

(1992) 09 SC CK 0034

In the Supreme Court Of India

Case No : Civil Appeal No"s. 3975 to 4022 of 1992 with SLP (Civil) No"s. 1577, 5838, 13069 and 13100 of 1985, 2534, 2537, 2567, 2569, 2570, 2572, 2577, 2578, 2601, 2605, 2618, 2621, 2780, 2785, 2807, 2816, 2819, 2905, 2932, 3001, 3005, 3008, 3007, 3011, 7664, 767

State of Rajasthan and Others

APPELLANT

Vs

Nandlal and Others

RESPONDENT

Date of Decision : 22-09-1992

Acts Referred:

Citation : (1992) 5 JT 655 : (1992) 2 SCALE 755 : (1993) 1 SCC 681 Supp : (1992) 1 SCR 785 Supp

Hon'ble Judges : V. Ramaswami, J;S. Ranganathan, J;B.P. Jeevan Reddy, J

Bench : Full Bench

Advocate : Aruneshwar Gupta, for the Appellant; B. Sunita Rao, Surya Kant and Sushil Kumar Jain, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Jeevan Reddy J.

1. Leave granted.

2. This batch of civil appeals is directed against the judgment and orders of Rajasthan High Court in certain batches of special appeals. The point that arose in all the writ petitions (from which the Special Appeals arose) filed in the Rajasthan High Court was common viz., whether the short-lifting of liquor on the part of the writ petitioners/licenses during the year 1967-68 was on account of the default on their part or on account of the inability of the State to supply the requisite quantities of liquor. The writ petitions were disposed of in batches by learned Single Judges on different occasions against whose orders special appeals were filed by the aggrieved parties i.e., by the State in some cases and by the licencees in others.

3. The retail sale of country liquor in the State of Rajasthan is regulated by the

provisions of Rajasthan Excise Act, 1950. Like every other excise Act, the Rajasthan Act also says that no person shall sell or otherwise deal in excisable articles including country liquor except in accordance with the terms and conditions of a licence granted in that behalf and the provisions of the Act and the rules made thereunder. During the year in question (1967-68) licences were granted under two different systems. One was called the 'Guarantee System' provided in Chapter VII(A) of the Rajasthan Excise Rules, 1955 and the other was 'Exclusive Privilege System' governed by Chapter VII(B) of the said Rules. Under the Guarantee System, the licensee guaranteed to draw from the Government Warehouse and sell, during that year, country liquor of a specified value, which was called the amount guaranteed. Under this system, the licensee was obliged to deposit 10% of the amount of guarantee by way of security at the time of grant of licence. He was under an obligation to draw from the warehouse every month liquor equivalent in value to 1/12th of the amount guaranteed and in case he failed to do so the amount of deficit could be recovered from out of the security deposit and also from his movable and immovable properties. Under the Exclusive Privilege System, the licensee was granted exclusive privilege of selling country liquor by retail within a particular local area on condition of payment of lump sum, instead of or in addition to excise duty, as may be determined by the Excise Commissioner. Under this system too, the licensee was required to deposit 10% of the said amount by way of security at the time of grant of licence. The total amount had to be deposited in 12 monthly installments and he was entitled to draw liquor from the Government warehouse against the said deposits. Any amount not paid could be recovered as land revenue.

4. In S.B. Civil Writ Petition No. 1596 of 1969 (Balmukund v. State of Rajasthan) decided on 27th JULY, 1971 a learned Single Judge of the Rajasthan High Court held that the State is not entitled to demand or recovery the deficit amount from a licensee, whether under the Guarantee System or under Exclusive Privilege System, for the reason that such recovery would amount to recovery of Excise Duty on un-drawn liquor. The said decision was reversed by a Division Bench which held that the amount agreed to be paid by the licensee is 'excise revenue' as defined in Section 3(8) of the Rajasthan Excise Act and is recoverable as such. The judgment of the Division Bench was affirmed by this Court in Pannalal and Ors v. State of Rajasthan and Ors. : [1976]1SCR219 .

5. The decision of this Court in Pannalal deals with several years including 1967-68 which is the concerned herein. It was held by this Court that by enforcing the payment of guaranteed sum or the stipulated lumpsum mentioned in the licences, the State does not purport to levy or recover excise duty. Excise duty, it was pointed out, is leviable on the manufacture of liquor and is recovered from the manufacturer. The licensees merely sell the same and the privilege of sale is given to them, under either system, in consideration of the amount guaranteed or stipulated, as the case may be. It was not, however, a case where the licensees alleged that there was failure on the part of the State to supply the

liquor asked for by them. Evidently, it was a case where short lifting was the result of the default on the part of the licencees.

6. As mentioned hereinbefore, a large number of writ petitions were filed in the Rajasthan High Court by the licencees questioning the demand of the deficit guaranteed/stipulated amount which writ petitions were dealt with and disposed of by different learned Judges on different dates. A brief reference to their decisions would be in order.

7. The first decision is by Dwarka Parshad, J. in a batch of 61 writ petitions, first of which was S.B. (C) W.P. No. 3388 of,1974 (Shanti Lal v. State). Before the learned Judge, the petitioners/licenses contended that the short-lifting of liquor was an account of failure of the State to supply the appropriate quantities as and when demanded by them. This allegation was, however, denied by the State. It squarely blamed the licenses for the said short-lifting. The State asserted that they were always ready and willing to supply the quantities demanded but that the licencees themselves failed to lift the same. The learned Judge found that the petitioners had singularly failed to produce any material to establish their allegation. He also found that the allegations in the writ petitions were couched in vague and general terms devoid of any particulars. In such a situation, he held, no relief could be granted to the petitioners and accordingly dismissed the writ petitions. During the course of his judgment the learned Judge observed that the petitioners had neither produced the challans nor produced any certificate from any official of the Excise department nor had they produced any other document to establish . that they asked for a particular quantity of liquor but that the department failed to supply the same.

8. A batch of 9 writ petitions [S.B. (C) W.P. 754/72 Nand Lal v. State of Rajasthan etc.) were heard and dismissed by another learned Single Judge on 7th February, 1980. The reasoning of the learned Judge is similar to the one adopted by Dwarka Parshad, J. in the aforementioned . batch of writ petitions. The learned Judge indeed referred to the said decision and followed it.

9. On 8.2.1980, another batch of 17 writ petitions (Kuraji v. State of Rajasthan and Ors.) were disposed of by a learned Single Judge. All the petitioners in this batch were attached to Banswara warehouse. In other words, they were to draw their supplies of liquor from Banswara warehouse. In this case the petitioners produced certain material in support of their allegation that the State was unable to supply the quantities demanded by them on account of which their shops had to be closed on different occasions. The material produced by them comprised the correspondence between Excise officials as also certain endorsements made by Excise officials in the stock registers of the licencees. The said material, according to the licencees, established that the production of country liquor during that year in the State of Rajasthan was below the requisite figure, with the result that adequate supplies could not be made to some of the warehouses besides showing that shops of some of the licencees had to be closed during certain periods for lack of supplies. In view of the said material the learned

Single Judge held "that the petitioners have succeeded in establishing that during the months of June, July, and December, 1967 and January, 1968 there was shortage of liquor at the warehouse at Banswara and on account of the said shortage. liquor was not made available to the licencees as per their demands for the purposes of sale in their shops." In this view of the matter, he held that "the impugned notice of demand for, the recovery of the entire amount of deficit resulting from the shortfall from the petitioner, and the proceedings for their recovery of the demands cannot therefore be upheld and must be quashed". At the same time, he made the following further directions:

The quashing of the impugned notices of demand will not stand in the way of the respondents from making fresh demand against the petitioners in respect of the deficit on account of the short-fall which can be attributed to the inability of the petitioners-appellants to draw liquor from the warehouse during the years mentioned in the tabular statements hereinabove. While making the demands the appropriate authority will, inter alia, take into consideration the availability of the country liquor in entire state of Rajasthan during the years under consideration, the total monthly requirement of liquor of the various licencees, who were entitled to draw their supplies of liquor from the particular warehouses, the quantity of liquor that was available every month at the said warehouses for distribution to the licencees and the fact that under the terms of the licences issued to them, they were entitled to make good the short-fall of a particular month by the tenth day of the succeeding month. It is further ordered that before making the determination with regard to the amount. of short-fall that can be attributed to the petitioner-appellants concerned for the purpose of making a fresh demand, the appropriate authority will afford a reasonable opportunity to them to show that the said short-fall cannot be attributed to them.

10. Special appeals were filed both by the licencees as well as the State against the aforesaid decisions. These Special Appeals too came to be disposed of in different batches on different occasions. The basis of all these judgments is, however, the same, which may best be set out in the words of one of the Division Benches (comprising S.K. Mal Lodha and S.S. Byas, JJ.) in D.B. Special Civil Appeal No. 64 of 1978 and 33 other appeals (Ratan Lai v. State of Rajasthan and Ors.) disposed of on 20th May, 1985. After referring to earlier Bench decisions of that court, the Division Bench observed and directed as follows:

It is, thus, clear that in regard to short-fall relating to the year 1967-68, irrespective of the fact whether the petitioners in the writ petitions have filed documents or not, the writ petitions were allowed as aforesaid and the special appeals were dismissed... The result is that we allow these appeals and set aside the common order dated July 5, 1978 passed in 33 writ petitions out of which thirty three appeals have arisen. The order dated Feb. 7, 1980 is also set aside. The writ petitions filed by each of the petitioner-appellants are allowed and the impugned notices of demands issued and the demands raised against them for the recovery' of the deficit on account of the short-fall in the amount of

guarantee prescribed in their licences for the year 1967-68, and the proceedings for the recovery of the demands including the orders for attachment etc. are quashed. This will, however, not preclude the respondents from making fresh demands against any of the petitioners-appellants for the recovery of the deficit regarding the short-fall, which can be attributed to the inability of the petitioner-appellants to draw liquor from the Government warehouses during the year 1967-68. While making the demands, the appropriate authority will, inter alia, take into consideration the availability of liquor in the entire State of Rajasthan during the year 1967-68, the total monthly requirement of liquor of the various licencees who were entitled to draw their supplies of liquor that was available every month at the said warehouses for distribution to the licencees and the fact that under the terms of the licences issued them, they were entitled to make good the short-fall of a particular month by the tenth day of the succeeding month. It is further ordered that before taking the determination with regard to the amount of short-fall that can be attributed to the petitioner-appellants concerned for the purpose of making a fresh demand, the appropriate authority will afford a reasonable opportunity to them to show that the said short-fall cannot be attributed to them. The petitioner-appellants shall be entitled to the refund of the amount deposited by them as security, if the respondents fail to initiate any proceedings against them for the purpose of determination of their liability for the short-fall for the year 1967-68 within a period of six months or if as a result of the said determination it is found that no part of the short-fall can be attributed to them. In cases, where it is found that the amount of shortfall for which any of the petitioner-appellants is liable, is less than the amount of security deposited by them, the petitioner-appellants concerned shall be entitled to the refund of the balance amount after deducting the amount for which they are found liable from the amount of security lying in deposit.

In the circumstances of the case, the parties are left to bear their own costs of these appeals.

11. The correctness of the said view is questioned in this batch of Civil Appeals.

12. Sri Aruneshwar Gupta, learned Counsel for the State of Rajasthan submitted that the burden of establishing their contention viz., the short-lifting was the result of the failure on the part of the State to supply the country liquor as and when demanded lay upon the writ petitioners. They ought to have made specific and clear allegations in their respective writ petitions and produced material to establish the same. If they failed to do so, the only course open for the court was to dismiss the writ petitions as was done by two learned Single Judge in Shantilal and Nandlal disposed of on 5.7.1978 and 7.2.1980 respectively. The burden can never be shifted on to the shoulders of the State to establish the petitioner's contention. The Division Benches were, therefore, in error in quashing the demand notices issued to the various writ petitioners and in directing that the attachment should also be raised. He submitted that the fresh enquiry ordered by the Division Benches was unnecessary and uncalled for in the circumstances.

So far as the decision dated 8.2.1980 in Kuraji is concerned, the learned Counsel submitted that the petitioners therein were attached to one particular warehouse, namely, Banswara warehouse. The material produced by them related only to that warehouse. Even the material produced did not pertain to all the 17 petitioners. If the material produced by the writ petitioners in that batch is properly analysed, it would appear that the material produced by them related only to a few shops and that too to certain short periods during that year. He submitted that the material of general nature indicating lesser production of country liquor during that year was of no help to the writ petitioners. He placed strong reliance upon the decision of this Court in *State of Andhra Pradesh Vs. Y. Prabhakara Reddy*,

13. Sri S.K. Jain, appearing for some of the respondents supported the reasoning and conclusion underlying the decisions of the Division Benches. He submitted that when there was overall short-fall in production in the State during that year, how could it be expected or presumed that all the licencees had obtained requisite supplies. According to him, the situation obtaining in Banswara warehouse was obtaining equally in all other warehouses in the State. He submitted that the Respondents in these appeals are all small contractors, each obtaining one or two licences and that after the lapse of so many years, they cannot reasonably be called upon to produce material of the nature contended for by the counsel for the appellants. He placed reliance upon the judgment of this Court in Civil Appeal Nos. 1170,1171 and 1176/84 decided on August 29, 1974 and contended that if at all any further enquiry is to be made, the matter may be sent to the High Court, giving liberty to the petitioners to place appropriate fresh material in support of their allegations. He also submitted that overall short-fall in production of liquor in the State during the relevant year is a perfectly legitimate circumstance to be taken into account by the Court, as held in the decisions under appeal.

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

15. So far as the first question is concerned, the fact remains that it is for the writ petitioners to establish their contention that inspite of their demand, the State could not supply the requisite quantity. The mere fact that there was a short fall in overall production of country liquor in the State of Rajasthan during the said year does not establish the contention of any of the petitioners. Even if there was an overall short-fall in production, and even if some of the warehouses could not be supplied with the full monthly allocations, it does not follow therefrom that the petitioner in any given writ petition was not supplied the quantity asked for by him, nor does it follow that all the licencees attached to that particular warehouse were subjected to a uniform cut. It may happen that a particular licencee, who comes at time when the stock is available in the

warehouse may get his full indented supply, while another licensee who comes at a time when there is no stock, may have to return empty handed. It is nobody's case that the available stocks were equally or proportionately distributed among all the licensees attached to that warehouse. It just doesn't happen. It was, therefore, obligatory upon each of the writ petitioners to establish that he asked for or indented for a particular quantity of liquor on a particular date but that he was not supplied on account of lack of supplies at the concerned warehouse. In this context, it must be remembered that the contracts in question are essentially commercial contracts though governed by statutory provisions. Even if there is no stock on a particular day, supplies may be available on the next day or a few days later or in the next week. Just because there was no stock in the warehouse on a particular day or in a particular week, it cannot be presumed that all the licensees attached to that warehouse went without supplies during the whole of the month. It also appears that the Rules provided for lifting the short-supplied quantities in the following month. Be that as it may, what we wish to emphasise is that the allegation made by each of the petitioner has to be established by him separately. If really the petitioners had asked for supply of certain quantity, there must be some evidence in support of such demand, whether in the shape of challan, indent or some other document. Further, when the warehouse could not supply the indented quantity, they must have made an endorsement to that effect on some document or must have issued a certificate to that effect. All that material must be in the possession of that licensees. It is true that the State cannot merely rely upon the theory of onus of proof and ought to assist the court in arriving at a fair decision by placing all the relevant material before it. But this obligation cannot be read to mean that the State is under an obligation to establish or make out the writ petitioner's case. The burden lies upon the petitioner, who seeks a particular relief on the basis of certain facts,; to establish those facts. Now, if we examine the principle underlying the decisions of the Division Benches of the Rajasthan High Court from the above stand point, it would be clear at once that it can not be sustained. The principle in effect is this: Because there was/a fall in production of country liquor in the State of Rajasthan during that year, it must be presumed - unless the State establishes to the contrary -- that there was a failure on the part of the State to supply the requisite quantities to every single licensee in the State. It is on this presumption that all the writ petitions were allowed -- even those where they very allegation of failure to supply was made in general and vague terms and not a scrap of paper filed to substantiate such an allegation, assuming that such a vague allegation can be permitted to be so established. As indicated hereinbefore, even in a case of inadequate supplies to a warehouse, on licensee may get his full quota, while the other may not. There may yet be a third man who may never have made an attempt to draw/lift the liquor. Furthermore, a licensee who could not be supplied the quantity on a particular date or a particular week or month, may have lifted the same in the following days or weeks or before the tenth of the following month, as provided by Rules. The situation may vary from warehouse to warehouse and from one licensee to

the other. In these circumstances, a general decision, irrespective of and unrelated to the pleadings and material of a given case, cannot be justified. We also find substance in the contention of Sri Aruneshwar Gupta that the material produced by the writ petitioners in Kuraji did not pertain to all the 17 shops/writ petitions but only to some of them and that too at different periods of time during the year. It is not clear whether they drew their supplies before the tenth day of the following month. We must reiterate that the question in issue is individual to each writ petitioner and no generalisation can be made in such a situation.

16. A word about this Court's order dated 29th August, 1974 in Civil Appeal No. 1170/74 etc.. It is a short order and may be set out in full:

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

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

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

17. Learned counsel for the Respondents insists that a similar order be passed in these matters as well. We cannot agree. The said order was before the decision of this Court in Pannalal. The Judgment in Pannalal settles and clarifies several issues which were raised in the said Civil Appeals. Those appeals related to the years 1962-63 to 1968-69. We are of the further opinion that instead of burdening the High Court, it is better to leave the matter to the authorities concerned who can also look into their own records while judging the truth and correctness of the contentions urged by the licencees. We must also say that inasmuch as notices of demand were issued soon after the expiry of the relevant excise year, there is no substance in the submission of the Respondent's counsel that they cannot reasonably be asked to produce material in support of their allegations.

18. For the above reasons, the judgments and orders impugned in these appeals

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

19. Before parting with this matter, we must refer to an extreme argument urged by Sri Gupta on behalf of the State. According to him, the liability of the licensee to pay the agreed amount remains unaffected even if there is a total failure on the part of the State in supplying the liquor. We cannot obviously agree with such a proposition. State is the only source of supply for such licensees. Unless the State supplies them the liquor they cannot carry on their business. As stated earlier, it is essentially a commercial contract, no doubt governed by statutory provisions. The obligation to supply constitutes the underpinning of the contract. This does not, however, mean that the State is bound to supply as much as is demanded or that its failure to supply on a given day or in a given week can be termed as failure to supply. Supplies of liquor are normally effected through warehouses and depots maintained by or on behalf of the State. Supplies have to be drawn over the month. It cannot be insisted that the entire monthly quantity or any other quantity must be supplied at once or as and when demanded by a licensee. All that can be said is that all licensees must be treated in a fair and equal manner in the matter of supplies, particularly during the lean years. Due regard must also be had to the Rules, conditions of licence and agreement and other provisions applicable in that behalf, in determining whether there was a failure on the part of the State to supply. Again, the extent of relief in case of failure on the part of the State to supply depends upon the length of period of non-supply, to loss caused to the licensee on that account, all of which has to be judged in the light of the relevant provisions of the Act, Rules, conditions of licence and agreement and other orders, if any, applicable.

20. In so far as Civil Appeal Nos. 4013 & 4012/92 (arising from S.L.Ps 1577/85 and 5838/85) are concerned, we dismiss the same for the following reasons: The writ petitions were allowed by the learned Single Judge on 27.7.1971. The writ appeals by the State were, however, preferred with a delay of six years 321 days. The Division Bench of the High Court declined to condone the delay and dismissed the appeals. We see no reason to interfere. We too find the explanation for the delay unacceptable. Similar is the situation in Civil Appeal Nos. 4010 & 4011/92 (arising from S.L.Ps. 13069 and 13100/85). These appeals accordingly fail and are dismissed.

21. So far as other Civil Appeals are concerned, they are allowed in the terms indicated in the preceding para.
22. No order as to costs in all these appeals.