

**(1999) 10 AHC CK 0080**  
**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition Nos. 481 and 9431 of 1993

|                                                    |            |
|----------------------------------------------------|------------|
| Sarla Talwar and Another; Vipul Talwar and Another | APPELLANT  |
| Vs                                                 |            |
| State of U.P.and Others                            | RESPONDENT |

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**Date of Decision :** 28-10-1999

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (1999) 10 AHC CK 0080

**Hon'ble Judges :** P.K.Jain, J

**Final Decision :** Allowed

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## Judgement

P.K. Jain, J.—In both the petitions common question of law and facts are involved, therefore, both the writ petitions are being decided by a common judgment.

2. Petitioners have filed this writ petition with the following prayers:

(i) Issue writs, orders or direction in the nature of certiorari quashing

(a) order dated 17891 of the Respondent No. 3 (Annexure XI) rejecting the application of the petitioners for the refund of Rs. 95,666.

(b) order dated 22792 of the Respondent No. 2 (Annexure XIII) rejecting the appeal of the petitioners against the order dated 17891 of Respondent No. 3.

(c) order dated 281192 of the Respondent No. 1 (Annexure XIV) rejecting the revision petition of the petitioners against the order dated 28792 of Respondent No. 2.

(ii) issue a writ, order direction in the nature of mandamus directing the respondents to refund Rs. 95,666 to the petitioners.

3. In the year 1982 the petitioners and one Smt. Shanti Devi had applied for FL7 licence for "Metro Hotel and Restaurant, Izatnagar, Bareilly in accordance with U.P. Excise (Licensing under the Surcharge Fee System) Rules, 1968. The

Collector, Bareilly recommended to the Excise Commissioner the grant of the licence by his letter dated 201 83. Excise Commissioner instead of himself sanctioning the licence made recommendations to the Government of Uttar Pradesh by letter dated 61083. The Government granted the licence in favour of "Metro Hotel and Restaurant" by order dated 221083. However, before grant of licence by the State Government, Smt. Shanti Devi had withdrawn herself from the partnership and therefore, an application dated 251083 was moved for grant of licence in the name of the petitioners. That despite application dated 251083 the licence was issued to the Metro Hotel and Restaurant in the name of the petitioner Smt. Shanti Devi, On 281083 the Collector, Bareilly recommended the Commissioner to modify the licence in the name of the petitioners. At the close of the year 198384 the petitioners applied for renewal of their licence in the name of the petitioners alone in view of the Rule 332 of the Excise Manual Volume I. The Collector renewed the licence in the names if the petitioners for 3 months only i.e. from 1484 and thereafter from 1784 to 3181984 with endorsement "in anticipation of Government Orders". Thereafter the Collector extended the period upto 3081984. A recommendation was made by the Collector, Bareilly to the Excise Commissioner on 301184 for deletion of the name of Smt. Shanti Devi from the licence. An other reference dated 111284 was also made. The period of licence was extended to 3061985. Since no order of Excise Commissioner was received he refused to renew the licence any further. It is further averred that the Excise Commissioner on receipt of reference from the Collector referred the matter to the State Government for approval by letter dated 2421985. By letter dated 2985 the State Government clarified that it was open to the Collector to find out and mention the names of the proprietors/ partners of Metro Hotel and Restaurant correctly in the licence issued to it. Under paragraph 648 of the Excise Manual Volume I, the Collector is empowered to finalise the names with the approval of the Excise Commissioner. Despite above clarification, the Collector Bareilly renewed the licence of the petitioners for the period till 3061985 provisionally even though the petitioners had applied for renewal of the licence for whole of the year after depositing the renewal fee of Rs. 6,000. The Collector sought approval of the Excise Commissioner by his letter dated 1911986. The Excise Commissioner asked for copy of the partnership deed which was sent by the Collector to the Excise Commissioner with his letter dated 681986. When the Collector did not renew the licence the petitioner moved an application before the Excise Commissioner for renewal of FL 7 licence till year 198788. The said application was rejected by the Excise Commissioner by order dated 2751988. The petitioners filed revision No. 6 of 1988 before the Commissioner challenging the\* order of the Excise Commissioner. The order of the Commissioner was quashed by the Government by order dated 1251989 and the matter was remanded to the Collector, Bareilly, for taking appropriate action under para No. 381 read with para 332 of the Excise Manual Volume I either to review the licence or refuse renewal after following the procedure laid down in Rule 381 (IV). It is further stated in the writ petition that the petitioners did not commit any breach of conditions of the licence FL 7. The licence was not renewed

by the Collector for no fault of the petitioners. Still the Collector demanded by order dated 14789 a sum of Rs. 1,62,000 for renewal of licence which was the fee payable for the years 198787 to 198990. The petitioners deposited the said amount under the protest. A representation dated 24789 was made. The petitioners were allowed to run the licence up to 30685. Thereafter, they were arbitrarily not allowed to run the licence and ultimately the petitioners were permitted to run the licence from 1489. They were thus not liable to pay licence fee for the period from 17 85 to 17789 and a sum of Rs. 95,666 were liable to be refunded to the petitioners. It was stated that under Section 24B of the UP. Excise Act, 1910 the State has the exclusive privilege of sale and supply of liquor and the State parts with such privilege on payment of consideration. The licence fee paid is the consideration for sale of liquor and when the Collector stopped the petitioners from selling liquor without any fault on the part of the petitioners, the Government is not entitled to have the licence fee unlawfully for the period between 1785 to 17789. The refund application dated 24591 was rejected by the Collector, Respondent No. 3 on 17891. An appeal was filed against the said order which was dismissed by the Excise Commissioner vide order dated 22792. Against the order of the Excise Commissioner revision was filed before the State Government which was dismissed vide order dated 281192 and the same was communicated to the petitioners on December 5, 1992. On the above stated facts and grounds the prayers mentioned above were made by the petitioners in both the writ petitions.

4. The respondents filed counteraffidavit of Sri M.L. Verma, District Excise Officer, Bareilly. The making of the application for the grant of licence was admitted by the respondents. It was stated that the Collector, Bareilly issued licence as per sanction of the State Government and it was beyond the competence of the Collector to issue licence in the names of the petitioners only without prior permission of the Government. The Collector, Bareilly recommended the matter to the Excise Commissioner for mutation of the names sunder Rule 648 (2) of the Excise Manual Vol. I. The renewal of the licence is not a matter of right. The Government did not make it clear that the licence should be issued in the names of the petitioners only excluding the name of one of the partners. Without approval of the State Government for renewal of the licence in the names of the petitioners only the Collector was not legally competent to renew the licence. The petitioners deposited the licence fee for the years 198687 to 198990 amounting to Rs. 1,62,000 without any oral and written protest. Annexure 5 to the writ petition seems to have been prepared by the petitioners after the order of the Collector passed on 17889. The person receiving the so-called protest letter can not be identified and the petitioners had not submitted any such protest letter at the time of depositing of the licence fee. Genuineness of Annexure 5 to the writ petition is not beyond doubt. The licence of the petitioners was not terminated or suspended after 30685 and was pending for renewal process. A sum of Rs. 1,62,000 was directed to be deposited to maintain the continuity of the licence of the petitioners and they had deposited the amount. Therefore, the

amount of Rs. 95,666 was not liable to be refunded and the petitioners are not entitled for the refund of the same. The order dated 17891 passed by the Collector and the subsequent orders passed by the Commissioner of Excise and the State Government were passed on consideration of all the relevant facts and circumstances of the case.

5. The petitioners filed rejoinder affidavit reiterating the facts stated in the petition and further asserting that the amount of Rs. 1,62,000 pursuant to the order dated 17789 passed by the Respondent No. 3 was deposited under protest. The amount of Rs. 1,62,000 was not deposited by the petitioners voluntarily.

6. Sri Arun Kumar Tandon, assisted by Sri C.P. Dwivedi, learned Counsel for the petitioners and Sri Arvind Kumar brief holder for the State/opposite parties have been heard.

7. It is submitted by Sri Arun Kumar Tandon that the facts are not disputed. It is admitted that between 1786 to 17789 the petkioners were not permitted to run the licence and even though the Respondent Nos. 2 and 3 had recommended deletion of the name of Smt. Shanti Devi from FL 7 licence, yet for the fault of the respondents the name of Smt. Shanti Devi could not be deleted form the licence granted to the petitioners in the name of Metro Hotel and Restaurant, Izatnagar, Bareilly. The licence was not renewed between the period from 1786 to 16789 for none of the default of the petitioners. It is submitted that under Section 24B (b) of the U.P. Excise Act, 1910 the petitioners were liable to pay licence fee as consideration for running the licence and since they were not permitted to run the licence for the period between 1786 to 16789 the excess amount recovered from the petitioners were liable to be refunded to them.

8. Learned Standing Counsel, however, submits that an order was passed by the Respondent No. 3 on 14789 conditionally renewing the licence on payment of licence fee amounting to Rs. 1,62,000 for the period 198687 to 198990 and pursuant to that order the petitioners deposited the said amount. They had thus voluntarily accepted the order and were now estopped from stating that the amount was deposited by them under protest. The Collector and the other respondents, therefore, rightly rejected the prayer for refund.

9. There is no dispute that the application for FL 7 licence was moved in the name of Metro Hotel and Restaurant by three partners of the Firm in the year 1992. The Government sanctioned the licence on 221083. Soon after granting of the licence the petitioners moved an application dated 251083 praying that the licence be amended since one of its partners namely, Smt. Shanti Devi has withdrawn herself. Even though on 281083 the Collector, Bareilly had recommended to be Commissioner for modifying the licence but the modification could not be done for some or the other reasons. For the financial year 198485 when the application for modification was still pending for disposal, the Respondent No. 3 renewed the licence from time to time up to 30685. Thereafter the licence was not renewed till 24789 the date on which the petitioners

deposited the amount of Rs. 1,62,000 pursuant to the order dated 14789 passed by the Respondent No. 3 which was conveyed to the petitioners through letter dated 17789. Admittedly, Respondent Nos. 1 and 2 had from time to time recommended to the State Government for modification in the licence which was not done by the respondents for none of the fault of the petitioners. The petitioners were thus deprived from running the licence from 1785 to 24789. The question, therefore, arises whether in the circumstances the petitioners were liable to pay the licence fee for the said period. Section 24B of the U.P. Excise Act reads as follows:

"24B. Removal of doubts. For the removal of doubts, it is hereby declared

(a) that the State Government has an exclusive right or privilege of manufacture and sale of country liquor and foreign liquor;

(b) that the amount described as licence fee in clause (c) of Section 41 is in its essence the rental or consideration for the grant of such right or privilege by the State Government;

(c) that the Excise Commissioner as the head of the Excise Department of the State shall deemed, while determining or realising such fee, to act for and on behalf of the State Government."

10. It is evident from perusal of the provisions of Section 24B of the Act that the State Government has exclusive right and privilege of manufacture and sale of country liquor and foreign liquor. When the State Government provides licence for manufacture or sale of country liquor or foreign liquor it parts with its exclusive right and privilege of manufacture and sale of the liquor. Subclause (b) of Section 24B of the Act classifies the amount which is charged as licence fee it in its essence the rental or consideration for the grant of such right or privilege by the State Government. It has been repeatedly held that such right has to be exercised by the State Government with reasonableness. If for no fault of the licensee he is not permitted to run the licence the State Government cannot recover the licence fee for the period for which licensee is not permitted to run the licence. In the case of *Panna Lal and others v. State of Rajasthan and others*, ALR 1975 (2) SCC 633, the Supreme Court while considering the provisions of the Rajasthan Excise Act has held in para 20 that "the licence fee stipulated to be paid by the appellants is the price or consideration or rental which the Government charges from the licensees for parting with its privileges in stipulated lump sum payment and is a normal incident of a trading or business transaction. This Court in the recent decision in *Nashirwar v. State of M.P.*, and the unreported decision dated January 21, 1975 in Civil Appeal No. 365 of 1969 *Har Shanker v. Deputy Excise and Taxation Commissioner* held that the state has exclusive right to manufacture and sale of liquor and to sell the said right in order to raise revenue. The nature of the trade is such that the State confers the right to vend the liquor by farming cut either by auction or by private treaty. Rental is the consideration for privilege granted by the Government for

manufacturing or vending liquor. Rental is neither a tax or an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government."

11. The question whether the State Government is entitled to recover the licence fee for the period for which the licensee for none of his fault is deprived from running the licence was considered by a Division Bench of this Court in *Banuman Prasad Jaiswal v. State of U.P. and others*, 1983 UPTC362. In para 8pf the judgment the Court has held that "Sri Raja Ram Agarwal the learned Counsel for the petitioner cited a number of authorities to reinforce his argument that State Government should have acted reasonably and fairly and that on principles of reasonableness and fair play also the opposite parties were not entitled to realise the amount in question.....We must, however, observe that we entirely agree with the submission of the learned Counsel that the attitude of the State Government lacked both reasonableness as well as fair play when they insist on realising the balance amount of the licence fee after closing the petitioner's shop for no fault of his. The attitude was most arbitrary and forced the petitioner into a litigation which could have been avoided."

12. There is yet another decision of the apex Court rendered in *State of Rajasthan and others v. Shri Nandlal and others*, JT1992 (5) SC 655, in which it was held that grant of licence for selling the liquor by the State is essentially commercial contract though it is governed by statutory provisions and if there is short supply for no fault of the licensee, the licensee will not be liable to pay the proportionate excise duty and/or revenue representing the short supply." The decision in the case of *Panna Lal v. State of Rajasthan (supra)*, was referred for approval by the Court. The retail sale of country liquor in the State of Rajasthan is regulated by the provisions of Rajasthan Excise Act, 1950. It provided that no person shall sell or otherwise deal in excisable articles including country liquor except in accordance with the terms and conditions of a licence granted in that behalf and the provisions of the Act and the rules made thereunder. During the year in question (1967-68) licences were granted under two different systems. One was called the "Guarantee System" provided in Chapter VII (A) of the Rajasthan Excise Rules, 1955 and the other was "Exclusive Privilege System" governed by Chapter VII (B) of the said Rules. Under the "Guarantee System", the licensee guaranteed to draw from the Government Warehouse and sell, during that year, country liquor of a specified value, which was called the amount guaranteed. Under this system the licensee was obliged to deposit 10% of the amount of guarantee by way of security at the time of grant of license. He was under an obligation to draw from the warehouse every month liquor equivalent in value to 1/12th of the amount guaranteed and in case he failed to do so the amount of deficit could be recovered from the security deposit and also from his movable and immovable properties. Under the Exclusive Privilege System, the licensee was granted exclusive privilege of selling country liquor by retail within a particular local area on condition of payment of lump sum, instead of or in addition to excise duty as may be determined by the Excise Commissioner. Under this system too, the licensee was required to deposit 10% of the said amount by

way of security at the time of grant of licence. The total amount had to be deposited in 12 monthly instalments and he was entitled to draw liquor from the Government warehouse against the said deposits. Any amount not paid could be recovered as land revenue.

13. In the writ petition before the Supreme Court two questions arose 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 petitioners/licencees entitled to? The Court held that 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. As to the second question an argument was made on behalf of the State that 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. The Court held that "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." Referring to the judgment in *Panna Lal's*, case (*supra*) it was observed that "it was held by this Court that by enforcing the payment of guaranteed sum or the stipulated lump sum mentioned in the licences, the State does not purport to levy or recover excise duty. Excise duty, it was pointed out, is leviable on the manufacture of liquor and is recovered from the manufacturer. The licensees merely sell the same and the privilege of sale is given to them under either system, in consideration of the amount guaranteed or stipulated as the case may be. The Court has also observed that if there was short supply for no fault of their own the appellants will not be liable to pay the proportionate excise duty and/or revenue representation the short supply."

14. In the case in hands as has been found above, the petitioners were not permitted to run the licensee for no fault of their. Their applications/representation for modification of the licence were not decided by the authorities/respondents for sufficiently a long period and between the period from 1785 to 24789 they were not permitted to run t" e licence as the same was not renewed by the authorities on one or the other pretext and by shifting the responsibilities. Therefore, in view of the settled position of law as discussed above, the petitioners were not liable to make payment of licence fee for the said period for which for no fault of their own they were not permitted to run the licence. The stand taken by the State that the order dated 14789 a conditional offer was made to the petitioners to renew the licence on deposit of Rs. 1,62,000 which included licence fee for the period from 1785 to 23785 amounting to Rs. 95,666 and the petitioners accepted the offer by depositing the said amount, they were estopped from claiming the refund, is not legally sustainable. If a demand is made illegally and the amount has been deposited by the petitioners pursuant to an illegal demand the petitioners cannot be estopped form claiming the refund.

The State has no right to illegally realize the amount of tax, licence fee etc. If the excess amount is realized or the amount is realized illegally then the State is liable to refund the same. The attitude of the respondents lacked fair play and reasonableness in refusing refund of licence fee for the period for which the petitioners were not allowed to run the licence. They cannot be permitted to insist the amount was voluntarily deposited pursuant to the offer for renewing the licence on payment of the aforesaid amount. The attitude of the respondents was arbitrary and had forced the petitioners into unnecessary and unwanted litigation. The respondents Nos. 1 and 2 and even the State of U.P. have arbitrarily rejected the claims of the petitioners for refund of the excess amount which the petitioners were compelled to deposit. The respondents are, therefore, liable to refund the said amount.

15. In view of the foregoing discussions the petitions are allowed. The orders dated 17891, 22792 and 281192 passed by the respondents are hereby quashed and the respondents are directed to refund the amount of Rs. 95,66600 to the petitioners within a period of 6 weeks from the date of a certified copy of this order is produced before respondent No. 3. In case the refund is not made within the said period the respondents shall be liable to pay interest to the petitioners at the rate of 15% per annum from the date of this order till the amount is paid. The petitioners shall also be entitled to the costs of these petitions which are quantified at Rs. 5,000. Petition allowed.