

(1983) 02 BOM CK 0044

In the Bombay High Court

Case No : Writ Petitions No"s. 214, 304, 322, 546, 882, 883, 888 to 891 and 964 of 1982

Sanmukh D. Makhija and Another, M.V. Bhatia and Girish Wines, Narayan A. Gore, Mohan Motiram Hingorani and Others, Ulhasnagar Excise Liquor Association and Others, Ulhasnagar Country Liquor Bar Owners Association and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 28-02-1983

Acts Referred:

Bombay Prohibition Act, 1949 — Section 2(15), 53
Constitution of India, 1950 — Article 14, 226
Maharashtra Country Liquor Rules, 1973 — Rule 25

Citation : (1983) 2 BomCR 431 : (1983) 85 BOMLR 411

Hon'ble Judges : S.N. Khatri, J;P.S. Shah, J

Bench : Division Bench

Advocate : N.H. Gursahani and N.V. Walwalkar, in W.P. Nos. 214, 546, 883, 888-91 and 964 of 1982 and P.M. Pradhan, in W.P. Nos. 304 and 322 of 1982, for the Appellant; V.H. Gumaste and N.D. Bhatkar, A.G.P., for the Respondent

Judgement

P.S. Shah, J.—This is a group of 11 petitions filed by the liquor vendors under Article 226 of the Constitution challenging the increase in the licence fees by the Government with effect from July 1, 1981. The petitioners have been granted these licences under the Bombay Prohibition Act, 1949 read with the relevant Rules.

2. The facts which are relevant for our purpose in all these petitions are more or less similar. Writ Petition No. 214 of 1982 was argued as a representative petition.

3. In Writ Petition No. 214 of 1982 the petitioner is a holder of C.L. III Licence which has been issued to him under the provisions of the Bombay Prohibition Act, 1949 (hereinafter referred to as the "Act") read with Rule (1) of the Maharashtra Country Liquor Rules, 1973. Licence has been issued in his favour for retail sale of country liquor on the terms and conditions mentioned in the

licence. This licence has been held by the petitioner for the last several years and is renewed from time to time and has thus been valid and subsisting upto March 31, 1982. At the commencement of the financial year 1981-82 the petitioner's licence was renewed for a period of 3 months upto June 30, 1981. This licence was again renewed for the remainder of the year i.e. for the period ending March 31, 1982 on the petitioners executing a bond in favour of the government. It appears that the licensing authority, viz. the collector, was directed to renew the licence only on execution of the bond by the licence-holder in the proforma sent to the Collector. At the time of the execution of the bond licence fee fixed for issue of C.L. III licence was Rs. 1500/-. In the year 1973 the Government charged Rs. 1000/- as permit fees or licence fees for the issue of the said licence. However, it appears that thereafter in the year 1978 the quantum of fees were increased from Rs. 1000/- to Rs. 1500/-.

4. After the licence was thus renewed for the period commencing from July 1, 1981 ending with March 31, 1982 the Government amended the Rules, which were published in the Government Gazette dated November 6, 1981. Under these amended Rules, called the Maharashtra Country Liquor (Second Amendment) Rules, 1981, the licence fees were increased from Rs. 1500/- to Rs. 6000/- for licence in Form C.L. III. Under Rule 24(1) in a city with population of 2 lacs and above the fees for the issue of C.L. III licence were raised to Rs. 6000/- from the fees of Rs. 1500/-. As mentioned above, the licence of the petitioner was renewable on April 1, 1981 on payment of licence fees of Rs. 1500/-. However, it is the case of the Government that since Government was contemplating revision of licence fees, the Home Department issued directions to the Collector that the licences which were due for renewal on that day should not be renewed for the period for which the licences were due for renewal in accordance with the existing provisions of Rules, but should be renewed for a period of three months only after charging proportionate fees for the same. It appears that in accordance with these instructions dated March 12, 1981 the petitioner's licence was renewed only for 3 months ending with June 30, 1981. Before the expiry of this period, the Home Department sent a wireless message dated June 30, 1981 to the Collectors directing that the licences should be renewed for the remaining period of the year after recovery of proportionate licence fees and after obtaining from the licensees an agreement in the prescribed proforma. The Collector accordingly obtained an agreement from the petitioner and renewed the licence for the period ending March 31, 1982. In the meanwhile the Maharashtra country Liquor Rules, 1973 were amended and the Government Notification to that effect was published in the Government Gazette dated November 6, 1981. These Rules, are called the Maharashtra Country Liquor (Second Amendment) Rules, 1981. Under these Rules a fee of Rs. 6000/- per annum has been prescribed where the licence is to be renewed in a city with a population of 2 lakhs and above. Though the licence was already renewed for the remaining period of the year i.e. till March 31, 1982, the Authorities demanded from the petitioner the proportionate additional fees on the basis of

the new Rules of 1981 for the nine months period from July 1, 1981 to March 31, 1982. By a letter dated January 11, 1982 the petitioner's attention was drawn to the agreement executed by him and he was called upon to pay the balance amount, viz. Rs. 4500/-. For each one of the petitioners, the licences were renewed on their executing the agreement in the proforma sent to them and the difference between the, licence fees as per the amended rules was later on demanded from them. As mentioned earlier, the facts in all these petitioners are similar, though the amount demanded from each one of them varies depending on the nature of the licence granted to the respective petitioner. The petitioners seek to challenge the demand for the excess amount for the period the licence already granted to them, viz. for the year 1981-82. They have also challenged the Maharashtra Country Liquor (second Amendment) Rules, 1981 as ultra vires and unconstitutional.

5. Mr. Gursahani, the learned Counsel appearing for the petitioners, urged the following contentions before us :---

(i) Maharashtra Country Liquor (Second Amendment) Rules, 1981 are ultra vires of the Constitution.

(ii) These Rules are subordinate legislation and as such on the ground of unreasonableness and arbitrariness they are liable to be struck down.

(iii) These Rules seek to increase the licence fees of the Country Liquor Licence without rendering equivalent services. Since the increase in fees has no correlation to the services rendered it is bad in law and unconstitutional.

(iv) The levy of increased fee retrospectively for the year 1981-82 is illegal and ultra vires of the powers of the Government since there is no provision either in the Act or the rules framed thereunder for retrospective levy.

(v) In any event, fees could not have been increased retrospectively without giving an opportunity of hearing to the petitioners is violative of the principles of natural justice.

(vi) The bond on the basis of which the Government is seeking to recover the enhanced fees from the petitioners is null and void since neither the conditions of the licence nor the Act nor Rules provide for recovery of additional fees during the continuance of the period of licence.

(vii) Under the Rules the licensee is entitled to renewal of licence as of right on his paying the prescribed fees and making an application for the renewal of the licence. There is no provision under the Act or the Rules which empowers the Government or the authorities to obtain a bond from the licensee making him liable for any additional burden by way of increase in the licence fees for the period for which the licence has been renewed.

(viii) The bond got executed from the petitioners has been taken from them under compulsion. Even assuming that the petitioners voluntarily executed the

bond, the Government cannot use it as a shield for illegal recovery since the application thereunder is contrary to law and rules and there cannot be any estoppel against a statute. Further the so-called bond is not based on any decision already taken by the Government but on vague proposal under consideration of Government and as such it is void and unenforceable as being without consideration.

6. Mr. Pradhan, who appeared for two of the petitioners, raised the additional contention that the classification of licensees based on the population of the village, town or city for the purpose of prescribing different rates of fees is arbitrary and irrational and is thus violative of Article 14 of the Constitution. He submitted that since the object of the Act is to regulate the liquor trade, there should have been uniformity of fees throughout the State irrespective of population of a particular area. He submitted that the basis of population has no nexus with the object of the Act, viz. the regulation of the liquor trade.

7. Mr. Gumaste, the learned Counsel appearing for the respondents, on the other hand strongly relied on the decision of the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, and contended that no one has a fundamental right to carry on liquor trade which can be completely prohibited by the State Government or can be regulated by method of licence. It being an absolute privilege of the Government, the privilege to carry on the liquor trade can be transferred by way of licence for consideration without there being any corresponding quid pro quo for rendering services to the licensee and as such the Government has absolute discretion to fix the licensee fees at any rate because in real terms what the Government does is to vend its right to carry on its business for a price. Such charge or licence fee levied is a pure and simple revenue measure and is neither a tax nor fee in the sense in which these terms are used. In other words, the concept of fee in the sense of fee for rendering service has no application to the case of license fees charged by the Government to the licensees for carrying on the liquor business. As far its retrospective demand for the period of the subsisting licence, viz. for the year 1981-82, is concerned, it was contended that though the Rules were prospective and did not apply to the period covered by the subsisting license, such retrospective levy was justified by reason of the terms of the bond executed by the petitioners. The learned Counsel also rightly invoked the aid of section 139 of the Act which confers over-riding power on the Government to change the conditions of the licence or issue instructions in relation to the matter covered by the licence. It was submitted that the wireless message sent by the Home Department to the Collector to renew the licence on the licensees executing the bond constituted order (sic) of the Government u/s 139 of the Act. Lastly it was submitted that in any event the obligation is under the contractual term of the bond and the avoidance of the obligation under a bond cannot be achieved by resort to a petition under Article 226 of the Constitution and the proper remedy for the petitioner is to file a suit.

8. It would be relevant at this stage to refer to the relevant provisions of the Act. The preamble shows that it is an Act to amend and consolidate the law relating to the promotion and enforcement of and carrying into effect the policy of prohibition and also of the Abkari law in the State. u/s 2(8) "Country Liquor" has been defined to include all liquor produced or manufactured in India. Section 2(15) defines "excise Revenue" to mean revenue derived or derivable from any duty, fee, tax, fine (other than a fine imposed by a Court of Law) or confiscation or forfeiture imposed or ordered under the provisions of this Act, or of any other law for the time being in force relating to intoxicants. u/s 2(17) the expression "foreign liquor" means all liquor produced or manufactured outside India. The proviso, however, mentions that the State Government may by notification in the Official Gazette declare that any specified description of country liquor shall, for the purpose of this Act, be deemed to be foreign liquor. u/s 2(50) expression "vendor's licence" means a licence granted u/s 35. Chapter III deals with the various prohibitions in the matter of manufacture, export, import, transport, sale, purchase, possession, use or consumption of intoxicants. The provisions contained in Chapter III only reiterate the position that the Government has absolute control in respect of manufacture, sale, export, import, transport, use, consumption or possession of liquor or any other intoxicants, and the other provisions of the Act are intended to regulate the above matters in relation to the particular types of intoxicants, including liquor. Chapter IV includes section 25 to 30 and these provisions pertain to the control, regulation and exemptions. It would be sufficient to state that the various provisions regarding grant of licences in respect of different categories are included in this regulatory chapter. The provisions therein indicate the sweeping power which the Government possesses in the matter or grant of licence and the regulation of liquor trade. Now sub-section (1) of section 34, inter alia, provides that the State Government may by rules or an order in writing authorise an officer to grant a vendor's licence or the sale of foreign liquor. Sub-section (2) thereof provides for certain conditions which are attached to the right of vendor's licence. Section 53 which provides for general conditions regarding licences runs thus :

"53. All licences, permits, passes or authorizations granted under this Act shall be in such form and shall, in addition to or in variation or substitution of any of the conditions provided by this Act, be subject to such conditions as may be prescribed and shall be granted to on payment of the prescribed fee."

Section 54 and 56 incorporate the powers of the Government to cancel or suspend licences on various grounds mentioned therein. Perusal of the provisions contained in Chapter VII indicate that practically most of the branches of the provisions of the Act and the Rules framed thereunder are made penal. The section 143 confers power on the State Government to make rules both for the purposes of carrying out the provisions of the Act or for any other law for the time being in force relating to excise revenue. Clause (f) thereof confers power on the Government to make Rules regulating the grant, suspension or cancellation of licence, permits, passes or authorisations for the import, export,

transport, collection, sale, purchase, possession, manufacture, bottling, consumption, use or cultivation of any of the intoxicants, denatured spirituous preparation, etc. Under Clause (u) of section 143 the Government is empowered to make rules prescribing the fees including rent or consideration payable in respect of any privilege, licence, permit, pass or authorisation granted or issued thereunder. The words "including rent or consideration" were added by the Maharashtra Amendment Act 70 of 1981 which came into force on 23-10-1981. Section 139 confers certain over-riding powers on the State Government to be executed by them by general or special orders in respect of licence and such other matters referred to in that section.

9. The relevant propositions that emerge from the decision of the Supreme Court in *Har Shanker's* case (supra) may be stated thus : Firstly, there is no fundamental right to do trade in intoxicants. The State in its regulatory powers has right to prohibit absolutely every form of activity in relation to intoxicants-its manufacture, storage, export, import, sale and possession. In all their manifestations these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. The wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants on such terms of general application as the State deems expedient. Secondly, since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. Thirdly, the amounts charged to the licensees under a liquor licence which are popularly called "fees" are neither in the nature of a tax nor of an excise duty. The "licence fee" which the State Government charges to the licensees through the medium of actions or the "fixed fee" which is charged to the vendors of liquor licences need bear no quid pro quo to the services rendered to the licensees. The word "fee" is not used in such an enactment in the technical sense of the expression, viz. a fee which may be charged for special services rendered to individuals by some Governmental agency and such a charge having an element in it of a quid pro quo. But a "Licence Fee" or a "fixed fee" is meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the State can carry on trade or business, such a charge is the normal incident of a trading or business transaction. *Har Shankar's* case arose out of the grant of liquor licences under the Punjab Excise Act (1 of 1914) and the Rules framed thereunder. It is not necessary to make any specific reference to the provisions of the Punjab Act or the Rules framed thereunder since the principles laid down in that case hold good in the case before us.

10. The provisions of the prohibition Act with which are concerned also indicate that levy of licence fees is by way of a revenue measure. This is clear from section 2(15) which defines "excise revenue" as revenue derived or derivable from any duty, fee, tax, fine etc. Thus fee is also treated as revenue of excise revenue under the Act. This is also reflected in section 143 of the Act which confers rule making power on the State, Sub-section (1) thereof empowers the

State Government to make rules for the purpose of carrying out the provisions of the Act or any other law for the time being in force relating to excise revenue. Under Clause (u) of sub-section (2) of section 143, the Government is empowered to make rules prescribing the fees, including rent or consideration in respect of any privilege, licence, permit, pass or authorisation granted or issued under the Act. This also indicates that the fees charged for the various licences under the Act are not fees in the traditional sense of fees correlated to services rendered. Har Shankar's case (supra) apart from the challenge to the licence fees charged to the licensees through the medium of auctions held under the Rules, the enhancement of the quantum "fixed fee" under the Punjab Rules was also challenged on the ground that the licence fee must have correlation to the services rendered. But the challenge was negatived on the ground that the normal concept of licence fee has no relevance in the case of trade or business relating to intoxicants. In fact it was pointed out in that case that there is no question of rendering any services as such in the case of trade or business in intoxicants. However, Mr. Gursahani sought to place reliance on the earlier decision of the Supreme Court in *The Indian Mica and Micanite Industries v. The State of Bihar* A.I.R. 1971 S.C. 1182 and contended that this decision which takes the view that even in the cases of business or trade in intoxicants the fees charged for the licence must have correlation to the services rendered, has not been considered by the Supreme Court in Har Shankar's case. He submitted that we should follow the said earlier decision taking a contrary view in preference to the decision in Har Shanker's case. Undoubtedly the aforesaid decision of the Supreme Court in *The Indian Mica and Micanite Industries*" case (supra) has not been referred to in Har Shankar's case and there are observations in that case to the effect that before any levy can be upheld as it must be shown that the levy has co-relationship to the services tendered by the Government and this principle is applied even in the case of licence fees in the Bihar and Orissa Excise Act. However, on a perusal of the judgment it does not appear that the question as to whether the principle of quid pro quo has no relevance to the case of liquor licences was argued or specifically considered by the Supreme Court. With respect therefore, we may consider the later decision of the Supreme Court in Har Shanker's case which sparsely deals with the question involved as binding on us. In the case of *Indian Mica Micanite Industries Vs. The State of Bihar and Others*, Rule 111 of the Rules framed u/s 90 of the Bihar and Orissa Excise Act was challenged as being ultra vires of the Constitution. The High Court had come to the conclusion that the levy made under the impugned Rule was a fee, which finding was not challenged before the Supreme Court by any of the parties and the only question posed for consideration of the Supreme Court was whether there was sufficient quid pro quo for levy. On the other hand, as pointed out by us above, the question as to whether the fees charged for the licence must have a correlation to the services rendered was squarely raised and answered by the Supreme Court in Har Shankar's case on a consideration of the arguments advanced before it. In the circumstances, the later decision in Har Shankar's case is binding on us.

11. In Har Shankar's case the Supreme Court had to consider the provisions of the Punjab Excise Act and the Rules framed thereunder. Under the Rules certain amount of fixed licence fees was charged for certain categories of licence. While considering the nature of the fees chargeable under the Rules, Chandrachud, J., (as he then was) who spoke for the Court observed :

"Para 55. Since rights in regard to intoxicants belong to the State, it is open to the Government to part with these rights for a consideration. By Article 298 of the Constitution, the executive power of the state extends to the carrying on of any trade or business and to the making of contracts for any purpose. As observed in Harinarayan Jaiswal's case, "if the Government is the exclusive owner of these privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Articles 14, if the Government, tries to get the best available price for its valuable rights". Section 27 of the Act recognizes the right of the Government to grant a lease of its right to manufacture, supply or sell intoxicants. Section 34 of the Act read with section 59(d) empowers the Financial Commissioner to direct that a licence, permit or pass be granted under the Act on payment of such fees and subject to such restrictions and on such conditions as he may prescribe. In such a scheme, it is not of the essence whether the amount charged to the licensees is predetermined as in the appeals of Northern India Caterers and of Green Hotel or whether it is left to be determined by bids offered in auctions held for granting those rights to licensees. The power of the Government to charge a price for a parting with its rights and not the mode of fixing that price is what constitutes the essence of the matter. Nor indeed does the label affixed to the price determine either the true nature of the charge levied by the Government or its right to levy the same.

Para 56. The distinction which the Constitution makes for legislative purpose between a "tax" and a "fee" and the characteristics of these two as also of "excise duty" are well known. "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for service rendered." Per Lathani C.J., in Mathews v. Chickory Marketing Board 60 C.L.R. 263, 276. A fee is a charge for special services rendered to individuals by some governmental agency and such a charge has an element in it of a quid pro quo. Commr. H.R.E, Madras v. Lakshmindra Thirtha Swamiar 154 S.C.R. 1005 . Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. Guruswamy and Co. etc. Vs. State of Mysore and Others, The amounts charged to the licensees in the Instant case are, evidently, neither in the nature of a tax nor of excise duty. But then, the " licence fee" which the State Government charged to the licensees through the medium of auctions or the "Fixed fee" which it charged to the vendors of foreign liquor holding licences in Forms L-3, L-4 and L-5 need bear no quid pro quo to the services rendered to the licensees. The word "fee" is not used in the Act or the Rules in the technical sense of the expression. By "licence fee" or "fixed fee" is

meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the state can carry on a trade or business, such a charge is the normal incident of a trading or business transaction."

It would, therefore, be clear so far as the licence fees for liquor licences are concerned, that it is not necessary that there should be an element of quid pro quo in the fees that are charged and the services rendered. The licence fee under the Act and the Rules with which we are concerned is nothing but the price or consideration which the Government charges as fees for parting with its privileges and granting them to the licensees and such a charge is nothing but a normal incident of a trading or business transaction and it is not necessary to establish a co-relationship between the charge and the services, if any, rendered by the Government to the licensees. The challenge to the amended Rule on the ground of absence of element of quid pro quo must fail.

12. We also do not find any merit in the challenge to the increase in fees on the ground of unreasonableness. It is not disputed that the impugned rules are of a general application. Since the licence fees need not have any co-relation to any services rendered and since the fees are charged by way of price or consideration for the privilege of carrying on trade and business it is futile to say that a ceiling should be placed on the quantum of fees. In a sense this position is also covered by the decision in Har Shankar's case. In this connection we may only refer to the following observations of the Supreme Court in paragraph 57 of the judgment in Har Shankar's case :

"57. While in this question, we may with advantage cite a passage from "American Jurisprudence" (Vol. 30 pages 642, 645) which is based on the decisions in Gundling v. Chicago (1899)44 L Ed. 725, Philips v. Mobile (1907)52 L Ed. 578, and Richard v. Mobile (1907)52 Law Ed. 581. It says :

"...the familiar principle that the imposition of licence fees on useful and honourable occupations must not exceed the cost of issuing the licence, plus the expense of inspecting and regulating the business licence.....is not necessarily applicable to a liquor licence. The liquor traffic is not something which is licenced for the purpose of promoting it. Indeed, licence fees may be exacted in amounts intended to discourage participation in the business. The courts have quite generally refused to hold that the licence fee imposed merely because it is large, is a tax, where the object is to control, regulate, and restrict and not to encourage the liquor traffic, the revenue being the result of the system and not the motive for its adoption.The higher the fee imposed for a licence, it is sometimes said, the better the regulation, as the effect of a high fee is to keep out of the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it."

Thus the Supreme Court has endorsed the view that under the Rule higher the fees imposed for the licence the better the regulation, as the effect of charging

high fees is to keep out of business those who are undesirable and also to keep within reasonable limits the number of those who may engage in it. It is for the Government to decide the quantum of fees for granting the licence and the licensee is not entitled to challenge the increase on the ground of unreasonableness. Having regard to the policy underlying there and the principles laid down by the Supreme Court in Har Shankar's case, it is not possible to accept the contention that the impugned Rules being in the nature of subordinate legislation are liable to be struck down on the ground of unreasonableness or arbitrariness.

13. We do not see any merit in the contention urged by Mr. Pradhan that prescribing different rates of licence fees on the basis of population of a particular area is arbitrary or discriminatory and, therefore, violative of Article 14 of the Constitution. However, the Rules in question viz. the Maharashtra Country Liquor Rules, 1973, prescribed different fees based on population of the village, town or city where the licensed shop is proposed to be located. Under the amended Rule 25, for a licence in Form C.L.III (called the retail and licence) the fees prescribed are where the licensed shop is proposed to be located in :

(a) town and village with a population Rs. 1,000/- upto 5000 (b) town with a population of 5000 and Rs. 1,500/- above, but below 10,000 (c) town and city with a population of Rs. 3,000/- 10,000 and above but below 2 lakhs

(d) city with a population of 2 lakhs and above Rs. 6,000/-

Now classification based on population is a well recognised mode for the purpose of fixing different fees. It is not disputed that the fees prescribed for the different categories are of a general application. It is difficult to see how such a classification can be said to be discriminatory, since all the license vendors in the particular category are similarly treated. However, challenge based on Article 14 of the constitution on such a contention will not be sustainable in view of the decision of the supreme Court in Har Shankar's case. All that was argued by Mr. Pradhan was that this basis in population totally ignores the number of shops and number of permits issued for a particular year in a particular area where the proposed shop is to be located. It is difficult to appreciate this argument because the number of shops as well as the number of permits would always be a fluctuating factor and it would be difficult and impracticable to make a classification for payment of different fees on such basis as suggested by the learned Counsel. It appears to us that basis of population may be perhaps a practicable and just basis of permissible classification. It is not possible to accept the contention that the classification is arbitrary or violative of Article 14.

14. Next question is whether the amended Rules can be retrospectively enforced so as to effect a license subsisting on the date of the amendment till the expiry of the period for which it has been granted. In other words, the contention is that the petitioners cannot be asked to pay higher amount of license fee as per the amended Rule 24 which admittedly came into force after the petitioners were

granted the licences and the period thereunder had not expired. Mr. Gumaste fairly considered that the amended Rules of 1981 are prospective and they would govern the licences granted or renewed after the Rules came into force. He, however, justified the demand for higher amount as per the amended Rules for the year 1981-82 on the basis of the bond executed by the petitioners. As pointed out above, the petitioners' licences were initially for the period ending June 1981. The same were again renewed for the further period of 9 months ending March 31, 1982 after taking the bond from the petitioners. It was, therefore, submitted by Mr. Gumaste that notwithstanding the fact that the amended Rules did not have retrospective operation, the petitioners, who had voluntarily agreed under the bond to pay higher licence fees as and when fixed were bound by the terms of the bond and the government was entitled to enforce the bond and demand the quantum of fees as provided under the Rules for the period 1981-82 as well. The other limb of the argument of Mr. Gumaste was based on the provision of section 139 of the Act. According to him, since the bond was executed pursuant to the directions issued by the Home Department of the Government by wireless message, such instructions directing the increase in license fees had an over-riding effect over the Rules which were in force at the time when licences were renewed. According to him, the instructions issued under the wireless message must be deemed to have been issued under Clause (n) of sub-section (1) of section 139. He submitted that as a result of these instructions; the terms of the original licences stood modified in so far as the quantum of the licence fees is concerned. Now section 139 of the Act provides for certain general powers of the State Government in respect of licences and other matters referred to in the section. The clauses of sub-section (1) of section 139 on which reliance is placed are Clauses (g) and (n). The section 139 so far as relevant runs thus :

"139(1) Notwithstanding anything contained in this Act or the rules made thereunder, the State Government may, by general or special order,---

(g) direct that no licence, permit, pass or authorisation of the kind specified in such order shall be granted without previous approval of the State Government or also direct any additions or alterations to be made to or in the conditions subject to which under any other provisions of this Act, such licence, permit, pass or authorisation can be granted;

(n) issue such other the instructions in any matter pertaining to the grant or otherwise of licence, permits, passes or authorisations under this Act, as the State Government may deem proper.

(2) An order made under sub-section (1), shall, if it is of a general nature or affecting a class of persons, be notified in the Official Gazette."

Assuming that this provision has the effect of permitting the Government to impose on the licensees higher fees even during the period of a subsisting licence, for the application of the said provisions the condition laid down in the

said section have to be complied with. It must be firstly be shown that there is an order passed by the State Government. No order of the Government is placed on the record of this case. Mr. Gumaste stated before us that apart from the wireless message issued by the Home Department of the Government, there is no other record about any order u/s 139 of the Act having been issued by the Government. Mr. Gumaste submitted that the wireless message issued by the Department should be treated as an order issued by the Government u/s 139. It is not possible to accept the submission. Mere instructions issued by the department of the Government can by no stretch of imagination be construed as an order of the Government. The order contemplated u/s 139 is an order of the Government and not of the Secretary of the Department. Further under sub-section (2) of section 139 the order made by the Government under that provision has to be notified in the Official Gazette, when such an order is of a general nature affecting a class of persons. In the present case there is neither any order of the State Government nor is there a publication of the order in the Government Gazette. The instructions to take the bond in this case are issued by an officer of the Government which cannot assume the character of an order of the State Government u/s 139. At best the wireless message would amount to the internal instructions to the Subordinate Officers by the Home Department and nothing more. We are, therefore, of the opinion that the wireless message does not amount to an order of the Government u/s 139.

15. Now it is not disputed that the bonds were got executed from the petitioners as per the instructions issued in the wireless message. The petitioners were thus compelled to execute the bond if they wanted to get their licenses renewed. On a perusal of the contents of the bond we find that the terms mentioned therein are vague. The bond shows that there was only a proposal for increasing the licence fee and this proposal was under the consideration of the Government but no final decision had been taken. This would be a further circumstance to show that there was no order issued by the Government u/s 139 which could be availed of by the respondents. Now, in the absence of any statutory provision in the Act or the Rules, the bond has no legal sanctity and as such cannot be endorsed against the petitioners. The provisions of the Act and the Rules clearly show that the licensees have to pay only the fee as fixed under the Rules. The Government has no power to circumvent the legal provisions by asking the licensees to execute the bond agreeing to pay higher fees. In this connection we must note that admittedly the old Rules continued to remain in force till they were amended in the month of November 1981 and the licences already granted or renewed must be governed by the Rules which were in force at the time of the renewal of the licence and it is only after the period of the licence is over new Rules would apply. Since admittedly the new Rules have no retrospective application the Government has no power to by pass the statutory provision and compel the licensees to pay the licence fee in excess of the prescribed fee at the time of the grant or renewal of the licence. The new Rules would have application only to the licences issued after the commencement of the Rules. This position is clear from

the provisions of section 53 of the Act which provides that all the licenses, permits, passes, or authorisations granted under the Act shall be in such form and shall, in addition to or in variation or substitution of any of the conditions provided by the Act, be subject to such conditions as may be prescribed and shall be granted on payment of the prescribed fees Since prescribed fee for the time being in force, i.e. the time when the licence was renewed, was Rs. 1500/- the licensee is entitled to carry on the business without payment of additional amount as per the amended Rules till the expiry of the be period of licence. No provision of law has been pointed out to us whereby the Government is entitled to demand fees in excess of those prescribed by the Rules, and if that is so an agreement whereunder the licensee agrees to pay higher amount must be deemed to be unlawful.

16. It was urged by Mr. Gumaste that a writ petition under Article 226 of the Constitution either to enforce the terms of the contract or to avoid the terms of the contract does not lie. But what we find in this case is that the bond or the demand thereunder is per se contrary to the Act and the Rules framed thereunder. In the present case, the real relief claimed is based on the ground of illegality and invalidity of the demand. Moreover there is no provision of the Act or the rules under which the Government can take a bond agreeing to pay enhanced fees for the period of the subsisting licence. In the circumstance, the demand itself being per se illegal, we see no reason why a petition under Article 226 of the Constitution could not be entered by this Court.

17. From the above discussion the following propositions emerge :

(i) The Maharashtra Country Liquor (Second Amendment) Rules, 1981, are valid but the increases in fees effected by the said Rules which came into force on November 6, 1981 have only prospective operation. These Rules are effective only in respect of licences granted or renewed after they came into force.

(ii) So far as the petitioners are concerned, these Rules cannot be given effect to for the period of their licences ending March 31, 1982, the bond notwithstanding.

18. In the result the petitions are partly allowed and the impugned letters whereunder the difference of fees is demanded from the petitioners are quashed and set aside.

19. In the circumstances of the case there shall be no order as to costs.

20. At the time of the admission of these petitions, the petitioners were granted interim stay of recovery of difference in the amount on condition that they had to furnish Bank guarantee for it. Accordingly the petitioners have furnished Bank guarantees. In the view that we have taken the Bank guarantees furnished by the petitioners are discharged.