
(2017) 02 P&H CK 0109

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 102 of 2017 (O&M)

M/s Somrass Traders through its partner S.Gurinder Singh
Gill, Ludhiana

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision : 27-02-2017

Acts Referred:

Punjab Excise Act, 1914 — Section 41(2)

Citation : (2017) 02 P&H CK 0109

Hon'ble Judges : S.J. Vazifdar, CJ. and Anupinder Singh Grewal, J.

Bench : Division Bench

Advocate : R.S.Rai, Senior Advocate with Surjeet Bhadu and Ms. Rubina, Advocates, for the Petitioner in CWP No. 25558 of 2016.; Ashok Aggarwal, Advocate General, Punjab with Kamal Sehgal, Additional Advocate General, Punjab and H.S.Sethi, Additional Advocate General, Punjab, for the Respondent-State of Punjab; Rajiv Atma Ram, Senior Advocate with R.S. Kalra, Advocates, for the Petitioner in CWP No. 25449 of 2016.; Mohan Jain, Senior Advocate with Vikram Jain, Arastu Chopra, Fateh Saini, Advocates, for the Petitioner in CWP No. 102 of 2017.

Final Decision : Dismissed

Judgement

S.J. Vazifdar, C.J. - These three writ petitions raise similar questions and are, therefore, disposed of by a common judgment.

2. In Civil Writ Petition No. 102 of 2017, petitioners No.1 and 2 are the same. They have unnecessarily been impleaded as petitioners No.1 and 2 on account of their having been issued licences for different zones, namely, Zone Nos.25 and 28, respectively. The petitioners seek a writ of mandamus directing the respondents to refund/adjust the license fee and other fees as prescribed for the month of April, 2016 in the Excise Policy for the year 2016-17 on account of liquor not having been supplied during this period. In Civil Writ Petition No.25449 of 2016, the petitioners seek the same reliefs and also a refund/adjustment for the period from 27.09.2016 to 31.10.2016. The petitioners in both the petitions

also seek a writ of certiorari to quash clauses 26, 27 and 36 of the Excise Policy for the year 2016-17. The third writ petitioner claims similar reliefs.

3. For convenience, we will refer to the facts from Civil Writ Petition No. 102 of 2017.

In March-2016, the first respondent announced its Excise Policy for the year 2016-17 under the Punjab Excise Act, 1914 and the Punjab Liquor License Rules, 1956. Clause 25 of the policy required the licences to be offered by inviting applications after requisite advertisements. Clause-25 further provides that if the applications were more than the number of licensing units/zones/groups the allotment would be made by means of lottery. The petitioners carry on retail business in liquor and have been issued L-2 and L-14 licences for the years 2016-17 in Zone No.25, Ludhiana comprising of 13 L-14A vends and 13 L-2 vends and 1 model shop i.e. L-2E (optional) and in Zone No.28, Ludhiana comprising of 14 L-14A vends and 14 L-2 vends and 1 model shop i.e. L-2E (optional) in the area of Municipal Corporation, Ludhiana.

4. The licensees are entitled to operate the licences for the entire year i.e. 01.04.2016 to 31.03.2017. The petitioners started operating their licences/vends from 01.04.2016 itself and were required to pay the license fee for the entire period. The licences specify the annual quota of Punjab Medium Liquor i.e. country liquor (PML), Indian Made Foreign Liquor (IMFL) and Beer. The licences are granted for a consideration of about ` 15.43 crores for each zone. The licence fees are charged by the State for parting with the exclusive privilege of the right to sell the liquor which comprises of three main ingredients, namely, place, time and quota.

5. An L-2 licence is in respect of IMFL and an L-14A licence is in respect of PML i.e. country liquor. These petitions are only in respect of IMFL and, therefore, pertain only to the L-2 licences held by the petitioners.

6. There are three levels in the liquor trade. Firstly, there is the manufacturer, who manufactures various brands of liquor and sells them under different labels. L1-A licensees purchase the liquor from the manufacturers. L1 licensees are wholesalers who purchase the liquor from the L1-A licensees. L-2 licensees such as the petitioners purchase the liquor from L-1 licensees.

7. The rebate is sought for the period 01.04.2016 to 26.04.2016 and for the period 27.09.2016 to 29.10.2016 on the ground that during these periods IMFL was not made available to the petitioners, as a result of which they were unable to exploit the benefit of their L-2 licences.

8. It is impossible to grant the relief sought in these petitions under Article 226 of the Constitution of India. Two questions arise in such cases. The first is whether the petitioners are entitled to rebate at all. Assuming that they are, the next question is the quantum of rebate that they are entitled to. The second question would undoubtedly raise substantial questions of fact involving inter-alia

a detailed examination of the accounts and the position of the stock of liquor at the material point of time with each of the licensees, namely, the L1-A, L-1 and L-2 licensees. Even the first question involves questions of fact such as whether the petitioners having operated the L-2 licences are entitled to seek a rebate subsequently. Each of these questions would require considerable documentary evidence and possibly oral evidence. Having heard the parties at considerable length, we are clearly of the view that these questions cannot be resolved in a petition under Article 226 of the Constitution of India. This is especially so as there is also a dispute as to the manner in which the authorities actually permit the trade to be conducted by the licensees. The alternate remedy which we will immediately indicate would infact address these questions more effectively.

9. We would normally have relegated the petitioners to a suit. The petitioners, however, are in a more advantageous position than other claimants in view of clause 3.19 of the Punjab Excise Manual (Volume-III) Executive Instructions, which reads as under:-

"3.19 Cases sometimes arise in which concessions may equitably be made to license holders who through no fault of their own have failed to obtain from their licensed business the profits that they had reason to expect:-

a) When a license is cancelled for a cause other than a breach of the conditions of the license, the licensee may be excused payment of the license fee calculated for a period of 15 days previous to the closure if due notice of the Collector's intention to close the shop has been given. He should also be excused payment of the fees due for the remainder of the term of his license.

b) If notice has not been given, the licensee may be awarded, in addition, such further sum, if any, as the Financial Commissioner may direct, by way of compensation- (Excise Act 1 of 1914 Section 41).

Foot Note: In the case of withdrawal of a license, permit or pass without notice under sub section (1) of section 41, the Financial Commissioner is empowered in accordance with sub section (2) of section 41 of the Punjab Excise Act to grant compensation to the licensee affected by such withdrawal.

(c) When there is an equitable claim for compensation owing to unavoidable circumstances which could not have been foreseen when the license was granted, such as an outbreak of plague, the occurrence of unusual scarcity, communal or other riots, bandhs or putting the area under curfew, a cases for a concession may be made out.

Compensation under sub-paragraph (b) requires the sanction of the Financial Commissioner and that under subparagraphs (a) and (c) of the Excise and Taxation Commissioner." (emphasis supplied).

Mr. Jain, Mr. Atma Ram and Mr. Rai, the learned senior counsel appearing on behalf of the petitioners in the above three petitions, base their case on sub-clause (c) of clause 3.19 of the Punjab Excise Manual. They submitted that the

petitioners have an equitable claim for compensation owing to unavoidable circumstances viz. the occurrence of unusual scarcity of liquor during the said periods which could not have been foreseen when the licences were granted. On account of the scarcity of liquor, the petitioners, through no fault of their own, failed to obtain from their licences the profit that they expected.

10. It is not necessary to consider whether the respondents are bound to consider the claim made by the licensees under clause 3.19 as the learned Advocate General for the State of Punjab stated that they are. He stated that in the event of an application being made by any L-2 licensee under sub-clause (c) of clause 3.19, the respondents would consider the same after affording the petitioners and similarly situated persons an opportunity of being heard and producing the necessary evidence. The statement is accepted. We have decided, therefore, to relegate the petitioners to the alternate remedy either under clause 3.19 or by way of a civil suit. We now proceed to furnish the reasons for being unable to grant the reliefs sought in these writ petitions and relegating the petitioners to an alternate remedy.

11. The petitioners contend that IMFL was not available during the said period essentially on account of a new term in the L1-A licences introduced for the year 2016-17. This term had a cascading effect upon the licences down the line, namely, the L-1 and L-2 licences on account of the liquor not being available for the L1-A licensees. L1-A licences were issued even under the previous excise policy from the year 2011. The excise policy for the year 2016-17 introduced clause 2.14 which added a new dimension to the L1-A licences. Clause 2.14 reads as under:-

"Clause 2.14

- i) It is necessary for the applicant for this licence to have an authority/consent letter from the manufacturing unit.
- ii) Any manufacturing company cannot issue the authority/consent letter to more than one person/company/firm/organization.
- iii) The manufacturing company will give this consent letter to that person/company/firm/organization who is at Arms Length Distance from the manufacturing company provided there is no promoter, director, partner in the manufacturing company or there is no holding, subsidiary, closely held company, fully/partially owned/ financed/ managed firm/company.
- iv) L-1A licensee will purchase IMFL (except Beer) wine, RTD from the State or the manufacturing companies situated outside the State and will sell it to only L-1 licensees.
- v) It is proposed that the license fees for the L-1A (IMFL) for the year 2016-17 is fixed at ` 2.50 crores and it is proposed to have the security amount of this licence fixed at ` 25 lacs."

12. Thus while under the earlier policies, the L-1 licensee could purchase the liquor from the manufacturer directly, in view of clause 2.14 an L-1 licensee could purchase the liquor only from an L-1A licensee. Clause 2.14 was challenged in this Court in Civil Writ Petition No. 5593 of 2016 Amarjit Singh Sidhu v. State of Punjab and others. The Division Bench by an order and judgment dated 09.06.2016 permitted the authorities to incorporate sub-clause (ii) of clause 2.14 in the Excise Policy 2016-17 but the clause was held to be invalid and inoperative to the extent that it did not prescribe the manner and the method of its issuance by the manufacturers or the distilleries. Paragraph-36 of the judgment reads as under:-

"(i) The respondent is empowered to incorporate sub clause (ii) of clause 2.14 in the Excise Policy 2016-17 but the same is held to be invalid and inoperative to the extent it does not prescribe the manner and the method of its issuance by the manufacturers or the distilleries. It shall be open to the respondent-authorities to make appropriate amendment and prescribe necessary guidelines to the manufacturers/distilleries for issuing consent/authority letter to eligible applicants either by draw of lots, auction or any other mode providing equal opportunities in a transparent and objective manner. It shall, however, be open for the respondents to retain such right with the concerned authority, if so required."

The above writ petition No. 5593 of 2016 was filed on 19.03.2016 and was disposed of by the judgment dated 09.06.2016. There was no stay of the operation of clause 2.14 or any part thereof. In other words, the operation of the L-1A licences was not stayed during the pendency of the writ petition.

The respondents filed a petition for Special Leave to appeal which was dismissed in limine by an order of the Supreme Court dated 27.09.2016.

13. There is some dispute as to whether as a result of the order and judgment of this Court dated 09.06.2016, the L-1A licences could have been operated considering clause 2.14 to be valid. The fact of the matter, however, is that the licences were so operated till the order of the Supreme Court with none of the parties before us at least objecting to the same. This is relevant as what is sought in this case is a rebate on account of the liquor allegedly not having been available inter-alia in view of clause 2.14. After the order of the Supreme Court dated 27.09.2016, the L-1A licences were not operative. On 29.10.2016, the respondents permitted L-1 licensees to obtain the liquor directly from the manufacturers. The petitioners in Civil Writ Petition No. 25449 of 2016 have, therefore, also claimed a rebate for the period 27.09.2016 to 31.10.2016.

14. The main contention on behalf of the petitioner was that even if L-1A and L-1 licences had been issued prior to 01.10.2016, the fact is that the stock of liquor was not available or made available to them as a result whereof the L-1 licensees were unable to obtain the stock from them and in turn the L-2 licensees i.e. the retailers such as the petitioners were unable to obtain the liquor. Consequently,

the L-2 licences issued to the petitioners could not be operated as a direct result of the respondents' acts.

15. The first question is whether the L-1A licences could not be operated upto 26.04.2016 on account of clause 2.14 of the Excise Policy or otherwise.

16. Mr. Jain, the learned senior counsel appearing on behalf of the petitioners in Civil Writ Petition No. 102 of 2017 submitted that infact liquor was not available during this period due to clause 2.14 having been challenged by certain persons including some L-2 licensees on the ground that the clause created a monopoly in favour of certain parties that the respondents were interested in. He submitted that what actually happened is that though the L-1A and L-1 licences were granted to purchase the liquor, as a result of the challenge to clause 2.14 the L-2 licensees were unable to obtain any liquor.

17. As we mentioned earlier there was no stay of the operation of any of the licences including L-1A and L-1 licences. There was nothing, therefore, that prevented these licensees from operating their licences during that period. The question that arises is whether the respondents would be liable for damages on account of L-1A and L-1 licensees not having operated their licences for whatever reasons despite the fact that they were not prevented from doing so. Our attention was not invited to any of the provisions of the Excise Policy or any other provision of law or any term or condition in the licences that makes the State Government responsible for ensuring the supply of liquor down the line from the manufacturer to the L-1A licensees, from the L-1A licensees to the L-1 licensees and from the L-1 licensees to the L-2 licensees such as the petitioners. There is nothing to indicate that the State Government would be responsible for the default on the part of the L-1A and the L-1 licensees or for any act of such licensees for which the State Government is not responsible.

18. It was contended on behalf of the petitioners that this is always an underlying understanding. That understanding we are afraid would have to be established as a matter of fact and only if established would the consequences thereof have to be considered. It would be appropriate to have the same decided in the first instance in appropriate proceedings including in an application under clause 3.19, if made.

19. Initially Mr. Jain, contended that L-1 licences were not available upto 21.04.2016. Thereafter he submitted that though the licences were available, they could not be effectively exploited on account of the aforesaid reasons.

20. Even assuming that this is established as a matter of fact and that the State can be held responsible for the non-supply or inadequate supply of liquor for that reason, it would be necessary to ascertain the extent of the loss caused thereby or on account thereof. This is for a variety of reasons. For instance, even the L-1 licensees would or in any event could have had the stock from the previous year which we will for convenience refer to as the old stock. The L-2 licensees could have purchased the same. There is nothing on record to indicate that there was

no old stock with the L-1 licensees. In that event it would be necessary to ascertain whether the old stock was sufficient to meet the demands of the L-2 licensees. This in turn would require ascertaining firstly the quantum of the old stock, if any, with the L-1 licensees, the requisitions, if any, by the L-2 licensees to the L-1 licensees for the supply of liquor during the aforesaid periods from 01.04.2016 to 26.04.2016 and/or between 27.09.2016 and 29.10.2016 and then ascertain whether or not there was any short supply. Even assuming that the stock with the L-1 licensee was less than the quota allocated to the L-2 licensee it would make no difference. An L-2 licensee may not have sought the supply of liquor for a variety of reasons. For instance an L-2 licensee may himself have had sufficient old stock. He may have sought the supply of an amount less than his quota. The material in this regard is not sufficient to decide such issues in this petition. Infact if we were to decide these petitions on the basis of the material available it may not even be fair to the petitioners.

21. The learned Advocate General has furnished in a tabulated form the stock available with the L-1 licensees during the relevant periods. For instance, so far as Writ Petition No.102 of 2017 is concerned, the respondents furnished in Annexure R-1/3 a stock statement of IMFL in respect of L-1 licensee in Ludhiana, namely, M/s Gautam Wines which indicates that in April-2016 the L-1 licensee had 4520 cases of IMFL and did not effect any sales during April-2016. Similarly, another L-1 licensee in Ludhiana M/s D.Vansh had 4365 cases of IMFL in April-2016 and sold only 2056 cases in April-2016 leaving an excess stock of 2310 cases. There are several such cases. This indicates that L-1 licensees had adequate stock. Whether the statements are correct or not is a different matter. The correctness would be decided in appropriate proceedings. Suffice it to say that this is not a clear case of there being no availability of liquor during the said periods.

22. The respondents, in fact, contend that every demand of the petitioners was actually met and that there is no outstanding requisition. The reply further states that the petitioners never approached the local office of the respondents with the submission that they were not getting the supply of liquor against permits from any L-1 licensee even in the Ludhiana district. It is specifically averred that some of the partners of the petitioners' firm also had L-1 licences and even other L-1 licensees of the same district, namely, Ludhiana had adequate stock to meet any demand of the petitioners. Annexure R-1/1 in Civil Writ Petition No. 102 of 2017 for instance tabulates the permits issued to the petitioners. There is no corresponding outstanding requisition for liquor. The learned Advocate General also submitted that the delay in issuance of L-1 licences was on account of the applicants submitting their applications for the same belatedly.

23. The submissions were met with the constant refrain that liquor was infact not available. The material produced, however, does not meet these contentions effectively at least. In any event, all this, to say the least, raises seriously disputed questions of fact which cannot be resolved in these writ petitions.

24. Even assuming that the entire requirements were not fulfilled the petitioners would not be entitled to a rebate of the entire license fee for the said periods. They would at the highest and absent anything else even in such cases be entitled to the rebate after deducting therefrom the proportionate amount on account of the receipt of a part of their requirements. The same can only be calculated after considering the stock records not only of the L-2 licensees but of the L-1 licensees as well.

25. Faced with this Mr. Jain contended that even old stock cannot be sold unless and until the labels were finalized. He submitted that the labels were finalized much later. It is significant to note that Mr. Atma Ram, the learned senior counsel appearing for the petitioner in Civil Writ Petition No. 25449 of 2016 did not support this submission. The learned Advocate General denied this submission. He stated that the approval of fresh labels was not necessary in respect of the old stock. Our attention has not been invited to any provision of law or to any terms or conditions of the licences which require fresh labels to be approved in respect of the old stock for the subsequent excise years.

26. In this regard, Mr. Jain, relied upon clauses 48.0, 50.0 and 52.0 of the Excise Policy, 2016-17 which read as under:-

"48.0. Regarding carry forwarded of unsold liquor stock/quota to the next year- it has been observed that some part of quota of the licencees remain unsold and they carry forwarded the same by hook and crook and sell the same. By carry forwarded of quota corruption comes into market. Govt. is unable to earn revenue on this carry forwarded quota. In the year of 2016-17 licencees will be permitted to take carry forwarded quota as additional quota in addition to his annual quota. In this case he will be required to pay difference of the licence fee of the new year v/s previous year. Similarly he will be required to pay additional levies for example additional licence fee on country liquor and extra licence fee on English liquor, permit fee, departmental developmental cess.

In case a licencees is unable to get business at his old place of business then he is permitted to transfer quota at the new place of business. If he is unable to the business in any district of that state then with the permission of collector he will be permitted to transfer this quota to a new licence of the same district. Licencee is required to give information about unsold/carry forward quota to AETC of his district by 31st March of the financial year.

50.0 Approval of Label- Every year labels of liquor are granted approval as per excise policy. It is observed that there is no major difference in the labels of country liquor by change of year. In case there is no change in pattern, colour and design of labels then after deposit of prescribed fee the label will be deemed to be automatically sanctioned. It is specified here that if Excise and Taxation Commissioner issues any general guidelines then distillery will be bound to effect changes in the labels accordingly. As per these inspections new label manufacturer as per the above instructions will be sent to Deputy Excise and

Taxation Commissioner for his information before 31st March.

52.0 Regarding registration of I.M.F.L. brands and E.D.P. it is observed that different companies send applications for registration of new labels during the year. The registration is done as per rule 93(K) of Punjab Distillery Rules, 1932. There is no specific provision for specifying E.D.P. in this rule. This process has been further streamlined. It is intention of the Government that concept of Ease of doing business be implemented. This is impossible only if its basis is formed in government machinery. This will strengthen vision of the Government. Therefore, label registration/IMFL, EDP approval will be made as follows:-

Major brands eligible for registration are divided into four categories:-

- i) Existing brands in Punjab
- ii) Variants of existing brands in Punjab.
- iii) Brands and their variants registered in one or more other States but not registered in Punjab.

Following procedure will be adopted for registration of brands:-

- i) Applicant/licensee will submit undertaking on the performa prescribed by the department in addition to his application for brand registration.
- ii) The committee constituted by the department will put the above application and undertaking on website and notice board of the office and will invite objections as under:-
 - (a) for categories (i) and (ii) above 3 days notice (b) for categories (iii) and (iv) above 7 days notice.

3. In case no objection is received then label and E.D.P. submitted by the applicant will be registered subject to rules and regulations of Excise Act.

In case any objection is received then the committee will analyse the same and submit report alongwith recommendation to the competent authority. It is mentioned here that if any objection pertaining to cost component of the brand then committee will not consider the same. However, if objection pertains to any point in undertaking given by the applicant then committee may consider it.

NOTE: If any licensee gets approved any variant of any existing brands then he cannot remove the existing brands from market during the year and will ensure its supply as per demand.

In case any problem is faced by adoption of the above procedure for brand registration and E.D.P. fixation then it may be reconsidered after approval from Government."

27. Clause 48 does not require the fresh labels to be approved. It stipulates various conditions for the sale of the old stock. Significantly none of the

conditions require approval of fresh labels for old stock. Faced with this, Mr. Jain submitted that it is not possible for L-1 licensees to pay the additional levies unless and until the labels are approved. As far as IMFL is concerned, what is required to be paid as per the last sentence of clause 48 is the extra license fee on English liquor i.e. IMFL, permit fee and departmental development cess. Mr. Jain has not been able to establish how the permit fee and departmental cess were dependent upon the labels being approved. Extra license fee is stipulated in clause 30 of the excise policy. We would, however, not conclude the petitioners on this point but leave the same open to be raised in appropriate proceedings. We do so as the material produced before us is inadequate to return a finding in favour of the petitioners.

28. It was also contended on behalf of the petitioners that the labels especially of the more popular IMFL brands was sanctioned only during the course of the year, in some cases as late as in the months of October and November, 2016. It was submitted, therefore, that the popular brands were made available only much later and that as a result thereof the petitioners and other L-2 licensees had in fact suffered damages of a far higher extent.

29. Clause 52 of the Excise Policy notes that the applications for registration of new labels are received during the year. The petitioners, therefore, were aware that the labels may be approved at various times during the course of the excise year. Thus when they applied for the licenses they were aware of the same. Prima-facie at least it is difficult to accept the contention that on account of the labels being approved after 01.04.2016, the petitioners ought to receive some concession in the license fee. There is yet another difficulty in this regard. Even assuming that the petitioners are entitled to concession on account of the labels being approved after 01.04.2016 it would be necessary to quantify the concession. This is for the obvious reason that not all the labels were approved only in October and November, 2016. Many were approved earlier. A licensee could therefore trade in those brands. They cannot get a total rebate for the entire period although they were able to operate the licenses during that period at least in respect of some brands.

Clause 50 in any event does not support Mr. Jain's contention.

30. The learned Advocate General further submitted that the stock was available with various L-1 licensees located not only in the districts in which the L-2 licensees are located but also in the other districts of the State of Punjab. He sought to produce the evidence in this regard. We did not think it necessary to permit him to do so in these writ petitions as we are not deciding the cases on merits.

31. The learned counsel appearing on behalf of the petitioners, however, submitted that L-2 licensees can obtain the products only from L-1 licensees located in their districts. Mr. Atma Ram relied upon the permits which specifically mention the source from which the stock was to be obtained and delivered to.

These receipts referred to the L-1 licensee in the same district as the L-2 licensee. However, Mr. Atma Ram relied upon only the permits and passes which are required to be obtained by the licensees for the purpose of transferring the products purchased by L-2 licensees from L-1 licensees each time. These permits, therefore, do not by themselves substantiate this contention on behalf of the petitioners that an L-2 licensee cannot purchase the liquor from an L-1 licensee outside the District.

Our attention has not been invited to any provision of law which prohibits an L-2 licensee in one district from obtaining the liquor from an L-1 licensee located in another district. Rules 1-A and 1-B of the Punjab Liquor Permits and Pass Rules, 1932 do not support this contention either. They read as follows:-

1.(a) "permit" means a no objection statement issued by the Collector of the district of destination concerned or an officer authorized in this behalf in the import and transport of liquor but not empowered to authorize its removal from the place of issue. This term is also used for permits authorizing possession of liquor exceeding the limit of retail sale.

b) "pass" means a document which actually authorizes the removal of liquor."

To this it was contended on behalf of the petitioners that in any event the authorities never grant permits for the movement of the liquor inter district. They stated that the authorities granted the permits/passes only for the transport of the liquor intra district and not inter district. There is nothing on record which would enable us to decide these questions.

On the basis of the material on record it is impossible to return a finding in the petitioner's favour. It is an issue which will require evidence probably even oral. Whether as a matter of practice the authorities did not permit inter district transfers is an issue which would be best decided in appropriate proceedings including under clause 3.19 of the Punjab Excise Manual.

32. Mr. Jain relied upon the judgment of the Supreme Court in *State of Rajasthan and others v. Nandlal and others*, 1993 Supp(1) Supreme Court Cases 681. This judgment far from being of any assistance to the petitioners entirely supports the respondents' case. In that case, the question that arose was whether the shortfall of liquor on the part of the petitioners/licensees was on account of the default on their part or on account of the inability of the State to supply requisite quantities of liquor. Under the Rajasthan Excise Act, 1950, no person was entitled to sell or otherwise deal in excisable articles which included country liquor except in accordance with the terms and conditions of a licence granted under the Act and the rules made thereunder. During the year in question, licences were granted under two systems, namely, the Guarantee System and the Exclusive Privilege System. Under the Guarantee System, the licensee guaranteed to draw from the government warehouse country liquor of a specified value equal to the amount guaranteed. The licensee was obliged to draw from the warehouses every month liquor equivalent in value to 1/12th of the amount guaranteed

failing which the security deposit was liable to be forfeited and the balance, if any, was to be recovered from the licensee's properties. Under the Exclusive Privilege System, the licensee was granted the exclusive privilege of selling country liquor by retail on condition of payment of a lumpsum. The amount had to be deposited in twelve equal monthly instalments. Under both the systems the licensee was required to deposit 10% of the value as security deposit. Some of the petitioners contended that the short-lifting of the liquor was on account of the failure of the State to supply adequate quantities as and when demanded by them. The State, on the other hand, blamed the licensees for the short-lifting of the liquor. Material was produced by either side in support of their rival contentions. The evidence on behalf of the petitioners included the fact that the production of the country liquor in the State during the year in question was below the requisite figure. Based on this, the petitioners contended that as a consequence thereof adequate supply could not be made to some of the warehouses. It is in this background that we must consider the following observations of the Supreme Court on which Mr. Jain placed considerable reliance:-

"14. Two questions were in issue in all the writ petitions filed by the licensees namely, (i) whether there was a failure on the part of the State to supply country liquor as and when demanded by the licensees and (ii) if there was such a failure, to what relief are the petitioner/licensees entitled to.

15. So far as the first question is concerned, the fact remains that it is for the writ petitioners to establish their contention that in spite of their demand, the State could not supply the requisite quantity. The mere fact that there was a shortfall in overall production of country liquor in the State of Rajasthan during the said year does not establish the contention of any of the petitioners. Even if there was an overall shortfall in production, and even if some of the warehouses could not be supplied with the full monthly allocations, it does not follow therefrom that the petitioner in any given writ petition was not supplied the quantity asked for by him, nor does it follow that all the licensees attached to that particular warehouse were subjected to a uniform cut. It may happen that a particular licensee, who comes at a time when the stock is available in the warehouse may get his full indented supply, while another licensee who comes at a time when there is no stock, may have to return empty-handed. It is nobody's case that the available stocks were equally or proportionately distributed among all the licensees attached to that warehouse. It just doesn't happen. It was, therefore, obligatory upon each of the writ petitioners to establish that he asked for or indented for a particular quantity of liquor on a particular date but that he was not supplied on account of lack of supplies in the concerned warehouse. In this context, it must be remembered that the contracts in question are essentially commercial contracts though governed by statutory provisions. Even if there is no stock on a particular day, supplies may be available on the next day or a few days later or in the next week. Just because there was no stock in the warehouse on a particular day or in a particular week, it cannot be presumed

that all the licensees attached to that warehouse went without supplies during the whole of the month. It also appears that the rules provided for lifting the short-supplied quantities in the following month. Be that as it may, what we wish to emphasise is that the allegation made by each of the petitioner has to be established by him separately. If really the petitioners had asked for supply of certain quantity, there must be some evidence in support of such demand, whether in the shape of challan, indent or some other document. Further, when the warehouse could not supply the indented quantity, they must have made an endorsement to that effect on some document or must have issued a certificate to that effect. All that material must be in the possession of the licensees. It is true that the State cannot merely rely upon the theory of onus of proof and ought to assist the court in arriving at a fair decision by placing all the relevant material before it. But this obligation cannot be read to mean that the State is under an obligation to establish or make out the writ petitioner's case. The burden lies upon the petitioner, who seeks a particular relief on the basis of certain facts, to establish those facts. Now, if we examine the principle underlying the decisions of the Division Benches of the Rajasthan High Court from the above standpoint, it would be clear at once that it cannot be sustained. The principle in effect is this: Because there was a fall in production of country liquor in the State of Rajasthan during that year, it must be presumed - unless the State establishes to the contrary - that there was a failure on the part of the State to supply the requisite quantities to every single licensee in the State. It is on this presumption that all the writ petitions were allowed - even those where the very allegation of failure to supply was made in general and vague terms and not a scrap of paper filed to substantiate such an allegation, assuming that such a vague allegation can be permitted to be so established. As indicated hereinbefore, even in a case of inadequate supplies to a warehouse, one licensee may get his full quota, while the other may not. There may yet be a third man who may never have made an attempt to draw/lift the liquor. Furthermore, a licensee who could not be supplied the quantity on a particular date or a particular week or month, may have lifted the same in the following days or weeks or before the tenth of the following month, as provided by the rules. The situation may vary from warehouse to warehouse and from one licensee to the other. In these circumstances, a general decision, irrespective of and unrelated to the pleadings and material of a given case, cannot be justified. We also find substance in the contention of Shri Aruneshwar Gupta that the material produced by the writ petitioners in Kuraji did not pertain to all the 17 shops/writ petitions but only to some of them and that too at different periods of time during the year. It is not clear whether they drew their supplies before the tenth day of the following month. We must reiterate that the question in issue is individual to each writ petitioner and no generalisation can be made in such a situation."

Firstly, as held by the Supreme Court, the onus is on the petitioners to establish their contention that the State could not supply the requisite quantity. The same is the case before us. It is the petitioners that raised this contention and the

onus must be on them to establish the same. The Supreme Court held that the case of each of the petitioners would have to be examined on its own merits. The shortfall was not presumed to be evenly distributed. Despite the shortfall, some of the petitioners could well have received the entire amount requisitioned by them, some may have received only a part of the stock requisitioned by them and some may not have received anything. The same reasoning applies in the cases before us. For instance, even assuming that there was no supply of new stock, the old stock was available. Further, assuming that the old stock was not sufficient to meet the quantities requisitioned by any of the petitioners, it would be necessary to consider the extent of the shortfall in the case of each licensee. There cannot be a presumption that the shortfall was evenly distributed. The question, therefore, of granting a blanket reduction/rebate to the licensees just cannot arise. Almost every part of the reasoning of paragraphs 14 and 15 of the judgment would apply to the case before us. If no rebate had been granted in those cases, we cannot say how such a rebate can be granted in the cases before us.

33. Paragraphs 16, 17 and 18 of the judgment further militate against the contentions raised on behalf of the petitioners. These paragraphs read as follows:-

"16. A word about this Court's order dated August 29, 1974 in Civil Appeal No. 1170 of 1974 etc. It is a short order and may be set out in full:

"The matter is remitted to the High Court for disposal in accordance with the following manner:

Counsel for the appellants states that there was short supply and further that the short supply was for no fault of their own. The appellants will file an affidavit in the High Court stating all facts in that behalf. The State of Rajasthan will file their affidavit in answer thereto. If there is short supply for no fault of their own, the appellants will not be liable to pay the proportionate excise duty and/or revenue representing the short supply. The High Court will decide this question and give whatever relief the appellants will be entitled thereto. The reliefs for short supply will be confined only to the allegations made in the writ petitions in the High Court. No other points will be allowed to be raised by either side. In view of this, it is not necessary to pronounce any opinion on the judgment of the High Court. For these reasons, the judgment of the High Court is set aside. The parties will pay and bear their own costs.

The stay granted by this Court will continue on the same terms in Civil Appeal Nos. 1170-71 of 1974 until the disposal of the matter by the High Court. In Civil Appeal No. 1176 of 1974, stay will be on the same terms as in Civil Appeal Nos. 1170-71 of 1974 and continue till the disposal of the matter by the High Court."

17. Learned counsel for the respondents insists that a similar order be passed in these matters as well. We cannot agree. The said order was before the decision of this Court in Pannalal [(1975) 2 SCC 633] . The judgment in Pannalal [(1975)

2 SCC 633] settles and clarifies several issues which were raised in the said civil appeals. Those appeals related to the years 1962-63 to 1968-69. We are of the further opinion that instead of burdening the High Court, it is better to leave the matter to the authorities concerned who can also look into their own records while judging the truth and correctness of the contentions urged by the licensees. We must also say that inasmuch as notices of demand were issued soon after the expiry of the relevant excise year, there is no substance in the submission of the respondent's counsel that they cannot reasonably be asked to produce material in support of their allegations.

18. For the above reasons, the judgments and orders impugned in these appeals are liable to be set aside and are accordingly set aside. However, having regard to the fact that the matter pertains to 1967-68 (about 25 years have passed by since then) and particularly in view of the fact that all the petitioners are said to be small contractors each obtaining one shop, we direct that before recovering the amount under the impugned demand notices the authorities shall give an opportunity to each of the writ petitioners to establish that though they asked for/indented/demanded for the requisite supplies, the department was unable to supply the same. The relief to which each of the petitioner is entitled to would depend upon the result of such inquiry. While granting the relief, if any, it is obvious that the authorities shall keep in mind the provisions of the Act, rules, the conditions of licence, terms of agreement, if any, entered between the parties and the decisions of this Court in Pannalal [(1975) 2 SCC 633] and Prabhakara Reddy [(1987) 2 SCC 136 : AIR 1987 SC 933]."

What is stated in these paragraphs supports the approach we intend taking. There is no question of this Court taking evidence in the matter and deciding every petitioner's case. There is no warrant for turning the writ Court into a trial court especially in these matters where an efficacious remedy in the form of clause 3.19 of the Punjab Excise Manual is available.

34. The reliance upon the observations in paragraph-19 of the judgment does not carry the petitioners' case further either. Paragraph-19 reads as under:-

"19. Before parting with this matter, we must refer to an extreme argument urged by Shri Gupta on behalf of the State. According to him, the liability of the licensee to pay the agreed amount remains unaffected even if there is a total failure on the part of the State in supplying the liquor. We cannot obviously agree with such a proposition. State is the only source of supply for such licensees. Unless the State supplies them the liquor they cannot carry on their business. As stated earlier, it is essentially a commercial contract, no doubt governed by statutory provisions. The obligation to supply constitutes the underpinning of the contract. This does not, however, mean that the State is bound to supply as much as is demanded or that its failure to supply on a given day or in a given week can be termed as failure to supply. Supplies of liquor are normally effected through warehouses and depots maintained by or on behalf of the State. Supplies have to be drawn over the month. It cannot be insisted that the entire

monthly quantity or any other quantity must be supplied at once or as and when demanded by a licensee. All that can be said is that all licensees must be treated in a fair and equal manner in the matter of supplies, particularly during the lean years. Due regard must also be had to the rules, conditions of licence and agreement and other provisions applicable in that behalf, in determining whether there was a failure on the part of the State to supply. Again, the extent of relief in case of failure on the part of the State to supply depends upon the length of period of non-supply, the loss caused to the licensee on that account, all of which has to be judged in the light of the relevant provisions of the Act, rules, conditions of licence and agreement and other orders, if any, applicable."

The observation supports the petitioners' contention only to the extent that the liability of a licensee to pay an agreed amount is affected if there is a total failure and that too on the part of the State in supplying liquor. Further, in that case, the State was the only source of supply for the licensees. In the cases before us, the State is not the only source of supply of liquor. Indeed, it is not the source of supply at all. The burden on the petitioners' before us is even greater for they would have to establish that the State was responsible for the alleged non-supply or short supply of liquor directly or indirectly. Even assuming that is established, the matter does not end there. It is necessary in every individual case to see the extent of relief on account of such failure.

35. The judgment of the Supreme Court, therefore, supports the view that we have taken.

36. Mr. Rai, the learned senior counsel appearing on behalf of the petitioners in CWP-25558-2016, relied upon the judgment of the Supreme Court in *Chitra v. State of Kerala and others*, (2016) 1 Supreme Court Cases 685. The facts are clearly distinguishable. In that case, the appellant was granted an FL3 Licence in respect of her hotel. A third party had filed a suit in which the Court granted an interim injunction restraining the Excise Commissioner from issuing the licence to the appellant. The suit was dismissed but an ad interim injunction was granted which was later vacated. Thereafter, the respondents rejected the appellant's application for an FL3 Licence due to an amendment in the foreign liquor rules rendering private parties ineligible for such licences. The appellant filed a proceeding for the licence which was allowed and the Excise Commissioner granted the licence and raised a demand. The matter was carried in appeal. The appellant contended that she was liable to pay a proportionate annual rental fee instead of the full annual fee on account of above facts. It is in these circumstances that the Supreme Court upheld the contention. The Supreme Court held:-

"6. We are in agreement with the learned Senior Counsel for the appellant that the legal principle to the effect that no person can be prejudiced because of an act of a court is apposite and relevant in the present case. We say this keeping in perspective the position that although the appellant had applied for the FL 3 licence which would ordinarily run the course of one financial year, due to interim

orders passed by the courts, the appellant could only utilise it for a fraction of that period. We hasten to clarify that the appellant's application was not made in the duration of that year and was thus initially not for a fraction of the financial year. This Court has already held in *R. Vijayakumar* [1994 Supp (2) SCC 47 : (1993) 4 Scale 386] , in the circumstances prevailing in that case, that the Department could not interfere with the utilisation of the FL 3 licence, provided that the licensee complied with all other conditions as well as "payment of annual rental proportionately". It is, therefore, clear that Rule 14 would not impede or inhibit the charging of annual proportionate fee so long as no failure is placed on the licensee or it is blameworthy itself. We must be quick to clarify that in the event that a party applies for a period which is obviously not effective for the entire financial year, such as applying for a licence midway that financial year, the full fee for that year may be claimable or chargeable and, therefore, would have to be paid. In other words, had the appellant applied for the licence even with the knowledge that because of external factors such as a pre-existing injunction order, etc., she would not have been able to exploit it for the entire year, she may not have been liable to pay the licence fee for the entire year. This is not the factual matrix which obtains in the case at hand; the licence could only be granted for the period from 21-12-1999 to 31-3-2000 i.e. till the close of that financial year, owing to unforeseeable circumstances beyond the ken and control of the parties before us. We have already made a mention of the Division Bench judgment delivered in *Jayadevan* [1998 SCC OnLine Ker 209 : (1999) 1 KLJ 87] which in turn was referred to in another Division Bench judgment in *Rajagopalan Nair v. Commr. of Excise* [1989 SCC OnLine Ker 387 : (1989) 1 KLT 800] , wherein the Division Bench directed that the licensee was entitled to remission of payment of kist because of being disabled to conduct its business on account of the interim orders passed by the Court. We affirm the conclusions arrived at in these decisions. We hold that a party is entitled to seek a remission in the payment of licence fee if it is precluded from transacting business on the strength of that licence because of factors and reasons extraneous to it and/or if it is granted the licence on the direction of a court for only a portion of the financial year."

The judgment is clearly distinguishable. Firstly, the facts were undisputed. Secondly, there was an injunction which precluded the respondents from issuing licence for the duration of the injunction. In the cases before us, there was no such injunction. Even after the judgment of the High Court in *Amarjit Singh Sidhu v. State of Punjab and others* (supra) licences continued to be operated. Even assuming that the litigation affected the supply for any reason, two questions would arise, - whether the State can be made responsible for the same and, assuming that it can be, the extent of the liability qua each individual licensee.

37. In the circumstances, the petitions are dismissed with liberty to the petitioners to avail of any alternate remedy including resorting to clause 3.19 of the Punjab Excise Manual for the year 2016-17. The statement of the learned

Advocate General that if applications are made under clause 3.19 of the Punjab Excise Manual, the same would be decided after affording the petitioners an opportunity of being heard and producing evidence is accepted. The interim orders shall continue upto and including 31.03.2017 to enable the petitioners to either challenge the judgment before the Supreme Court or to seek interim reliefs in the alternate proceedings that they may adopt. There shall be no order as to costs.