

**(2011) 03 AHC CK 0074**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ (Tax) Petition No's. 1429 of 2006, 385 and 386 of 2007

Brij Kishore Jaiswal and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

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**Date of Decision :** 09-03-2011

**Acts Referred:**

Constitution of India, 1950 — Article 19(1), 301, 304, 47  
Uttar Pradesh Excise (Settlement of Licences Country for Retail Sale of Country Liquor) Rules, 2002 — Rule 12, 2, 8  
Uttar Pradesh Excise Act, 1910 — Section 21, 24, 36, 41

**Citation :** (2011) 03 AHC CK 0074

**Hon'ble Judges :** Yatindra Singh, J;Prakash Krishna, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## **Judgement**

Yatindra Singh, J.—The main question involved in these writ petitions (W Ps) is,

Whether a person-successful in the lottery for allotment of the country made liquor shop and who operates the shop for the entire excise year-is required to pay the licence fee at the minimum guarantee quantity (MGQ), even if no licence was issued to him, due to his failure to deposit the security amount within time.

### **THE FACTS**

2. These writ petitions are against the recovery of licence fee on the MGQ for the country made liquor shops situate at,

(i) Ondeh and Malik Mau Aima District-Raiberilly in WP (Tax) 1429 of 2006 (the first WP);

(ii) Suthatti, District-Jaunpur in WP (Tax) 385 of 2007 (the second WP);

(iii) Bhora Bazar, District-Jaunpur in WP (Tax) 386 of 2007 (the third WP).

3. The recovery relates to the following excise years:

Excise year 2002-03 (the first WP);

Excise year 2003-2004 (the second WP and the third WP).

4. In the aforesaid excise years, the licence for country made liquor shop was to be allotted by the lottery system in accordance with U.P. Excise (Settlement of Licences for Retail Sale of Country Liquor) Rules, 2002 (the Rules) framed under the U.P. Excise Act, 1910 (the Act).

5. For the aforesaid years, the licensing authority under the Rules published the advertisements in the newspapers in the month of March of the relevant year for grant of the licences in respect of liquor shops, including the shops in question.

6. The application form also includes lottery slip duly signed by an applicant. The lottery is drawn from the these slips. The slip of the successful applicant is also counter signed by the licensing authority and other official present at the time of draw of the lottery.

7. The Petitioners applied for grant of licences alongwith earnest money. They were successful in the lottery and were allotted the aforesaid shops After being successful in the lottery, their lottery slips were counter signed by the licensing authority and the other officials. They also deposited the basic license fee within time and started running the shops.

8. The Petitioners were also required to deposit the security amount within the period stipulated under Rule 12 of the Rules. However,

In the first and third W Ps, only a part of the security amount was deposited;

In the second WP, the entire security amount was deposited beyond the stipulated period under the Rules.

9. As the entire security amount was not deposited within time, the formal licences were not issued to the Petitioners. But, they were permitted to continue and paid the licence fee according to the quota lifted by them.

10. The notices dated 25.12.2002 were issued to the Petitioners in the first WP, requiring them to deposit the remaining security amount as well as the licence fee on the MGQ. They filed their reply on 20.2.2003 and 4.1.2003. It is not clear, if any orders were passed on their replies however, the recoveries dated 6.2.2003 were issued against them for the remaining license fee on the MGQ.

11. The Petitioners in the first WP filed a writ petition No. 1365(M/B) of 2003 against the aforesaid recovery before the Lucknow bench of the Court. It was dismissed on 12.3.2003 on the ground of alternative remedy of fling appeal under the Act. They filed the appeal. It was dismissed on 9.5.2006. They have filed the first WP against this order as well as against the recovery.

12. In the second and third W Ps, the Petitioners did not file any appeals. They have filed the W Ps challenging the recoveries dated 3.6.2004 on the remaining licence fee on the MGQ.

## POINTS FOR DETERMINATION

13. We have heard Shri Neeraj Sharma, counsel for the Petitioners and Shri SP Kesarwani, Additional Chief Standing Counsel for the Respondents.<sup>1</sup> The following points arise for determination in the case:

- (i) What is the nature of liquor trade and consideration for grant of liquor shop licence;
- (ii) Was there a contract between the parties so as to make the Petitioners liable for the licence fee on the MGQ;
- (iii) Whether the Petitioners are estopped from challenging the recovery of the remaining part of the licence fee on the MGQ, even if there was no contract between the parties.

### 1st POINT; LICENSE FEE-CONSIDERATION FOR PARTING PRIVILEGE

14. The Constitution guarantees rights regarding trade and commerce at two places:

- (i) Article 19(1)(g): Apart from other rights, it guarantees the right to carry on any occupation, trade, or business;
- (ii) Part-XIII: It is titled Trade, commerce and intercourse within the territory of India". Its first article namely, Article 301 provides that, subject to part XIII, trade, commerce, and intercourse within the territory of India shall be free. The other articles of part XIII provide restrictions on the parliament as well as the state legislature on their legislative powers.

Does it mean that anyone has right to carry on trade in liquor? Is there no limitation?

15. Historically, the intoxicants-including tobacco, opium, and liquor-have been subject matter of monopoly of the State. It is the State that has the sole privilege of trading in intoxicants. No one, but the State, had a right to trade in them.

16. Even, after the advent of the Constitution guaranteeing fundamental right to carry on any occupation, trade, or business, the position remains the same: one reason is Article 47 in part IV of the Constitution.

17. Part IV of the Constitution is titled as "Directive Principles of State Policy". They are not enforceable but are fundamental in governance of the State. If the fundamental rights are the means; then the directive principles of State policy are the goals to be achieved: the two have to be balanced.

18. Article 47 is one of the directive principles of the State policy. It provides that the State shall endeavour to bring about prohibition and consumption of intoxicant drugs; and drugs that are injurious to health-except for medical purposes. In view of this, the State can always provide total ban in trade of an

intoxicant. This proposition was not even disputed in *State of Bombay v. FN Balsara* AIR 1951 SC 318 (paragraph-24).

19. In the subsequent cases, the Supreme Court, step by step, held that there is no fundamental right to carry on trade in the intoxicant liquor. The cases are as follows:

*Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, and held that there was no such inherent right.;

*The State of Assam Vs. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong*, The Court held that there was no absolute right to trade in liquor.

20. However, there was a discordant note in the case of *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, In this case, the High Court had dismissed the writ petition. In appeal, the Supreme Court dismissed the appeal: did not go into the question, whether there was any infringement of the fundamental right or not-but the Court made the following passing remarks,

We...hold that dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make a law imposing reasonable restrictions on the said right, in public interests.

21. The *Krishna Kumar* case was explained in the case of *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, Then came *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, and *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, These cases firmly established that there was no fundamental right to carry on trade in liquor. This preposition has been reaffirmed in subsequent decisions. This proposition has been subsequently reiterated in *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, *Rajendra Singh Vs. State of Madhya Pradesh and others*, *M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration and Others*, *Prohibition and Excise Suptd. A.P. v. Tody Tappers Coop.* Air 2004 658 ; *State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another*, of the Supreme Court.

22. The State has the sole privilege to deal with liquor and it can part with that privilege on payment of money. The payment of money for imparting the privilege or the licence fee for doing trade in liquor is neither a tax, nor a fee. It is simply a levy for granting exclusive right of the State. {See *State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another*, (the *Devans* case).

23. It has been also held that levy of license fee is not a restriction on trade commerce and intercourse among the States and Articles 301 and 304 of chapter XIII do not apply to the liquor trade {see the *Devans* case (paragraph 311)}. This has been so held for the reason that the licence fee is a levy for granting exclusive privilege of the State; it is neither tax nor fee.

24. The Act also clarifies the aforesaid position. Section 24B is titled "Removal of

Doubts". It states that for removal of doubts, it is declared that:

The State has the exclusive right or privilege to manufacture and sell liquor; and Licence fee mentioned in Section 41(c) of the Act is in substance rental of consideration for grant of such right of privilege.

25. In our opinion:

There is as no fundamental rights carry on trade in liquor. It is exclusive right and privilege of the State;

The licence fee is the consideration for imparting that privilege.

2nd POINT: THERE WAS A CONTRACT

26. The counsel for the Petitioners cited the following paragraph of Rajendra Singh Chauhan Vs. The State of U.P. and Others,

In view of the statutory rules, the Petitioner cannot be fastened with the liability qua the Minimum Guaranteed Quantity or for payment duty relating to the Minimum Guaranteed Quantity, as no licence was ever granted to the Petitioner, nor could be granted to the Petitioner in the eyes of law. The demand raised there, cannot be sustained.

And submitted that:

No licence was ever granted to the Petitioners;

Here, in two W Ps, the basic licence fee was only partly paid. In one WP, it was paid beyond the stipulated period. In view of Rule 12 of the Rules, the selection of the Petitioners stood cancelled;

There was no contract and the Petitioners were neither liable to lift the MGQ nor liable to pay the licence fee on the same.

Nature and Time of Deposit of Different Amounts

27. Under the Rules, an applicant for allotment of the licence of the shop has to pay earnest money alongwith the application. If he is successful, then he has to pay security amount, basic licence fee, and the licence fee on the MGQ fixed for the shop.

28. Rules 2(d) and 2(m) of the Rules explain the word "basic licence fee" and "licence fee". The basic licence fee is part of the consideration for grant of licence of exclusive privilege of retail sale of country liquor. Licence fee is the remaining part of consideration.

29. The annual MGQ, monthly MGQ, and daily MGQ are also defined in Rules 2(c), 2(h), and 2(o) of the Rules:

Annual MGQ: It means the quantity of strong country liquor fixed by the licensing authority and guaranteed by the licensee to be lifted by him for his retail shop

during an excise year;

Monthly and Daily MGQ: They are 1/12th and 1/365th part of the annual MGQ.

30. Rule 2(p) of the Rules defines the words "security amount". It means a sum equal to the 1/10th part of the licence fee excluding the basic licence fee. It is deposited in the Government treasury as interest free security, refundable after the final settlement of all the claims and dues of the State Government.

31. Rule 12 is titled "Payment of basic licence fee and security amount". It states that in case an applicant is selected then, he shall deposit the entire amount of basic licence fee within three working days, deposit half the security amount within ten working days and balance of security amount within twenty days of information of his selection

32. The purpose and the time to deposit these amounts are as follows:

Earnest money: It is to be paid alongwith the application. It is a kind of guarantee that the applicant will work if selected. This is adjusted in the license fee if that person is selected. Otherwise, it is refunded {see Rule 8(e) of the Rules};

Security amount: It is to be deposited after the person is selected and shop is allotted to him within the time stipulated in Rule 12 of the Rules. This is to ensure that the successful applicant will work for the entire period. It also ensures the payment of the licence fee;

License fee: A successful bidder is also required to pay the licence fee on the MGQ for the entire year. It is paid from month to month. It is irrespective of the fact that whether that quantity of liquor is lifted or not. In case more liquor is lifted than the monthly MGQ then the person is liable to pay the extra licence fee on the excess amount of liquor lifted;

Basic licence fee: It is part of the consideration for granting privilege to do trade in liquor. It is to be deposited within the time stipulated in Rule 12 of the Rules. In case quantity of liquor lifted is more than the monthly MGQ then the basic license fee is also increased provided the extra liquor is more than certain percentage of the MGQ.

33. In these writ petitions, the Petitioners in first and third W Ps have not deposited the entire security amount. In the second WP the entire security amount has been deposited however, it is beyond 20 days mentioned in Rule 12 of the Rules. However, in our opinion, this is immaterial so far as contract between the parties is concerned.

Petitioners' Applications Were Counter Signed

34. The licensing authorities had published the advertisements before the excise years, advertising the terms and conditions of the settlement proceedings. This is done district wise. Different districts have, different kinds of notice. In some

districts,

The MGQ, basic licence, licence fee on the MGQ, earnest money and the security amount is mentioned in the advertisement. This was the case in the second and the third WP;

It is indicated in the advertisement that the aforesaid details can be seen on the notice board in the office. This was the case in the first WP.

In any case, in every district, the aforesaid details were handed over alongwith the application forms.

35. Rule 8 of the Rules is titled as "Eligibility conditions for applicants". An applicant should fulfil the conditions mentioned therein and has to file an affidavit under Sub-clause (d) of Rule 8 {Rule 8(d)} of the Rules.

36. The Excise Commissioner has issued suggestions dated 14.3.2002 and 5.3.2003 for the excise years 2002-03 and 2003-04. In these suggestions, a format of the affidavit to be filed by an applicant is attached. The English translation 3 of paragraph 2 of the affidavit is as follows

That the deponent has understood the conditions and restriction of the licence. In case the shop is allotted to him then he would follow the rules, conditions of the licence and the direction given by the licensing officer from time to time

The Petitioners have also filed affidavits on the aforesaid format containing the aforesaid paragraph.

37. The lottery were also drawn for the different shops for which the Petitioners were successful. They were selected. Their lottery slips that was part of their applications and signed by them, were counter-signed by the licensing authority and other officials.

38. Once the applicants were successful in the lottery and their lottery slips (part of the applications) were counter signed by the licensing authority and other officials, the contract was complete. They were bound by the terms and condition of the advertisements and liable to pay licence fee on the MGQ.

39. It is correct that the licences were not issued in favour of the successful candidates. However, a licence is only signed by the licensing authority; it does not require signature of the successful candidate. It is merely a proof that the person is successful and his application has been accepted.

40. In the present case, it was not issued as the Petitioners had not performed their part of the duty namely to deposit the security amount. This did not mean that the Petitioners were not successful or their applications were not counter signed. They were signed by the licensing authority as well as other officials. The contract was complete between the parties.

Rule 12 is an Option Available to the Licensing Authority

41. The counsel for the Petitioners submitted that:

In case the security amount was not deposited within time then selection stood cancelled;

The Respondents should have cancelled the selection and ought to have forfeited the earnest money, the basic licence fee, and the security amount;

After forfeiting the aforesaid amount, the shop should have been resettled forthwith;

The Respondents have not done so and they cannot take advantage of their own negligence.

42. The advertisements and the conditions were merely an invitation of offer but not the offer itself {see Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, . The Petitioners had filed the applications alongwith the affidavits for allotment of the shops. This was the offer from their side. Once the lottery was declared in their favour and their lottery slips/ applications were counter signed by the licensing authority: it meant that offer given by the Petitioners were accepted. The contract was complete.

43. The later part of Rule 12 of the Rules talks about cancellation of the selection. However, this is merely an option for the licensing officer. It only provides an extra right to the licensing authority to take the suitable action. It does not mean that if the licensing authority was lenient and had not taken that action then the Petitioners were relieved of their part of duty or dues.

44. The later part of Rule 12 of the Rules, merely entitles the licensing authority to avoid the contract for non-deposit of the security amount; his inaction to-do so-does not absolve a successful applicant from their obligations. The Petitioners are not relieved of their liability due to,

Their default of not depositing the security amount or due; or

Lenient attitude taken by the licensing Authority.

Petitioners are Defacto Licensee-Could Have Surrendered

45. Section 36 of the Act is titled "Surrender of licence to sell by retail". It provides that holder of a licence can surrender his licence. If the Petitioners did not want to run the shop on the conditions of lifting the MGQ-as mandated in the rules and provided in the advertisement-then they should have surrendered their rights to sell liquor,

46. The counsel for the Petitioners submitted that;

The Petitioners were not licensees;

They could not file the applications u/s 36 of the Act.

47. The Petitioners may not be licensees, as licences were not issued. However,

they were selected and their selection could not be cancelled at their instance. They cannot take advantage of their default.

48. In any case, the selection of Petitioners was not cancelled. They could have filed an application that they do not want to run the shops. Not only, they failed to do so, they also worked the shops for the entire year. They have shown willingness to work. They cannot turn round and say that they are not liable to perform their part of the conditions, namely to deposit the licence fee on the MGQ.

49. The counsel for the Petitioners cited the following decisions:

(i) State of Madhya Pradesh and Another Vs. Firm Gobardhan Dass Kailash Nath,

(ii) Union of India (UOI) and Others Vs. Bhim Sen Walaiti Ram,

And submitted that:

The case of the Petitioner is similar to the aforesaid two cases;

The Petitioners are not liable to pay licence fee on the MGQ.

50. The Gobardhan-Dass and Bhimsen cases are not applicable to the facts of the present case. In these cases, there was no acceptance and the contract had not come into existence. This is clear from the following observations in these cases.

(i) In the Gobardhan Dass case, the Court observed (paragraph 9):

There was no proof, by way of anything in writing, to show that such a sanction was in fact given. There was equally no proof that the Chief Conservator had the authority to waive the conditions, subject to which only tenders could be validly accepted and sanctioned. In the absence of the initial deposit of 25 per cent of the purchase price having been made on the spot, the tenders could neither be validly accepted nor sanctioned by the Chief Conservator. In the absence of any authority to waive the said conditions, there was no valid acceptance or sanction of the said tenders.

(ii) In the Bhimsen case the Court observed (paragraph 3):

If the Chief Commissioner had granted sanction...the auction sale in favour of the Respondent would have been completed transaction and he would have been liable for the short fall on the resale. As the essential pre-requisites of a completed sale are missing in this case there is no liability imposed on the Respondent for payment of the deficiency in the price.

51. This is not a case here. In the present case, no further approval of any higher authority was necessary. The only thing necessary here was that, the Petitioners should be successful in the lottery and their applications should be signed by the licensing authority. It was done in the present case.

52. Section 21 of the Act is titled "Sale of intoxicants without licence prohibited". It prohibits sale of intoxicants without a licence. It is not disputed that the Petitioner have applied for obtaining a shop for selling country made liquor. They were successful and their application was accepted. If-as they contend-their selection was cancelled and they were not licensee then, they could not have lifted the liquor. The fact that they had lifted, sold, and worked for the entire period without any restriction shows that they were accepted to be licensee or in other words, they were treated to be defacto licensee for the purposes of the Act and the Rules.

53. The Petitioner had filed applications for obtaining liquor. They have deposited the fee for the same. These are on record of the W Ps. They indicate that the Petitioners have described themselves as the licensees.

#### MGQ Unreasonable-Question Cannot be Raised

54. The counsel for the Petitioners submitted that:

The MGQ was fixed at the higher rate;

In the subsequent years it was reduced;

As the MGQ was unreasonable, the Petitioners cannot be fastened with the liability to pay the licence duty on the same.

55. There is nothing on the record to show that MGQ was reduced in the subsequent years. Even, if this was correct, it does not affect the case as there can be reasons for reducing the MGQ: most obvious reason is, opening of more liquor shops in the region.

56. In any case, the Petitioners never complained to the licensing authority that the MGQ was unreasonably high and should be reduced. It is only after the period is over that the Petitioners are complaining in the writ jurisdiction. Now, they cannot turn about and say that MGQ was unreasonable.

#### Rajendra-Singh Case-Not Correctly Decided

57. It is not clear from the judgment of the Rajendra-Singh case, whether the application of the Petitioner in the Rajendra-Singh case was signed by the licensing authority or not. The only thing mentioned in the decision is that the licence was not issued. However, as already indicated that:

Once the Petitioners were successful in the lottery and their lottery slips/applications were counter signed by the licensing authority-the contract was complete and issuance of licence was merely a formality;

If the lottery slips are counter signed then there was acceptance by the licensing authority and it cannot be said that the contract was not complete or the Petitioners are relieved from paying the licence fee on the MGQ merely for the reasons that the licences were not issued.

With due respect to the single Judge, the Rajendra-Singh Case is not correctly decided.

58. In our opinion, a concluded contract had come into existence the moment the Petitioners were successful in the lottery and their lottery slips/ applications were counter signed by the licensing authority.

### 3rd POINT: NO CONTRACT-PETITIONERS STILL LIABLE

59. We have held that there was a contract between the parties and the Petitioners are liable to pay the licence fee on the MGQ. However, even if there was no contract, yet the Petitioners are liable to pay the same. Our reasons are indicated in the succeeding paragraphs.

60. The Petitioners applied for grant of license. They were successful in the lottery They worked for the period. After the period has come to the end, they cannot turn about and say that they are not bound by the Act or the Rules or the other terms and conditions of the advertisements.

61. No other person was granted contract in the region, where the Petitioners were permitted to sell the liquor. They have exploited the situation to their advantage and to the exclusion of others. They cannot resile from their part of liability on the ground that they were not bound to pay licence fee on the MGQ as the licences were not issued.

62. The Rules contemplate lifting and payment of licence fee on the MGQ. A successful applicant has to lift MGQ of liquor. He is liable for the licence fee on the same. This is the condition mentioned in the Rules. This was also mentioned either in the advertisement or it was mentioned in the advertisement that terms can be seen. It was given to all the applicants as well. This was part of the terms and conditions. Having applied for the licence and being successfully-they were bound by the same.

63. The Petitioners had given the affidavits to the effect that they would abide by the Act, Rules as well as of the terms and conditions. It is on these terms and conditions that they had worked during the period. They cannot say that, the State was bound to permit them to trade in liquor but they were not bound by their part and would not pay the licence fee on the MGQ. They are estopped from saying that.

64. The entire matter can be looked into from another angle too.

65. In case the Petitioner had deposited the security money then the formality of issuing licence would have been completed and they would have been liable to pay the licence fee on the MGQ.

66. There are many others, who were successful in the lottery. They have deposited the basic licence fee as well as security amount. The licences were issued to them. They have paid licence fee on the MGQ as they were bound to pay. This is irrespective of the fact whether they lifted MGQ quota for their shops

or not.

67. On the other hand, the Petitioners have defaulted in depositing the security amount. They are the defaulters. If they are not required to pay the licence fee on the MGQ then the defaulters would be on the advantageous position. This cannot be the intention of law: it is unreasonable. Such an interpretation cannot be given.

68. The Petitioners cannot approbate and reprobate at the same time. The writ jurisdiction of this Court is of discretionary nature. It cannot be employed in aid of the Petitioners, when neither justice nor equity is in their favour.

69. In our opinion:

Even if there was no contract between the parties, the Petitioners are liable to pay license fee on the MGQ;

The Petitioners are estopped from challenging the recovery of the license fee on the MGQ.

#### CONCLUSIONS

70. Our conclusions are as follows:

(a) No one has fundamental right to carry on trade in intoxicants. The State has exclusive right to carry on manufacture and sale of the same;

(b) The State can part with the exclusive privilege for consideration. The licence fee is the consideration for parting that privilege;

(c) There was a contract between the parties and the Petitioners are liable to pay licence fee on the MGQ;

(d) Even if there was no contract, the Petitioners are estopped from challenging the recovery of licence fee on the MGQ;

(e) Rajendra Singh Chauhan Vs. The State of U.P. and Others, does not lay down the correct law.

In view of our conclusions, the writ petitions have no merit and are dismissed.

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1 We are thankful to the counsel for the parties for the parties for correcting a part of the judgment under the heading (THE FACTS and POINTS FOR DETERMINATION). Yet, if there are any mistakes, they are ours.

3 The original Hindi of Clause (2) of the affidavit is as follows: