

CASE NO.:

Appeal (civil) 4673 of 1997

Appeal (civil) 5024 of 1999

Appeal (civil) 5828 of 1999

PETITIONER:

State of U.P. & Ors.

State of U.P. & Ors.

Daya Shankar Dixit

RESPONDENT:

Jagjeet Singh & Ors.

Vinod Kumar & Ors.

State of U.P. & Ors.

DATE OF JUDGMENT: 16/10/2003

BENCH:

CJI., Brijesh Kumar & Arun Kumar.

JUDGMENT:

JUDGMENT

BRIJESH KUMAR, J.

The common question involved in all the above noted three appeals is as to whether the contractors running the liquor shops under licence, issued by the State, in Uttar Pradesh are entitled to remission of licence fee for the period during which the liquor shops were ordered to be closed under Section 59 of the U.P. Excise Act, 1910 (for short 'the Act'). The licensees in all the three cases, being the highest bidders for the group of shops in question, their bids were accepted and thus they were running the shops in the concerned areas. In the month of December, 1992, the structure in Ayodhya was demolished. As a sequel thereof disturbances and tension prevailed at several places in the State and the shops involved in the first two appeals noted above, were ordered to be closed during the period curfew was imposed in the areas concerned. In so far it relates to the group of shops involved in the third appeal, they were ordered to be closed during the period of imposition of curfew due to communal disturbances between November, 1991 & 200\223 January, 1992, in Aligarh.

In the above noted Civil Appeal No.4673 of 1997, the High Court by means of the impugned judgment, quashed the order, rejecting the request of the respondent to allow remission and to pay compensation and remanded the matter to the authorities to reconsider their applications under paragraphs 179 and 190 of the Excise Manual and it was also directed that the amount as may be found liable for remission shall be paid to the licensees with interest @ 18% p.a. In the other appeal no.5024 of 1997, the High Court, while quashing the order refusing to give remission, directed the State and its authorities to adjust the licence fee for the given period with interest @ 12% p.a. In the third appeal, namely, civil appeal no.5828 of 1999, the court found that the contractor was allowed remission partially, which is in the discretion of the Government and as to in what proportion the remission is liable to be allowed would not be a matter to be decided in writ proceedings and for that purpose licensee may seek his remedy elsewhere.

The relevant facts for the purposes of this case, which admit of no dispute, are that in the State of Uttar Pradesh grant of exclusive privilege to manufacture or sale of liquor, at the relevant time was being given under a licence by auction system. The highest bidder would be issued licence to run the liquor shops. The auction would be held of one shop or group of shops in a particular area. The licensees in the above noted appeals had made bid for group of shops which were accepted by the authorities and the licences were issued to them for sale of liquor on the basis whereof they have been running the shops but

the difficulty arose when curfew was imposed during certain periods due to disturbances and communal tensions.

Before entering into the merits of the matter, it may be appropriate to peruse some of the relevant provisions of the U.P. Excise Act, 1910 and the U.P. Excise Manual.

Section 24 of the U.P. Excise Act provides for grant of exclusive privilege of manufacture and sale of liquor and it reads as under:

"24. Grant of exclusive privilege of manufacture, etc.-

Subject to the provisions of Section 31, the Excise Commissioner may grant to any person a license for the exclusive privilege :

(1) of manufacturing or of supplying by wholesale, or of both; or

(2) of selling by wholesale or by retail, or

(3) of manufacturing or of supplying by wholesale, or of both, and of selling by retail.

any country liquor or intoxicating drug within any local area."

Section 31 provides for issue of license subject to certain conditions and restrictions. The provision reads as under :

"31. Form and conditions of licences, etc.- Every licence, permit or pass granted under this Act shall be granted â\200\223

(a) on payment of such fees (if any),

(b) subject to such restrictions and on such conditions,

(c) shall be in such form and contain such particulars, as the (Excise Commissioner) may direct either generally or in any particular instance in this behalf, and

(d) shall be granted for such period as the [State Government] may in like manner, direct."

One of conditions of the licence which provides for normal close days for liquor shops is Condition No.27 of the licence which provides as under :

"The shop will remain closed on 1st day of every month, Independence day, (15th August), Republic day, (26th January) and Mahatma Gandhi birthday (2nd October). If 1st day of any month is public holiday then next day will be the day, when Shop will remain closed. In addition to this, any three days during the excise year, will be declared by the Licensing authority on which the shops will remain closed. No compensation will be given to the licensee for closure of the shop on aforesaid days."

According to the above condition, no compensation was liable to be paid for closure of shops as provided in the said condition. Section 59 provides for closure of the shops in certain exigencies and for the sake of public peace. The same reads as under :

"59. Power to close shops for the sake of public peace.- The District Magistrate by notice in writing to the licensee may require that any shop in which any

[Intoxicant] is sold shall be closed at such time or for such period as he may think necessary for the preservation of the public peace.

If a riot or unlawful assembly is apprehended or occurs in the vicinity of any such shop a Magistrate of any class or any police officer above the rank of constable who is present may require such shop to be kept closed for such period as he may think necessary:

Provided that where any such riot or unlawful assembly occurs the licence shall, in the absence of such Magistrate or police officer, close his shop without any order."

It may be noted that the above provision does not provide either way, for awarding remission of compensation for the period of closure of shops in the circumstances given in Section 59 quoted above. Section 41 empowers the Excise Commissioner to make rules subject to previous sanction of the State Government. Such rules known as U.P. Excise Licences (Tender-cum-Auction) Rules, 1991 were framed in exercise of power under Section 41 of the Act. Rule 34 provides for no claim for delay in supply of intoxicant. It reads as under: "34. No claim for delay in supply.- The licensee shall have no claim for damages or for remission of bid-money in the case of delayed supply of the intoxicant."

Rule 34 was, however, amended on March 10, 1992 by the U.P. Excise Licences (Tender-cum-Auction) (Amendment) Rules, 1992 and after amendment it reads as under : "No claim for delay in supply or for closure or not opening of shop or curtailment in hours of sale:

(i) The licensee shall have no claim for damages or for remission of bid-money in the case of delayed supply of the intoxicant.

(ii) The licensee shall have no claim for remission or refund of bid-money, in case a shop or some shops, auctioned in a group remain closed or could not be opened for any reason. Similarly the licensee shall have no claim for remission of refund of bid-money in case of curtailment, at any time in the hours of sale."

The provision relating to administration of the Excise Department is provided for under Chapter II of the Act. Section 10 provides as under : "10. Administration of Excise Department in districts.- (1) The administration of the Excise Department in any district shall, unless the [State Government] otherwise directs, be under the charge of the Collector of that district.

(2) Power of State Government .- The [State Government] may by notification applicable to the whole of [Uttar Pradesh] or to any district or local area comprised therein â\200\223

(a) To appoint Excise Commissioner : [appoint an officer hereinafter referred to as the Excise Commissioner, who shall, subject to the orders of the [State Government] have the control of the

administration of the Excise Department].

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The Excise Commissioner having the control of the administration of the Excise Department in the State issues certain directions from time to time which are normally compiled and known collectively as Excise Manual.

Paragraphs 179 and 190 of the Excise Manual would be relevant for the purposes of a remission of payment of compensation. They read as under:

"179. Remission in special cases.- Proposals for remissions other than of irrecoverable balances must be reported to the Excise Commissioner who, if he supports them, will forward them for the orders of the State Government.

190. Miscellaneous directions.- The following miscellaneous directions regarding the classification and payment of charges are noted for observance :

(1) Payment on account of compensation for closing shop under Section 59 of the Act or for closing country spirit shops settled under the auction system during the passage of troops includes (a) the refund of an amount originally credited to Excise and (b) 10 per cent calculated on the amount of licence fees for the period during which the shop was closed, on account of loss of profits.

(2) The latter charge only should be debited to Contract Contingencies. The former will be treated as a refund and adjusted against the separate grant for refund and drawbacks.

(3) Compensation may be paid by the Collector on his own authority."

The learned counsel for the licensees has drawn our attention to Rule 34 as amended vide notification dated March, 1998 to indicate that prior to the said amendment, there was no such provision by which remission may not be allowable even though all the shops of the group are closed in entirety. The rule 34, as amended in 1998, is quoted below: "No claim for delay in supply or for closure or for closure or not opening of shop or curtailment in hours of sale:

(i) The licensee shall have no claim for damages or for remission of bid-money in the case of delayed supply of the intoxicant.

(ii) The licensee shall have no claim for remission or refund of bid money, in case of an auction shop or some or all shops, auctioned in a group remain closed or could not be opened for any reason. Similarly the licensee shall have no claim for remission of refund of bid-money in case of curtailment, at any time in the hours of sale."

We may, however, presently consider the case according to the rules as existing in 1991-92. The effect of amendment of 1998 may be seen later. The claim of the licensees for remission of the license fee rests upon the plea that under Section 59 of the Act there is no provision either way to allow or prohibit such remission on account of closure ordered under the aforesaid provisions. The other plank on which the licensees base their case is Clause (ii) of Rule 34 as amended in 1992

where it particularly provided that a licensee shall have no claim for remission in case a shop or some shops, auctioned in a group remain closed or could not be opened for any reason. It further provided that no remission would be admissible in case of curtailment in hours of sale. The interpretation of the above noted sub-rule (ii), according to the licensee is that a remission would not be permissible if a shop or some of the shops out of the total number of shops of the group remain closed. The reason being that if some of the shops out of the whole pool, remain open the licensee would not be totally deprived of the earnings and may also stand compensated for closure of other shops of the group of shops. It would thus be permissible only in case of all shops of the group being closed in the entirety. Reliance has been placed on certain decisions of the Allahabad High Court on the point to which we shall make a reference a little later. Yet another basis for claim of remission is paragraph 179 of the Excise Manual which provides for remission in special cases in respect of which a report is submitted to the Excise Commissioner who, in case agrees with the proposal, would forward it to the government for orders, whereas paragraph 190 provides for payment on account of compensation for shops being closed under Section 59 of the Act during the passage of troops.

The question for grant of remission in respect of closure of shops during the month of December, 1992 came to be considered before the Allahabad High Court in a batch of writ petitions decided on March 30, 1993 which has been referred to in the impugned judgment as Harpal Singh's case (Harpal Singh & Ors. etc. vs. State of U.P. & Ors.) or decision as rendered in the case of Ratnagar Mishra, both of whom were petitioners in separate writ petitions before the High Court in the same bunch of petitions. The matter was decided by a common judgment. The Court accepted the contention of the petitioners in those writ petitions that Rule 34 (ii) as amended in 1992 would apply in cases of auction of shops in a group. It has been held that clause (ii) of Rule 34 refers to partial closure of shops auctioned in a group, in respect whereof no claim for remission would be permissible but it does not provide otherwise. That is to say clause (ii) of Rule 34 would be no bar for grant of remission or compensation under paragraphs 179 and 190 where closure of the shops auctioned in a group is total and in entirety. Where no shop out of the group of shops remains open, in that event, clause (ii) of Rule 34 would not be applicable. To support the above interpretation the Division Bench observed that Rule 34 clause (ii) refers to only partial closure either in terms of number of shops or in terms of hours of sale. The High Court has also distinguished the decision of another Bench of the High Court in the case of Hanuman Prasad Jaiswal Vs. State of U.P. (Civil Misc. Writ Petition No.2902 of 1981, decided on January 25, 1981) (1983 U.P.T.C.-362). It was held in that case that closure of a shop for the rest of the period of the license amounted to cancellation of the license under Section 35(3) of the Excise Act and it was not a case of temporary closure as envisaged under Section 59 of the Act. Yet another decision which has been referred to is rendered by another Division Bench of the High Court in Civil Misc. Writ Petition No.375 of 1981, Om Prakash Sharma & Anr. Vs. The Excise Commissioner, U.P. Allahabad & Anr., decided on 4th July, 1991. The Bench presided over by Hon'ble Mr. Justice B.P. Jeevan Reddy (Chief Justice - as he then was) held that remission/compensation was liable to be paid since the government had itself failed to supply the bhang for sale of which license was granted to the petitioner in that case on annual license fee @ Rs.10,800/- per month. The petitioner had deposited two months' license fee in advance but the authorities failed to make supply of bhang to the petitioner. The Court observed : "In the present case we are of the opinion that the Government having itself failed to supply bhang for more than one month to the petitioner and for this reason, his license remained practically suspended for the said period, there is no justification for the Government to recover licence fee for the aforesaid period." A reference of the Division Bench decision in the case of Hanuman Prasad Jaiswal (supra) was also made. It was observed that the petitioner could not sell bhang by procuring it otherwise from any other source except as made available from the

bonded warehouses. It was observed that the petitioners cannot be asked to pay the licence fee for the period because the Government itself created a situation where petitioners were not able to run their shops. We have noticed that in the case of Hanuman Prasad Jaiswal also the closure of the shop for the rest of the licenced period was at the instance of the Government which was held to be virtual cancellation of the licence. The above noted two decisions do not help the petitioner. The closure of the shops under Section 59 of the Act would not be a situation created by itself. During the relevant period tension had prevailed at many places and the communal riots had also erupted necessitating imposition of curfew resulting in closure of shops.

Yet another decision of the High Court as referred to on the point is dated 12th July, 1993 rendered in Civil Misc. Writ Petition No.1200 of 1993, Om Prakash Vs. State of U.P. & Ors. The Bench was presided over by one of us (Mr. Justice V.N. Khare, as he then was). Remission was claimed for closure of the shop due to imposition of curfew from December 8 to 14th December, 1992. An application moved by the petitioner in that case was rejected by the Collector, Azamgarh. Relying upon the decision in the case of Harpal Singh and Ratnagar Mishra (supra) it was contended before the Bench that an application for remission would be maintainable and the view taken otherwise was incorrect. The Bench noted that the order passed by the Collector, Excise was an appealable order before the Commissioner. But an apprehension was expressed by the petitioner in filing the appeal before the Commissioner that the Commissioner himself had issued a direction that application for remission was not maintainable, therefore, it would be an illusory remedy. The Bench observed that the apprehension was not well founded since in the case of Ratnagar Mishra it was held that application for remission would lie where a group of shops, has been closed in entirety. Therefore, the Court declined to interfere with the order and provided that the petitioner could file an appeal before the Excise Commissioner who shall entertain the same and decide it on merits, in accordance with the law. The writ petition was thus dismissed on the ground of alternative remedy.

In the background set out above, the effect of Rule 34 clause (ii) as amended in 1992, is to be seen as to whether the embargo to lay a claim of remission is confined to cases where it has been an auction of group of shops or it extends to closure of shops for whatever reason auctioned singly or in group and closed partially or entirely.

We may examine the provisions under the law as quoted above in relation to closure of shops and remission/compensation in lieu thereof. Section 59 empowers the District Magistrate to close any liquor shop at such time or for such period which he may consider necessary for preservation of peace. In cases where some riot or unlawful assembly is apprehended in vicinity of such a shop a Magistrate or any police officer above the rank of constable, who is present may order for closure of the shop. The proviso to Section 59 casts a duty on the licensee to close the shop without any order by any authority, where a riot or unlawful assembly occurs at the place where the shop is situated. Apart from providing for closure of the shop to maintain peace, Section 59 does not provide for anything either way for awarding compensation or remission on account of such a closure. We then find that licence is issued under Section 24 of the Act subject to the provisions of Section 31. Section 31 under "clause (b)" provides that the licence would be subject to such restrictions and on such conditions as the Excise Commissioner may direct generally or in particular. Condition No.27 of the licence, quoted above, prescribes the days on which the shop would remain closed, i.e. first of every month, the Independence Day, the Republic Day, on birthday of Mahatma Gandhi and apart from such days on any three days during the excise year which would be declared by the licencing authority to be the close days. Then in negative form it provides that no compensation will be given for closure of shop on the aforesaid days. The rest, it leaves to inference. There is no provision in same terms for no compensation for closure on such days other than indicated in Condition No.27 of the licence. We may then consider Rule 34 of the U.P. Excise

(Tender-cum-Auction) Rules, 1991 (as amended in 1992) which also deals with the subject of remission and compensation. Clause (i) deals with cases of delayed supply of the intoxicant in which case no remission/damages of bid money is allowable. Clause (ii) however, as indicated earlier, says that there would be no claim in case of a shop or some shops auctioned in a group is closed for any reason nor in case of curtailment at any time in the hours of sale. It is to be noted that Rule 34 does not contain any blanket bar against any claim of damages or remission on account of closure. The heading of Rule 34 no doubt mentions about no claim for delay in supply or closure or not opening of shop but its contents in clauses (i) and (ii) do not provide plainly that no remission or damages would be payable for closure or non-opening of a shop. The manner in which clause (ii) is worded, it appears that it governs the shops auctioned in a group. It restricts the scope of claim of remission or damages in case a shop or some shops auctioned in a group, remain closed for any reason. A group of shops is one whole and in case such group of shops is only effected partially no remission or refund of bid money can be claimed. The Division Bench in the case of Harpal Singh has observed that clause (ii) of Rule 34 (as amended in 1992) deals with partial closure as would be evident from the later part of the sub-rule which provides that there would be no claim for curtailment of any time in the hours of sale i.e. there would be no remission in case of curtailment of time of a shop but the position in respect of total closure of a shop in place of mere curtailment of time has been left unprovided for. We may say there is no provision either way and the prohibition is only in respect of partial closure in a day. Similarly, the first part of the sub-rule (ii) talks about the auction of shops in group. Out of the group of the shops if some shops are closed or a shop is closed there would be no claim for any remission. It leaves a situation where all shops of a group are closed. Therefore, the language used for negating the claim in respect of partial closure in relation to time or a group of shops leads to the conclusion that cases of total closure would not be covered by Rule 34. We may hasten to say that no such inference can be drawn that in case of total closure of a group of shops or for whole time in a day, would necessarily entitle a licensee for remission or damages. All that can be said is that it is not impermissible. It may or may not be allowed, is liable to be decided on its own merits. But it would not be possible to say that no such application for remission/damages would be maintainable as in the case of curtailment of time of a shop or closure of one or some of the shops in a group of shops. The interpretation as made by the Bench in the case of Harpal Singh cannot be faulted with.

Rule 34 is obviously referable to Section 41 of the Act which empowers the Excise Commissioner to make rules with previous sanction of the State Government regulating the manufacture, supply, storage or sale of any intoxicant.

Then we come to the positive provisions relating to remissions and in that connection para 179 of the Excise Manual may be referred to, which provides for remission in special cases it may be reported to the Excise Commissioner who in turn, if considers appropriate, will forward for orders to the State Government. Similarly, para 190 of the Excise Manual provides for compensation on account of closing of a shop during the passage of troops. Such directions as contained in paras 179 and 190 issued by the Excise Commissioner are referable to Section 10 of the Act quoted above, wherein he is entrusted with control and administration of Excise Department. The position thus which emerges is that in some special cases a remission is permissible, if the Excise Commissioner finds some merit in the claim, he shall then forward it for orders to the State Government. Rules of course do not provide any such positive provision but only provides for cases in which remission cannot be claimed, namely, where it relates to curtailment of hours of the shop or partial closure of shops auctioned in a group. Section 59 itself does not provide for any such claim for the closure but the licence issued under Section 24 contains a condition referable to Section 31 of the Act again confers no right to claim for closure of shop on the days as specified in Condition No.27 plus three more days. For the

rest of the days or period it leaves open the matter without any provision therefor. This being the position under the provisions of the Act, the rules and the Excise Manual, there is scope for the argument that Rule 34 does not exclude the possibility of any claim for remission or damages on account of closure of a shop totally which situation is not dealt with under Rule 34 as amended in 1992. However, it is introduced by amendment of Rule 34 in 1998, as quoted earlier.

The above noted amended provision of 1998 squarely provides for closure of a shop auctioned or some or all shops auctioned in a group. It may be noted that the language of clause (ii) of Rule 34 which used to be "in case a shop or some shops auctioned in a group" has been changed to "in case of an auction shop or some or all shops auctioned in a group". That is to say auction of shops has been put in two categories where it is an auction of one shop and the other shops auctioned in a group. It is further clarified in the amended sub-rule that remission would not be claimed where an auctioned shop or some or all auctioned shops in a group remain closed. It is submitted that in absence of the provision as now exists after amendment in 1998 it could not be said that no compensation could be claimed for the period prior to 1998 amendment. By amendment of Rule 34 in 1998 certainly the position has somewhat changed, but in relation to the period with which we are concerned in this case, the Amended Rule 34 (ii) (1998) would not be attracted. Learned counsel for the licensees submit, that subsequent amendment clarifies the position that earlier the position was different from what is sought to be brought about by means of the amended provision.

We may recapitulate the position as it regards the cases decided by the High Court of Allahabad pertaining to the above provisions which have been referred to in the earlier part of this judgment. All those decisions relate to period prior to 1998 i.e. before the amendment of Rule 34(ii). In the case of Hanuman Prasad Jaiswal remission/damages was allowed since on facts it was found that it was a case which amounted to cancellation of licence for the rest of the period. Hence, such a closure was beyond the purview of Section 59. The case of Om Prakash Sharma was also on a different footing but the remission/damages was not refused; rather allowed since it was found that the government itself was at fault in not making supply of bhang from the bonded warehouse and did not make it available for sale to the licensee for a period of two months. In principle it was accepted that remission/ damages could be claimed if due to fault of the government the shop could not be opened for the purpose of sale for which the licence was granted. In the case of Harpal Singh and Ratnagar Mishra, it has been held that such an application for remission would be maintainable where it is a case of total closure in entirety and distinction was drawn between a partial and a total closure. In the case of Om Prakash, it was observed that in view of decision in the case of Ratnagar Mishra an application would lie for remission. In yet another case Om Prakash Gupta Vs. State of Uttar Pradesh, Civil Misc. Writ Petition No.408 of 1996, dated 4th December, 1996, decided by a learned Single Judge of the Allahabad High Court, it pertained to the year 1988 before coming into force of 1992 Rules. It was held that an application for remission would be maintainable and the same was allowed for closure of shops for 5 days.

The position which finally emerges out is that an application for remission/damages for closure of shops in entirety auctioned in a group as is the case in the appeals in hand would be maintainable. But it is for the authorities concerned to consider the merit of the claim for remission/damages and pass any appropriate order looking to the facts and circumstances of the case in accordance with law. It would be the position as it relates to cases prior to the amendment of Rule 34 in 1998.

In the result, we partly allow the appeals (C.A.No.4673 of 1997 and C.A.No.5024 of 1999) filed by the State and set aside the directions as given by the High Court for remission and damages to the respondents with interest etc. The other part of the order, however, is maintained and it is directed that the applications of the respondents for

remission/damages may be considered and appropriate orders may be passed by the authorities in accordance with the law, expeditiously say within a period of three months from the date of communication of this judgment.

So far Civil Appeal No.5828 of 1999 is concerned, it is dismissed and the order passed by the High Court is maintained. There will, however, be no order as to costs.

JUDIS