

(1994) 12 OHC CK 0009

In the Orissa High Court

Case No : Original Jurisdiction Case No. 279 of 1992

Sri Narayan Prasad

APPELLANT

Vs

The State of Orissa and Others

RESPONDENT

Date of Decision : 22-12-1994

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 2, 27, 29, 89
Constitution of India, 1950 — Article 226, 227
Orissa Excise (Exclusive Privilege) Rules, 1970 — Rule 6A(3)

Citation : (1995) 2 OLR 361

Hon'ble Judges : P.C. Naik, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : B. Pal, R.K. Kar, N. Paikaray, B.P. Mohanty, V. Agarwala, M.N. Harsabardhan, A.N. Ray, M.K. Badu and B.C. Panda, for the Appellant; S.C. Roy, General and Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

P.C. Naik, J.—This order shall also govern the disposal of OJC. No. 827/92 (Smt. Kamala Saha v. State of Orissa) OJC No. 1359/92 (Ganouri Prasad v. State of Orissa) and OJC No. 1361/92 (Lalan Prasad Gupta v. State of Orissa).

The petitioner has filed this petition for quashing the fixation of the Minimum Guaranteed Quantity (in short, "M. G. Q") in respect of his liquor shops and also prays for issuance of an appropriate writ, direction or order, quashing the notice of demand dated 9-12-1991 (Annexure-3 to the petition) whereby the petitioner is required to pay a sum of Rs. 1,80,150/- towards the duty, on shortfall in lift the M.G.Q.

2. The facts giving rise to the petition are hereafter stated :

The petitioner is an Excise Contractor. For the year 1991-92 (1-4-1991 to 31-3-1992) tenders were invited by the Collector, Kalahandi for granting exclusive privilege in respect of country spirit in the District of Kalahandi. The

petitioner and others participated in the auction-cum-tender. As the M.G.Q. fixed for the year 1991-92 was (according to the petitioner) about 52% more than that of the previous year, i. e., 1990-91, representations were made by the petitioner and others to the Collector. It is contended that the petitioner and others participated in the auction under protest. The petitioner being the highest bidder was granted the exclusive privilege, and accordingly, a licence was issued on his depositing the consideration money as fixed by the opp. party Nos. 3 and 4. After obtaining the licence, the petitioner opened the shops. However, there being a shortfall, a notice dated 9-12-1991 was issued by the authorities requiring the petitioner to deposit towards duty, the amount representing the shortfall of lifting of the MGQ. The notice provided that in case the petitioner failed to deposit the amount towards the shortfall, the same would be adjusted from out of the advance consideration money. On his representation not being decided, the petitioner has filed this petition.

3. The case of the petitioner is that the MGQ ought to have been fixed in accordance with the Excise Policy for 1991-92 which was declared by the State Government by Notification No. IEX.81-90 53/EX.-dated 15-1-1991 which in respect of MGQ provided as under:

"(iv) Minimum guaranteed quantity of sale may be fixed during 1991-92 on the basis of MGQ fixed during 1990-91 plus 15% extra. Collectors will fix MGQ for different shops taking into consideration the potential of sale and other relevant factors."

Relying on the aforesaid clause, it was contended that as the MGQ fixed for 1991-92 was more than 15% of the MGQ for the year 1990-91, it was contrary to the Policy, and as such, cannot be sustained. The petitioner also contended that the demand of excise duty on the shortfall, is in fact a demand of excise duty on unlifted liquor, and as such, the demand is invalid and cannot be sustained. According to the petitioner, excise duty can only be levied on the import, export, transport and manufacture on any excisable goods, and as there was no import, export, transport or manufacture, the duty could not be levied or demanded on the quantity which had not been lifted by the petitioner even though it related to the MGQ. The petitioner has also challenged the vires of Sub-rule (3) of Rule 6-A of the Orissa Excise (Exclusive Privilege) Rules, 1970 in so far as it provides for levy of duty on the unlifted liquor.

4. The opp, party Nos. 1 to 4 filed a counter affidavit opposing the petition. The averment of the petitioner that the increase in the MGQ is by 52% has been specifically denied, it is submitted that the increase is by 22.2% to 23.3%. It is further contended that the Excise Policy dated 15-1-1991 was received by the Collector on 21-1-1991 whereas the MGQ for the relevant shops was fixed and approved by the Excise Commissioner prior to that date, and as such, the fixation, though it was in excess of 15%, could not be said to be erroneous. It is further contended that the fixation of MGQ was made considering the potentiality of sale and by taking other relevant factors into consideration, and the petitioner

and other contractors were aware of the MGQ at the time when they participated in the auction-cum-tender. It was also contended that the petitioner having accepted the contract cannot now turn around and challenge the fixation of MGQ for the year 1991-92. It is agreed that as the demand was justified being the duty towards shortfall of the MGQ, the challenge of the petitioner to Annexure-3 is untenable. Sub-rule (3) of Rule 6-A of the Orissa Excise (Exclusive Privilege) Rules, 1970, according to the opp. parties, is valid and has been framed in exercise of powers under Sub-Section (1) of Section 89 of the Bihar and Orissa Excise Act, 1915 which empowers the State Government to make rules to carry out the objects of the Act, or any other law for the time being in force relating to the excise revenue and also by Section 89 (2) of the Act which empowers the State Government to make rules for regulating the import, export or transport of any intoxicant. It is further contended that u/s 22(1) of the Act, an exclusive privilege can be granted to any person on such terms and conditions and for such period as the State Government may think fit. The M. G. Q. being one of the conditions for grant of a licence, the Government was fully empowered in framing rules which related to fixation of M. G. Q. and also for providing the consequences which would follow on breach of such condition. This power, according to the opposite parties, flows from a combined reading of Section 22, 27, 29 and 89 of the Act. According to the opposite parties, the provision relating to the M. G. Q. ought to be considered as a condition of licence, and that being a condition, subject to which the licence was issued and accepted by the petitioner, the petitioner cannot, after operating the licence, challenge the same. He is bound by the conditions and is, therefore, liable to pay the amount demanded to compensate the State for the loss sustained by it for failure on the part of the petitioner to lift the M. G. Q.

5. The questions therefore that arise for consideration are two, namely:

(i) Whether, in view of the Excise Policy declared by the Government, the district authorities were justified in fixing the M. G. Q. at a rate higher than that provided in the Policy for the relevant year ; and

(ii) Whether the authorities were justified in demanding duty in the nature of excise on the shortfall in lifting the M. G. Q. In other words, whether excise duty could be levied and recovered on undrawn liquor ?

As the real bone of contention between the parties is regarding demand of duty on the shortfall in lifting the M. G. Q., it would be appropriate to deal with the second question first. However, before dealing with the question, we feel it necessary to make a reference to various provisions contained in the Bihar and Orissa Excise Act, 1915, (hereinafter referred to as "the Act") which deal with the duty of excise.

6. The power to levy duty in the nature of excise is derived from Entry 51 of List-II contained in 7th Schedule of the Constitution of India which reads thus :

"51. Duties of excise on the following goods manufactured or produced in the

State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India : (a) alcoholic liquors for human consumption :

(b) opium, Indian hemp and other narcotic drugs and narcotics : but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

Thus, the State is competent to levy duty in the nature of excise on alcoholic liquors for human consumption.

7. In this State, the trade of liquor is governed by the provisions contained in the Bihar and Orissa Excise Act, 1915. This Act contains provisions relating to the import, export, transport, manufacture, possession and sale of certain kinds of liquor and intoxicating drugs, and also contains provisions relating to imposition of duty thereon. Sub-section (6) of Section 2 defines "excisable article" to mean any alcoholic liquor for human consumption or any intoxicating drug. Sub-section (6-a) defines "excise duty" and "countervailing duty" to mean any such excise duty or countervailing duty, as the case may be, as is mentioned in Entry 51 of List II in the 7th Schedule of the Constitution. Sub-section (9) defines "excise revenue" to mean the revenue derived or derivable from any duty, fee, tax, payment, other than a fine imposed by a Criminal Court, on confiscation imposed or ordered under the Act or any other law for the time being in force relating to liquor " or intoxicating drugs, and includes any payment to be made to the State Government u/s 29. Sub-section (10) defines "export" means to take out of the State otherwise than across a customs frontier as defined by the Central Government in. Sub-section (12); "Import" means (except in the phrase import into all States of India) to bring into the State otherwise than across customs frontier as defined by the Central Government. Under Sub-section (21) "transport" means, to remove from one place to another within the State-section 17 of the Act provides for payment of duty on removal of distillery, brewery, warehouse or other place of storage and reads thus :

"17. Payment of duty on removal from distillery, brewery, warehouse or other place of storage : No intoxicant shall be removed from any distillery, brewery, warehouse or other place of storage licensed, established, authorised or continued under this Act, unless the duty if any payable under Chapter V has been paid or bond has been executed for the payment thereof."

Chapter V contains Section 27 to 29-A which deal with levy of duty under the Act.

8. The power to levy duty under the Act is conferred by Section 27 which, amongst others, provides that an excise duty or countervailing duty, as the case may be at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area on any excisable article imported or exported or transported or manufactured under any licence granted or on any hemp plant, cultivated or on any excisable article manufactured in any distillery or brewery licensed, established authorised, or continued under the Act.

Section 28 provides for ways of levying duty on excisable article imported, exported, transported, or manufactured within the State. Section 29 which relates the payment for grant of exclusive privilege, provides that instead of or in addition to any duty leviable under the Act, the State Government may accept payment of a sum in consideration of the grant of any exclusive privilege u/s 22 of the Act which is to be determined in the manner provided in the Section. Section 89 of the Act confers on the State Government the power to make rules to carry out the objects of the Act or any other law for the time being in force relating to the excise revenue. 9. In exercise of the powers conferred u/s 89 of the Act, the State Government have framed the Orissa Excise (Exclusive Privilege) Rules, 1970, hereinafter referred to as "the Rule". These Rules were amended by the State Government by Notification dated 2-3-1989 published in the Orissa Gazette (Extraordinary) dated 28-3-1989. This amendment substituted Rule 6, 6(A) and 6(B). Rule 6-A, which relates to Minimum Guaranteed Quantity of Country Spirit, is relevant and is being quoted in extenso :

"Every successful bidder of Country Spirit shop shall, before obtaining licence, guarantee the rate of the minimum guaranteed quantity of Country Spirit as fixed by the Collector. The bidder shall before obtaining licences submit monthly distribution statement to the concerned Collector. The licensee before the 30th June, may revise and re-submit the monthly distribution statement for the portion of the Excise Year from August to March. The Collector shall be competent to revise and approve such revised statement. There shall be no further changes in the distribution statement so approved.

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(3) Subject to provisions of Sub-rule (1) no licensee shall lift less than the specified minimum guaranteed quantity of Country Spirit in any month. The excise duty of Country Spirit for the month as approved in the distribution statement under Sub-rule (1) shall be remitted in two equal instalments by the licensee into the Government Treasury of the District in which the shop is situated. The first instalment shall be remitted by fifth of the month and the second instalment by fifteenth of that month. Where the date of subsequent-day happens to be a holiday, the instalment shall be remitted on the next working day. If in any month, the first or second instalment of the excise duty of Country Spirit for that month" is not remitted as required above, the excise duty to the extent of deficit payment without prejudice to any other mode or recovery shall be deducted first from the Bank Guarantee, if any, and the balance from the balance deposits furnished or paid under Rule 6, and the licensee shall be called upon to indemnify the amounts, so adjusted in the case of first instalment by fifteenth of that month and in the case of second instalment by twenty-fifth of that month in which deficit payment of instalment of excise duty had occurred."

The above Rule indicates that a successful bidder is required to guarantee sale of the minimum guaranteed quantity (M. G. Q.) of Country Spirit as may be fixed.

The quantity is to be lifted by the end of the month and in case of shortfall, it can be adjusted against the other months except in the months of February and March, It further provides that if in any month, the first or second instalment of the excise duty for Country Spirit for that month is not remitted as required in the manner provided, the excise duty to the extent of deficit payment, without prejudice to any other mode of recover/ shall be deducted first from the Bank Guarantee, if any, and the balance from the advance deposits furnished or paid under Rule 6 and the licensee shall be called upon to indemnify the amounts so adjusted. In other words, under this Rule, the exclusive privilege holder is duty bound to pay into the Government Treasury the excise duty on the minimum guaranteed quantity of a particular month and on his failure to pay the duty on the minimum guaranteed quantity, the duty on the shortfall can be realised by adjustment from out of the Bank Guarantee or advance deposit. This clearly indicates that irrespective of the fact whether or not Country Spirit to the extent of the minimum guaranteed quantity is drawn, the exclusive privilege holder is duty bound to deposit or pay into the Treasury the excise duty payable on the minimum guaranteed quantity. The question, therefore, is whether this rule in so far as it provides for imposition of duty on undrawn liquor is valid and whether the authorities are justified in demanding and recovering duty on the undrawn liquor.

10. In support of the contention that levy of duty on undrawn liquor is invalid, Mr. Pal, the learned counsel for the petitioner has relied on the decisions in the case of *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, : *State of Madhya Pradesh Vs. Firm Gappulal and Others*, ; *Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others*, . He has also made a reference to the case of *M/s. Lilasons Breweries (Pvt.) Ltd. and another Vs. State of Madhya Pradesh and others*, .

On the other hand, the learned Advocated General appearing on behalf of the opposite parties contends, the petitioners having entered into an agreement for sale of country liquor and having been granted an exclusive privilege on certain terms and conditions, cannot now, after entering into a contract, wriggle nut of their contractual obligation and contend that the amount demanded for shortfall of M. G. Q. is invalid. He contends that the sum sought to be realised is damages for breach of contract namely, failure to lift M. G. Q. it is in the granting of damages being the duty on the shortfall, and as such, is in the nature of a penalty and can be realised on a breach being committed. Strong reliance is placed on *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, : *Panna Lal v. State of Rajasthan AIR 1975 SC 2003* and *State of Haryana v. Jage Ram and Ors. AIR 1980 SC 2018*.

11. The question whether duty on undrawn liquor could be realised first came up for consideration in *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, . The appellants in that case were excise contractors. One of the auction condition was that the successful bidders will have to sell a prescribed minimum quantity

of liquor in their shops and if they fail to take delivery of the prescribed minimum quantity of liquor they will have to pay excise duty on the quantity of liquor which they failed to take delivery. The State of M. P. also issued a Notification (which was under challenge) amending the rule, by inserting Clause 2 (c) which read thus :

"The minimum quantity for taking issues from the Warehouse for sale is fixed at 3213 p. litres of spiced spirit and 25940 p. litres plain spirit. You shall be liable to make good every month the deficit of monthly average of the total minimum duty on or before the 10th day of each month following the month to which the deficit duty relates."

During the period of the licence, as there was a shortfall in lifting the quota and the M.G.Q. demand notices were issued requiring the appellants therein to pay duty on the shortfall. There was no dispute in the case that the appellants therein had paid the prescribed licence fee, the price of the liquor purchased by them and also the duty on the liquor taken delivery of by them. The dispute was with respect to the demand notice served on the appellants demanding duty said to be due from them in terms of Clause 2 (c) on the quantity which they failed to lift. It was contended by the appellants (in that case) that excise duty being a tax, it could be levied on the basis of a valid law. No tax could be levied on the basis of a contract nor could tax be levied by all executive orders even though in view of the contract. Clause 2 (c) in the Notification had been made a part of the licence condition. The Apex Court, after considering the provisions contained in the Madhya Pradesh Excise Act, 1915 and particularly Section 25 which provides for excisable articles, held thus :

"11. Neither Section 25 or Section 26 or Section 27 or Section 62 (1) or Clause (d) and (h) of Section 62 (2) empower the rule-making authority, viz, the State Government to levy tax on excisable articles which have not been either imported, exported, transported, manufactured, cultivated or collected under any licence granted u/s 13 or manufactured in any distillery established or any distillery or brewery licensed under the Act. The legislature has levied excise duty only on those articles which come within the scope of Section 25. The rule-making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of Section 25. Therefore, it is not necessary to consider, whether, any such power can be conferred on that authority. Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to exercise a power which it did not possess."

" 18. No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it."

12. The matter again came up for consideration before the Apex Court in State of Madhya Pradesh Vs. Firm Gappulal and Others, where one of the condition in the licence prescribed payment of excise duty on liquor not lifted by the contractor as per the licence conditions. In these licences also there was a condition that the licensee will lift the minimum quantity of country liquor each month and that in respect of liquor which the licensee failed to lift, he will be liable to pay excise duty. In this case also, as the contractor failed to lift the minimum quantity of country liquor, demand notices were issued by the State Government requiring them to pay duty on the quantity which they failed to lift. This was challenged by the contractors: The relevant condition under which the demands were raised reads thus :

"In case the fixed monthly quantity is not taken in any month, the concerning contractor shall be liable to pay the Government the amount of PRATIKAR at the rate fixed by the Government for spiced spirit and plain spirit to the extent to which it would be less than the fixed monthly minimum quantity and . . . the amount of such PRATIKAR shall be paid within the tenth day of the month which falls immediately after the month to which such shortage is concerned. Security to the extent of one-sixth to one-tenth of the whole of the amount of yearly PRATIKAR will have to be given. Pratikar is excise duty."

Relying on Bimal Chandra's case the Apex Court held that as the State could not levy excise duty on undrawn liquor, the demands were rightly quashed by the High Court.

13. Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, was a case arising under the U. P. Excise Act, 1910 and the subject-matter of challenge were the demands of duty raised by the Excise Department in unlifted quantity of liquor, The relevant clause which came up" for consideration before the Apex Court reads as under:

"3. (a) The licensee shall lift each month the proportionate quota for the month, if any, fixed for his vend and deposit stillhead duty realisable thereon. On his failure to lift the monthly proportionate quota in any month, he shall be liable to pay compensation to the State Government at the rate equal to the rate of stillhead duty per litre of spiced spirit and stillhead duty per litre of plain spirit as may be in the area in which the shop is situated on the quantity falling short of such monthly proportionate quota and such compensation shall be paid by the 7th of the month following the month to which such shortfall relates,

(b) He shall be bound to sell the whole quantity of country spirit obtained for the shop from the warehouse. On his failure to do so, he shall be liable to pay to the State Government compensation at the rate equal to the rate of stillhead duty per litre of spiced spirit and stillhead duty per litre of plain spirit as may be in force in the area in which the shop is situated on the unsold quantity of country spirit during the period of the contract to which the licence relates."

The contractor having failed to lift and sell the minimum quota of liquor

prescribed thereunder in their licences were required by the Excise Authorities to pay, by way of compensation, the amount of Excise duty leviable on the shortfalls. A writ petition filed before the High Court by the contractors was allowed and the demands quashed. The Excise Department went up in appeal before the Supreme Court. Upholding the order of the High Court which had quashed the demands, the Supreme Court observed thus :

"14. The common question of law that arises for determination in all these appeals is whether the condition incorporated in the licences of the respondents that they would lift the fixed minimum quantity of liquor and sell the same at their allotted shops and in case of their default or failure to do so, they would be liable to pay compensation equal to the amount of excise duty leviable on the unlifted quantity is valid and enforceable. This point is no longer *res Integra*

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15. Thus the aforesaid question arising for determination by us stands already settled by the ratio of the decision of this Court in *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*,

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18. We have, therefore, not the slightest hesitation in holding that the demand made by the appellants though disguised as compensation's in reality a demand for excise duty on the unlifted quantity of liquor which is not authorised by the provisions of the Act. This being the sole point involved in appeals other than Appeal Nos. 399 to 404 of 1975, the former Appeals cannot succeed. In the result, they are dismissed with one set of costs."

Thus, in that case, though what was demanded was termed as "compensation", the law laid down in *Bimal Chandra Banerjee's* case was followed because the demand was, in fact, excise duty on undrawn liquor something which could not be demanded under the Act.

14. Reference may also be-made to the case of *M/s. Lilasons Breweries (Pvt.) Ltd. and another Vs. State of Madhya Pradesh and others*, . In this case, vires of Rule 22 of the Madhya Pradesh Brewery Rules, 1970 framed u/s 62 of the Madhya Pradesh Excise Act, 1915 came up was under consideration. Rule 22 reads as under:

"22. Excise Commissioner to appoint officer-in-charge Brewery : Every brewery shall be placed by the Excise Commissioner under the charge of an Excise. Inspector to be designated as officer-in-charge of the brewery. The Excise Commissioner will further appoint such other officer of the Excise Departments he may deem fit to the charge of breweries. The pay of all such officers shall be met by the Government; provided that when the annual charges exceed five per cent of the duty leviable on the issue made from the brewery to districts within the State excess shall be realised from the brewer."

15. After analysing Rule 22, the Apex Court held as under: "The excise duty collected goes to the coffers of the State. The pay of officers have to come out from coffers of the State. Five per cent of the duty leviable is assessed to meet the pay of such officers, which the Government, but for the Rule, is otherwise supposed to meet. This part of the rule is purely internal between the Government and its officers. The licensee is least concerned as to how the excise duty leviable would be appropriated. It is only in the case of a shortfall when the excess is sought to be realised from the brewer that he gets affected. Now what is this excess? It is obviously the sum which falls short of the duty leviable, In other words it is this for the brewer:

"You have not lifted enough quantities of beer and sent them to district within the State. Thus the State has not earned enough excise duty resulting in a shortfall in its 5%. That does not go to meet the annual expenses of the officers. Therefore you meet the shortfall, without lifting the goods". Therefore, the shortfall partakes the same colour and content. It cannot for a moment be suggested that when there is a shortfall, the demand is as if of an "additional excise duty". It is obvious from the language of the Rule that in the event of the excise duty leviable falling short of the expected five per cent to meet the pays of the officers cannot be met therefrom, the State has all the same to pay (sic). The measure goes to recoupe the State of the charges by demanding a sum equal to the duty leviable to that extent without lifting excisable articles. On this understanding arrived at the demand is hit in our view, by the ratio of *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, , *State of Madhya Pradesh Vs. Firm Gappulal and Others*, , and *Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others*, , and cannot be sustained. Rule 22 to that extent is ultra vires the Act and beyond the rule-making power of the State."

The Apex Court accordingly allowed the appeal and declared that to the extent Rule 22 permits raising a demand, which in sum and substance is additional excise duty, though it was not actually due, as ultra vires the Act and beyond the rule-making power of the State.

16. The above mentioned cases are therefore authorities for the proposition that excise duty can only be levied in accordance with the charging provision and that it cannot be levied on undrawn liquor irrespective of the fact whether or not a term regarding the levy is incorporated in the licence or in the relevant rules relating to excise auction for grant of exclusive privilege.

17. Having considered the authorities cited on behalf of the petitioners, we shall now proceed to consider the authorities cited on behalf of the opp. parties. The decision in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, was delivered by the Constitutional Bench The appellants therein were excise contractors holding licences for sale of liquor in specified vends which were granted to them on acceptance of their bids in the auctions held by the Excise Department. Prior to the auctions, the conditions governing the auctions

were notified. By condition 14(i) licences for retaining vend of country spirit were granted on the basis of "licence-fee fixed by auction". Condition 14(ii) required that the quota of country liquor fixed for each vend was announced before the vend was to put to auction. Condition 15(ii) required the successful bidders to pay the whole amount of licence fee in 24 equal instalments spread over the year. Condition 15(iii) authorised the Collector to re-sale the vend if the successful bidder failed to deposit the security or refused to accept the licence. In the event of such re-sale, any deficiency in the licence-fee was recoverable from the defaulter. After taking the vend, the licensees were unable to meet their obligations under the conditions of auction and fell in arrears. The State Government demanded the payments and threatened to cancel the licences and declared that on failure the vends would be re-auctioned at the risk of the licensees. On demands being raised, petitions were filed before the High Court of Punjab and Haryana claiming amongst other, a direction restraining the State from enforcing the obligation arising under the terms and conditions of the auction. On the prayer being refused by the High Court, the licences appealed to the Supreme Court. Before the Supreme Court, a preliminary objection was raised by the State that the appellants having taken the licence with open eyes could not wriggle out of their contractual obligations. The appellants on the other hand, questioned the power of the Government to levy and realise large licence-fees either through the medium of auctions or on scales fixed under the rules. With respect to the objections raised by the State, the Apex Court held that the writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred but it was further observed that this could not estop the persons affected from challenging the rules or to raise a contention that the rules/provisions are not applicable. While disposing of the contention raised by the licensees, the Apex Court held that there is no fundamental right to do trade or business in intoxicants. The rights are vested in the State which could part with the privilege for a consideration. And, the licence-fee was the consideration paid by the licensees for grant of an exclusive privilege to sell intoxicants. It was accordingly held that the payments demanded from the licensees was excise revenue and were lawfully due to the State Government. It was observed that, "the amount charged to the licensees is not a fee properly so called for indeed a tax but \s in the nature of the price of a privilege which the purchaser has to pay in any trading or business transaction."

This case was on a different point and is really not relevant for the question in issue before us as the question whether or not duty could be levied on undrawn liquor was neither raised nor considered by the Apex Court.

18. Panna Lal's case AIR 1975 SC 2003 is the next case relied upon by the opposite parties. The appellants in that case were also liquor contractors who had obtained licences under the guaranteed system. The principal conditions subject to which the licences were granted were :

(1) The licensee guarantees to the Governor of Rajasthan State that he, in the year concluding on March..... shall receive from the Government and sell such quantity of wine of which issue price shall not be less than Rs.....(hereinafter known as the "guaranteed price" which are prevailing on--..... March.....).

(2) The liquor shall be supplied to the licensee at the prevailing issue price, but the difference between such issue price and the issue price calculated at the prevailing rate on 31 March.....shall not be included in the guarantee amount.

(3) The licensee will have to pay the shortfall, if, any, between the price of the liquor obtained by him up to the end of any month at the issue price of 31 March..... and amount of guarantee multiplied by the months, which have passed and divided by eleven at the godown by the tenth of the next month.

(4) In case of non-payment, the licence will be cancelled and when cancelled this way, the above mentioned difference shall be recovered from security, cash deposits and remant, if any, shall be recovered from the licensee and the surety jointly and severally.

After obtaining the licences for, sale of liquor at stipulated amount of license-fee under the exclusive privilege system as the contractors failed to pay the guaranteed amount, notices were issued for recovering the amount for the total shortfall. The demands were opposed by the contractors who contended that what was being demanded as shortfall, in fact, amounted to levy of excise duty and could not be sustained. The contention of the State was that what was being realised was the guaranteed amount in the licence for the exclusive privilege of selling country liquor. The contentions were negatived by the High Court of Rajasthan against which the contractors went up in appeal before the Supreme Court.

It was contended that the word "issue price was composite name for "cost price" of liquor and "excise" "duty leviable there on" and therefore, an agreement by the licensees under the guarantee system to pay "issue price" was tantamount to an agreement to pay "cost price" and "excise duty" as distinct items though described as issue price,

19. The Apex Court after considering the conditions of the licence and in the light of the provisions contained in the Rajasthan Excise Act, 1950 and in particular Section 24 thereof, observed as under :

" 27. There is no levy of excise duty in enforcing the payment of the guaranteed sum of the stipulated lump sum mentioned in the licence, for these reasons. First, the licences were granted to the appellants after offer and. acceptance or by accepting their tenders or auction bid. The appellants stipulated to pay lump sum amounts as the price for the exclusive privilege of vending country liquor. The appellants agreed to pay what they considered to be equivalent to the value of the right. Second, the stipulated payment has no relation to the production or

manufacture of country liquor except that it enables the licensee to sell it. The country liquor is produced by the distilleries. u/s 28 of the Act and under the relevant duty notifications the excise levy is on the manufacture and not on the sale or retail of liquor. Under the duty notifications no excise duty is levied or collected from the liquor contractors who are liable only to pay the price of liquor. The taxable event is not the sale of liquor to the contractors but the manufacture of liquor. What the liquor contractors pay in consideration of the licence is a payment for the exclusive privilege for selling country liquor. The liability for excise duty on the distillery and the liquor contractors are not concerned with it. Before 1965 there was no excise duty. The appellants were required to pay the guaranteed amount. After the imposition of excise duty the position is not altered because the privilege of selling is granted by auction or by offer and acceptance before the goods came into existence. Excise contracts are settled in the preceding year. Third, the stipulated amounts payable by the appellants have relation only to what the appellants foresaw they could recoup by the sale of country liquor from the liquor shops licensed to them. There are several varieties of country liquor and rates of excise levy on these varieties are different. The appellants are not bound to take any particular quantity or any particular quality of any variety. Without reference to any quantity or quality, it is impossible to predicate the alleged levy of excise duty.

XX XX XX 29. The lump sum amount stipulated under the agreement is not to be equated with issue price. The issue price is payable only when the contractors take delivery of a particular quantity of specified value of country liquor. The issue price relates only to liquor drawn by the contractors and does not pertain to undrawn liquor. No excise duty is or can be collected on undrawn liquor. The issue price is the price at which country liquor is sold to the liquor contractors. So far as the liquor contractors are concerned, they pay the price of the liquor even though the price may include the component of excise duty in respect of which they have no direct liability. Illustrations may be found in case of a person buying a match box or a motor car or a refrigerator. When the purchaser pays the price of a match box, or a motor car or a refrigerator the price includes excise duty levied and collected on the manufacture of those goods. The price of goods necessarily includes different components but the price a buyer pays is different from duties and taxes paid or payable by the manufacturers. The incidence of all the components of cost and taxes is inevitably passed on to the consumer what the consumer pays is the price of the goods and not the antecedent components as such."

20. The Apex, Court further observed that the lump sum amount payable for the exclusive privilege was not to be confused with the issue price as in essence what was sought to be recovered from the liquor contractors was the shortfall occasioned on account of failure on their part to fulfil the terms of licence. Dealing with the contention that what sought to be realised was in fact the duty on undrawn liquor, the Apex Court observed as follows :

"The contractual obligation of the appellants to pay the stipulated amounts is not dependent on the quantum of liquor sold by them which is relevant only for the purpose of remission to be earned by them under the licence. No excise duty is charged or chargeable on undrawn liquor under the licence. To suggest that the licence obliges the contractors to pay excise duty on undrawn liquor is totally misreading the conditions of the licence. The excise duty is collected only in relation to the quantity and quality of the country liquor which is drawn. No excise duty can be predicated in respect of undrawn liquor."

Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., taken notice of and was distinguished :

" xx xx. In Bimal Chandra Banerjee's case (supra) a levy of excise duty on updrawn liquor was imposed in terms by the State Government by a notification amending the Rules and by an alteration in the conditions of the licence. It was provided that certain minimum quantity of liquor would have to be withdrawn by each contractor who was to be liable to make good every month the deficit monthly average of the total minimum duty on or before the 10th of each month following the months to which the deficit duty relates. The ision there was that in imposing the excise duty on undrawn liquor by the impugned notification the State Government was exercising powers which it did not possess. In the present case, the State Government has not imposed any excise duty on the licensee. O the contrary, the licence only takes into account the excise duty component of the issue price for the purposes of giving a concession or remission to the contractors...."

Panna Lal's case, therefore, can also not be of any assistance to the opp. parties. The distinction between this case and the case of Bimal Chandra Banerjee's (supra) has " been pointed out by the Apex Court, in the paragraph-33 of the judgment. The fact that Panna Lal's case cannot be an authority for considering whether or not duty can be levied and realised on undrawn liquor can be spelled out from paragraph-17 of the judgment in Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, which reads as under :

" The decision of this Court in Panna Lal v. State of Rajasthan which is sought to be relied upon on behalf of the appellants is clearly distinguishable. In that case, the contractual obligation of the appellants to pay the guaranteed sum or the stipulated sum mentioned in the licences was not dependent on the quantum of liquor sold by them and no excise duty was charged or chargeable on undrawn liquor under the licence. The excise duty there was collected only in relation to the quantity and quality of the country liquor which was drawn."....."

The decision in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , is, therefore, in no way affected by Panna Lal's case.

21. Strong reliance has been placed by the opp. parties on Jage Ram's case AIR 1980 SC 2018 in which it has been held that the bidders offering bids with full

knowledge of terms and conditions attached to auctions cannot be permitted to wriggle out of their voluntarily incurred contractual obligations by invoking writ jurisdiction. It has further been held in that case that the amount which bidders agree to pay to the State Government under auction terms is neither fee nor excise duty on undrawn liquor, but is a price paid by the contractors to the State Government for parting with the privilege. Relying on this cases, the learned Advocate General contends that the objections raised by the petitioners cannot be sustained. At first glance the decisions in Jage Ram's case seems to favour the contention of the learned Advocate General. But, in fact, it is not so as this case is clearly distinguishable. Jage Ram was an excise contractor. He had participated in an auction, which was held for the financial year 1967-68. The auction was in terms of Punjab Liquor Licence Rules, 1956 as amended by the Excise and Tax Commissioner, Haryana. Relevant parts of Rule 36 are quoted below :

" 36(1) Subject to such changes as the Financial Commissioner may make each year before the annual auctions the Collector shall, on the basis of the probable sales during the next licence year determine, in the case of country liquor vends, the minimum quota of country liquor and the licence fee calculated thereon..... The minimum quota and the licence fee calculated thereonfor each vend shall be announced by the Presiding Officer at the time of auctions.

36(16). Bids in respect of country liquor vends shall be received in terms of quota of country spirit in proof litres to be lifted during the whole year, and the successful bidder shall be liable to pay licence fee calculated by multiplying the quota bid by Rs. 17.60.

36(22-A). A person to whom a country spirit shop has been sold shall deposit in a Government Treasury under head "Licence Fee on country spirit" subordinate to Major Head "X-State Excise Duties" by way of security an amount equivalent to one twenty-fourth of the amount of the licence fee determined under Clause (16) within a period of seven days of the date of auction and the aforesaid amount of security shall be refundable to him at the end of the year, unless the same or any part thereof is forfeited or adjusted against any amount of fee duty or penalty due from him in respect of his licence. In the event of the amount of security deposit or any part thereof being forfeited or adjusted as aforesaid the deficiency shall be made good by him, within seven days of the happening of such an event failing which the licence shall be liable to cancellation by the authority; by which it was granted.

36 (23) (2) A person to whom a country spirit shop is sold shall pay the amount or licence fee as calculated under Clause (16) in 22 equal instalments each instalment being payable on the 10th and 25th of each month starting from the month of April. In the event of failure to pay the instalment by the due date, his licence may be cancelled.

36 (23) (3). Notwithstanding anything contained in Sub-clause (2) (a) the

licensee shall be entitled to deduct from the amount of the licence fee to be paid by him such amount of stillhead duty as may have been actually paid by him on the quota of country spirit actually lifted by him not exceeding the amount of such duty payable in respect of the quota bid by him at the time of auction."

In the auction, Jage Ram's bid for a quota of 62, 100 proof litres was accepted and as per the licence conditions, he became liable to pay the amount calculated at the rate of Rs. 17.60 per litre, that is to say Rs. 10,92,960/-. The licence fee was required to be paid in 22 equal instalments. As the contractors fail to pay the instalments, notices were issued calling upon them to make good the shortfall. On failure to pay the amount the vends were re-auctioned but lesser amounts were realised. Accordingly, notices were issued requiring the. Contractors to make good the deposit. The writ petition challenging legality of the aforesaid notice was allowed by the High Court and thereafter the matter was taken to the Supreme Court by the State of Haryana. It was not disputed that in terms of Rule 36 auction was on the basis of the quota that has to be lifted for each particular shop. In order to convert it in terms of money, each proof litre bid was multiplied by Rs. 17.60 and that is how, the fee for a particular shop was fixed. The licensee was required to deposit one-twenty-fourth of the amount so arrived at as security. Thereafter, he was to lift the quota specified for each month in the Rules and if he failed to do so, the amount to the extent of short-lifted quantity in terms of the licence fee for that month was deducted from his security amount and he was to make good the deficiency in the security. Even if he did not sell any liquor, the money value of that quota which he had bid for, calculated at the rate of Rs. 17.60 per litre, was to be paid by him to the State. On the facts involved, allowing the State appeal, the Apex Court held that the licensees could not avoid the contractual liability by challenging the rules under which the bids offered by them were accepted and for which they became entitled to conduct their business. It was further held that since the rights in regard to the manufacture and sale of intoxicants were vested in the State, it is open to it to part with those rights for a consideration. It was further held that the amounts which were charged to the licensees who offered their bids in auction sales of vends are neither in the nature of tax nor in the nature of excise duty, and that, the true nature of the charge which the Government levies in such cases is that it is a price which the State charges as a consideration for parting with its privileges in favour of the licensees.

Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , State of Madhya Pradesh Vs. Firm Gappulal and Others, and Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, on which reliance was placed by the contractors were considered and distinguished in the following words :

"21. Strong reliance was placed by the respondents on the decisions of this Court in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , State of Madhya Pradesh Vs. Firm Gappulal and Others, and Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, in support of their contention

that what they are called upon to pay by the Government is excise duty. In Bimal Chandra Banerjee's case, it was held by this Court that the levy of Excise duty on undrawn liquor was beyond the power of the State Government and that, therefore, the rule imposing the condition to that effect was invalid. That decision was followed in the Madhya Pradesh case where also, the licensees were required to pay what was described as "pratikar", which was nothing but Excise duty on undrawn liquor. The same situation obtained in the U. P. case, because, the real nature of the payment which the licensees were required to make there was Excise duty on undrawn liquor.

22. These decisions cannot hold the respondents, because the true position, as stated earlier, is that the amount which the respondents are called upon to pay is not Excise duty on undrawn liquor, but the price of a privilege for which they offered their bid at the auction of the vend which they wanted to conduct."

Thus, it will be seen that it is in the background of the relevant rule and conditions involved in that case that the demands raised were upheld by the Apex Court. But, the Apex Court did not upset the decision in Bimal Chandra Banerjee, Gapulal and Ram Kumar's cases which lay down that the Excise duty cannot be levied on undrawn liquor. These cases have been distinguished, but not departed from.

22. In this context, a judgment of the Supreme Court to which reference may be made is, that of State of Andhra Pradesh Vs. Y. Prabhakara Reddy, . The primary question involved in that case was whether under the Excise law prevailing in the State of Andhra Pradesh, the Government is entitled to claim from the Excise Contractors who failed to lift the minimum guaranteed quantity of liquor, the amount said to represent the excise duty component in the issue price of liquor relating to such unlifted quantity of liquor. The relevant provision which related to the minimum guaranteed quantity of arrack was Rule 15 of the Andhra Pradesh (Arrack, Retail Vend Special Conditions of Licences) Rules, 1969 which reads as under :

"Rule 15. Minimum guaranteed quantity of arrack--(1)No licensee shall purchase arrack less than the specified minimum guaranteed quantity in any month. If in any month, quantity less than the minimum guaranteed quantity fixed for that month is drawn, at the end of that month issue price to the extent of deficit purchase shall be deducted from the advance money paid by the licensee under the minimum quantity of arrack "guaranteed by him and the licensee shall be called upon to indemnify the amount, so adjusted by the end of the succeeding month in which short drawn quantity had occurred :

Provided that the Excise Superintendents may permit the licensee to lift the short drawn minimum guaranteed quantity of the previous month in the succeeding month for special reasons except for the month of September, unless the licensee has committed default in lifting the minimum guaranteed quantity for two successive months :

Provided further that whether the Commissioner deems it necessary to permit a shop-keeper to draw the deficit quantity short drawn in any month in the subsequent months, he shall obtain the prior approval of the Government for granting such permission.

(2) Where a licensee fails to lift the arrack as permitted by the Excise Superintendent or to indemnify the advance amount so adjusted by the end of the succeeding month in which the short drawal of quantity had occurred, the right acquired by the defaulting licensee shall be re-auctioned forthwith:"

23. The right to sell liquor in retail was to be granted by auction for a period of one year. Prior to the auction, the issue price of arrack and the minimum guaranteed quantity in respect to each shop was fixed. Issue price was fixed at a definite sum for a bulk litre. The liquor contractors having failed to lift minimum guaranteed quantity, notices were issued requiring them to make good the shortfall. This action was challenged by the contractors. One of the contentions raised was that the amount towards the Excise duty which was part of the issue price could not be recovered from them. In support of this contention, reliance was placed on the case of Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , State of Madhya Pradesh Vs. Firm Gappulal and Others, and Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, . Regarding these cases, the Apex Court observed :

"13. Thus we see that in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., and State of Madhya Pradesh Vs. Firm Gappulal and Others, , what was sought to be recovered, was excise duty and in Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, also what was sought to be recovered was excise duty, though disguised as compensation. Such excise duty on unlifted liquor was not leviable. Referring to these cases, Chandrachud. C. J. observed in State Bank of Haryana and Others Vs. Jage Ram and Others, : "In Bimal Chandra Banerjee"s case it was held by this Court that the levy of excise duty on undrawn liquor was beyond the power of the State Government and that therefore, the rule imposing the condition to that effect was invalid. That decision was followed in State of Madhya Pradesh Vs. Firm Gappulal and Others, where also the licensees were required to pay what was described as "Pratikar" which was nothing but excise duty on undrawn liquor. The same situation obtained in Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, because the real nature of the payment which the licensees were required to pay there was excise duty on undrawn liquor.

These decisions cannot help the respondents because the true position, as we stated earlier, is that the amount which the respondents are called upon to pay is not excise duty on undrawn liquor but is the price of a privilege for which they bid at the auction of the vend which they wanted to conduct."

The Apex Court considered the cases of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , Jage Ram AIR 1930 SC 2018 and

Panna Lal and observed that the amount which each of the contractors was required to pay or have adjusted was not excise duty on undrawn liquor, but was part of the price which he had agreed to pay for the grant of the privilege to sell liquor.

We are, therefore, of the opinion, the law declared by the Supreme Court that Excise duty cannot be levied on undrawn liquor still holds the field.

A careful analysis of the aforementioned decisions clearly indicates that there is a distinction between (i) the claim for compensation on failure to lift the minimum guaranteed quantity which is measured by the issue price of liquor multiplied by the shortfall and (ii) a claim for realising duty on the undrawn liquor without any reference to the price of liquor that was not drawn. In the former, it is the loss of price of liquor, which may also include the Excise duty, is the measure of damages and is sought to be realised by the State whereas, in the later it is only the loss of excise duty on undrawn liquor that is sought to be realised. This is the distinction that has to be borne in mind while considering the case in hand.

24. While discussing the authorities cited at the Bar, we have made a specific reference to the relevant clauses which were under consideration in these cases. It is seen that ones which were under consideration in Vimal Chandra Banerjee's, Gappulal's and Ram Kumar's case. When we look at the relevant clause, i. e. Rule 6-A (3), which is the matter of dispute/interpretation in the present petition, we find that it is more or less akin to the ones which were the subject-matter of consideration in Bimal Chandra Banerjee's, Gappulal's and Ram Kumar's case. This, in our view, cannot be disputed.

25. In order to support the demand, the learned Advocate General contended that irrespective of any word or term used in Rule 6-A (3), what was sought to be realised from the contractors is compensation for his failure to lift the minimum guaranteed quantity of liquor which he agreed to lift under the contract. He also contended that the petitioner having agreed to pay the amount for obtaining an exclusive privilege is liable for breach of contract and cannot now challenge the demand and thereby try and wriggle out of his contractual obligations. This agreement is obviously based on the decision in Jage Ram's case which cannot be applied to the facts of this petition. Suffice to say, and it may be stated at the risk of repetition, what is sought to be realised from the petitioner in this case is not "compensation" calculated in terms of the price of the quantity not lifted, but is clearly "duty" on the quantity which the petitioner has failed to lift. This is clear from a reading of Rule 6-A(3). The word "excise duty" in the said Rule cannot be substituted by or be read as "compensation". Reading the word "compensation" for the word "excise duty" will really amount to rewriting the Rule. This is not permissible nor can it be done. The word "excise duty" has to be read and understood as "excise duty". Thus, a plain reading of Rule 6-A (3), as it stands, conveys one thing and that is, if there is a shortfall in the minimum guaranteed quantity, duty to the extent of the shortfall is payable by the contractor. This Rule is not capable of any other interpretation. It follows,

what is sought to be realised from the contractor/petitioner is duty on the quantity of liquor which he has failed to lift from the warehouse.

26. Rule 6-A (3), no doubt, provides for payment of duty on the quantity not lifted to the extent of the shortfall, but does the charging provision in the Act provides for such a levy ? Section 27 of the Act gives the power to impose duty on "import, export, transport and manufacture" of any excisable article. Section 28 deals with the ways of levying any duty that may be imposed u/s 27 of the Act. A combined reading of these sections shows that duty can be levied only on the import, export, transport and manufacture of excisable article (also cultivation of hemp). The petitioner is not a manufacturer. Since he has not lifted a particular quantity of liquor, there is no question of any import, export or transport of the quantity not lifted. If this be the position, the demand of duty on the quantity of liquor not lifted cannot come within the purview of the charging section nor can such a demand be levied under the Act. So, to permit levy of such a duty under Rule 6-A (3) would be permitting a levy which is not within the purview of the charging section. An action which is not permissible under the substantive provision of the Act cannot be sustained on the basis of some provision in the Rules which are framed under the Act. It follows, that Rule 6-A (3) in so far as it provides for the levy of duty undrawn liquor goes beyond what is contemplated by the charging provision contained in the Act and is, to that extent, invalid being ultra vires the Act. The demand of duty on undrawn liquor in terms of Rule 6-A (3), therefore, cannot be sustained. The contention of the petitioner that no duty can be levied on undrawn liquor has to be upheld.

In view of the above, a decision on the first question posed namely, whether in view of the excise policy declared by the Government the district authorities were justified in fixing the M.G.Q. at a rate higher than that provided in the policy for the relevant year is not necessary. As no duty can be levied on undrawn liquor, whether the M.G.Q. was fixed on the basis of the M.G.Q. of the previous year plus 15% under the policy or more will make no difference because irrespective of the guaranteed quantity, no duty can be levied and or realised on the quantity not lifted by the contractor. In this view of the matter, as a decision on the first question will be academic, we refrain from considering the same in this petition.

27. In view of the discussions aforesaid, the petition is allowed. The demand notice dated 9-12-1991 (Annexure-3 to the petition) for realising a sum of Rs. 1,80,150.00 from the petitioner towards the duty on shortfall in lifting the M.G.Q. is quashed. We declare Rule 6-A (3) of the Orissa (Excise Exclusive Privilege) Rules, 1970 to the extent it permits levy of duty on undrawn liquor invalid. We further hold that the State has no power to levy and recover any duty on undrawn liquor. There shall be no order as to costs.

G.B. Patnaik, J.

I agree.