

(1974) 10 PAT CK 0005
In the Patna High Court
Case No : C.W.J.C. 1361 and 1417 of 1973

Shree Krishna Gyanoday Sugar Ltd. and Another	APPELLANT
Vs	
The State of Bihar and Another	RESPONDENT

Date of Decision : 16-10-1974

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 22, 7(2), 8, 8(3)
Constitution of India, 1950 — Article 226, 299
Contract Act, 1872 — Section 70
Evidence Act, 1872 — Section 115

Citation : AIR 1975 Patna 123

Hon'ble Judges : S.N.P. Singh, C.J.; Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : Rajeshwari Prasad, Akhoury Binod Shekhar Sinha, Devendra Prasad Sinha, Ganga Prasad Bimal and Laxman Sharan Sinha, for the Appellant; Balabhadra Prasad Singh, General, K.P. Verma, Government Advocate and R.C. Sinha, Jr. to Govt. Advocate, for the Respondent

Judgement

Nagendra Prasad Singh, J.—These two writ applications arise out of the same controversy. In C. W. J. C. No. 1417 of 1973, the petitioners are the State of Bihar and the Commissioner of Excise, Bihar; and in C. W. J. C. No. 1361 of 1973, the petitioner is Messrs. S. K. G. Sugar Ltd. (hereinafter referred to as the "Petitioner"), whose tender for supply of country spirit to the Government warehouses in Bihar for the period commencing from the 1st April, 1968 to the 31st March, 1971 had been accepted by the State Government. As common questions of law and fact are involved in the two writ applications, they have been heard together and this judgment will govern them both.

2. In exercise of the powers conferred u/s 22 of the Bihar and Orissa Excise Act, 1915 (hereinafter referred to as the "Act"), read with Clause 218 of the Instructions issued by the Board of Revenue, Bihar (hereinafter referred to as the "Board"), in exercise of its powers u/s 90 of the Act, tenders were invited for supply of country spirit to Government warehouses for the period commencing

from the 1st April, 1968 to the 31st March, 1971. The petitioner, along with several others, filed its tender, and, ultimately, the tenders filed by the petitioner and Messrs. Lakshmi Narayan Ram Narayan of Ranchi group of distilleries were accepted by the State Government. Exclusive privilege for supply of country spirit to the Government warehouses of North Bihar was granted to the petitioner, and for South Bihar to the said Messrs. Lakshmi Narayan Ram Narayan. By letter No. 1428, dated the 13th March, 1968, acceptance of the tender of the petitioner was communicated to it. A copy of that letter is annexure "1" to C. W. J. C. No. 1361 of 1973 and annexure "2" to C. W. I. C. No. 1417 of 1973. The relevant portion of that letter reads as follows :--

"..... I am directed to say that your tender for the supply of country spirit, manufactured from the base of pure molasses, to the licensed warehouses noted below, for a period of three years commencing from the 1st April, 1968 has been accepted subject to the condition that the distillery shall be paid 42 paise (forty-two paise) per London Proof litre on all supplies of molasses liquor within the contract area consisting of the following warehouses"

A copy of the letter of acceptance of the tender of Messrs. Lakshmi Narayan Ram Narayan is annexure "3" to C. W. J. C. No. 1417 of 1973, from which it will appear that exclusive privilege to the said firm was granted subject to the condition that the distilleries shall be paid 57 paise (fifty seven paise) per London Proof litre.

3. The petitioner, being aggrieved by the aforesaid order of the State Government granting exclusive privilege only in respect to North Bihar, filed a writ application under Articles 226 and 227 of the Constitution before this Court, giving rise to C. W. J. C. No. 197 of 1968. Messrs. Lakshmi Narayan Ram Narayan also filed a writ application which was numbered as C. W. J. C. No. 234 of 1968. The two writ applications were admitted and operation of the aforesaid orders of the State Government was stayed during the pendency of the writ applications.

4. In view of the stay granted by this Court, the Commissioner of Excise discussed the question of maintaining supplies of country spirit to the Government warehouses with the petitioner as well as with Messrs. Lakshmi Narayan Ram Narayan, and the two suppliers agreed to maintain supplies to the Government warehouses after the 31st March, 1968 in the areas allotted to them for the period 1965-68, A copy of the proceedings of the meeting held in the chambers of the commissioner of Excise on the 28th March, 1968 is annexure "2" to C. W. J. C. No. 1361 of 1973, the contents whereof are as follows :--

"The question of maintaining supplies of country spirit to the existing warehouses was discussed by the Excise Commissioner with the present contractors Shri S. N. Jayaswal (Ranchi Group of Distilleries) and the Representative of S. K. G. Sugar Ltd., Shri P. N. Seth.

Both of them agreed that they would continue supply of country spirit to the

warehouses even after 31-3-1968 according to the existing arrangements of contract till the disposal of the writ application filed by M/s. S. K. G. Sugar Ltd., which is pending before the Hon"ble Court."

The said proceedings were signed by the representatives of the two contractors. According to the petitioner, by a letter, dated the 11th July, 1968 (Annexure "3" to C, W. J. C. No. 1361 of 1973), it informed the Commissioner of Excise that it had maintained supply of the country spirit on the basis of arrangement which existed during the contract period 1965-68 till the disposal of the writ application, but the rate for supply after the 1st April, 1968 would be 42 paise per London Proof litre (hereinafter referred to as "L. P. Litre"). The relevant portion of the said letter reads thus :--

".....By an agreement dated 28-3-1968, we as well as Messrs. Lakshminarain Ram Narain agreed to supply country spirits on the basis of the arrangements which existed during the contract period 1965-68 till the disposal of the writ application.

We have maintained the supplies as per agreement dated 28-3-1968. For supplies made with effect from 1-4-1968 we are being paid by the Department @ 33 paise per L. P. Litre. We have accepted payments at this rate entirely on provisional basis. It may kindly be appreciated that in your letter No. 1428 dated 13-3-1968 you were kind enough to offer us a rate of 42 paise per L. P. Litre for supplies to be made i. e. from 1-4-1968 at least @ 42 paise per L. P. litre.

We, therefore, write to make it clear that for supplies made on and from 1-4-1968 the old rate of 33 paise per L. P. litre is not applicable and payments at the said rate have been accepted by us only on provisional basis. The rate for supplies after 1-4-1968 will be 42 paise per L. P. litre as offered in your letter No. 1428 dated 13-3-1968 or at any higher rate which may be determined after the disposal of the writ application by the Hon"ble High Court, Patna.

We have thought it necessary to make the position clear so that there may not be any ambiguity regarding payments received by us for supplies made after 1-4-1968."

5. Both the writ applications were, however, dismissed by this Court on the 6th December, 1968. Against the judgment of this Court, on leave being granted, the petitioner as well as Messrs. Lakshmi Narayan Ram Narayan filed appeals before the Supreme Court. During the pendency of the appeals before the Supreme Court, the matter regarding supplies of country spirit was again discussed by the Excise Commissioner with the petitioner and Messrs. Lakshmi Narayan Ram Narayan on the 15th April, 1969. In course of the discussion, according to the petitioner, the Commissioner of excise agreed that the arrangements for supply and the rate for the same were provisional, and, after the disposal of the appeals by the Supreme Court, the parties would be entitled to payment at the rate of 42 paise per L. P. litre, or at any higher rate which might be determined by the Supreme Court. In confirmation of the said discussion, the petitioner wrote a

letter to the Commissioner of Excise on the 16th April, 1969 (Annexure "4" to C. W. J. C. No. 1361 of 1973), the relevant portion of which reads as follows :--

"We refer to the discussion held on 15th instant in your office. While we have agreed to your proposal for maintaining supplies, the following had transpired in course of discussion there which we would like to put on record :

1. We had submitted that our rates had remained constant for nearly last 20 years and with overall increase in cost of production, we are getting out of pocket in this business. We had therefore, submitted that our bills for the current supplies at the old contract rate should be treated as provisional bills as indicated by us earlier vide our letter No. SKJ. SKG : DIST : 3862 dated 11-7-1968 and the Government should consider paying us at least at the rate indicated by them in their letter dated 13-3-1968 in acceptance of our tender, unless the same is modified and raised by the Hon'ble Supreme Court to the level of the price paid to M/s. Ranchi Group of Distilleries....."

6. The Supreme Court, by its judgment and order, dated the 26th March, 1971, dismissed both the appeals as having become infructuous as the period of the contract was to expire on the 31st March 1971. The petitioner, by a letter, dated the 30th March, 1971 (Annexure "5" to C. W. J. C. No. 1361 of 1973), informed the Excise Commissioner regarding the dismissal of the appeal by the Supreme Court and claimed payment of the difference between 33 paise per L. P. litre, as paid to it, and 42 paise per L. P. litre, as agreed to by the State Government in its letter, dated the 13th March, 1968, for the supplies made during the period 1968-71. The petitioner renewed its prayer by another letter, dated the 25th June, 1971 (Annexure "6" to C. W. J. C. No. 1361 of 1973), for instructions for payment of the amount due to It. The same request was reiterated by a letter, dated the 22nd August, 1972 (Annexure "7" to C. W. J. C. No. 1361 of 1973), inviting the attention of the Excise Commissioner to the earlier letters of the petitioner. It was also mentioned in that letter that the representative of the petitioner had personally met the Excise Commissioner several times requesting him to order payment of the dues to the petitioner.

7. It has been stated on behalf of the petitioner that, in spite of repeated requests and representations, the petitioner was not favoured with any reply from the Commissioner of Excise, nor was the amount due to the petitioner paid to it. In paragraph 21 of C. W. J. C. No. 1361 of 1973, it has been stated by the petitioner that the Excise Department had realised the price of the spirit from the retail dealers at the rate of 48 paise per L. P. litre for the supplies made to them during 1968-71, but they had paid the petitioner at the rate of 33 paise only. The claim for difference over the total supplies made by the petitioner during this period came to Rs. 8,40,048.97 paise. According to the petitioner, when the Commissioner of Excise did not make any order for payment of the said sum, the petitioner filed an application u/s 8 of the Act before the Board for a direction on the Commissioner of Excise to make payment to the petitioner. The Member of the Board, after hearing the petitioner and the State, passed an order on the

11th May, 1973, directing the Excise Department to make payment to the petitioner at the rate of 42 paise per L. P. litre for the supplies made by it from the 11th July, 1968 to the 31st March, 1971. A copy of the said order is annexure "8" to C. W. J. C. No. 1361 of 1973.

8. On the 24th May, 1973, the petitioner addressed a letter to the Excise Commissioner requesting him to order payment in terms of the order passed by the Member of the Board. A copy of the said letter is annexure "9" to C. W. J. C. No. 1361 of 1973. When no reply was received, the petitioner wrote another letter, dated the 10th September, 1973 (Annexure "10" to C. W. J. C. No. 1361 of 1973) to the Commissioner of Excise requesting for immediate payment. Having received no reply to the said letters of demand, the petitioner filed this C. W. J. C. No. 1361 of 1973 for a writ of mandamus directing the State of Bihar and the Commissioner of Excise to pay the said amount of Rs. 8,40,048.97 paise, which the petitioner claims to be entitled to in view of the order of the State Government contained in annexure "1" as well as the order of the Member of the Board (Annexure "8"). According to the petitioner, the respondents are amenable to the jurisdiction of this Court as they have neglected and refused to perform their statutory obligations as well as to comply with the orders passed by the Member of the Board.

9. C. W. J. C. No. 1417 of 1973 has been filed by the State of Bihar and the Commissioner of Excise for quashing the aforesaid order of the Member of the Board, dated the 11th May, 1973, a copy whereof is annexure "1" to C. W. J. C. No. 1417 of 1973, because according to the petitioners, the said order is illegal and without jurisdiction and, as such, not binding on the State Government. According to the petitioners of C. W. J. C. No. 1417 of 1973, no doubt, exclusive privilege for supply of country spirit in North Bihar had been granted to the petitioner at the rate of 42 paise per L. P. litre and the order had been communicated to it by the aforesaid letter, dated the 13th March, 1968, for the period 1st April, 1968 to 31st March, 1971; but the petitioner having filed the writ application before this Court, the operation of the said order was stayed, and, on the 28th March, 1968, the aforesaid arrangement was arrived at by which the petitioner had agreed to maintain supply of the country spirit to the Government warehouses according to the existing arrangement of contract till the disposal of the writ petition, that is, at the rate of 33 paise per L. P. litre, which was the contracted rate for the period 1965-68, and the petitioner was paid at that rate. Later, the petitioner purported to retract from the said arrangement which was devoid of any substance. The acceptance of the rate at 42 paise per L. P. litre, communicated by the letter, dated the 13th March, 1968 never became effective. According to the State, the aforesaid letters, dated the 11th July, 1968 and the 19th April, 1969, said to have been sent by the petitioner, were never received by the Excise Commissioner. The application u/s 8 of the Act filed by the petitioner before the Board was not maintainable, because under that section the Board could have revised any order passed by a Collector, the Excise Commissioner or the Commissioner of a Division. In the instant case,

there being no order passed either by the Collector or the Excise Commissioner, the Board had no jurisdiction to pass the order, dated the 11th May, 1973.

10. Learned Advocate-General, appearing for the State, has, firstly, submitted that the Member of the Board by his order, dated the 11th May, 1973, has purported to enforce a contract which is foreign to the scope of the provisions of Section 8 of the Act; and there being no order passed either by the Collector or by the Excise Commissioner, the application before the Board for exercise to its powers under Sub-section (3) of Section 8 was not maintainable. According to the learned Advocate-General, on the facts and in the circumstances of the case, there was no concluded contract between the petitioner and the State, and, as such, the petitioner had no right to claim payment at the rate of 42 paise per L. P. litre. Alternatively, it has been submitted that, even if the petitioner had a right to claim the said amount, the forum for the said claim was the Civil Court, and not this Court for exercise of its powers under Articles 226 and 227 of the Constitution.

11. A bare reference to the provisions of the Act and the rules framed thereunder will show that the Board is vested with supervisory powers over the Excise Department and it can exercise its powers in respect of grant of exclusive privilege regarding the manufacture, supply, storage and sale of intoxicants, country spirit, liquor etc., Section 22 of the Act reads as under :--

"(1) The State Government may grant to any person, on such conditions and for such period as it may think fit. the exclusive privilege-

- (a) of manufacturing, or supplying wholesale, or
- (b) of manufacturing and supplying wholesale, or
- (c) of selling wholesale or retail, or
- (d) of manufacturing or supplying wholesale and selling retail, or
- (e) of manufacturing and supplying wholesale and selling retail any country liquor or intoxicating drug within any specified local area :

Provided that public notice shall be given of the intention to grant any such exclusive privilege, and that any objection made by any person residing within the area affected shall be considered before an exclusive privilege is granted.

(2) No grantee of any privilege under Sub-section (1) shall exercise the same unless or until he has received a license in that behalf from the Collector or the Excise Commissioner."

On a reading of this section, it is clear that the State Government can grant the exclusive privilege for manufacture, supply and sale of such articles, subject to certain conditions as it thinks fit. u/s 7 (2) of the Act, the State Government may, by a notification, appoint an officer to have control of the administration of the Excise Department, and delegate to the Board or the Excise Commissioner

any of the powers conferred upon it under the Act. The relevant portion of Section 7 (2) is in these words :--

"(2) The State Government may by notification applicable to the whole of the State or to any specified local area-

(a) appoint an officer who shall, subject to such control as the State Government may direct, have the control of the administration of the Excise Department and the collection of the excise revenue;

* * * * * (e) delegate to the Board, the Commissioner of a Division or the Excise Commissioner all or any of the powers conferred upon the State Government by or under this Act, except the power conferred by Section 89 to make rules;"

12. By notification No. 470-F, dated the 15th January, 1919, the State Government, in exercise of its powers under Clause (a) of Section 7 (2) of the Act, has appointed the Excise Commissioner as the officer to have control of the administration of the Excise Department, subject to the general control of the Board, in the following terms :--

"No. 470-F. In exercise of the powers conferred by the provisions specified below of the Bihar and Orissa Excise Act, 1915 (Act II of 1915) hereinafter designated "the Act" the Lieutenant-Governor in Council is pleased-

* * * * * II. to make the following orders under Sub-section (2) of Section 7 :--

(i) Under Clause (a)-- There shall be an Excise Commissioner who shall, subject to the general control of the Board, have throughout the province of Bihar and Orissa the control of the administration of the Excise Department and the collection of excise-revenue,"

The State Government has also delegated its powers u/s 22 of the Act to the Board in these words :--

(II) Under Clause (e) of Sub-section (2) of Section 7, to delegate to the Board the powers conferred on the Provincial Government by the portions of the Act specified below :--

***** (4) Section 22, Sub-section (1), Clauses (a) and (b) power to grant the exclusive privilege of manufacturing or supplying wholesale or of manufacturing and supplying wholesale country liquor or any intoxicating drug,

13. In view of the aforesaid notification, it cannot be disputed that the State Government has appointed the Excise Commissioner to have control of the administration of the Excise Department and the collection of excise-revenue, "subject to the general control of the Board." Section 8 of the Act prescribes that the Collector shall be subject to the control of the Excise Commissioner, and the Board may revise any order passed by the Collector or the Excise Commissioner. Section 8 reads thus :--

"(1) The Collector shall, in all proceedings under this Act, be subject to the

control of the Excise Commissioner, and shall, in such matters as the State Government may direct, be subject to also to the control of the Commissioner of the Division.

(2) Orders passed under this Act or under any rule made hereunder shall be appealable in such cases to such authorities and under such procedure as may be prescribed by rule made u/s 89, Clause (c).

(3) The Board may revise any order passed by a Collector, the Excise Commissioner or the Commissioner of a Division."

In view of the aforesaid provisions, that is, Section 7 (2) (a), read with the notification, dated the 15th January, 1919 and Sub-section (3) of Section 8 of the Act, the Excise Commissioner is subject to the general control of the Board and the Board can revise any order passed by the Excise Commissioner. If any order has been passed by the Excise Commissioner, the Board may, in exercise of its power of superintendence, revise the said order, even suo motu. Reference in this connection may be made to the case of M.R. Patel Vs. State of Bihar and Others, , In my opinion, the Board can issue directions to the Excise Commissioner even in those cases where no specific order has been passed. When the Act and the notification issued thereunder put the Excise Commissioner subject to the control of the Board, it is futile to urge that the Board, either suo motu or on an application filed before it, cannot issue appropriate directions to the Excise Commissioner in conformity with the provisions of the Act and the Rules framed thereunder. I am not inclined to take the view that the exercise of the power under Sub-section (3) of Section 8 can be made nugatory by the Excise Commissioner merely by refusing to pass a written order. Even if it is assumed that the Board can exercise its powers under Sub-section (3) of Section 8 only when some order is passed by the Excise Commissioner, because the sub-section speaks of "any order passed by the Excise Commissioner", yet, in view of Section 7 (2) (a), read with the notification referred to above, the State Government has clothed the Board with ample power of supervision over the acts and omissions of the Excise Commissioner, and it can issue suitable directions from time to time. In that view of the matter, in my opinion, there is no substance in the contention of the learned Advocate-General that the order, dated the 11th May, 1973, passed by the Member, Board of Revenue is illegal and without juris-diction.

14. Now, the question is as to whether the Board was justified in passing the said order on the facts and in the circumstances of the case. It is not disputed that the State Government had granted the exclusive privilege to the petitioner for supply of country spirit to the warehouses of the State Government for the period 1968-71 in respect of certain area of Bihar at the rate of 42 paise per L. P. litre. As already indicated, according to the State, this order never came into force in view of the writ application filed by the petitioner and the operation of the said order having been stayed by this Court as well as by the Supreme Court; and the supply for the period in question had been made on the basis of

the arrangement arrived at between the parties in the meeting of the 28th March, 1968. In this connection it was also submitted by the learned Advocate-General that no licence, as contemplated under Sub-section (2) of Section 22, had been received by the petitioner from the Collector or the Excise Commissioner, and, as such, there was no concluded contract on the basis of which the petitioner could found its claim. In support of his contention, learned Advocate-General has drawn our attention to the cases of Mulamchand Vs. State of Madhya Pradesh, , K.P. Chowdhary Vs. State of Madhya Pradesh and Others, and Laliteswar Prasad Sahi Vs. Bateshwar Prasad and Others, , where it had been held that the non-compliance with the provisions of Article 299 of the Constitution makes the contract itself void and unenforceable. It cannot be disputed that any contract, which has to be in accordance with Article 299 of the Constitution, is nullified and becomes void, if the contract is not executed in conformity with the provisions of Article 299, and there is no question of estoppel or ratification in such cases. But, it is difficult to accept the contention raised on behalf of the State that, when the State Government, in exercise of its powers u/s 22 of the Act, grants the exclusive privilege to any person on certain conditions under Sub-section (1) of Section 22 and a licence is received by that person under Sub-section (2) of that section it amounts to a contract made in exercise of the executive power of the State Govt. within the meaning of Article 299 of the Constitution. In my opinion, the State Government, in such circumstances, grants the exclusive privilege to a particular person for manufacturing, or supplying or selling articles covered by the Act in exercise of its statutory function u/s 22 of the Act. In the instant case, by the letter, dated the 13th March, 1968, the State Government had accepted the tender of the petitioner for supply of country spirit at the rate of 42 paise per L. P. litre. But, in view of the writ application filed by the petitioner, the petitioner was requested to continue the supply on the basis of the existing arrangement. The petitioner, by its letters, dated the 11th July, 1968, and the 19th April 1969, had made it clear that the acceptance of 33 paise per L. P. litre was provisional and because of the pendency of the writ application before the High Court and the Supreme Court, respectively. The statement of the petitioner regarding the letter, dated the 11th July, 1968, has been denied by an assistant of the Excise Department in the counter-affidavit filed on behalf of the State, saying that no such letter had been received in the Excise Department and that there was no entry in any file or diary register to show that such a letter was received by the Department. Similarly, regarding the meeting held on the 15th April, 1969 and the letter of confirmation, dated the 19th April, 1969, it has been denied by saying that there was nothing in the relevant file to show that the Excise Commissioner had agreed to the payment at the rate of 42 paise per L. P. litre. The affidavit has been sworn by an assistant of the Excise Department. But there is nothing in the counter-affidavit to show that the said assistant was working in the office of the Excise Commissioner at the relevant time. In the last paragraph of the counter-affidavit the said assistant has stated that the contents of paragraphs 2 to 15 of the counter-affidavit were true to his knowledge derived from the records of the

case. In that view of the matter, I am not inclined to place much reliance on the aforesaid statements. It cannot be imagined that, when the State Government had granted the privilege of supply at the rate of 42 paise per L. P. litre, as conveyed by the letter, dated the 13th March, 1968, the petitioner would agree to supply at the rate of 33 paise per L. P. litre for the whole (period. The dispute in the writ application was for a larger area and for a higher rate. In that writ application, the petitioner had claimed that the area which ought to have been allotted to it had been allotted to Messrs. Lakshmi Narayan Ram Narayan. It had also challenged that, whereas the said privilege had been granted to it at the rate of 42 paise per L. P. litre, it had been granted to Messrs. Lakshmi Narayan Ram Narayan at the rate of 57 paise per L. P. litre. In that view of the matter, I am of the opinion that the petitioner had agreed to continue the supply at the rate of 33 paise per L. P. litre only on the assurance that it will get the higher rate determined to be payable to it by the High Court or the Supreme Court, or at least the rate which had been accepted by the State Government while granting the exclusive privilege of supply within the area mentioned in the aforesaid letter, dated the 13th March, 1968.

15. Sub-section (2) of Section 22 of the Act, no doubt, prescribes that no grantee of any privilege under Sub-section (1) shall exercise the same unless or until he has received a licence in that behalf from the Collector or the Excise Commissioner. Admittedly, no licence had been received by the petitioner, as contemplated by Sub-section (2). The question is, is it open to the State Government to disown its liability incurred under the aforesaid letter, dated the 13th March, 1968 while accepting the tender of the petitioner, specially in view of the proceedings of the meeting held in the chambers of the Excise Commissioner on the 28th March, 1968, a copy whereof is annexure "2" to C. W. J. C, No. 1361 of 1973? The relevant portion of the letter has already been extracted above, from which it is clear that the Excise Commissioner had discussed the question of maintenance of supplies of country spirit to the existing warehouses of the Government on the 28th March, 1968, and in the minutes of the proceedings it was mentioned that the petitioner had agreed to continue the supplies even after the 31st March, 1968 "according to the existing arrangements of contract till the disposal of the writ application filed by M/s. S. K. G. Sugar Ltd., which is pending before the Hon'ble Court." In my Judgment, the petitioner had agreed and acted to its prejudice on the basis of the assurance given by the Excise Commissioner, and it is not now open to the Excise Commissioner or the State Government to take the plea that the supplies made by the petitioner were without any licence and, as such, it was not entitled to found its claim on the basis of the statutory order passed by the State Government. I am inclined to hold that there has been a substantial compliance of Section 22 (2) of the Act. Under Sub-section (2) of Section 22, the grantee has to receive the licence from the Collector or the Excise Commissioner before he starts making supplies. When the Excise Commissioner, in the meeting held on the 28th March, 1968, asked the petitioner to continue to supply on the basis of the existing arrangements till the matter

was decided by this Court, the petitioner made the supplies during the period 1968-71 on the basis of the order of the Excise Commissioner, although a formal licence in Form 27 had not been issued to it. The right for making the supply of the country spirit flows from Sub-section (1) of Section 22. Subsection (2) only fixes a restriction as to since when the said right shall be exercised.

16. This aspect of the matter has been considered in several judgments of the Supreme Court, where it has held that Courts have power in appropriate cases to compel performance of the obligations imposed upon departmental authorities by orders which are executive in character, when they find that any person has acted to his detriment on solemn promises made by the State Government or its authorities concerned. In this connection, reference may be made to the oft-quoted judgment of the Supreme Court in *Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd.*, , where after referring to a judgment of the Bombay High Court, their Lordships observed :--

".....even though the case does not fall within the terms of Section 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution.""

The same view was reiterated by the Supreme Court in *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, , where it was observed :

"11. Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced *ex contractu* by a person who acts upon the promise : when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation if the contract be not in that form may be enforced against it in appropriate cases in equity."

In this connection reference can also be made to the observations of Denning, J. in *Robertson v. Minister of Pensions* ((1949) 1 KB 227) which has been applied even in India :--

"The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to better its future executive action."

17. As I have already held, the petitioner made supplies only on the assurance and belief that it will be paid at least at the rate of 42 paise per L. P. litre. In view of the assurance given by the Excise Commissioner, who was competent enough

to do so under the statute and the notification issued thereunder, the Member of the Board was justified as well as competent to take the view that the State is bound to pay the difference between 42 paise and 33 paise per L. P. litre, which had already been paid to the petitioner, and his order cannot be said to be in any manner illegal, arbitrary or un-just. The argument of the learned Advocate-General that the claim of the petitioner is mere contractual which could be enforced only in the Civil Court is also without any substance, since it has already been held that, while granting the privilege to the petitioner, the respondent State had exercised a statutory power conferred under the Act, and, as such, it cannot be equated with those contracts which are entered into between the State Government and a citizen in exercise of its executive powers.

18. On behalf of the State, reliance have been placed on a Bench decision of this Court in *B.K. Sinha Vs. State of Bihar and Others*, , where this Court dismissed a writ application filed by a contractor whose contract had been cancelled by an Executive Engineer. Even in that case their Lordships have clearly drawn a distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. In that case it was observed as follows :--

"I am conscious of the fact that under certain circumstances a writ of mandamus can issue to compel the authorities concerned to do certain acts even though they related to contractual rights. But in such a situation the contractual right of a petitioner is affected not merely by breach of contract on the part of the authorities concerned but also because of their violation of statutory duties. The matter stands on a different footing if the action which is taken by the authorities concerned is in violation to their statutory duties. In the instant case, however, it is clear on the fact and in the circumstances of this case that as between the two contracting parties to the contract, pure and simple, one of them is said to have committed a breach."

In this connection I may refer to a case of the Supreme Court in *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, , where their Lordships had occasion to consider the effect of an order passed by a Divisional Forest Officer cancelling an order of his subordinate forest authority depriving the respondent in that case of his valuable rights. Their Lordships, while affirming the judgment of the High Court taking the view that the Divisional Forest Officer had no jurisdiction to rescind the order passed by his subordinate officer, who was duly authorised to pass the said order, observed as follows :--

"But in the present case the order is passed by a public authority modifying the order or proceeding of a subordinate forest authority. By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ, in view of the judgment of this Court in *K.N. Guruswamy Vs. The State of*

Mysore and Others, there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power."

I am also supported by an observation of the Supreme Court in *Ram Chandra Rai v. State of Madhya Pradesh* AIR 1971 SC 128), where, while deprecating summary dismissal of a writ application in connection with a licence issued by the Excise Department, it was observed :--

"The High Court summarily rejected the petition observing that the supply of liquor to the appellant was under a contract to the Government and "if the Government had committed a breach of the contract the remedy is elsewhere." It cannot, without further investigation, be said that the rights and obligations arising under a licence issued under a statutory authority are purely contractual."

19. A submission was made on behalf of the petitioner that the State had realised at the rate of 48 paise per L. P. Litre as cost price from the retailers, although the supplies had been made by the petitioner during the relevant period at the rate of 33 paise per L. P. litre, and, as such, there is no question of the State being a loser in any manner if it were to pay the petitioner the amount as directed by the Member of the Board. In the counter-affidavit, filed on behalf of the State it has been stated that the amount in excess of 33 paise which had been realised from the retailers has already been adjusted towards additional surcharge. During the course of the hearing, learned Advocate-General, who was followed by Mr. Lakshman Sharan Sinha, appearing for the State, could not satisfy us as to under what authority of law this amount had been adjusted towards additional surcharge. But, in my view, this is not at all relevant for the purpose of the decision of the present writ applications. If the State is liable to pay the petitioner the amount directed by the Board to be paid to it, then it is of no consequence as to how far the State was justified in adjusting 15 paise per L. P. litre which the Excise Department had realised from the retail dealers.

20. In view of my finding that the Member, Board of Revenue had ample jurisdiction under the provisions of the Act, read with the aforesaid notification, to pass the order directing the Excise Department to make payment to the petitioner at the rate of 42 paise per L. P. litre for the supplies made between the 11th July, 1968 and the 31st March, 1971 and the said order is not illegal or arbitrary on merits, it has to be held that there is no merit in C. W. J. C. No. 1417 of 1973 filed by the State and the Commissioner of Excise. Accordingly, it is dismissed. So far as C. W. J. C. No. 1361 of 1973 filed by Messrs. S. K. G. Sugar Ltd. is concerned, it is allowed and I direct issuance of a writ in the nature of a writ of mandamus upon the respondents to implement the order, dated the 11th May, 1973, passed by the Member, Board of Revenue (Annexure "8" to the said writ application). In the circumstances, there will be no order as to costs in either case.

S.N.P. Singh, C.J.

21. I agree.