkari

policy followed previously:

(a) Abkari shops were to be auctioned group-wise,

(b) In the matter of supply of rectified spirit, the existing system was to be discontinued, instead permits will be given to the-contractors (licensees) to bring "a designated quantum of rectified spirit determined in relation to the auction amount".

(c) The Board of Revenue was to ensure, before issue of permits, that adequate arrangements are made for the timely collection, of duties, taxes, etc.

(d) Fool proof arrangements were to be made for enforcing quality and no release of arrack was to be authorised till the contractor satisfied the department about the required quality.

4. The change in the policy appears to have been dictated by considerations of expediency and the need to plug the escape of revenue by clandestine purchases by the abkari contractors. The affidavits filed on behalf of the Appellants have explained in detail the rationale behind the change in policy. It is pointed out that the supply of arrack by the three public sector distilleries in the State during 1992-93 was 15872789 bulk litres against the quota of 1.02 crores bulk litres fixed for the year. The State obtained a revenue of Rs. 7,93,63,945/- as excise duty on the arrack supplied by the three public sector distilleries in 1992-93. The actual demand for arrack in the State was several times the quota supplied, so that it may not be wrong to presume that the contractors were indulging in clandestine import which affected the revenues of the State. It was to overcome this situation that the rules were amended in March 1993 with effect from 1st April 1993 by which the State gave up its obligation to supply arrack to the contractors, and on the other hand, permitted free import of rectified spirit for sale after conversion into arrack. A minimum designated quantum of rectified spirit to be purchased/imported was prescribed for each group of shops. The designated quantum was fixed after an assessment was made of the total quantum of use of arrack in the State, which was five times the quota given in 1992-93. Based on this assessment, the designated quantum was fixed at 160 litres of rectified spirit per month for a rental of Rs. one lakh in 1992-93. The total designated quantum for 1993-94 was thus 24055680 bulk litres of rectified spirit. Since the intention was to augment the income of the State, which was otherwise being lost, payment of excise duty on the designated quantum was made compulsory, to be paid in advance. The State thus expected its revenue under, this head to go upto about Rs. sixty crores in 1993-94 compared to Rs. 7.94/- crores which it had collected in the previous year 1992-93. Under this revised policy, the rental for the arrack shops actually increased to Rs. 180.37/- crores in 1993-94 compared to the total collection of Rs. 123 10 crores in the year 1992-93.

5. The change in the abkari policy was implemented by making amendments to Rule 8 of the Disposal in Auction Rules, firstly on March 4, 1993 and again on March 31, 1993. We

shall just refer to the amendment brought about on 4th March though it is only the rule with the changes made on March 31 that is relevant, as that was the one actually in force on April 1, 1993. Rule 8(1) was amended on 4th March providing that before the starting of the auction for each group of arrack shops, the auctioning Officer shall announce in the auction hall that permits will be issued to the contractors to import/purchase a designated quantum of duty paid rectified spirit. The contractors will be given no objection certificates for import/transport permits based on their requests by the concerned Assistant Excise Commissioner. The contractors shall remit the excise duty on the designated quantum of rectified spirit in each month. The licensees shall purchase/import duty paid rectified spirit either from the distilleries in the State or from the distilleries in other States. But in issuing, permits, preference will be given to the contractors to lift whatever quantity that can be supplied by the public sector distilleries in the State. A new Sub-rule (6) was substituted in place of the old one providing for the issue of special licences to contractors for opening godown to store duty paid rectified spirit for manufacturing arrack and for storage of manufactured arrack on payment of the amounts of annual rental prescribed. This sub-rule further provided that the licensees shall purchase the duty paid rectified spirit from the distilleries in the State or import it from distilleries in other States. The newly substituted Sub-rule (11) prescribed the procedure for remittance of the duty on the quantity of rectified spirit which any licensee desired to purchase/import. The licensee had to produce before the Treasury Officer a challan signed by him or his authorised agent and countersigned by the Excise Inspector for the amount of the duty due to Government, as may be prescribed from time to time, on the quantity he desired to purchase/import. The receipt obtained from the Treasury for payment of the duty was to be produced before the permit issuing authority to obtain the required permit.

6. Sub-rule (1) was further amended on March 31, 1993, by which it was stipulated that if the excise duty on the designated quantity of rectified spirit was not remitted on or before the 10th day of each month, the same may be remitted on or before 25th day of that month, with 18 percent interest on the excise duty due. Failure of the licensee to pay the amount of duty, and interest, under this clause shall entail him the consequences similar to those prescribed in Sub-rule (28) of Rule 6 for failure to pay the kist due from him. This was the substantial change made on March 31, 1993. The rule then proceeded to state that the licensee shall purchase/import duty paid rectified spirit from the distilleries in the State or from the distilleries in other States with priority for supply from public sector distilleries within the State to the extent they can supply rectified spirit or arrack.

7. Rule 8(1) as amended on March 31, 1993 runs thus:

(1) Before starting the auction in each group of arrack shops, the auctioning officer shall announce in the auction hall that permits will be issued to the contractors to import/purchase a designated quantum of duty paid Rectified Spirit. The contractors will be given No Objection Certificate and import/transport permits based on their requests, by the Assistant Excise Commissioners concerned. The contractors shall remit the Excise Duty on the designated quantum of Rectified Spirit in each month. If the Excise Duty on

the designated quantum of Rectified Spirit is not remitted on or before the 10th day of each month, the same may be remitted on or before the 25th day of that month with 18 per cent interest on the Excise Duty due. Failure on the part of the licensee to pay up the amount of Excise Duty and interest, if any, levied upon him under this clause shall entail him the consequences similar to those prescribed in Sub-rule (28) of Rule 6 for failure to pay the kist due from him. The licensee shall purchase/import the Duty paid Rectified Spirit from the Distilleries in the State or from the Distilleries in other States. However, in issuing permits priority will be given to the Public Sector Distilleries to supply whatever quantity of Rectified Spirit or arrack they can supply:

Provided that if the strength of Rectified Spirit purchased/imported if found lower than the prescribed strength on analysis by the Chemical Examiner, the licensee will not be entitled for refund or abatement of the Excise duty already remitted. However, if "the strength is found higher than the prescribed strength the licensee is liable to remit the differential duty on the Rectified Spirit at the tariff rate before the release of the spirit.

8. According to the Contractors, the effect of the aforesaid amendments to Rule 8 was to compel them to pay duty on the designated quantum of rectified spirit, allowed to each, irrespective of whether the rectified spirit was imported or not. The writ petitions were occasioned by the demand made by the Appellants for payment of excise duty on the designated quantum of rectified spirit. The licensees who had executed agreements pursuant to the confirmation of the auctions in their favour had been issued permits for the import of rectified spirit from other States as under Rule 8(1) of the Disposal in Auction Rules, but according to them, they could not actually import the rectified spirit for various reasons, like scarcity of rectified spirit in other States, restrictions imposed by those States and the like. They challenged the demand for duty on the designated quantum on various grounds, but we may even at the outset state that none of the licensees has any case that they had been denied no objection certificates or permits for the import of the designated quantum of rectified spirit. Their grievance is that they were not able to procure supplies from outside but that nevertheless they have to pay the duty on the designated quantum.

9. Apart from the above, there is one more point of controversy between the parties, relating to the increase in the excise duty on arrack from Rs. 5/- to Rs. 10/- per bulk litre, by a notification issued on March 29, 1993 as per G.O. (P) No. 53/83/TD. The learned Single Judge held that the increase was arbitrary and unfair as, according to him, it was not "necessary" as postulated by Sub-rule (9) of Rule 8 of the Disposal m Auction Rules which reads:

The Government may also at any time during the currency of the contract, if found necessary, revise the rate of duty.

This is another point which arises for consideration before us.

10. The contractors (licensees) challenged the levy of excise duty on the designated quantum of rectified spirit not actually imported as ultra vires Sections 17 and 18 of the Act; rectified spirit was not fit for human consumption and therefore the levy was outside the purview of Entry 51 of List II to the Seventh Schedule to the Constitution; and that no rectified spirit was produced within the State and therefore the levy of countervailing duty on imported rectified spirit was impermissible in law. The learned Single Judge upheld these contentions and held that the impugned levy which is excise duty on undrawn quantum of liquor was illegal, but that the levy on the quantity actually drawn by the contractors was valid; that the levy was not authorised by Sections 17 and" 18 of the Act; that the levy of countervailing duty on imported rectified spirit was illegal; and that levy of excise duty on rectified spirit was without legislative competence. The learned Single Judge also held that the increase in excise duty of arrack from Rs. 5/- to Rs. 10/- per bulk litre effective from 1st April 1993 was arbitrary and illegal. The writ petitions were accordingly allowed and the Respondents directed to refund the excise duty so levied and collected.

11. In arriving at these conclusions, the Learned Judge held in paragraph 13 of his judgment that the State was the only source of supply of rectified spirit to the contractors, that it has failed to ensure supply of the spirit to the contractors despite collecting excise duty on the designated quantum, and that the obligation of the State constituted the underpinning of the contract, to adopt the words of the Supreme Court in State of Rajasthan and Others Vs. Nandlal and Others, . On this premise, the learned Judge found substance in the plea of the contractors that they were 4 not supplied rectified spirit on the permits for the months of April, May and June, 1993, but were nevertheless compelled to pay excise duty thereon, which, according to him, was not legal. We have already mentioned that the contractors had no case-and it was so stated before us-that the State had defaulted in issuing no objection certificates or permits to them for import of rectified spirit from other States as and when applied for. On the other hand, it was the admitted case that they had been issued no objection certificates and permits as and when applied for, and that the problem was only that they could not procure the requisite quantity in the months of April to July, 1993. It was also admitted before us that rectified spirit was freely available for import from August, 1993.

12. We may at once mention that the learned Single Judge"s premise that there was an obligation on the part of the State to supply rectified spirit to the contractors is not supported by the Abkari policy for 1993-94 and is, in fact, contrary to it. It is true that till and inclusive of the year 1992-93, it was a State monopoly and the State was under an obligation to supply" the allotted quota of arrack or rectified spirit to the contractors. But the State was unable to meet the requirements in full, causing substantial loss of revenue because of the large scale clandestine dealings indulged in by the contractors. The Abkari policy was therefore drastically changed on 8th February 1993, for the year 1993-94 with consequent amendments to the Disposal in Auction Rules, by which the State did not undertake any obligation for the supply of rectified spirit, and instead left it to

the contractors themselves to import the designated quantum of rectified spirit. The State fixed - the quantum which could be thus imported with reference to the kist payable for the year 1992-93 and the contractors were called upon to pay the excise duty on that quantum permitted to be imported. This was evidently done to augment the revenues of the State. The provisions of Rule 8 as amended on 4th and 31st March, 1993 are clear that the State did not take upon itself any obligation to supply rectified spirit to the contractors, and that it limited its obligation to the issue of no objection certificates and permits for import of the designated quantum. This position is emphatically reiterated in Clause 14 of the auction notice issued under Rule 5(3)(A) of the Disposal in Auction Rules which reads:

(There is no obligation on Government to supply rectified spirit to the contractors-true translation).

The contractors who have participated in the auction pursuant to this auction notice did so with full notice that the State was not undertaking any obligation to supply them any rectified spirit. The position is further affirmed in the guidelines, issued to the officers which required the auctioning officer to announce before the auction that there was no obligation at all on the part of the Government to supply the rectified spirit. The State''s obligation was thus only to issue No Objection Certificates and permits to import the designated quantum, and no more. Admittedly there was no default on the part of the State in performing this obligation. Therefore, the basic premise on which the learned Judge has proceeded that there was default on the part of the State in supplying, rectified spirit to the contractors is erroneous and unsustainable.

13. The complaint of the contractors as voiced before us was only that they were not able to procure the requisite quantity of rectified spirit from outside the State upto July, 1993. This does not appear to be totally correct going by the statement which the State has furnished, of the monthwar quantity of rectified spirit lifted by the contractors. Further this complaint is misplaced, and irrelevant in the decision of the case. The contractors have entered into the contracts with open eyes, full well aware as to what are their rights, and as to what are their liabilities. There was no compulsion on them from any source, much less the government agencies to participate in the auctions or to bid at any amounts. On the other hand, the Abkari policy had been formulated and published as early as on February 8, 1993, long before the auctions were held. The first amendment to the rules was on March 4, 1993, again long, before the auctions took place between 15th and 17th of March, 1993. The contractors therefore knew very well, when they participated in the auctions, that they had to make their own arrangements for the import of rectified spirit, and that they cannot visit the State with any liability in that regard, even assuming that there is any truth in their contention that they were unable to procure the requisite quantity from outside.

14. We may mention here that according to the State there was no such scarcity or difficulty in the import of rectified spirit from outside. The statement referred to earlier

shows that considerable quantities had been import by various contractors during the year. This lends credence to the case put forward before us by Sri Kapil Sibal, Senior Counsel appearing for the State, that the contractors were never serious about importing duty paid rectified spirit from outside and were only anxious to procure, spirit clandestinely without payment of duty. He pointed out in particular that the contractors were not anxious even to lift the available quantities of arrack from the public sector distilleries in the State, for which the duty per bulk litre worked" out to Rs. 22.13/-, while the duty on the imported liquor came to Rs. 25.73/-, netting a gain of Rs. 3.60/- per litre to the contractor. All this is pointed out only to show that there was no genuine difficulty in obtaining liquor from outside, but that the contractors were not anxious to avail of such liquor for their own reasons.

15. But this factor does not assume any importance in the absence of any obligation on the State to supply rectified spirit to the contractors, their obligation being limited to the issue of No objection Certificates and permits for import of the designated quantum of rectified spirit, an obligation on which the State did not commit any default.

16. The crucial question for consideration however is what is the true nature of the amount collected from the contractors under Rule 8(1) of the Disposal in Auction Rules. A conspectus of the course of events and of the nature of the contracts leads to the conclusion that what was collected by the State under Rule 8(1) was a consideration for parting with the privilege of vending arrack and for according the permission to import rectified spirit for the purpose of manufacturing arrack. It is now well established having regard to the long line of decisions of the Supreme Court culminating in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , that the State under its regulatory powers has the right to prohibit absolutely every form of activity in relation to intoxicants its manufacture, storage, export, import, sale and possession, and that in all these manifestations these rights are vested in the State. The State is entitled to sell this exclusive privilege of its, subject to such conditions and restrictions as it may impose for the purpose. It is accordingly that auctions are held for granting the privilege of vending liquor. Section 18A of the Act makes it lawful for the Government to grant to any person or persons on such conditions and for such period as they may deem fit the exclusive or other privilege of selling liquor by retail within any local area on payment to Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be fixed by auction, negotiation or by any other method as may be determined by the Government from time to time and may be collected to the exclusion of, or in addition to the duty or tax leviable under Sections 17 and 18. This section is, in fact, only a recognition of the right which otherwise vests in the State of farming out the privilege of vending liquor, which is exclusively its own. It will be noted that the amount that may be collected u/s 18A for granting the privilege may be exclusive of, or in addition to, the duties or tax payable under Sections 17 and 18 of the Act.

17. So far as the Abkari year 1993-94 is concerned Government has granted two rights, one the privilege of vending arrack and the other, the privilege of procuring the necessary

quantity of arrack from outside the State for sale, which again is a privilege of the Government, (vide Section 6). What the Government did by the Abkari policy of 1993-94 was to grant both these privileges for consideration, which consisted of the rental as fixed in the auction, and the amount which was described as excise duty on the designated quantum of rectified spirit allowed to be imported. The totality of these amounts was the consideration for the grant of the two rights of vending arrack as well as of the right to import the requisite quantity of spirit for sale as arrack. The consideration is indivisible and an integrated one for the grant of both these privileges. This is clear from Rule 8(1) as amended on 4th March and 31st March, 1993. By the first amendment it was stated that the licensee shall purchase/import the duty paid rectified spirit from distilleries in the State or from distilleries in other States, and that they shall remit the excise duty on the designated quantum in each month. Sub-rule (6) of Rule 8 further emphasised the position when it stated that the licensee shall purchase the duty paid rectified spirit from the distilleries in the State or from the distilleries in other States. The amendment of 31st March, 1993 to Sub-rule (1) made the position further clear when it insisted that the contractors shall remit the excise duty on the designated quantum of rectified spirit in each month, granting time till the 10th day of each month for such payment. It was however permitted to be remitted before the 25th day of the month, with 18 percent interest and if default was committed, the contractors will be dealt with under Rule 6(28) in the same manner as a defaulter in the payment of kist. The amount payable is actually crystallised even before the auction as the designated quantum is known and fixed with reference to the kist paid for 1992-93. The liability arises on confirmation of the auction, though as in the case of the kist, the contractor is permitted to pay it in instalments every month. It was a term of the auction itself that the excise duty on the designated quantum had to be paid, the only obligation on the part of the State being to issue the no objection certificates and permits. The contractors have accordingly undertaken this obligation to pay the excise duty on the designated quantum before the 10th day of every month, in the agreements which they have executed pursuant to the acceptance of their bids in the auctions (vide Annexure B-1 and D-1 in the paper book in W.A. No. 1335 of 1993). Having obtained the privilege after undertaking this obligation it is not open for the contractors to resile from their agreements and refuse to abide by their obligations.

18. The privilege conferred as stated above consisted of two parts in the current year, namely one of vending and the other the additional right for the licensee to import. The State could not have intended to permit import of large quantities of rectified spirit into the State without any corresponding benefit to itself. No doubt, the amount is described as excise duty on rectified spirit, but it is in reality part of the consideration for transfer of the privileges to the contractor. It is not excise duty as such, but only a measure of the consideration payable by the contractors for grant of the privileges. What the State was interested in was augmentation of its revenues, which otherwise was being lost by the clandestine dealings of the contractors.

19. At this juncture, we may also note that no sale of rectified spirit as such was intended or permitted, but only sale of the arrack manufactured therefrom. This is evident from the stringent quality control measures provided for in the amended rules by which the contractors were required to store the imported rectified spirit and the arrack manufactured therefrom in godowns licenced for the purpose, for the checking of the rectified spirit by the Chemical Examiner at the time of import, and the further checking of the arrack manufactured, before it is released for sale. The obvious intention was that the goods should reach the market only as arrack. The levy was styled as excise duty on rectified spirit only for purposes of convenience and facility of collection in advance at the time the no objection certificates and permits are issued for import.

20. The situation presented in these cases is not akin to those in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , State of Madhya Pradesh v. Firm Cappulal A.I.R.1976 S.C. 639 or Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, , which were relied on by the learned Single Judge to hold that no excise duty could be levied on, what he termed as undrawn quantum of liquor. In all these cases the position was that the State had a monopoly for the supply of liquor and the contractors were very much dependent on the State for the availability of liquor for being vended by them. In Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., Section 25 of the Madhya Pradesh Excise Act provided for the levy of excise duty or a countervailing duty on excisable articles imported, exported, transported or manufactured. A notification issued by the State Government on January 7, 1960 fixed a minimum quantity of liquor to be lifted by the licensees with the liability to make good the deficit of the monthly average of the minimum duty before the 10th of the following month. The Supreme Court held that the levy of duty on liquor which the contractors failed to lift, imposed by the notification, did not fall within the scope of Section 25 and was therefore beyond the powers of the State Government (vide paragraphs 17 and 18). This case rested on the principle that no tax can be imposed by any bye-law, rule or regulation unless the statute specially authorised the imposition. State of Madhya Pradesh Vs. Firm Gappulal and Others, followed Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., . Incidentally the Court referred to the decisions in Pannalal v. State of Rajasthan AIR 1975 S.C. 2008 and distinguished it as a case where a lump sum had been agreed to be paid in the licences, which was not to be equated with the issue price as under the Madhya Pradesh auction conditions dealt with in State of Madhya Pradesh Vs. Firm Gappulal and Others, .

In the third case of Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, , the Court struck down the demand for excise duty on unlifted quantity disguised as compensation, as it was not authorised by the provisions of the U.P. Excise Act governing the matter. There again the licensee had to lift a minimum quantity of liquor and sell the same, with liability to pay compensation equal to the amount of excise duty, on the unlifted quantity. It was this obligation that was struck down as not authorised by the Act, though it was styled as compensation.

21. M/s. Lilasons Breweries (Pvt.) Ltd. and another Vs. State of Madhya Pradesh and others, , is again a case where the levy in question, imposed by a rule, was ultra vires the provisions of the Madhya Pradesh Excise Act.

22. The cases on hand are akin to that dealt with by the Supreme Court in State of Haryana v. Jage Ram AIR 1980 S.C. 2010. In that case, the auction was in respect of country liquor. The position arising under the rules, as summarised by the High Court was as under:

The auction is on the basis of the quota that has to be lifted for each particular shop. In order to convert it in terms of money, each proof litre bid is multiplied by Rs. 17.60/- and that is how, the fee for a particular shop is fixed. The licensee is required to deposit one-twenty-fourth of the amount so arrived at as security. He is then to lift the quota specified for each month in the rules and if he fails to do so, the amount short lifted in terms of the licence fee for that month is deducted from his security amount and he is required to make good the deficiency in the security. He may not sell even a litre of liquor; but whatever quota of liquor he has bid for, the money value of that quota by multiplying it by Rs. 17.60/- per litre has to be paid by him. There is no escape from this.

The cancellation of the licence for failure to pay the amount due as above was challenged on the ground that the licence fee charged on the licensees was in reality "still-head" duty or excise duty and the rule requiring payment of such duty, even when no quota of liquor was actually lifted by the licensees was unconstitutional for there can be no liability to pay such duty unless the liquor was lifted by the licensees. In effect the contention was that the taxable event had not occurred for the levy to attach itself. Naturally, reliance was placed on Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , State of Madhya Pradesh Vs. Firm Gappulal and Others, and Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, . These decisions were distinguished on the ground that what the licensees were called upon to pay was not excise duty on undrawn liquor but the price of the privilege for which they offered their bid at the auction of the vend which they wanted to conduct. Chandrachud, C.J. explained the position thus in paragraph 19:

The Respondents agreed to pay a certain sum under the terms of the auction and the rules only prescribe a convenient mode whereby their liability was spread over the entire year by splitting it up into fortnightly instalments. The rules might as well have provided for payment of a lump sum and the very issuance of the licence could have been made to depend on the payment of such sum. If it could not be argued in that event that the lump sum payment represented excise duty, it cannot be so argued in the present event merely because the quota for which the Respondents gave their bid is required to be multiplied by a certain figure per proof litre and further because the Respondents were given the facility of paying the amount by instalments while lifting the quota from time to time. What the Respondents agreed to pay was the price of a privilege which the State parted with in their favour. They cannot, therefore, avoid their liability by contending that the, payment

which they were called upon to make is truly in the nature of excise duty and that no such duty can be Imposed on liquor not lifted or purchased by them.

The above decision is, therefore, on all fours and amount remitted as "still-head" duty was treated as consideration and not as duty. The Supreme Court held thus inspite of the concession of the Advocate General in the High Court that it was "duty". Their Lordships observed that the Court had to consider the true nature of the item in law and ignore the concession of Counsel as incorrect.

23. Precisely the same view was taken in State of Andhra Pradesh Vs. Y. Prabhakara Reddy, , where the question involved was Whether the State was entitled to claim from the excise contractors who had failed to lift the minimum guaranteed quantity of liquor, the amount stated to represent the excise duty component in the issue price of the liquor relating to the unlifted quantity. After referring to the relevant rules, Chinnappa Reddy speaking for the Court observed:

....the picture which emerges is that the privilege of selling liquor which includes the lease of the shop for an area and the licence to sell liquor therein may be granted by the State by public auction subject to (1) payment of rental being the highest bid at the auction, (It is to be noted here that rental is the rent payable in consideration of grant of lease for the sale of liquor but it is not the sole or exclusive consideration for the lease), (2) the requirement that the licensee shall purchase arrack at the issue price, and (3) the further requirement that the licensee shall purchase a minimum guaranteed quantity of arrack, which he has to make good in case of short fall. The consideration for the grant of the privilege to sell liquor is not merely the rental to be paid by the lessee but also the issue price of the arrack supplied or treated as supplied in case of short fall, which is also to be paid by the lessee-licensee. There Is no question of the lessee-licensee having to pay the excise duty though it may be that the issue price is arrived at after taking into account the excise duty payable.

And eventually held in paragraph 16 that the amount payable by the contractors was not excise duty on undrawn liquor, but was part of the price which they had agreed to pay for the grant of the privilege to sell liquor. See also the observations of Jeevan Reddy in paragraph 5 of the decision in State of Rajasthan and Others Vs. Nandlal and Others, .

24. The position in the cases before us is the same. What the contractors are required to pay is the consideration payable to the State for being granted the twin privileges which we have referred to earlier, and not excise duty on unimported rectified spirit. The contractors are therefore bound to pay the amount which, in its measure is the excise duty payable on the designated quantum of rectified spirit under the terms of Rule 8, and as undertaken in the agreements executed by them. As observed by the Supreme Court in Jage Ram AIR 1980 S.C. 2018, with reference to Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , the contractors who offered their bids at the auctions with full knowledge of the terms and conditions attaching thereto, cannot be

permitted to wriggle out of the contractual obligations arising out of acceptance of their bids.

25. Considerable stress was made by the contractors on the fact that the State and its officers had described the amount demanded as excise duty on rectified spirit. As already noted we cannot attach much importance to the terminology, when in effect and in essence the amount demanded was only part of the consideration for parting with the twin privileges of Government as above mentioned by us, the reference to excise duty being only as a measure of the amount payable.

26. Counsel for the contractors-Sri P.C. Chacko in particular - referred to various differences in the incidence of rental and excise duty. They pointed out that while rental was payable in ten equal instalments, excise duty was payable in twelve monthly instalments. The deposit of 30 percent on confirmation of the auction was only with reference to the rental. The excise duty carries interest from the 10th of every month at 18 percent per annum. It was also stated that the question of damages, if any, payable on reauction will be reckoned with reference to the rental amount only without taking into account the excise duty.

27. It is true that there are such distinguishing factors between the rental payable under the bid at the auctions and the excise duty which is payable under Rule 8(1). The existence of these distinguishing features will not however detract from their being the price payable by the contractors for the transfer of the twin privileges of vending arrack and of importing rectified spirit. The payment of the amount under Rule 8(1) arises because of the additional privilege conferred of the right to import the designated quantum of rectified spirit. Distinctions between rental and excise duty, though they may exist, do not affect the position that the amount termed excise duty also forms part of the consideration for the privileges conferred on the contractors under the Abkari policy of this year.

28. In this view of the matter, the findings entered by the learned Single Judge have to be set aside. This is sufficient to entail dismissal of the various writ petitions. But we shall briefly touch upon some of the other points which have been thrown up in the course of the arguments.

29. Sri O.V. Radhakrishnan, appearing for some of the contractors, had a plea that Government had made a fraudulent misrepresentation that sufficient quantity of rectified spirit will be available in other States for import into Kerala, pursuant to permits issued to the contractors. This contention only deserves to be stated and rejected. We are unable to find any such representation anywhere, either in the Abkari policy, or in Rule 8 or at the announcements made at the time of the auctions. On the other hand the representation was other-vise, that Government did not undertake any responsibility for supplying rectified spirit to the contractors, and that they were leaving the contractors to fend for themselves to import the quantum designated. There was no representation, much less

any fraudulent misrepresentation, on which the contractors could found a cause of action.

30. There was a faint allegation of coercion within the auction hall, made by Sri P.C. Chacko, for another set of contractors, which stands in the realm of mere allegation without anything more. Similar is the plea of legitimate expectation which was put forward. Here again we do not find any substance in the plea. The contractors bid at the auctions, full well aware of the risks and the chances. They are businessmen, who participated in the auctions, after the Government had made their position very clear in the auction notice and in the Abkari policy. There was no scope for any expectations to be roused. The plea is a very weak one, and we do not find anything on the facts of these cases which bring them within the parameters of the decision in Union of India and others Vs. Hindustan Development Corpn. and others, . There was a further plea that the State should not take advantage of such contracts, which according to the contractors, are unfair and unreasonable. Reference was made to the decision of Ramaswamy, J. (then of the Andhra Pradesh High Court) in Raghunadha Rao v. State of A.P. 1988 (1) A.L.T. 461, where the learned Judge held that the conditions/covenants in a Government contract must satisfy the rigour of Article 14. But we need not dwell at length on this point, for the reason that the Supreme Court had occasion recently to deal with the question of fairness and reasonableness in a Government contract in the decision dated February 22, 1984 in Assistant Excise Commissioner v. Isaac Peter C.A. No. 3442 of 1984 and Ors., where Jeevan Reddy, J. speaking for the Court observed:

We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned Counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by (statutory provisions, i.e., where it is a statutory contract or rather more so. It is one thing to say that a contract-every contract must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State....We are, therefore, of the opinion that in case or contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State, in such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts.

We overrule this plea of the contractors.

31. The learned Judge has struck down the enhancement of the excise duty from Rs. 5/- to Rs. 10/- per bulk litre of arrack made on 29th March 1993. He has relied on Rule 8(9) of the Disposal in Auction Rules which permitted the Government to revise the rate of duty at any time during the currency of the contract if found necessary. Government justified the increase pointing out that in respect of imported rectified spirit, the duty payable on one litre of arrack 75ï¿½ proof worked out to Rs. 25.73/- whereas even the enhancement to Rs. 10/- imposed only a duty of Rs. 22.13/-. In other words, the contention was that this was necessary to balance the duty on imported rectified spirit. The learned Judge however held that Rule 8(9) enabled Government to enhance excise duty only if found necessary, and according to him there was no necessity for the enhancement. We are unable to accept this line of reasoning. The question of necessity stands explained earlier. Even apart from that, the rate of duty or tax leviable on a particular item is essentially a matter of expediency and policy of the Government, and so long as it is not violative of any fundamental or other constitutional right, the levy at a particular rate is not open to challenge. We do not find anything arbitrary in the enhancement, on the facts and circumstances prevailing as explained earlier. Further Rule 8(9) on which the learned Judge relied has no application here. What it interdicts is revision of the duty during the currency of the contract. It speaks of revision during the currency of the contract. The currency of the contract in this, case was from 1st April 1993. The enhancement was made on March 29, 1993. The Government is not therefore precluded by Rule 8(9) from revising the duty, nor is it bound to show necessity for the revision. The learned Judge was, for all these reasons, in error in holding that the increase in the rate of duty was arbitrary and illegal.

32. The learned Judge had held that the levy of excise duty on rectified spirit is without legislative competence. This question does not really arise for consideration in the view we have already taken about the nature of the amount payable by the contractors. Sri Kapil Sibal for the Appellants submitted that the levy is perfectly justified under Entry 51 of List II to the Seventh Schedule to the Constitution, as rectified spirit becomes fit for human consumption by the mere addition of the requisite quantity of water. We are, however bound by what the Supreme Court has held in Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, , though the case related only to industrial alcohol. The Court held that the expression "alcoholic liquor for human consumption" meant that liquor which was consumable as it is in the sense of being capable of being taken by human beings as such as beverage or drinks. Rectified spirit as such is not consumable by human beings, though it becomes fit for human consumption by the addition of sufficient quantity of water. We may note here that the High Court of Rajasthan had in the decision dated June 27, 1989 in Hindustan Copper Ltd. v. State of Rajasthan Civil Writ Petition No. 1669 of 1984 and Ors., held, after referring to the earlier decisions of that Court in J.K. Synthetics Ltd. v. State of Rajasthan 1976 R.L.W. 338, Sona Distilleries Ltd. v. Excise Commissioner 1984 R.L.R. 773, of the Allahabad High Court in D.C. and G. M. Company v. Excise Commissioner 1973 A:L:J: 629, Mohan Meakin Breweries Ltd. v. State of U.P. 1977 T.L.R. 130, Ajudhia Distillery v. State of U.P.

1980 T.L.R. 2262. and of the High Court of Madhya Pradesh in Suneeta Laboratories v. State of M.P. 1972 T:L:R: 2052, that no excise duty is leviable on rectified spirit as such as it is not meant for human consumption.

33. We therefore affirm the view of the learned Judge that levy of excise duty on rectified spirit as such is beyond the competence of the State Legislature. Equally, the State is incompetent to levy any countervailing duty on imported rectified spirit in view of the decision in Kalyani Stores v. State of Orissa AIR 1966 S.C. 1636. But these findings are not of any assistance to the contractors, as we have held that what is demanded is not excise duty on rectified spirit but a lump sum amount of consideration for the grant of the privileges of the State.

The result of the above discussion is that the appeals are allowed. The decision of the learned Single Judge is set aside. All the writ petitions, namely those out of which the writ appeals arise, and those which are posted before us along with the writ appeals, are dismissed. No costs.