
(1955) 08 BOM CK 0017
In the Bombay High Court
Case No : O.C.J. Suit No. 224 of 1951

Jehangir B. Patel

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 04-08-1955

Acts Referred:

Constitution of India, 1950 — Article 363

Citation : (1958) 60 BOMLR 721

Hon'ble Judges : Tendolkar, J

Bench : Single Bench

Judgement

Tendolkar, J.—This is a suit filed by four individuals carrying on business in partnership in the name and style of Messrs. Premier Distillery and Chemical Works at Akalkot, a former Indian State, against the Union of India and the State of Bombay claiming against them jointly or in the alternative against defendant No. 2 several sums of money as damages for breach of a contract and also claiming the refund of a sum of rupees fifteen thousand being the amount of the license fees for the months of October, November and December 1948. The matter arises in this way.

2. By an agreement dated February 21, 1946, made between His Highness Raja Saheb of Akalkot and plaintiffs Nos. 1 and 2, the two plaintiffs were granted in the State of Akalkot certain exclusive rights including the right to install a distillery, to manufacture, distribute and sell country liquor and Indian made foreign liquor, to cultivate, manufacture and prepare and sell ganja, bhang and sell opium. The plaintiffs were also given rights to instal, build and construct distilleries, stills, etc. and to prepare and manufacture country and foreign made liquor and to import duty free all materials required for the purpose. The consideration for the said agreement was the payment of Rs. 60,000 per annum by monthly instalment of Rs. 5,000 and the agreement was for a term of 20 years from August 1, 1946. On February 24, 1946, there was a second agreement between the same parties and it provided for the consequences of a

breach of the first agreement, several sums having been mentioned as payable by way of damages by the Raja of Akalkot in the event of a breach. Pursuant to the agreement of February 21, the plaintiffs spent about Rs. 2,00,000 for putting up distilleries, plants and machinery in the said State. On August 15, 1947, the Indian Independence Act was passed and the Raja of Akalkot became free from his alliance to the then British India, Thereafter on August 16, 1947, Akalkot State acceded to the Dominion of India. The plaintiffs allege that at the time of such accession the Dominion Government agreed and gave assurances to the Raja of Akalkot that the agreements with plaintiffs Nos. 1 and 2 would be duly honoured. On February 22, 1948, the Rulers of Deccan State including the Raja of Akalkot executed a merger-agreement merging their respective States with the Province of Bombay. In the interval, on August 27, 1947, the extra Provincial Jurisdiction Act was passed, and acting under that Act on February 25, 1948, the Dominion of India delegated its jurisdiction over the merged States to the Province of Bombay subject to the control of the Dominion. On July 28, 1948, the Indian States (Application of Laws) Order of 1948 was passed, by which it was provided that with effect from September 15, 1948, all enactments specified in parts 1 & 2 of Schedule II would apply to the merged States including the State of Akalkot. One of such Acts was the Bombay Abkari Act, 1878. By the Administration of Indian States Order, 1948, the Commissioner of Excise, Bombay, was empowered to exercise the same powers, functions and jurisdiction in each of the merged States which he exercised in the Province of Bombay. On September 11, 1948, the Collector and Chief Administrator, Sholapur, wrote to the Premier Distillery and Chemical Works (which I shall hereafter refer to as "the Premier Distillery") that all excise laws would come into force in all the merged States on September 15, 1948, and informed the Premier Distillery that they would have to apply for the requisite licence under the Bombay Abkari Act before that date in respect of liquor and that opium and Drug Shops would be closed from October 1, 1948. The Administrator also imposed certain restrictions on the working of the distilleries upto September 30, 1948. In the correspondence that ensued the Premier Distillery took up the step that the agreements of February 21 and 24, 1946, were binding on the Dominion of India as well as the Province of Bombay and that, therefore, they were not bound to take out any licence under the Bombay Abkari Act, although they were willing to apply for licence, if it was merely a formality to regularise their rights under the agreements. This position was not accepted by the Provincial Government with the result that the distillery had to be closed by the end of September 1948 and all the shops for selling opium and hemp drugs were also closed from October 1, 1948. The plaintiffs say that by requiring them to apply for a licence under the Bombay Abkari Act and imposing conditions on them not justified by the agreement of February 21, 1946, the defendants have committed a breach of the agreement and are liable to pay damages. It is the plaintiffs' case that the Provincial Government acted on behalf of the Dominion Government or under an authority delegated to them and the Dominion Government are liable for the acts and omissions of the Provincial Government. By the Constitution enacted by the

Constituent Assembly of, India, the Dominion was constituted into the Union of India and the Province of Bombay was constituted into the State of Bombay, who are the defendants in this suit. The prayers in the plaint are for damages consisting of four different sums, one for Rs. 50,000 being general damages, the other for Rs. 17,83,332 being damages at the rate of Rs. 1 lac per year for the unexpired period of the agreement, this amount having been provided for by Clause 1 of the agreement of February 24, 1946, the third for a sum of Rs. 1,37,683 being the cost of the buildings, plant, machinery etc. which was agreed to be paid by Clause 2 of the agreement of February 24, 1946, and the fourth for a sum of Rs. 70,833 being the costs of country and foreign liquor, bhang, ganja, opium, mhowra, essences, colours, bottles and packing materials etc. which was also payable under Clause 2 of the agreement of February 24. In addition to these claims for damages, the plaintiffs also claim a sum of Rs. 15,000 being the amount of refund of licence fees for the months of October, November and December 1948 which they duly paid but during which period they were not allowed to exercise any of the rights under the agreement of February 21.

3. By their written statement, the Union of India denies that at the time of accession of Akalkot, the Raja of Akalkot had pointed out to the Dominion that he had entered into the agreements in suit with plaintiffs Nos. 1 and 2, and the Dominion Government also denies that it had agreed to honour the obligations under the said agreements. The Union of India further denies that as a successor State it is bound by the agreements entered into by the Raja of Akalkot. The Union of India further says that any claim of the plaintiffs arising from either accession or merger of the State of Akalkot is not justiciable and the Dominion denies that either they or the State of Bombay are liable in damages to the plaintiffs.

4. The written statement of defendant No. 2, in addition to raising the same pleas which had been raised by defendant No. 1, further states that the agreements were not entered into bona fide and were entered into in anticipation of the merger of the State with the State of Bombay and are, therefore, in any event not binding on the State of Bombay. The State of Bombay further says that by virtue of the provisions of the Indian States (Application of Laws) Order, 1948, the privileges if any acquired by the plaintiffs from the Raja of Akalkot continued to be valid only in so far as they were not inconsistent with the provisions of law which were made applicable to the State after its merger, and as the terms of the agreement of February 21 were inconsistent with the terms and conditions of the licence granted by the State of Bombay under the Abkari Act, the said agreement could not in any event have any validity after the Bombay Abkari Act was made applicable to the merged State of Akalkot. With regard to the claim for the refund of Rs. 15,000, the State of Bombay by their written statement admitted their liability to pay Rs. 10,000 being the amount of premium for October and November, but at the hearing, after proof of the fact that a further instalment of Rs. 5,000 for December had also been paid, Mr. Joshi on behalf of the State of Bombay indicated that the State accepted its liability for refund of the sum of Rs.

15,000.

5. On these pleadings several issues have been raised before me. But the real issue in the case is whether the State of Bombay as a successor Government is bound by the agreement entered into by the Raja of Akalkot with plaintiffs Nos. 1 and 2.

6. Now before I deal with this question, I may dispose of a preliminary objection that was raised as to the maintainability of the suit. The suit is filed by four different people claiming to be the partners of Premier Distillery and Chemical Works of Akalkot, and although the plaint states that the agreements of February 21 and February 24 were with the plaintiffs, the agreements obviously are not with the plaintiffs at all but are with plaintiffs Nos. 1 and 2. It is urged therefore on behalf of the defendants that the plaintiffs are not entitled to maintain the suit. The partnership between the four plaintiffs was registered from August 1, 1946, i.e. at a date subsequent to the date of the two agreements. The plaintiffs, therefore, obviously have collectively no right to file the suit in respect of a breach of an agreement entered into by plaintiffs No. 1 and 2 only; but nonetheless this is not a suit by a firm but by four individuals who are described as partners of a firm, and if two of them have any rights under the agreement, although the suit by the other two may fail, if plaintiffs Nos. 1 and 2 establish their rights, they will be entitled to a decree.

7. I may also state that when evidence was led on behalf of the plaintiffs to prove the agreements, the genuineness of the second agreement of February 24 was challenged in cross-examination on behalf of the defendants by Mr. Joshi. Thereupon Sir Nasserwanji Engineer on behalf of the plaintiffs intimated to the Court that he gave up the second agreement and does not wish to rely on it, with the result that we are now concerned in this suit only with the agreement of February 21, 1946.

8. Now, the contention put forward by Sir Nasserwanji Engineer is that by the modern usage of nations which had become law, a successor State is bound to honour the obligations of the State to which it succeeds. This proposition is disputed by the defendants who urge that a successor State is only bound to the extent to which it may have recognised or endorsed the agreements of the former State. The proposition which Sir Nasserwanji has attempted to canvass has the authority of the opinion of Chief Justice John Marshall of the Supreme Court of the United States, whilst the proposition that has been canvassed by the defendants has the authority of numerous decisions of the Privy Council and of the House of Lords. All these decisions were considered by their Lordships of the Supreme Court in *Virendra Singh and Others Vs. The State of Uttar Pradesh*, and without, therefore, going through all the authorities, it would be convenient to refer to the learned judgment of Bose J. in this case. The case before their Lordships concerned the grants of Jagirs and Muafis by the Rulers of Sarila and Charkhari States which were revoked by the Governor of Vindhya Pradesh in consultation with the Government of India; and the question for determination

was whether the Union of India had the right and power to revoke these grants. In this connection, Bose J. observed (p. 424):

Jurists hold divergent views on this matter. At one extreme is the view of the Privy Council series of cases. Their effect was summarised in *Vajesingji Joravarsingji v. Secretary of State for India* (1924) L.R. 51 IndAp 357 : 26 Bom. L.R. 1143 and again in *Secretary of State v. Sardar Rustam Khan* (1941) L.R. 68 IndAp 109, in the following words.

...a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties"; also in the *Secretary of State in Council of India v. Kamachee Boye Sahaba* [1859] 7 M.I.A. 476 and in *Johnstone v. Pedlar* [1921] 2 A.C. 262 as follows:

...Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected, These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.

According to the Privy Council in *Secretary of State for India in Council v. Bai Rajbai* (1915) L.R. 42 IndAp 229 and also in *Vajesingji Joravarsingji v. Secretary of State for India*, the burden of proving that the new sovereign has recognised the old rights lies on the party asserting it.

His Lordship then referred to the view of Chief Justice John Marshall of the United States Supreme Court in the *The United States v. Percheman* [1833] 7 Pete 605 8 Law ed. 41 in the year 1833 to the following effect (p. 67):

It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated, and private rights annulled.

His Lordship also referred to Hyde's International Law which lays down the same principle. His Lordship then drew attention to the observations of Lord Alverstone C.J. in *West Rand Central Gold Mining Co. v. Rex* [1905] 2 K.B. 391 in which, inter alia, Lord Alverstone points out (p. 427):

...the Privy Council and the House of Lords both have held that the new sovereign can choose to waive his rights and recognise titles and rights as they existed at the date of cession. This recognition can be given either by legislation or by proclamation and it can even be inferred from the mode of dealing with the property after the cession.

9. Then His Lordship proceeded (p. 428):

In dealing with the views of international jurists, Lord Halsbury insisted that they were only enunciations of what in their opinion the law ought to be and had no binding force. He said in the House of Lords in *Cook v. Sprigg* [1899] A.C. 572:

It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced" by sovereign against sovereign in the ordinary course of diplomatic pressure.

His view was endorsed by the Privy Council in *Secretary of State v. Sardar Rustam Khan* and again in the House of Lords in *Johnstone v. Pedlar*. Lord Alverstone C.J. analysed in detail how far international law can be accepted and applied in municipal Courts of justice in *West Rand Central Gold Mining Company v. Rex* and set out reasons for the above conclusion.

The position, therefore, under the authorities is that whatever may have been the view taken by Chief Justice John Marshall of the Supreme Court of the United States of America and whatever view our own Supreme Court may take after the passing of the Constitution which came into force on January 21, 1950, I have to deal in this case with a merger which took place on February 22, 1948. The law that would determine the rights of a successor State at the time of merger would be the law as laid down by the Privy Council in the numerous decisions and also by the House of Lords and not the law as enunciated by John Marshall, Chief Justice of the United States. I, therefore, hold that the agreement of February 21 did not bind the successor State unless it can be shown that the agreement was recognised or confirmed by the State.

10. Now, it is urged by Sir Nasserwanji that the agreement had been recognised

both in fact and in law. He relies on the fact that subsequent to the merger, the state of Bombay continued to receive the monthly sum of Rs. 5,000 from the Premier Distillery under this agreement till the end of December 1948; and indeed there are letters produced which show that the Administrator of Akalkot State asked for the payment of this premium when it was not paid in time. There is for example a letter dated September 11/13, 1948, which complains of the delay in payment of the instalment for September 1948 and there is also a letter of October 15, 1948, which requires the Premier Distillery to pay the future instalments in time. Now ordinarily the receipt of instalments which were payable under the agreement of February 21 would, in the absence of more, be some evidence of the recognition of the agreement by the successor State; but there is ample material in this case that the Premier Distillery at all times knew and the State of Bombay had made it perfectly plain that they were not recognising this agreement. In the first instance, the payments used to be made before the merger in the Treasury Office at Akalkot and they continued to be so made after the merger, with the result that the demand for payment by the Administrator of Akalkot or the receipt of payment by the Treasury Officer is not necessarily a recognition by the State of Bombay of the agreement under which the payment was due. But this is not all. There are numerous letters which clearly show the attitude that the State of Bombay had adopted with regard to this agreement and similar agreements. On July 21, 1948, the Commissioner of Excise wrote to the Collector & Chief Administrator of Sholapur that certain steps should be taken under the existing laws of the States in anticipation of Government approval. These steps were : (1) that all excise and toddy licences should be continued to the present licencees for two months from August 1, 1948; (2) the days of closure followed in the case of excise shops in the " districts should be applied to the State areas; (3) "The Excise shops in the Akalkot which are managed by the Distillery Contractors under the contract agreement should be continued until Government decide whether the contract agreement should be terminated or not" and (4) in the case of distilleries worked under contracts granted by the State, it should be seen whether the contractors possess the necessary licences, and if not, they should be asked to apply for the necessary licences. A copy of this letter was forwarded to the Premier Distillery, Akalkot, by the Additional Administrator, Akalkot. It bears a somewhat curious endorsement that the copy was forwarded for immediately supplying the information called for, although the letter does not indicate what information was required to be supplied. The letter had directed the Collector to take certain steps and not to collect any information. In any event the receipt of this letter by the Premier Distillery was a clear intimation to them that Government had not decided whether the contract should be terminated or not, and it is only pending such decision that licences were to be continued for two months. Thereafter on July 31, 1948, the Collector of Sholapur wrote to the Prant Officer and Administrator, Sholapur Division, to arrange to continue all opium shops in the State areas for two months from August 1 and a copy of this letter was forwarded to the Premier Distillery for information and necessary action. This letter, however, was cancelled by a

subsequent letter dated August 31, 1948, as not being applicable to the shops in the Akalkot State. Then on August 13, 1948, a memorandum was sent by the Additional Administrator of Akalkot to the Premier Distillery under orders received from the Commissioner of Excise informing them that they should issue no liquor from their distillery without obtaining sanction in each case from the Collector and Chief Administrator, Sholapur, and that they should not export liquor outside the State without the specific sanction of the Commissioner of Excise. Both these requirements were clearly inconsistent with the alleged rights of the plaintiffs under the agreement of February 21 and this memo. could not have left them in any doubt that the agreement was at least till then not being recognised by the State of Bombay. It appears that the Premier Distillery thus realised that their agreements had not in fact been recognised, but the question of whether they should be recognised or terminated was under consideration; and by their letter of August 13, 1948, addressed to the Administrator of Akalkot, the Premier Distillery pointed out that the matter of terminating the agreements was under the consideration of Government, as intimated by them in their letter of July 21, 1948. They also by their letter of August 15, 1948, addressed to the Commissioner of Excise expressed their willingness to follow the order regarding the issue of liquor from their distillery as well as regarding the export outside the State. Then on August 25, 1948, the Administrator, Akalkot, addressed a memo, note to the Premier Distillery in which he called upon them to state whether they possessed a licence under the Abkari Act and intimated to them that they should apply for one if they did not possess one. In reply to this letter, the Premier Distillery pointed out that necessary licence had been granted to them as per the agreement dated February 21, 1946. They further went on to point out that the matter of termination of contract was under consideration and that for the present, therefore, there was no necessity to obtain a licence, which clearly shows that not only had the State of Bombay not recognised the agreement of February 21, but the plaintiffs, themselves were quite conscious of this position. Then by their letter of September 12, 1948, addressed to the Collector of Sholapur, the Premier Distillery applied for the necessary licence and the Collector by his reply dated October 1, 1948, informed them that they will be permitted to work the distillery in the first instance upto March 31, on certain terms and conditions. This correspondence in my opinion clearly establishes that the State of Bombay had made it abundantly plain that they did not accept the agreement of February 21, 1946, and that whatever was done was being done pending the decision by the State of Bombay as to whether the agreements should be terminated or recognised and confirmed. In my opinion, therefore, there is no evidence in this case to establish that the agreement of February 21, 1946, was in fact recognised by the successor Government.

11. I next come to the plea that there was legislative recognition of the agreement. Now this legislative recognition is to be found, according to Sir Nasserwanji, in the first proviso to Section 5 of the Indian States (Application of

Laws) Order, 1948. Now Section 5 repeals all enactments in force in any Indian States. Proviso 1 on which reliance is placed by Sir Nasserwanji in so far as it is relevant is in the following terms:

Provided that the repeal by this Order of any such enactments shall not affect the validity, invalidity, effect or consequence of anything already done or suffered or any right, already acquired...or granted.

It is the case of Sir Nasserwanji that the agreement dated February 21, 1946, was a right that accrued to the plaintiffs under the law that is in force in the Akalkot State, and that right which has accrued to him is subsequently recognised by this proviso. As against this plea, Mr. Joshi for the defendants relies on the second part of the proviso which is in these terms:

Nor shall the repeal by this order of any enactment affect any...privilege or exemption...in so far as the same respectively is not in any way inconsistent with any of the enactments extended under paragraph 3 of this order...

In other words, Mr. Joshi's contention is that if the plaintiffs get any thing at all by virtue of the agreement of February 21, 1946, it was either a privilege or an exemption from the operation, of the Excise Law that was applicable to the Akalkot State and that such exemption or privilege is only valid in so far as it is not inconsistent with the provisions of the Bombay Abkari Act which was extended to the merged Akalkot State by the Indian States (Application of Laws) Order, 1948. The question, therefore, for determination is whether what the plaintiffs got under the agreement was a right accrued or it was merely a privilege or exemption.

12. Now, the contention advanced by Sir Nasserwanji is that the agreement constitutes a licence under the provisions of the Bombay Abkari Act. Now it appears from an Administrative Report of the Akalkot State that the Bombay Abkari Act had been made applicable to the State as amended upto the year 1912 and that it had become necessary to do so by reason of the fact that Abkari Revenue of the Akalkot State had been leased out to the Province of Bombay prior to the agreement dated February 21, 1946. The contention of Sir Nasserwanji is that the agreement itself is a licence issued under the Abkari Act which was in force in the Akalkot State at the time when the agreement was arrived at. This contention is based on a submission that under the Abkari Act all powers of issuing a licence are vested in the Provincial Government and all other Officers who exercise that power of issuing a licence are only exercising delegated authority. It would, therefore, be open to the Provincial Government, in this case the Raja of Akalkot, to grant licences himself and the agreement dated February 21, constitutes such a licence.

13. Now I have been taken through all the provisions of the Abkari Act; and there is, no doubt left in my mind after carefully considering all the provisions of the Act that the contention of Sir Nasserwanji that all powers are vested in the Provincial Government under that Act is wholly and entirely untenable. In

support of this plea Sir Nasserwanji has relied on certain sections of the Act to which I shall presently refer. Section 4 confers upon the Collector the duty of collecting Abkari-revenue and the carrying out of the provisions of this Act. This is made subject to the orders of the Provincial Government or the Commissioner, It is not clear to me how it follows therefrom that the powers of the Collector can be exercised by the Provincial Government. A power of superintendence or control is a wholly different power from a power to do an Act. Then Sir Nasserwanji relies on Section 6, para. 2, which provides as follows:

The Provincial Government or the Commissioners may invest any servant of the Crown in any Department either personally or in the right of his Office, or any other person with such powers and impose upon, him such duties, under this Act as they deem fit, and any such Officer shall thereupon exercise the said powers and discharge the said duties in addition to the powers and duties incident to his principal office.

This provision undoubtedly confers upon the Provincial Government the power to invest any other Officer with certain rights or duties under the Act; but I find it extremely difficult to see how it follows therefrom that the Provincial Government instead of conferring powers on other servants of the Crown can discharge the functions of the different Officers by clothing itself with all the powers which specified officers can exercise by virtue of the provisions of the Act. Reliance is next placed on Section 30 of the Abkari Act which prescribes that the Provincial Government in the case of licences may direct what the terms or conditions of any licence may be. That power again is the power to prescribe the terms and conditions of a licence and not to grant one. The licences can be granted only by the appropriate Authority under the Act. Reliance was next placed on two other sections of the Act, Section 8A which provides that the Commissioner and other Abkari Officers shall be subject to the orders of Government and Section 64A, particularly Sub-clause (j), which confers upon the Provincial Government the power to direct that licences of the kind specified in such order shall be granted to persons specified in such order; but these sections were incorporated in the Bombay Abkari Act by Bombay Act XV of 1941, and as the Act applicable to the Akalkot State was the Bombay Abkari Act as amended upto the year 1912, the provisions of these two sections do not fall to be considered. When one looks at the other sections of the Act, it is clear that there is a division of powers between the Bombay Government, the Commissioner of Excise and the Collector of Excise. The powers enjoyed by each one of these authorities under the Abkari Act have been tabulated in the Bombay Excise Manual, Vol. II, and when one looks at these powers, it is quite clear that the powers exercisable by the different authorities under the Abkari Act are wholly and entirely different. For example, u/s 9 no intoxicant and no hemp can be imported unless the Provincial Government has given permission and the power to grant a permission is specifically that of the Provincial Government and not of the Commissioner of Excise or of the Collector. Similarly u/s 11 the Provincial Government is, empowered to prohibit, import, export and transport of intoxicants, and that

again is not a power that can be exercised by either the Commissioner or the Collector. u/s 15 of the Act, the power to grant a licence for a distillery is in the Commissioner and obviously, it seems to me to be futile to suggest that this power can be exercised by the Provincial Government. Indeed in the absence of a provision like the present Section 8A, if the Provincial Government attempted to interfere with the discretion of the Commissioner to grant or refuse a licence, any order of the Commissioner made in consequences of such interference would be liable to be set aside in a Court of law. Similarly Section 14A confers upon the Collector of Excise the power to issue a licence for manufacture of intoxicants, cultivation and collection of hemp, tapping of toddy, bottling of foreign liquor and the possession of implements or apparatus for the purpose of manufacture of any intoxicants. This is a power which only the Collector can exercise and no one else. It seems, therefore, to me to be impossible to urge that all the powers under the Abkari Act in respect of the issue of a licence are vested in the Provincial Government. They are obviously vested in the specific authorities, who have been empowered to grant such licences under the Act, and I am unable, therefore, to hold that the agreement of February 21, 1946, is a licence issued under the law as then prevalent in the State. If it is not such a licence, it cannot confer any right on plaintiffs Nos. 1 and 2 and there can be no question of a right accrued which is saved by the first proviso to Section 5 of the Indian States (Application of Laws) Order, 1948.

14. The agreement of February 21, 1946, appears to me to be nothing more or less than an agreement between the Raja Saheb and plaintiffs Nos. 1 and 2. But at its highest, it can only be construed as conferring upon plaintiffs Nos. 1 and 2 an exemption from the operation of the Abkari, Act in so far as licences were required to be obtained thereunder or a privilege to carry on the distillery and to manufacture, distribute and sell liquor, as well as cultivate, manufacture and prepare ganja, bhang and opium under the provisions of the Abkari Act. Assuming that it conferred such a privilege or exemption, the same falls within the second part of the proviso to Section 5 of the Indian States (Application of Laws) Order, 1948, and it is saved only in so far as it is not inconsistent with any of the enactments extended to the former Akalkot State, one of which is the Abkari Act, 1878, as amended upto the date of its application to the Akalkot State. It is clear that the provisions of the agreement of February 21, 1946, in so far as they enable the plaintiffs to carry on their business in excisable articles without a license conflict with the provisions of the Bombay Abkari Act; and assuming that plaintiffs Nos. 1 and 2 had either an exemption or a privilege, they could only seek to enforce it by complying with the provisions of the Bombay Abkari Act, which were made applicable to the former Akalkot State. But they failed to comply with these provisions and thereby automatically lost such exemption or privilege that they may have had under the agreement dated February 21, 1946.

15. The plaint as drafted appears to indicate that reliance was placed by the plaintiffs on the Agreements of Accession and Merger; but it was conceded at the

Bar by Sir Nasserwanji that he was not claiming in this suit any rights that arise out of the Agreement of Accession or Merger and such rights are clearly not justiciable having regard to Article 363 of the Constitution. The result, therefore, is that I hold that the agreement of February 21, 1946, was not binding on the successor Government as it was not recognised or confirmed by such Government, or by legislation, and, therefore, the question of a breach of the agreement does not arise. It is not in dispute that the plaintiffs were not permitted to carry on under the agreement dated February 21, 1946, after September 31, 1948, but that does not constitute a breach of any agreement which bound any of the defendants. The entire claim of the plaintiffs for damages for breach of the alleged agreement must, therefore, fail. However, with regard to one part of the claim for damages, namely the sum of Rs. 70,833, being the costs of the country and foreign liquor, bhang, ganja, opium, mhowra, essences, colours, bottles and packing materials etc. which were lying in the Akalkot State and which the plaintiffs in the plaint describe as "now in the wrongful possession of the Provincial Government", Sir Nasserwanji claims that he is entitled to this amount even if the agreement may not be binding on the defendants. Now so far as this claim is concerned, I find no averment in the plaint except in para. 28(d), which relates to damages for breach of the contract, as to how the plaintiffs claim to be entitled to receive this amount. The words "now in the wrongful possession of the Provincial Government" are a mere description of the goods and does not give rise by themselves to any claim. It might have been open to the plaintiffs to claim the price of these articles as on conversion or as the price of goods had and received. But no such claim is made in the plaint. In answer to the claim made in para. 28(d) in this regard, however, defendants No. 2 by their written statement have stated that by their letter of February 2, 1950, addressed to the Superintendent of Excise, Sholapur Division, the plaintiffs had agreed to sell the stock at certain rates and defendants No. 2 took over such stock for which the price is to be paid to the plaintiffs. Therefore, quite irrespective of the question that the plaint does not disclose any cause of action in respect of the price of these articles except by way of damages for breach of the agreement, on the admission of the State of Bombay, I would have been prepared to pass H decree in favour of the plaintiffs for the price of these articles; and that price appears from the correspondence in so far as is admitted by defendant No. 2 to be Rs. 6,644-12-7 (see letter dated May 5, 1952, from the Director of Excise and Prohibition to the attorneys of the plaintiffs). However, Sir Nasserwanji when asked whether he wishes to have a decree for this amount has intimated that he does not want a decree for this amount as he has never accepted the rates offered by Government and that the letter dated February 2, 1950, to which reference is made in the written statement of defendant No. 2 was only written "without prejudice." As there is no claim in the plaint for the price of these articles except by way of damages for breach of a contract and since I have held that there was no contract binding upon the defendants, there can be no question of any damages for breach of a contract. This claim, therefore, cannot survive in the view that I have taken of the facts of this case.

16. The only other claim which survives is the claim for Rs. 15,000 being the monthly premia for 3 months of October, November and December, 1948. This claim is admitted by defendant No. 2 and there will, therefore, be a decree against defendant No. 2 for Rs. 15,000.

17. As regards, costs, the position is that the suit against defendant No. 1 has failed and will be dismissed with costs against defendant No. 1.

18. As regards defendant No. 2, there has been a decree against defendant No. 2 for Rs. 15,000 in respect of a claim out of which Rs. 10,000 was admitted by the written statement. On this part of the claim, a suit would have been competent in the City Civil Court and the only costs to which the plaintiffs would be entitled would be the costs for pleaders' fees which they would have obtained in the City Civil Court. The plaintiffs will, therefore, pay defendant No. 2's cost of the suit with liberty to set off against this amount the pleaders' fees in the City Civil Court on a claim for Rs. 15,000. Interest on the decretal amount of Rs. 15,000 at 4 per cent, from the date of the decree and interest on costs payable by the plaintiffs also at the same rate.