

CASE NO.:
Appeal (civil) 4726-4728 of 1994

PETITIONER:
SOLOMON ANTONY & ORS.

Vs.

RESPONDENT:
STATE OF KERALA & ORS.

DATE OF JUDGMENT: 22/02/2001

BENCH:
CJI, S. Rajendra Babu & R.C. Lahoti

JUDGMENT:

L...I...T.....T.....T.....T.....T.....T.....T...J
[With C.A.Nos.4729-37, 4738, 4739, 4740-42, 4743,
4744-45, 4746-50, 4751-65, 4790, 4791-97, 4883, 4884-86,
4887, 4888, 6111-12, 6113 of 1994, 94/95, 4115-16, 6679-82,
6815 of 1995, SLP(C) No.4122/98]

J U D G M E N T

RAJENDRA BABU, J. :

For the excise year 1992-93 the State had monopoly in the matter of supply of arrack. The privilege of vending the arrack was obtained through a licence and the licensees got their supply only through the State owned or controlled distilleries. Such licensees were not allowed to import any arrack or rectified spirit from outside the State. In the excise year 1993-94 commencing from April 1, 1993 the State modified the policy in this regard by G.O. (MS) No. 18/93/TD dated February 8, 1993. The modifications effected in the policy are as follows :-

(a) Abkari shops were to be auctioned groupwise.

(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 equality and no release of arrack was to be authorised till the contractor satisfied the department about the required quality.

Pursuant to this policy amendments were made to Rule 8 of the Disposal in Auction Rules on March 4, 1993 and again on March 31, 1993. Under amended Rule 8(1) it was provided 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 or purchase a designated quantum of duty paid rectified spirit. The contractors will be given No Objection Certificates for import or 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 licensee could obtain the duty paid rectified spirit either from the distilleries in the State or from the distilleries in other States. Sub-rule (6) was substituted to enable the contractors for opening godowns to store duty paid rectified spirit for manufacturing arrack and for storage of manufactured arrack on payment of the amounts of annual rental prescribed. Similarly here the licensee could purchase the duty paid rectified spirit from the distilleries in the State or import it from distilleries from outside the State. Sub-rule 11 was substituted prescribing the procedure for remittance of duty. Rule 8(1) was amended on March 31, 1993.

payment of excise Writ petitions were filed on the demand made by the State for duty on the designated quantum of rectified spirit and additionally a contention was raised that the increase in excise duty on arrack from Rs. 5 to Rs. 10 per bulk litre by a notification issued on March 25, 1993 was also invalid. The contractors 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 Abkari Act rectified spirit was not fit for human consumption and, therefore, levy was outside the purview of Entry 51 of List II of the Seventh Schedule to the Constitution. It was further contended 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 who dealt with the writ petitions upheld these contentions. He was of the view that (1) the levy of excise duty on rectified spirit was without legislative competence and, therefore, the levy of such duty is void; (2) the levy of excise duty which is countervailing duty on rectified spirit is illegal; (3) the excise duty on undrawn rectified spirit or the quantum of rectified spirit not supplied to the contractors levied pursuant to sub-rule (1) of Rule 8 of the Kerala Abkari Shops (Disposal in Auction) Amendment Rules 1993 is illegal, and (4) excise duty levied and collected on the quantity of rectified spirit actually supplied to or drawn by the contractors is valid. Further, it was held that increase in excise duty from Rs. 5 to Rs. 10 per bulk litre of rectified spirit is arbitrary and, therefore, illegal.

The State carried the matter in appeal. The Full Bench of the High Court took the view that from the nature of the duty imposed it is clear that it forms part of the consideration for parting with the privilege conferred on the licensees under the Abkari policy for the year 1993-94 and, therefore, the collection is good; that till the year 1992-93 it was the State monopoly in the matter of vending the arrack and it only allotted the quota of arrack or rectified spirit to the contractors; that as the State was unable to meet the requirements in full resulting in substantial loss to the revenue because of large scale clandestine operations carried on by the contractors, the

policy was, therefore, changed; that the State fixed the quantum by the policy which could be 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; that this step was taken by the State to augment the revenue of the State; that there was no obligation upon the State to supply rectified spirit to the contractors having limited its obligation to the issue of No Objection Certificates and permits for import of the designated quantum of rectified spirit; that the contractors who had participated in the auction pursuant to the auction notice did so with full notice that the State was not undertaking any obligation to supply them any rectified spirit; that the State obligation was only to issue No Objection Certificates and permits to import the designated quantum and no more; that the State is entitled to sell exclusive privilege in regard to manufacture, storage, export, import, sale or possession of intoxicants liquor and alcohol and, therefore, as provided under Section 18A of the Arrack Act, it was lawful for the Government to grant to any person exclusive privilege to sell liquor by retail within any local area on payment to Government of an amount as rental in consideration of the grant of such privilege; that the amount of rental may be fixed by auction or negotiations or by any other method as may be determined by the Government from time to time and such amount may be collected to the exclusion of or in addition to the duty or tax leviable under Sections 17 and 18; that the amount that may be collected under Section 18A for granting the privilege is exclusive of or in addition to the duties or tax payable under Sections 17 and 18 of the Arrack Act; that for the abkari year 1993-94 the Government granted two privileges (i) the privilege of vending arrack and, (ii) the privilege to procure the necessary quantity of arrack from outside the State for sale; that to procure the requisite quantity of rectified spirit for a consideration which the contractor had agreed is a privilege of the Government and to part with such privilege the rental was fixed in the auction and the amount which was described as excise duty on the designated quantum of rectified spirit was allowed to be imported. The totality of these circumstances indicated that these amounts were the consideration for the grant of the two privileges and formed part of the consideration which is indivisible and integrated one for the grant of both these privileges.

Thus summing up the position the Full Bench held that what the contractors are required to pay is the consideration payable to the State for being granted the two privileges as stated earlier and are, therefore, bound to pay the amount which in its measure is equivalent to 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 the contractors. The High Court also noticed that the enhancement of duty from Rs. 5 to Rs. 10 per bulk litre was also valid after finding that there was nothing arbitrary in the enhancement. The High Court felt that what is collected by the Government was only in the nature of a fee for privilege granted and not a levy of excise duty on rectified spirit and, therefore, question of legislative competence would not arise. Therefore, the Full Bench of the High Court allowed the writ appeal by setting aside the order made by the learned Single Judge. Hence these appeals by special leave.

Shri Joseph Vellapalli, the learned senior Advocate, submitted that the consideration in a contract for sale of goods or privilege is entirely a matter between the buyer and the seller and it is not open to the court to find out the quantum claimed by the buyer as duty at different stages and whether the same constitutes consideration by parting with any privilege. In the present case, the subject matter of sale of rectified spirit by auction was the privilege to vend arrack in specified shops and the obligation to pay duty on the designated quantum of rectified spirit would at best be described as a condition of the contract. The Legislature having specifically enacted Section 18A of the Arrack Act authorising the Executive to grant or sell exclusive privilege of selling liquor, there is no other part left with the Executive to grant privilege in respect of import of liquor. The obligation to pay duty on import of rectified spirit having been imposed under the law, it necessarily follows that the contractors liability to pay such duty can be determined only in terms of and within the strict letter of law. The obligation imposed under the relevant Rules and the tender condition to pay duty on the designated quantum of rectified spirit has to be construed as an obligation to pay the duty as per the Act and no more. Shri D.D. Thakur, the learned senior Advocate appearing for some of the appellants, supported the contentions raised by Shri Joseph Vellapalli and submitted that the character of demand in the present case will clearly indicate that it is in the nature of a tax or a duty which could not be levied on rectified spirit. Shri P. Krishnamoorthy, the learned senior Advocate, submitted that even assuming it to be correct that the State granted two privileges, namely, to vend in retail alcohol and to import the rectified spirit, the levy on rectified spirit is not permissible in view of the decision of this Court in *Synthetics and Chemicals Ltd. and ors. v. State of U.P. & Ors.*, 1990(1) SCC 109, inasmuch as rectified spirit is not potable alcohol.

The learned Solicitor General appearing for the State submitted that the State can impose excise duty in terms of Entry 51 of List II on alcoholic liquors for human consumption. The entire field of legislation in regard to intoxicants liquors the production, manufacture, possession, etc. are covered by Entry 8 of List II. The policy had been set out by the Government on February 18, 1993 and the notice in regard to sale of privilege of vending liquor had been given subject to the conditions set forth in the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 [hereinafter referred to as the Rules] and Rule in this regard clearly enabled the State to collect the excise duty on the designated quantum of rectified liquor in each month and the licensee shall purchase or import duty paid rectified spirit from the distilleries in the State or from the distilleries in other States. Under the Kerala Abkari Shops (Disposal in Auction) Amendment Rules, 1993 Form No. ii under the heading Agreement was amended so that the kist amount would include the excise duty on designated quantum of rectified spirit on the establishment. He, therefore, contended that what was collected was only the kist amount which was not only to vend in retail alcohol but also to import rectified spirit for conversion to alcohol and the measure of such kist amount was partly based upon the quantum of rectified spirit. He further submitted that the rate Rs. 5 per bulk litre had been amended to Rs. 10 per bulk litre by a notification dated March 29, 1993 well

before the rates came into force and to be effected from April 1, 1993 and, therefore, the variations in the rate would also be justified.

The undisputed facts are as follows: On March 4, 1993, notice [G.O.(P) No. 32/93/TD] was published in the Kerala Gazette regarding the sale of privilege of vending toddy, arrack and foreign liquor including coco-brandy in independent retail shops. It was made clear in the notice that the auction sale will be held subject to the conditions set forth in the Rules. The Abkari Policy for the year 1993-94 was announced to the effect that the system of tender-cum- auction would continue and in the matter of supply of rectified spirit the existing system will be discontinued and instead permits will be given to the contractors to bring a designated quantum of rectified spirit determined in relation to the auction amount amongst other factors.

On March 4, 1993, the Rules were amended so as to substitute sub-rule (1) of Rule 8 by the following: (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 Asst. Excise Commissioner concerned. The contractors shall remit the excise duty on the designated quantum of rectified spirit in each month. The licence 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, preference will be given to the contractors to lift whatever quantity that can be supplied by the Public Sector Distilleries in the State.

The said Rules were further amended on March 31, 1993 so as to include the following clause:

IN PERMANENT AGREEMENT FORM NO.ii under the heading agreement in the second paragraph after the words kist amount, the following words shall be inserted namely:

and excise duty on designated quantum of rectified spirit on the establishment.

On March 29, 1993, the notification was amended to enhance the rate of duty from Rs.5 per bulk litre to Rs.10/- per bulk litre, which was to come into effect from April 1, 1990.

If the contractors have agreed to participate in the auction sale in terms of the notifications issued and the amended rules, it would make it clear that the kist amount would include excise duty on designated quantum of rectified spirit on the establishment. The argument put forth now is that the excise duty on designated quantum of rectified spirit is payable only in terms of the Act and the rules which is in the nature of a tax or a levy and the State Government is not competent to levy such excise duty on rectified spirit which is non-potable alcohol. This argument ignores the fact that the permit is granted to the contractors to import or purchase a designated quantum of

duty paid rectified spirit and excise duty on the designated quantum of rectified spirit has to be paid each month which will be utilized for the purpose of manufacture of arrack and the kist amount payable would include the excise duty on the designated quantum of rectified spirit. It means that the consideration for parting with the privilege of vending arrack would include the consideration equivalent to excise duty on the rectified spirit. Therefore, as is often said by this Court, if the contractors with their eyes wide open have accepted the terms of payment of consideration of the Kist inclusive of an amount equivalent to excise duty on rectified spirit, we find no substance in the argument advanced on behalf of the appellants that the excise duty payable even by way of Kist is in the nature of a tax or a levy and not leviable under law by the State.

Another facet of this contention is that even in cases of non-utilization of the quota of rectified spirit permitted to be imported or drawn from State Distilleries the State is demanding the excise duty on the entire quantity. Again, this submission loses sight of the terms of the agreement to the effect that duty payable on unlifted quota of rectified spirit is also part of the amount payable as kist on the designated quantity. The aforesaid two aspects have been effectively dealt with in some of the decisions of this Court to which we will advert now.

In fact, in the State of Haryana & Ors. vs. Jage Ram & Ors., 1980(3) SCR 746, this Court had occasion to consider a somewhat similar question. In that case, Jage Ram held a retail licence to vend liquor on payment of a licence fee calculated at Rs.17.60 per litre for a quota of 62.100 proof litre. He defaulted in making the instalment payable by him and his licence was cancelled. Thereafter, the retail vend was re-auctioned at his risk which resulted in a loss to the State to the extent of Rs.7,41,577.40, which amount he was called upon to pay. He filed a writ petition in the High Court contending that the licence fee was not a fee but a still head duty or an excise duty, and the rule requiring the payment of such duty even when no quota of alcohol was actually lifted by the licensee was unconstitutional and the rationale to raise this contention was that there could be no liability to pay still head duty or excise duty unless the licensee lifted the liquor. The High Court upheld the contention and quashed the levy. On appeal by the State, Chandrachud C.J. succinctly and with his usual felicity of expression summed up the position in law as under:

the amount which the respondents agreed to pay to the State Government under the terms of the auction is neither a fee properly so-called which would require the existence of a quid pro quo, nor indeed is the amount in the nature of excise duty, which by reason of the constitutional constraints has to be primarily a duty on the production or manufacture of goods produced or manufactured within the country. The respondents cannot, therefore, complain that they are being asked to pay excise duty or still-head duty on quota of liquor not taken, lifted or purchased by them. The respondents agreed to pay a certain sum under the terms of the auction and the Rules only prescribe a convenient mode whereby their liability was spread over the entire year by splitting it up into fortnightly 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.[emphasis supplied]

To similar effect, this Court again in *State of Andhra Pradesh v. Y.Prabhakara Reddy*, 1987 (2) SCC 136, stated that under a public auction the licence to sell liquor might be granted by the State subject to (1) payment of rental being the highest bid at the auction, (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. In that case, it was noticed that the consideration for the grant of the privilege to sell liquor is not merely the rental to be paid by the contractor 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 contractors. It was further observed that there is no question of the contractors 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 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. This view is again reiterated in the decision in *State of Rajasthan & Ors. vs. Nandlal & Ors.*, 1993 Supp. (1) SCC 681.

The facts as stated above make it clear that the contractors are required to pay the consideration payable to the State for sale of the liquor, namely arrack and by importing designated quantity of rectified spirit in respect of which the consideration payable is equivalent to excise duty. Thus the High Court is justified in holding that the contractors are bound to pay the amount which is a measured excise duty payable on the designated quantum of rectified spirit in terms of rule 8 of the Rules and had undertaken in the agreements executed by them.

The other point raised is in relation to the enhancement of the rate of excise duty from Rs.5 per bulk litre to Rs.10 per bulk litre of arrack made on 29.3.1993. The learned Single Judge took the view that Rule 8(9) of the Rules enabled the Government to enhance the excise duty only if it is found necessary and the learned Single Judge found that there was no necessity for enhancement. While the justification offered is that in respect of imported rectified spirit the duty payable on one litre of arrack 75° proof worked out to Rs.85.73 whereas even the enhancement to Rs.10/- imposed only a duty of Rs.22.13. In other words, the argument was that this enhancement was necessary to balance the duty on imported rectified spirit. On this basis the Division Bench upheld the revision in excise duty from Rs.5 per bulk litre to Rs.10 per bulk litre of arrack. If it is the excise duty and the Government has found certain rate to be appropriate, we do not think that it would be open to attack. In this case, explanation was

offered by the Government to make such adjustments in the matter of excise duty payable on bulk litre of arrack. Therefore, we find no substance in the challenge to this enhancement.

In this view of the matter, we find no substance in any one of the contentions raised on behalf of the appellants. These appeals and the special leave petition, therefore, deserve to be and stand dismissed. In the circumstances of the case, there shall be no orders as to costs.

CJI.
S. RAJENDRA BABU
R.C. LAHOTI

FEBRUARY 22, 2001.

JUDIS