
(1969) 02 KL CK 0006

In the High Court Of Kerala

Case No : O.P. No's. 3326, 3397, 3398, 3399, 3400, 3401, 3462, 3839, 3840, 4249, 4566, 5228 5229, 5355, 5394, 5395, 5396, 5402, 5410, 5411, 5412 of 1968 and 67, 68 and 72 of 1969

Madhavan K.P., Kunissery, Alathur

APPELLANT

Vs

Assistant Excise Commissioner, Palghat and 4 others

RESPONDENT

Date of Decision : 06-02-1969

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 19(1)(g), 19(6)

Citation : (1969) KLJ 289

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : S.A. Nagendran, N. Krishna Pillai, P.A. Mohamed, C.P.S. Prasad and N.N.D. Pillai in OP 3326 of 1968 and S.A. Nagendran, N. Krishna Pillai, P.A. Mohamed, C.P.S. Prasad, N.N.D. Pillai, T.C. Karunakaran, P.K. Shamsuddin, K.K. Gangadharan, V.M. Kurien, P. Kesavan Nair, M.I. Joseph, K. Bhaskaran, O.V. Radhakrishnan, P. Thankappan, T.V. Prabhakaran, P.N. Rajan and V.R. Venkitakrishnan in O.P. Nos. 3397, 3398, 3399, 3400, 3401, 3462, 3839, 3840, 4249, 4566, 5228 5229, 5355, 5394, 5395, 5396, 5402, 5410, 5411, 5412 of 1968 and 67, 68 and 72 of 1969, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—The petitioners in these writ petitions bid in auctions the right to vend country liquor in the respective areas mentioned in the licences issued to them. The auctions have been confirmed. The petitioners committed default in payment of the rental payable by them. The privilege to vend the liquor of some of them was directed to be re-auctioned, and proceedings have been taken against them and the other defaulters for recovery of arrears of rental under the provisions of the Revenue Recovery Act. The petitioners contend that no amount can be recovered from them by way of rental under the provisions of the Revenue Recovery Act, that section 18A of the Abkari Act, under which the privilege to vend the liquor was granted to them, is ultra vires the Constitution,

as it infringes their fundamental right to carry on a trade under Art. 19 (1) (g) of the Constitution, that the rental is neither an excise duty nor a luxury tax, and that if it is considered as a fee, there is no quid pro quo. They further contend that the rental being neither a tax nor a fee cannot be recovered from them under the Revenue Recovery Act, that recovery of any amount under the provisions of that Act would be discriminatory as an unguided discretion has been vested in the authority concerned either to resort to a suit or to the more drastic provisions of that Act.

2. The Cochin Abkari Act, 1 of 1077, was enacted by the Maharaja of Cochin. This enactment was amended in 1964 by the Abkari Laws (Amendment and Validation) Act, 1964 (Act 1 of 1964) and the amended Act with further modifications was extended to the whole of Kerala by Act X of 1967, hereinafter called the Act. Section 18A, which practically re-enacts the provisions of Section 16 of the Cochin Act reads:

Grant of exclusive or other privilege of manufacture etc., on payment of rules:--

(1) It shall be lawful for the Government to grant to any person or persons, on such conditions and for such period as they may deem fit, the exclusive or other privilege--

(i) of manufacturing or supplying by whole-sale; or (ii) of selling by retail; or (iii) of manufacturing or supplying by whole-sale and selling by retail, any liquor or intoxicating drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other method as may be determined by the Government, from time to time, and may be collected to the exclusion of, or in addition to, the duty or tat leviable under S. 17 and 18. (2) No grantee of any privilege under sub-section (1) shall exercise the same until he has received a licence in that behalf from the Commissioner. (3) In such cases, if the Government shall by notification so direct, the provisions of S. 12 relating to toddy and toddy producing trees shall not apply.

Sub-section (23) of Section 3 reads:

"rental", means the rental payable under sec. 18A in consideration of the grant of an exclusive or other privilege of manufacturing, supplying or selling any liquor or intoxicating drugs.

"Abkari revenue" is defined:

Abkari revenue" means revenue derived or derivable from any duty, fee, tax fine or confiscation imposed or ordered under the provisions of this Act, or of any other law for the time being in force, relating to liquor or intoxicating drugs.

3. It was argued on behalf of the State that "rental" is the consideration for the privilege of vending liquor, that the State could grant the privilege as the State has monopoly in liquor trade, that the assumption behind section 18A of the Act

is that the State has exclusive monopoly to carry on the trade in liquor, and therefore the reasonableness of restrictions imposed upon the fundamental right of the citizens to carry on trade in liquor cannot be canvassed in view of the amendment to Art. 19 (6) of the Constitution in 1951. In support of the contention that the trade in liquor was the monopoly of the State under the Cochin, Travancore and Madras Abkari Acts, and therefore, under the Kerala Statute also, the learned Government pleader referred me to the Cochin State Manual, Chapter XII, Page 333, There, it is stated that the practice in erstwhile Cochin State was to farm out the privilege of vending toddy and arrack to a few persons. In T.K. Velu Pillai's Travancore State Manual, Vo. IV at page 48 it is stated:

In the early days the management of the Abkari Department was vested in the Dewan. The Abkari revenue was collected by a staff consisting of Vicharipukars, Pillamar and others employed for the purpose. The Amanee system was introduced in 1010 ME, under it, the monopoly of selling toddy and arrack was farmed out taluk by taluk to the highest bidder, who agreed to certain stipulations almost identical with those that obtained in British India. The selling prices were fixed by Government. To each contractor was assigned a fixed number of shops. He employed his own peons, collected the monthly instalments of the rent and remitted it into the District or Huzur Treasury. If no farmer came forward, the Tahsildar controlled the management of the shops.....

That the practice in the Malabar area was also the same is clear from the Malabar District Gazetteer, Chapter XII, Page 376. Counsel also relied on the observations in T.D.C.V.T.C.S. Ltd. V. State of Kerala 1958 KLT 521 and Kunnathur Taluk Chethu Thozhilali v. State 1960 KLJ 689 to support the contention that the State has the exclusive privilege to carry on the trade in country liquor and can farm out that privilege to the citizens.

4. That the right to carry on trade in liquor is a fundamental right cannot be disputed in view of the ruling of the Supreme Court in Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others, Apparently, it may be difficult to reconcile the holding that the right to carry on trade in liquor is a fundamental right with the proposition that the right to vend liquor is the exclusive privilege of the State, which can be farmed out to citizens and as consideration for grant of the privilege, the State can realise rental. But, if the Legislature has by section 18A of the Act enabled the Government to carry on the trade in liquor to the exclusion of citizens totally or partially, the validity of the section cannot be canvassed in a court on the ground that it imposes unreasonable restrictions upon the fundamental right under Art. 19 (1) (g). That is the effect of Art. 19 (6) (ii) of the Constitution. In Saghir Ahmad Vs. The State of U.P. and Others, the court said:

The new clause in Art. 19 (6) has no doubt been introduced with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business; but the amendment does not make the establishment of such

monopoly a reasonable restriction within the meaning of the first clause of Art. 19 (6). The result of the amendment is that the State would not have to justify such action as reasonable at all in a court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Art. 19 (1) (g) of the Constitution.

The amendment to Art. 19 (6) enables the State to carry on any trade or business by itself or through a Corporation owned or controlled by the State. The Supreme Court was required to explain the word "itself" in *Akadasi Padhan Vs. State of Orissa*, where the petitioner contended that the Government cannot carry on a business through agents and claim the benefit of the amendment. Elucidating the intention of the framers, the court observed that as the State can carry on its business through its departmental officers, similarly, it can do so through its agents as well. In that case the validity of the Orissa Tendu Leaves (Control of Trade) Act, 1961, was challenged. The preamble of the Act provides that the enactment was just to regulate trade in tendu leaves by creating a monopoly in it. u/s 3 of the impugned Act no person other than the Government Officer so authorised or an agent of Government shall purchase or transport tendu leaves. The Government was also empowered to fix minimum prices. The petitioners mainly contended that such provisions infringed Art. 19 (1) (g) and that the Government cannot carry on monopoly through agents. They also contended that clause (6) of Art. 19 is only permissive in its character permitting the State to create a monopoly by law but is not a bar to the judgment of such monopoly by any standard of reasonableness. The respondents contended that Art. 19 (6) prohibits a challenge to a law creating monopoly on ground that it is an unreasonable restriction of the right guaranteed by Art. 19 (1). Gajendragadkar, J., as he then was, basing his observations on a liberal approach, held that to a socialist, the notion of State ownership is a matter of principle, and its justification lies in the notion of social welfare. To a rationalist it is a matter of expediency dominated by considerations of economic efficiency and increased output. The first is doctrinaire while the other is pragmatic. The former proceeds on the general ground that all national wealth and means of producing should come under national control whilst the second supports nationalisation on grounds only of efficiency and increased output. He said that the effect of the amendment was that a law relating to creating of monopoly of the State should be presumed to be reasonable and in the interest of the general public. It makes no difference in this case whether you accept the view expounded by Mukherjea J., in *Saghir Ahmad Vs. The State of U.P. and Others*, or that taken by Gajendragadkar J. in *Akadasi Padhan Vs. State of Orissa*, as to the scope of the amendment. (See the discussion of the question by H. M. Seervai at page 399 of his *Constitution Law*).

5. As already stated, one main question in *Akadasi v. State of Orissa* was whether a trade or business carried on through person other than agents *stricto sensu* could be considered as a trade or business carried on by the State. The Supreme Court held that in order that it may be said that a trade or business is

carried on by the State, it is necessary that the trade or business is conducted either by departmental agencies or by agents in the strict sense of that term. The court emphasised the fact that if the agents have beneficial interest in the trade, the trade would not be a trade carried on by the State. The Court said:

.....It seems to us that when the State carries on any trade, business or industry, it must inevitably carry it on either departmentally or through its officers appointed in that behalf. In the very nature of things the State as such cannot function without the help of its servants or employees and that inevitably introduces the concept of agency in a narrow and limited sense. If the State cannot act without the aid and assistance of its employees or servants, it will be difficult to exclude the concept of agency altogether. Just as the State can appoint a public officer to carry on the trade on its behalf, so can it appoint an agent to carry on the trade on its behalf. Normally and ordinarily, the trade should be carried on departmentally or with the assistance of public servants appointed in that behalf. But there may be some trades or businesses in which it would be inexpedient to undertake the work of trade or business departmentally or with the assistance of State servants. In such cases, it would be open to the State to employ the services of the agents, provided the agents work on behalf of the state and not themselves.....Therefore, in our opinion, if a law is passed creating a State monopoly and the working of the monopoly is left either to the state or to the officers of the State appointed in that behalf or to the department of the State, or to persons appointed as agents to carry on the work of monopoly strictly on behalf of the State, that would satisfy the requirements of Art. 19 (6) (ii). In other words, the limitations imposed by the requirement that the trade must be carried on by the State or by a Corporation owned or controlled by the State cannot be widened and must be strictly construed and agency can be permitted only in respect of trades or businesses where it appears to be inevitable and where it works within the well recognised limits of agency. Whether or not the operation of State monopoly has been entrusted to an agent of this type, will have to be tried as a question of fact in each case. The relationship of agency must be proved in substance, and in deciding the question, the nature of the agreement, the circumstances under which the agreement was made and the terms of the agreement will have to be carefully examined. It is not the form, but the substance that will decide the issue....."

6. In the light of the above observations can it be said that the State here is carrying on a trade or business in liquor? I think Not. The contractors carry on the business on their own behalf; the profits they obtain from the business will accrue to them and not to the Government. The loss they sustain must be suffered by them and will not be borne by the Government. There is no question of accountability as between them and the Government. The fact that they are subject to restrictions in the matter of charging the price of liquor and in other matters would not make them agents in the connotation of that term in law. If the State is not carrying on the trade, as explained by the Supreme Court, Art 19

(6) (ii) will not be attracted. So, let me consider the question whether considering the nature of the trade in question the restrictions imposed by section 18A are reasonable restrictions upon the fundamental right to carry on a trade.

7. Art. 298 of the Constitution enables the executive government of a state to carry on any trade or business. The authority of State to exclude competition is derived from Entry 21 in List III in the Seventh Schedule which reads:

Commercial and industrial monopolies combines and trusts

There is no reason therefore why by a law the Legislature of a State cannot create a monopoly in liquor trade in the State and prohibit the citizens from carrying on the trade, except in the manner provided in that law. But then, the law which create the monopoly must be able to sustain an attack on the ground that it infringes the fundamental right of the citizens to carry on the trade.

8. In *Saghir Ahmad Vs. The State of U.P. and Others*, the Supreme Court held that the notifications in question in that case providing for exclusive State stage carriage services on the routes in question there offended the fundamental right of the citizens under Art. 19 (1) (g). Mukherjea J., said.

As has been held by this court in the case of *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, , whether the restrictions are reasonable or not would depend to a large extent on the nature of the trade and conditions prevalent in it. There is nothing wrong in the nature of the trade before us, which is perfectly innocuous. The learned Judges of the High Court have upheld the validity of the legislation substantially on two grounds. In the first place, they have relied on what may be said to be an abstract proposition of law that prohibition with a view to State monopoly is not "per se" unreasonable.

"In my opinion," "thus observes one of the learned Judges" even this total stoppage of trade on public places and thoroughfares cannot "always" be said to be an unreasonable restriction.

In the second place, it has been said that the transport services are essential to the life of the community and it is conducive to the interests of the general public to have an efficient system of transport on public roads. It is pointed out that the preamble to the Act indicates that the legislation was passed in the interests of the general public who are undoubtedly interested in a suitable and efficient road transport service, and it was not proved by the petitioners that the monopoly, which was contemplated in favour of the State in regard to this particular business, was not conducive to the common welfare. As a proposition of law, the first ground may not admit of any dispute but we think: that the observation of Lord Porter in the Privy Council case of--"*Commonwealth of Australia v. Bank of New South Wales*", 1950 A.C. 235, 311, upon which considerable reliance has been placed by the High Court would indicate the proper way of approach to this

question.

"Their Lordships do not intend to lay it down" thus observed Lord Porter "that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or commonwealth agency or in some other body be justified. Every case must be judged in its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation."

In order to judge whether State monopoly is reasonable or not, regard therefore must be had to the facts of each particular case in its own setting of time and circumstances. It is not enough to say that as an efficient transport service is conducive to the interests of the people, a legislation which makes provision for such service must always be held valid irrespective of the fact as to what the effect of such legislation would be and irrespective of the particular conditions and circumstances under which the legislation was passed. It is not enough that the restrictions are for the benefit of the public, they must be reasonable as well and the reasonableness could be decided only on a conspectus of all the relevant facts and circumstances.

At all times in history, the trade in liquor has stood on a different footing from other trades.

9. Mahajan C.J. said in *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, , that although every citizen had a fundamental right to carry on trade in liquor, the restrictions that may be put upon that right can be much more drastic than in other trades. He quoted the observations of Field J., in *Crowley v. Christensen* (1969) 34 Law Ed. 620 to 623 to the following effect;

The police power of the State is fully competent to regulate the business--to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evil.

and said that the police power of the State can be exercised to the extent of prohibiting any citizen from carrying on the trade. This is what he said:

Art. 19 (1) (g) of the Constitution guarantees that all citizens have the right to practise any profession or to carry on any occupation or trade or business, and cl. (6) of the Article authorises legislation which imposes reasonable restrictions on this right in the interests of the general public. It was not disputed that in order to determine the reasonableness of the restriction, regard must be had to the nature of the business and the conditions prevailing in that trade. It is

obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public.

Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some by the dangerous character of the articles used, manufactured or sold, require also special qualifications in the parties permitted to use, manufacture or sell them.

Therefore, restrictions which are impermissible in other trades might be lawful and reasonable so far as trade in liquor is concerned, and a law which imposes restrictions amounting even to prohibition on the part of the citizens to carry on the trade in liquor may be reasonable. That restrictions may amount in certain circumstances to prohibition in harmless trades or businesses and yet be reasonable has been held by the Supreme Court in *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, .

10. The provisions of the Act which came up for consideration in *Akadasi Padhan Vs. State of Orissa*, are similar to these which are now under consideration here. One contention there was that the provisions created monopoly in favour of a few persons. Mahajan C.J. in negating the contention said:

The contention that the effect of some of these provisions is to enable Government to confer monopoly rights on one or more persons to the exclusion of others and that creation of such monopoly rights could not be sustained under Art. 19 (6) is again without force. Reliance was placed on the decision in *Rashid Ahmed Vs. The Municipal Board, Kairana*, . That decision is no authority for the proposition contended for. Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all could carry. The provisions of the regulation cannot be attacked merely on the ground that they create a monopoly. Properly speaking there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor.

Considering the nature of the trade, I think it was open to the Legislature to provide that the right to vend liquor could be farmed out by Government either

in auction or by private treaty and that that would be a reasonable restriction on the fundamental rights of citizens to carry on the trade.

11. Section 18 A provides, as already stated, that rental can be collected in addition to or to the exclusion of the tax provided in sections 16 and 17 of the Act. The learned Government pleader contended that rental is luxury tax. I am not certain whether country liquor can be regarded as luxury. That apart, I do not think that rental is a "tax". The distinctive characteristics of a "tax" have been laid down by the Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, as follows.

A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. This definition brings out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. The essence of a taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is no element of *quid pro quo* between the tax-payer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

Rental is the consideration for the privilege granted by Government for manufacturing or vending liquor. If it is the consideration for the privilege, then, it cannot be a tax. This is the view taken by the Mysore High Court in *D. Cawasji & Co. v. State* AIR 1969 Mys 23. The court said:

One of the characteristics of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. In other words, there is no element of *quid pro quo* between the tax-payer and the public authority. Since the payment of shop rent under Mysore Excise Act is for the benefit which the licensee gets in the form of exclusive privilege to sell liquor in certain area or in certain shops, shop rent cannot be regarded as a tax at all.

Nor can rental be regarded as an excise duty. See *Shinde Brothers etc. Vs. Deputy Commissioner and Others*, etc., .

12. Mahajan C.J., in *Cooverjee v. Excise Commissioner* AIR 1954 SC. 226 seems to have assumed that rental can be collected by State as abkari revenue. He said:

The next contention that the charge of fee by public auction is excessive and is

not in the nature of a fee but a tax ignores the fact that that licence fee described as a licence fee is more in the nature of a tax than a licence fee. One of the purposes of the regulation is to raise revenue. By the provisions of section 24, duties can be imposed on the manufacture, import, export and transport of liquor and other excisable articles. Revenue is also collected by the grant of contracts to carry on trade in liquors and these contracts are sold by auction. The grantee is given a licence on payment of the auction price. The regulation specifically authorises this. It is not a fee levied without authority of law as was the situation in *Rashid Ahmed Vs. The Municipal Board, Kairana*, .

The learned Chief Justice gave no categorical answer to the question whether the consideration for the privilege is a tax or a fee. He nevertheless said that it can be collected.

13. The petitioners have entered into agreements to pay the rental in consideration of the privilege. The obligation therefore arises out of the agreements. They got the privilege subject to the liability to pay the rental. If the obligation to pay rental arises out of the agreement, I do not think it necessary for me to decide the question whether rental is a "tax" or a "fee". The Government need not justify the collection of the rental either as tax or as fee. Section 28 of the Act provides that any amount due from the grantee of a privilege can be collected by the government under the Revenue Recovery Act. Section 28 of the Act reads:

All duties, taxes, fines and fees payable to the Government direct under any of the foregoing provisions of this Act or of any license or permit issued under it, and all amounts due to the Government by any grantee of a privilege or by any farmer under this Act or by any person on account of any contract relating to the Abkari Revenue may be recovered from the person primarily liable to pay the same or from his surety (if any) as if they were arrears of land revenue, and, in case of default made by a grantee of a privilege or by a farmer, the Commissioner may take grant or farm under management at the risk of the defaulter or may declare the grant or farm forfeited, and re-sell it at the risk and loss of the defaulter. When a grant or farm is under management under this section, the Commissioner may recover any money due to the defaulter by any lessee or assignees as if they were arrears of Land Revenue.

14. Some of the petitioners contended that if rental is regarded as the consideration for the privilege and the obligation to pay it arises out of the agreement, the consideration failed, at any rate partially, when the Government established sub-shops contrary to the agreement and failed to supply arrack in accordance with the terms of the auction notices. In short, they submit that they have several defences to the enforcement of the obligation to pay rental on the basis of the agreements. As I said, the liability is also a statutory liability by virtue of section 28 of the Act. I do not think that this is the forum for considering the defence of the petitioners. The defences raised should be agitated in suit and not in a proceeding under Art. 226 of the Constitution of

India.

15. In Writ Appeal Nos. 160, 161 and 162 of 1967 this court held that since the petitioners there voluntarily and with open eyes contracted the liability to pay rental by bidding for the privilege in the auctions, they should not be permitted to challenge the validity of the provisions in the Abkari Act, which enabled them to bid in the auctions and obtain the privilege to vend the liquor. In paragraph 8 of the judgment it is observed:

The learned Judge considered the arguments relating to section 18 A and 24 and for the reasons stated in the judgment held that the validity of these sections cannot be challenged by the writ applicants, It appears to us that considering the fact that all these petitioners being persons who had applied and obtained licenses issued pursuant to these very same provisions cannot be heard to contend that Sections 18 A and 24 of the Abkari Act 1 of 1077 are violative either of Art. 19 and/or 14 of the Constitution. These aspects can only be considered in other and appropriate cases if and when they arise.

By bidding in the auctions, the petitioners got the privilege to carry on the trade in the liquor and they successfully excluded other persons from carrying on the trade. They carried on the trade after obtaining the privilege. They also paid some of the instalments of the rental. They should not now be permitted to challenge the validity of the provisions of the Act under which they got the privilege.

16. The rule is well settled that one who voluntarily proceeds under a statute and claims benefits hereby conferred will not be heard to question its constitutionality in order to avoid its burdens. (See *United Fuel Gas Co. v. Kentucky R. Commission* 278 U.S. 300) Such a person will not be allowed to retain his advantage or keep his consideration and then repudiate the act as unconstitutional (see *Monamotor Oil Co. v. Johnson* 292 U.S. 86. In many different ways, the general doctrine has been invoked to prevent attacks on legislation. For instance, an employer who elects to accept the benefits of a Workman's Compensation Act is estopped to attempt to escape its burdens by asserting that it is unconstitutional. (See *Booth Fisheries Co. v. Industrial Commission* 271 U.S. 208) Also, one who has acquired property rights necessarily based up on a statute may not attack the statute as unconstitutional. (*Forost v. Corporation Commission*) 278 U.S. 515, Nor can one who accepts a loan from the Federal Farm Board, organised under the Federal Marketing Act, question the constitutionality of the Act in a proceeding to enforce mortgage securing the loan (See *North-Dakota-Montana Wheat Growerd Association v. United States* 291 U.S. 672).

17. It was argued that the petitioners could not by their voluntary act of bidding in the auctions have waived their fundamental right to carry on the trade in liquor.

18. In *Gopal Das Mohta v. Union of India* AIR 1955 S.C. page 1 the question was whether when there is a voluntary agreement, a proceeding under Art. 32

complaining violation of fundamental right would lie. The Supreme Court said:

In our judgment this petition is wholly misconceived. Whatever tax the petitioner has already paid or whatever is still recoverable from him is being recovered on the basis of the settlement proposed by him and accepted by the Central Government. Because of his request for a settlement no assessment was made against him by following the whole of the procedure of the income tax Act. In this situation unless and until the petitioner can establish that his consent was improperly procured and that he is not bound thereby he cannot complain that any of his fundamental rights has been contravened for which he can claim relief under Art. 32 of the Constitution. Art 32 of the Constitution is not intended for relief against the voluntary actions of a person. His remedy, if any, lies in other appropriate proceedings.

Whether the fundamental right under Art. 19(1) (g) of the Constitution can be waived or not is itself a matter of dispute. I have already said that those provisions in the Act which restrict the exercise of the fundamental right to carry on the trade in liquor are reasonable. In other words, the petitioners' fundamental rights are subject to those restrictions. The plea that fundamental rights to carry on trade in liquor under Art. 19(1) (g) cannot be waived assumes that if the petitioners had not bidden in the auctions and obtained the privilege, they would have had the right to carry on the trade. That assumption is baseless, because as already stated, section 18A, granting the Government the right to farm out the privilege is not violative of the fundamental right of the petitioners under Art. 19 (1)(g).

19. It was further argued on behalf of the petitioners that the enforcement of the liability to pay the rental under the Revenue Recovery Act is discriminatory, as there was no guidance to the officer concerned as to whether he should resort to the provisions of that Act or to a suit to enforce it. It was submitted that an arbitrary discretion has been vested in the officer concerned to initiate proceedings either under the Revenue Recovery Act or realise the amount by instituting a suit and that that is discriminatory. Reliance was placed upon the ruling of the Supreme Court in *Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another*, to support the contention. The fact that the petitioners have undertaken to pay the rental and that in case they fail to pay the same they are agreeable to have the provisions of the Revenue Recovery Act put in motion against them is sufficient answer to this contention. The auction notices provided that the amounts due from the bidders will be realised under the Revenue Recovery Act. As the petitioners have agreed to the recovery of the amounts outstanding, by machinery of the Revenue Recovery Act, they cannot now contend that recovery of the amount under that Act is discriminatory. I am not satisfied that provisions in the Revenue Recovery Act for recovery are much more drastic. I am also not satisfied that the employment of the provisions of the Revenue Recovery Act for recovery of rental would be substantially more prejudicial to the petitioners than a suit.

20. Two additional contentions were urged by the petitioners who have bid in auctions the privilege to vend arrack, (1) that they were not supplied with the quantity of arrack specified in the auction notices, and therefore, they have been put to great loss. They contend that there was a clause in the auction notices which gave power to the Excise Commissioner to grant additional quota of arrack to them over and above the minimum quota, on payment of a commission and although the petitioners were prepared, and in fact in some cases paid the commission, they were not supplied with additional quota of arrack as promised. Apart from the question whether the contention is true, I do not think that this is a contention which could be urged in these proceedings. The question relates to the breach of the obligation arising out of the agreement, and this court should not be made the forum for an assessment of the damages sustained by the petitioners as a result of the failure of Government to supply the additional quota or even the minimum quota of arrack. The second contention was that the notices under the Revenue Recovery Act in these cases were premature, as the Government themselves have agreed to postpone the payments due from these petitioners, and that the notices were issued before the due dates under the agreement, and, therefore, the notices ought to be quashed. I am not satisfied that any notice has been issued before the amount specified therein became due. At any rate, the amounts are now due and I do not think that justice requires interference on this score.

21. It was contended on behalf of the petitioners in some of these cases that no agreements were executed by them, and therefore, the Government are not entitled to recover any amount by way of rental. Reliance was placed upon the decisions of the Supreme Court in *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, and *Mulamchand v. State of M.P.* 1968 (II) S.C.W.R. 397 for the proposition that unless there is an agreement executed in accordance with the provisions of Art. 299 of the Constitution, the petitioners in the cases where no agreements have been executed would not be liable to pay rental. The argument was that the liability to pay rental arises only out of the agreement, and if there is no agreement, then, there is no liability to be enforced. As I have indicated, the liability to pay the rental arises not only by virtue of the agreement but also by the provisions of Section 28 of the Act. The decision of the Supreme Court in *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, would make it clear that if there are provisions in the Act, the liability to pay the rental can be enforced. I think that even if no agreement has been executed, there was the liability u/s 28 of the Act, and that the liability could be enforced under the provisions of the Revenue Recovery Act (See sections 6 and 62 of the T.C. Act) The argument of the petitioners in some cases that preliminary agreements which substantially incorporate all the terms of the final agreement are insufficient to satisfy the provisions of Art. 299 does not appear to me to be sound as these agreements also purport to be executed between the Governor and the petitioners concerned.

I dismiss the petitions, but in the circumstances without any order as to costs.