

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P.(C) No.943 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
2. M/s Laxminarayan Ram Swaroop Shivhare & Company, a proprietorship firm having its office at opposite Sagar Hotel, Sakchi, Jamshedpur represented through its one of the Director Hemant Dhumal, S/o K. M. Dhumal, R/o Kokar, Ranchi, P.O., P.S. & Dist.- Ranchi

... .. **Respondents**

With

W.P.(C) No.944 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
2. K.D. Liquor & Fertilizers Pvt. Ltd. 503, N.P. Center, Dal Bunglow Road, Patna its Binod Kumar, Manager, S/o Late Baleswhar Yadav, Piska More, Bank Colony, P.O.-Hehal & P.S.- Sukhdeonagar, District-Ranchi, represented through one of the Manager, Binod Kumar S/o Late Baleshwar Yadav resident of Piska More, Bank Colony, Ranchi **Respondents**

With

W.P.(C) No.945 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
2. Radhey Biscuits Pvt. Limited, a registered company incorporated under the Company Act, 1956 having its registered office at-2 Joginder Kaviraj Row, 3rd Floor, Kolkata, through its Manager, Shashi Kumar, S/o Late Ram Jatan Lal, R/o Krishna Nagar, Booty More, Ranchi, P.O. & P.S.- Bariatu, Dist.- Ranchi

... .. **Respondents**

With

W.P.(C) No. 948 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
2. Narottamka Mercantile Pvt. Ltd. a company incorporated under the Indian Companies Act, 1956 having its office at 2, Joginder Kaviraj Row, 3rd Floor, Kolkata-7 through its Director Ram Dular, S/o Sri Ramji, resident of opposite M.D.G. Public High School, Deepatoli, P.S.-Sadar, District-Ranchi

... .. **Respondents**

With
W.P.(C) No. 949 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
2. M/s Laxminarayan Ram Swaroop Shivhare & Company, having its office at opposite Sagar Hotel, Sakchi, Jamshedpur, represented through one of Director namely Hemant Dhumal, s/o Sri K.M. Dhumal, Kokar, Ranchi, P.O. & P.S. Kokar Dist.- Ranchi

... .. **Respondents**

With
W.P.(C) No. 950 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
2. M/s Laxminarayan Ram Swaroop Shivhare & Company, having its office at opposite Sagar Hotel, Sakchi, Jamshedpur, represented through one of the Director Hemant Dhumal, s/o K.M. Dhumal, Kokar, Ranchi, P.O. & P.S. Kokar District- Ranchi

... .. **Respondents**

With
W.P.(C) No. 951 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi.
2. M/s Laxminarayan Ram Swaroop Shivhare & Company, having its office at opposite Sagar Hotel, Sakchi, Jamshedpur, represented through its one of the Director Hemant Dhumal, s/o K.M. Dhumal, Kokar, Ranchi, P.O. & P.S. Kokar Dist- Ranchi

... .. **Respondents**

With
W.P.(C) No. 955 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
2. Abbu Sama, S/o Late Sheikh Jalil, Para, Mihijim, Jamtara, its Manager Saurabh Goyal, S/o Sri Ramesh Chandra Goyal, P.O. & P.S. Bariyatu, District-Ranchi **Respondents**

With
W.P.(C) No. 956 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
 2. Jogendra Tiwari, S/o Sri Rameshwar Tiwari, Station Road, Mihijam, Jamtara its Sanjeev Singh, S/o Sri Ramdev Singh, Adarsh Nagar, Dhurwa, Ranchi
- **Respondents**

With

W.P.(C) No. 957 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand

... .. **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi.
 2. Pickup Credit & Trading Co. Pvt. Ltd, a registered company incorporated under the Companies Act, 1956 having its office at D.S.P. Road, Jawahar Nagar, Gumla represented through Mukesh Kumar S/o Sri Bhagwan Das resident of Vasundra Garden, Bariyatu, Ranchi-one of the Director, P.O. + P.S. Bariyatu, District-Ranchi
- **Respondents**

With

W.P.(C) No. 959 of 2007

The State of Jharkhand, through Excise Commissioner, Govt. of Jharkhand

... .. **Petitioner**

Versus

1. Member Board of Revenue, Jharkhand, Ranchi
 2. M/s Laxminarayan Ram Swaroop Shivhare & Company, having its office at opposite Sagar Hotel, Sakchi, Jamshedpur, represented through its one of the Director Sri Hemant Dhumal, S/o Sri K.M. Dhumal, resident of Kokar, Ranchi, P.O. & P.S. Kokar, District-Ranchi
- **Respondents**

CORAM: HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Petitioner(s)	: Mr. V.K Prasad, S.C (L&C) : Mr. Rishu Ranjan, Advocate Mr.Vineet Prakash, J.C.to S.C. (L&C)
For the Respondent(s)	: Mr. D.V Pathy, Advocate : Mr. Abhishek Kumar, Advocate

06/31.01.2018

1. Heard Mr. V.K Prasad, Standing Counsel (Land and Ceiling), appearing on behalf of the petitioners in all the cases.
2. Heard Mr. D.V Pathy, Advocate appearing on behalf of the respondent no. 2 in all the cases.
3. All the aforesaid writ petitions arise out of the common order dated 1.11.2006 passed by the Member Board of Revenue,

Jharkhand, Ranchi and therefore all these writ petitions have been tagged and are being heard together.

4. The writ petition and the corresponding case number of the revision petition disposed of by the aforesaid impugned order dated 1.11.2006 are as under:-

S.no.	Writ petition number	Revision case number
1	W.P.(C). No. 943 OF 2007	REV. CASE No. 25 OF 2006
2	W.P.(C). No. 944 OF 2007	REV. CASE No. 29 OF 2006
3	W.P.(C). No. 945 OF 2007	REV. CASE No. 21 OF 2006
4	W.P.(C). No. 948 OF 2007	REV. CASE No. 23 OF 2006
5	W.P.(C). No. 949 OF 2007	REV. CASE No. 30 OF 2006
6	W.P.(C). No. 950 OF 2007	REV. CASE No. 31 OF 2006
7	W.P.(C). No. 951 OF 2007	REV. CASE No. 28 OF 2006
8	W.P.(C). No. 955 OF 2007	REV. CASE No. 22 OF 2006
9	W.P.(C). No. 956 OF 2007	REV. CASE No. 24 OF 2006
10	W.P.(C). No. 957 OF 2007	REV. CASE No. 26 OF 2006
11	W.P.(C). No. 959 OF 2007	REV. CASE No. 27 OF 2006

5. These writ applications have been filed by the petitioner for quashing the order dated 01.11.2006 passed by the Member Board of Revenue, Jharkhand, Ranchi to the extent it relates to respective revision cases . The impugned order is annexed as Annexure-2 to the writ applications.
6. The counsel for the petitioner submits as follows:-
- a) The Petitioner State had introduced new excise policy for settlement of retail excise shop for the financial year 2004-2005.

- b) Prior to 2004-2005 excise retail shops were used to be settled individually for one year, but from 2004-2005 excise retail shops of country liquor and country spiced liquor were settled in Group-1 for a block period of three years and in 2nd and 3rd year of settlement, 10% increase in license fee was proposed.
- c) Although the block period was for three years but the license was to be issued for only one year subject to renewal ever year.
- d) A sale notification in prescribed Form dated 01.06.2004 under the provision of Bihar Excise Act, 1915 (as adopted by the State of Jharkhand) was issued by the State for the period from 01.07.2004 to 31.03.2007. As per Clause-4 of the sale notification, the settlement for second and third year required increase in license fee by 10% in each year.
- e) The respondent no.2 participated in the auction and was successful.
- f) There was no problem for the license for the period from 01.04.2004 to 31.03.2005.
- g) The license was renewed for the period from 01.04.2005 to 31.03.2006.
- h) On 31.03.2006 respondent no. 2 filed a petition before the Member Board of Revenue, under Section 39 of the Bihar Excise Act, 1915 praying for remission of license fee on account of alleged non-supply of country liquor for different periods ranging from a few months to the entire license period for the year 2005-2006 except for the days notified in advance as dry days.
- i) Similar applications for country liquor and spiced country liquor were clubbed together and numbered as Revision Case No. 20 to 31 of 2006 which were disposed

of vide common order dated 01.11.2006 as contained in Annexure-2 to the writ petition.

- j) Respondent no.2 having never submitted weekly lifting program to the wholesale supplier or the competent authority as per provision of the clause 20(ka) of the sale notification cannot be permitted to raise the plea of non-supply. He submitted that this issue was specifically raised before the Member Board of Revenue but has not been considered. The counsel for the petitioner submits that the impugned order is not only perverse but is wholly without jurisdiction. On the point of jurisdiction, the learned counsel by referring Section 39 of the Bihar Excise Act, 1915 submits that power of Board can be exercised only when it thinks fit at any time during the period for which any licence has been granted, order a reduction of the amount of fees payable in respect thereof during the unexpired portion of the grant. It has been submitted that as the application for grant of remission under section 39 of the Bihar Excise Act, 1915 was filed on the last date of the expiry of the license i.e on 31.3.2006 and there was no period left as unexpired portion of the grant, section 39 of Bihar Excise Act, 1915 was not at all applicable even if it is assumed that on 31.3.2006 licence was yet to be expire on that date.
- k) The Board of Revenue by the impugned order dated 01.11.2006 after hearing the parties allowed the prayer for remission for non-supply of country liquor for the period from 1st October, 2005 to 8th December, 2005 except for the days notified in advance as dry days .So far as the remission for non-supply of spiced country liquor is concerned the same was allowed for the

period prayed for except for the days notified in advance as dry days.

7. Being aggrieved by the impugned order dated 01.11.2006 passed by the Member, Board of Revenue, State of Jharkhand through Excise Commissioner, Government of Jharkhand has filed these writ applications and has raised the following points:-

- a) The Member, Board of Revenue while passing the impugned order granting remission of license fee on alleged non-supply of country liquor/spiced country liquor has failed to consider the conditions contained in Clause 20 (Ka) of sale notification which clearly stipulated that no remission will be allowed for non-supply or under any condition.
- b) The Member, Board of Revenue had no jurisdiction to entertain the petition for remission of license fee filed by the respondent no. 2 under the provision of Section 39 of the Bihar Excise Act, 1915.
- c) Member, Board of Revenue is guilty of passing inconsistent orders on the same issue, in as much as said authority has himself vide another order dated 27.04.2006 as annexed with the writ petition held that last paragraph of the Clause 20(ka) of the sale notification clearly stipulated that no claim for remission would lie in case of non-supply but in the instant case has taken a different view.
- d) The impugned order itself is perverse as second paragraph of clause 20(ka) has not been considered by the Member Board of Revenue while passing the impugned order.
- e) The member, Board of Revenue has wrongly relied upon the judgment reported in **(2003) 8 SCC 270**. The

said judgment does not help the respondent no. 2 in any manner whatsoever, and the reliance on this judgment by the Member, Board of Revenue without referring to the corresponding provisions under the provisions of Bihar Excise Act, 1915 and the rules framed and circulars issued thereunder is wholly misplaced.

- f) Otherwise also respondent no.2 having never submitted weekly lifting program to the wholesale supplier or the competent authority as per provision of the clause 20(ka) of the sale notification cannot be permitted to raise the plea of non-supply.

8. Counsel for the respondent no. 2 Mr. D.V Pathy, assisted by Mr. Abhishek Kumar, Advocate submits as follows :-

- a. There is no perversity in the impugned order and the order has been passed after considering all the facts and circumstances of the matter including the fact that there could not be any supply for the period from 1.10.2005 till 8.12.2005.
- b. The petitioner in this case has not challenged any finding of fact recorded in the impugned order and accordingly, it is not open to them to challenge any finding of fact which has been recorded in the impugned order.
- c. Once a privilege of under section 22 of Bihar Excise Act, 1915 has been granted, right accrued in favour of the respondent no.2 to have liquor although there is no fundamental right as such.
- d. In absence of any sale no licensee fees can be realized as licensee fee is nothing but realization of excise duty which is the levy on manufacture and as the whole seller did not supply the country liquor to the

respondent no.2, the same cannot be realized from the respondent no.2. It is submitted that respondent no.2 accordingly prayed for remission in the payment of the license fee under section 39 of the Bihar Excise Act,1915.

- e. It is submitted that section 39 of Bihar Excise Act, 1915 is the only provision under Bihar Excise Act, 1915 where remission application could be filed before the authority under the said Act and accordingly, remission application was rightly filed.
- f. Since the application for remission was filed on 31.3.2006, therefore, license cannot be said to have expired on that date and therefore, application for remission filed before the Member Board of Revenue was rightly filed.
- g. The learned counsel for the respondent no.2 has referred to Section 13,20,22 and 39 of the Bihar Excise Act, 1915. The learned counsel for the respondent no.2 has also referred to Rule 51A of the Rules under the Bihar Excise Act,1915. He has also referred to statutory form no. 26 under which license is granted.
- h. He submits that sale notification has to be read with section 26 of the Act and Rule 111 A of the Rules and upon conjoint reading it is apparent that supply is a condition precedent for sale and there being no supply for the periods for which remission from licence fee has been claimed including the period from 1.10.2005 to 8.12.2005, no liability can be imposed upon the respondent no.2 and accordingly, the respondent no.2 was entitled in law to claim remission from licence fee under the provision of the Bihar Excise Act,1915.

- i. The member, Board of Revenue has rightly relied upon the judgment reported in **(2003) 8 SCC 270** and has granted the relief to the respondent no. 2.
 - j. Counsel for the respondent no.2 has referred to law laid down by the Hon'ble High Court of Gauhati reported in **AIR 1959 Gau 75**. While referring the said judgment, the learned counsel for the respondent no.-2 has submitted that under similar circumstances it has been held by the Hon'ble High Court of Gauhati that in case of non- supply, the contract itself is frustrated.
9. After hearing the learned counsel for the parties this court is inclined to allow these writ petitions on account of following facts and reason :-

a. ON THE POINT OF MAINTAINABILITY OF PETITION FILED BY THE RESPONDENT No. 2 UNDER SECTION 39 OF BIHAR EXCISE ACT,1915

- i. As per the submissions of both the parties, application for remission of the licence fee was filed before the Member Board of Revenue under the provision of Section 39 of the Bihar Excise Act,1915.
- ii. It is the specific case of the respondent no. 2 that the only provision on the basis of which an application for remission could have been filed under the facts and circumstances of this case is Section 39 of the Bihar Excise Act, 1915.
- iii. Section 39 of the Bihar Excise Act,1915 reads as follows :-

"39. Power of Board to reduce fees –

The Board may, if it thinks fit, at any time during the period for which any licence has been granted, order a reduction of the amount of fees payable in respect thereof during the unexpired portion of the grant."

From the perusal of Section 39 of Bihar Excise Act, 1915, it is apparent that the application for remission is to be filed during the period for which the license is granted and the power to grant reduction in the amount of license fee can be granted only in respect of the unexpired portion of the grant.

- iv. Thus there are two conditions which are required to be satisfied for maintaining an application for remission/reduction of licence fee, firstly, it should be filed during the period of licence and secondly, there has to be an expired period of licence for which remission/reduction of licence fee can be granted.
- v. Admittedly the petition for remission/reduction of licence fee was filed on 31.03.2006 and as on that date there was no unexpired portion of the grant of licence available to the respondent no. 2. Apparently Section 39 is there in the statute to ensure that if during the existence of the license period, application for remission/reduction of licence fee is filed, then for the unexpired period of the grant of licence, the reduction of license fee could be granted.
- vi. As on 31.03.2006 there was no unexpired portion of the grant of licence available to the respondent no. 2, therefore the petition for remission/reduction of licence fee filed by the respondent no. 2 before the Member, Board of Revenue itself was not maintainable. This point on the maintainability of the petition under Section 39 of Bihar Excise Act, 1915 was specifically raised by the State before the Member, Board of Revenue and the Member, Board of Revenue while dealing with this issue has only said that the application was filed during the existence of the licence i.e on 31.03.2006 but the order is totally silent

on the point as to whether there was any unexpired portion of the grant of licence to make the petition for remission/reduction of licence fee maintainable and to grant remission for any such period. In fact the remission claimed for by the respondent was for the period prior to 31.03.2006 which could not have been granted by the member, Board of Revenue in exercise of powers under section 39 of Bihar Excise Act, 1915.

- vii. There is no dispute that the licence was being granted every year subject to renewal although the block period was of three years.
- viii. It has been submitted that the grant was for a period of 3 years and accordingly the 3 years was yet to expire therefore, the petition under Section 39 was maintainable and only licence was to be renewed from time to time.
- ix. In view of the clear provision that the license was for a period of 1 year only, the stand taken by the respondents is not sustainable even if the grant was for the period of 3 years because the grant was to be renewed after fulfillment of certain condition. Moreover, Section 39 empowers for remission of license fee only for the remaining period of the grant. so if at all this argument of the respondent is taken to be correct then also the remaining period of the grant would have commenced from 01.04.2006 to 31.03.2007 and not a period prior to 01.04.2006 for which application for remission was made.
- x. Accordingly, the petition for remission/reduction of licence fee filed by the respondent no. 2 under Section 39 of Bihar Excise Act, 1915 before the Member, Board of Revenue was not maintainable before the Member, Board of Revenue.

- xi. Thus this court finds that the order impugned is wholly without jurisdiction and is fit to be set-aside.

This point is decided in favour of the petitioner and against the respondent no 2.

b. On the point of the claim of the respondent no. 2 on the merits of the case.

- i. Admittedly the respondent no.2 has no fundamental right to trade in liquor and they are to be governed by provisions of the Act, Rules, License and other condition of auction of the liquor vendor. The sale notice has been brought on record by the writ petitioner, Clause-20 thereof reads as under:-

देशी शराब अनुज्ञप्तियों के निलामक्रेता को बंदोबस्ती के उपरांत उपायुक्त को न्यूनतम प्रत्याभूत मात्रा का मासिक वितरण विवरणी प्रस्तुत करना होगा। उपायुक्त निलामक्रेता द्वारा प्रस्तुत की गयी मासिक वितरण विवरणी के पुनरीक्षण के लिए सक्षम होंगे और उनका निर्णय अंतिम होगा। निलामक्रेता देशी शराब की आपूर्ति के लिए अपनी साप्ताहिक मांग एवं आपूर्ति लेने का कार्यक्रम भन्डागार पदाधिकारी एवं ठेकेदार को पिछले माह के अंतिम सप्ताह तक दे देगा और तदनुसार प्रत्येक सप्ताह में आपूर्ति लेगा। यदि निलामक्रेता द्वारा उक्त रीति से देशी शराब की न्यूनतम प्रत्याभूत मात्रा के अनुरूप आपूर्ति लेने के लिए अग्रिम साप्ताहिक मांग की वितरण विवरणी प्रस्तुत नहीं की जाती है तो वैसी स्थिति में देशी शराब की आपूर्ति बाधित होने पर वह किसी प्रकार की क्षतिपूर्ति अथवा अनुज्ञा शुल्क की वापसी का हकदार नहीं होगा।

मदिरा की अनापूर्ति की दशा में न तो सरकार द्वारा किसी प्रकार की क्षतिपूर्ति दी जायेगी और न अनुज्ञा शुल्क में छूट का कोई दावा स्वीकार किया जायेगा।

- ii. From the perusal of Clause-20 of the sale notice, it appears that after the grant of license the licensees are required to submit the requisition for monthly lifting program of the

liquor and it is submitted that at the time of submitting the monthly lifting program it is the minimum quantity of liquor which is required to be given as per the minimum guaranteed quota (MGQ) and this was to be filed before the wholesale supplier as well as before the authority under the Bihar Excise Act, 1915 who was supposed to approve the same.

- iii. It has also been provided that in case of non-supply as per the monthly program or in case of non-supply for any other reason the licensee would not be entitled for any remission or compensation/damages in the license fee.
- iv. From the perusal of Clause-20 (Ka) of the sale notice with particular reference to sub-para to Clause-20 (Ka) there is a clear provision that in case of non-supply of liquor the licensee will not be entitled to any compensation or remission in the license fee.
- v. This sub-para of Clause-20 (Ka) of the sale notice has not been considered by the Member, Board of Revenue in the impugned order who has held that this Clause denies compensation if the retailer does not submit his monthly lifting program. The Member, Board of Revenue was of the view that as neither the liquor was available nor the price at which it could be lifted was fixed, therefore, there was no occasion to submit the monthly liquor program and thus held that the respondent no. 2 was entitled to remission/reduction of licence fee. While taking this view, the member Board of Revenue completely ignored sub-para of Clause-20 (Ka) of the sale notice where there is a clear provision that in case of non supply of liquor the licensee will not be entitled to any compensation or remission in the license fee.

- vi. From the perusal of the impugned order as well as from the perusal of the records, it is clear that no details of submitting monthly lifting program has been given and no grievance has been raised in connection with alleged non supply and the respondent no. 2 applied for remission under section 39 of Bihar Excise Act, 1915 on the last date of the licence under section 39 of Bihar Excise Act, 1915 when the said petition was itself not maintainable as there was no remaining portion of the grant/licence.
- vii. There is nothing on record to suggest that the respondent no.2 had submitted the monthly lifting program and in spite of that the wholesale supply was not made to them or the State could not provide them liquor.
- viii. In fact the respondent no.1 in another order dated 24.04.2006, which is a part of the writ petition, has specifically recorded that last paragraph of 20 (Ka) clearly stipulates that no claim for remission would lie in the event of non-supply and same authority while passing the impugned order has omitted to consider the very same sub- para of clause 20 (Ka) of the sale notice.
- ix. The counsel for the respondent no. 2 has heavily relied upon the judgment reported in reported in (2003) 8 SCC 270 being judgment passed in Civil Appeal No. 4673 of 1997 which has been relied upon by the member board of revenue to grant relief to the respondent no. 2.
- x. From the perusal of the judgment reported in (2003) 8 SCC 270 it appears that the said judgment was delivered in the context of remission/damages for closure of shops under the orders issued under Section 59 of U.P Excise Act, 1910 and the said case was decided on the interpretation of the various provisions which permitted

remission for the closure of the shops as provided under the U.P Excise Act, 1910, rules framed thereunder, and as per the various circulars issued by the State Government as contained in the U.P Excise manual.

- xi. The counsel for the respondent no.2 has failed to point out any provision of law which empowered any authority under the Bihar Excise Act, 1915, rules framed thereunder or from the Bihar Excise Manual containing all instructions and circulars enabling the respondent no. 2 to get remission in the facts and circumstances of this case except the provision of Section 39 of the Bihar Excise Act, 1915.
- xii. As held aforesaid the provisions of Section 39 of Bihar Excise Act 1915 is not at all applicable to the facts and circumstances of this case and accordingly there is no provision under the provision of Bihar Excise Act and rules framed thereunder to grant remission for the period of non-supply that too after expiry of the period of the licence. On the contrary, there is a specific provision under the sale notification in this case that in case of non-supply no claim for remission will be entertained. The parties have entered into contract and they are bound by the terms and conditions of the contract. Even the licence granted to the respondent no.2 refers to the terms and conditions of the sale notification and it is nobody's case that the terms and conditions of the sale notification including Clause-20 (Ka) is not binding on the parties.
- xiii. The respondent no. 2 has not invoked writ jurisdiction of this court to claim remission irrespective of the provisions of the Bihar Excise Act 1915 or the rules framed thereunder rather they invoked the jurisdiction of the statutory authority under Section 39 of the Act and

according to them the said authority was empowered to grant remission to them under the facts and circumstances of case. This court has already held above that the petition filed by the respondent no.2 before the Member, Board of Revenue under Section 39 of the Act was itself not maintainable.

- xiv. Therefore the judgment reported in **(2003) 8 SCC 270** does not help the respondent no. 2 in any manner whatsoever, and the reliance on this judgment by the Member, Board of Revenue without referring to the corresponding provisions under the provisions of Bihar Excise Act and the rules framed thereunder is wholly misplaced.
- xv. So far as the judgment passed in the case reported in AIR 1959 Gauhati 75 is concerned, the counsel for the petitioner has referred to this three judges bench judgment and has referred only to the minority view taken by the 3 judges bench to submit that under similar circumstances it has been held by the Hon'ble High Court of Gauhati that in case of non-supply, the contract itself is frustrated. So far as majority view of the judgment is concerned it did not find favour with the point raised by the petitioner and the appeals were dismissed by the majority view of other two judges.
- xvi. The doctrine of frustration of contract would not apply to the facts and circumstances of this case when the respondent no. 2 with their open eyes have accepted the terms and conditions of the sale that there would be no remission on account of non supply for whatsoever reason it may be, as mention in second paragraph of Clause-20 (Ka) of the sale notice.
- xvii. It has been held in (1983) 2 SCC 503 that the licencees who participate in auction voluntarily in the case of liquor

vend do so with full knowledge and are bound by the bargain.

xviii. Thus Court finds that the respondent no. 2 has no case in their favour on the merits also and in fact the impugned order passed by the Member Board of Revenue is incorrect as well as perverse and is accordingly fit to be set aside.

xix. This point is decided in favour of the petitioner and against the respondent no 2.

c. **ON THE POINT RAISED BY THE RESPONDENT No. -2**
THAT IN ABSENCE OF ANY SALE NO LICENCE FEE
CAN BE REALISED AS LICENCE FEE IS NOTHING
BUT REALISATION OF EXCISE DUTY

i. In the judgment passed by Hon'ble Supreme court in the case of Nashirwar and others Vs. State of Madhya Pradesh and Ors. reported in (1975) 1 SCC 29 it has been held in para 23 and 35 as follows:-

23. There are three principal reasons to hold that there is no fundamental right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise law shows that the State has the exclusive right or privilege of manufacture or sale of liquor.

35. Trade in liquor has historically stood on a different footing from other trades. Restrictions which are not permissible with other trades are lawful and reasonable so far as the trade in liquor is concerned. That is why even prohibition of the trade in

liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of the liquor. The State possesses the right of complete control over all aspects of intoxicants viz. manufacture, collection, sale and consumption. The State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. That is the view of this Court in Bharucha case and Jaiswal case. The nature of the trade is such that the State confers the right to vend liquor by farming out either in auction or on private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government.

- ii. In Panna Lal and Others Vs. State of Rajasthan and Others reported in (1975) 2 SCC 633 ***the Hon'ble Supreme court has held as follows:-***

“20. The license fee stipulated to be paid by the appellants is the price or consideration or rental which the Government charges from the licensees for parting with its privilege in stipulated lump sum payment and is a normal incident of a trading or business transaction. This Court in the recent decision in Nashirwar v. State of M.P. and the unreported decision dated January 21, 1975 in Civil Appeal No. 365 of 1969 Har Shanker v. Deputy Excise and Taxation Commissioner held that the State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. The nature of the trade is such that the State confers the right to vend liquor by farming out either by auction or by private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government.

21. The licenses in the present case are contracts between the parties. The licensees voluntarily accepted the contracts. "They fully exploited to their advantage the contracts to the exclusion of others. The High Court rightly said that it was not open to the appellants to resile from the contracts on the ground that the terms of payment were onerous. The reasons given by the High Court were that the licensees accepted the license by excluding their competitors and it would not be open to the licensees to challenge the terms either on the ground of inconvenient consequence of terms or of harshness of terms.

26. The decisions of this Court establish that the lump sum amount voluntarily agreed to by the appellants to pay to the State are not levies of excise duty but are in the nature of lease money or rental or lump sum amount for the exclusive privilege of retail sales granted by the States to the appellants."

iii. In *Thakur Prasad Sao and Others Vs. The Member, Board of Revenue and Others* reported in **(1976) 2 SCC 850** the Hon'ble Supreme court has rejected the plea of "quid pro quo" in connection with realisation of licence fee for liquor vend.

iv. In *State of Haryana and Others Vs. Jag Ram and Others* reported in **(1980) 3 SCC 599** it has been held as follows:-

"22. On this consideration also, apart from the validity of the preliminary objection, the respondents' writ petition is liable to fail. The amount which the respondents agreed to pay to the State Government under the terms of the auction is neither a fee properly so called which would require the existence of a quid pro quo, nor indeed is the amount in the nature of excise duty, which by reason of the constitutional constraints has to be primarily a duty on the production or manufacture of goods produced or manufactured within the country. The respondents cannot therefore complain that they are being asked to pay

“excise duty” or “still-head duty” on quota of liquor not taken, lifted or purchased by them. The respondents agreed to pay a certain sum under the terms of the auction and the Rules only prescribe a convenient mode whereby their liability was spread over the entire year by splitting it up into fortnightly instalments. The Rules might as well have provided for payment of a lump sum and the very issuance of the licence could have been made to depend on the payment of such sum. If it could not be argued in that event that the lump sum payment represented excise duty, it cannot be so argued in the present event merely because the quota for which the respondents gave their bid is required to be multiplied by a certain figure per proof litre and further because the respondents were given the facility of paying the amount by instalments while lifting the quota from time to time. What the respondents agreed to pay was the price of a privilege which the State parted with in their favour. They cannot therefore avoid their liability by contending that the payment which they were called upon to make is truly in the nature of excise duty and that no such duty can be imposed on liquor not lifted or purchased by them.

23. *In Panna Lal v. State of Rajasthan it was held by this Court that the licence fee stipulated to be paid by the licensees was the price or consideration or rental which the Government charged them for parting with its privilege and that it was a normal incident of trading or business transaction. It is true that the court also said that no excise duty could be collected on undrawn liquor but it held that while enforcing the payment of the guaranteed sum or the stipulated sum mentioned in the licences, the Government was not seeking to levy or recover excise duty on undrawn liquor. In the instant case too, what the Government is trying to recover from the respondents is in essence the price of the privilege with which it has parted in their favour and not excise duty on undrawn liquor.”*

- v. In view of the aforesaid judicial pronouncements this court is of the considered view that the plea raised by the respondent no. 2 that the licence fee is nothing but excise duty and in absence of any sale the same cannot be realised , is fit to be rejected.
 - vi. So far as the judgment passed in the case reported in **AIR 1959 Gauhati 75** is concerned, the counsel for the petitioner has referred to this three judges bench judgment and has referred only to the minority view taken by the 3 judges bench to submit that under similar circumstances it has been held by the Hon'ble High Court of Gauhati that in case of non-supply, the contract itself is frustrated. So far as majority view of the judgment is concerned it did not find favour with the point raised by the petitioner and the appeals were dismissed by the majority view of other two judges.
 - vii. The doctrine of frustration of contract would not apply to the facts and circumstances of this case when the respondent no. 2 with their open eyes have accepted the terms and conditions of the sale that there would be no remission on account of non-supply for whatsoever reason it may be, as mention in second paragraph of Clause-20 (Ka) of the sale notice.
 - viii. It has been held in **(1983) 2 SCC 503** that the licencees who participate in auction voluntarily in the case of liquor vend do so with full knowledge and are bound by the bargain.
 - ix. This point is decided in favour of the petitioner and against the respondent no 2.
10. In view of the aforesaid the writ petition is allowed.
11. Before concluding it is relevant to mention here that vide order dated 06.04.2007 the following interim order was passed :-

“In view of the fact that the Board of Revenue, Jharkhand, Ranchi has granted remission, it would be appropriate to make some interim arrangements. Private respondents through their partners/Directors shall furnish the lists of their respective immovable properties with the Registrar of this Court and also file their respective undertakings that they will not transfer/alienate their immovable properties in any manner till the disposal of these writ applications. The aforesaid undertakings and the list of the immovable properties be filed within a period of four weeks. If the undertakings are not filed, as above, there shall be deemed stay of the impugned orders passed by the Board of Revenue. “

12.It has been submitted by the counsel for the respondent no. 2 that the said interim order dated 06.04.2007 was duly complied and the respondent no. 2 in various case submitted the details of properties which they had undertaken not to transfer or alienate in any manner during the pendency of the writ petition except in the case being W.P.(C). No. 944 of 2007. The details are as under :-

S.no	Writ petition number	DETAILS OF PROPERTIES AS PER UNDERTAKING FILED IN THIS COURT PURSUANT TO ORDER DATED 06.04.2007			
1	W.P.(C). No.943 of 2007	Sl.	Land/House	Location	Area
		a.	House (Residential)	B-17 Ashok Vihar Colony	1500 Sq. ft.
		b.	House (Residential)	B-18 Ashok Vihar Colony	1500 Sq. ft.
		c.	Agriculture Land	Banmore Morena	50 Beega
2	W.P.(C). No.944 of 2007	NO DETAILS OF THE PROPERTY FOUND ON RECORD			
3	W.P.(C). No. 945 of 2007	Sl.	Land/House	Location	Area
		a.	Plot	City Centre Gwalior	11125 Sq Feet
		b.	Agriculture Land	Purani Chabni Gwalior	2 Bigga 8 Biswa
4	W.P.(C). No. 948 of 2007	a. Further it is stated that this company does not hold any assets in the form of immovable Property.			

5	W.P.(C). No. 949 of 2007	Sl.	Land/House	Location			Area		
		a.	House (Residential)	B-17 Ashok Vihar Colony			1500 Sq. ft.		
		b.	House (Residential)	B-18 Ashok Vihar Colony			1500 Sq. ft.		
		c.	Agriculture Land	Banmore Morena			50 Beega		
6	W.P.(C). No. 950 of 2007	Sl.	Land/House	Location			Area		
		a.	House (Residential)	B-17 Ashok Vihar Colony			1500 Sq. ft.		
		b.	House (Residential)	B-18 Ashok Vihar Colony			1500 Sq. ft.		
		c.	Agriculture Land	Banmore Morena			50 Beega		
7	W.P.(C). No. 951 of 2007	Sl.	Land/House	Location			Area		
		a.	House (Residential)	B-17 Ashok Vihar Colony			1500 Sq. ft.		
		b.	House (Residential)	B-18 Ashok Vihar Colony			1500 Sq. ft.		
		c.	Agriculture Land	Banmore Morena			50 Beega		
8	W.P.(C). No. 955 of 2007	a. Mihijam 856/J/7 P.S. Jamtara District- Jamtara 8.25 Decimil (House) Plot No. 856/J/7, Kelahi Road, P.O. & P.S.- Mihijam, Dirstric Jamtara							
9	W.P.(C). No. 956 of 2007	S. No	Mouza	Plote NO.	Circle	P.O & P.S	Dist.	Area in Decimil	
		a.	Lakhikundi	92/3	Kumrabad	Muffsil Dumka	Dumka	11.91	
		b.	Lakhikundi	92/4	Kumrabad	Muffsil Dumka	Dumka	29.35	
		c.	Lakhikundi	92/5	Kumrabad	Muffsil Dumka	Dumka	11.91	
		d.	Lakhikundi	92/6	Kumrabad	Muffsil Dumka	Dumka	29.35	
10	W.P.(C). No. 957 of 2007	a. Surja Tilveni Appartment, Flot No. T/2, New Patliputra Coloney, Patna							
11	W.P.(C). No. 959 of 2007	Sl.	Land/House	Location			Area		
		a.	House (Residential)	B-17 Ashok Vihar Colony			1500 Sq. ft.		
		b.	House (Residential)	B-18 Ashok Vihar Colony			1500 Sq. ft.		
		c.	Agriculture Land	Banmore Morena			50 Beega		

13. Accordingly the petitioner may calculate the amount payable by the respondent no. 2 and raise a demand upon the

respondent no. 2 and in turn the respondent no. 2 is directed to pay the demand within a period of 4 weeks from the date of receipt of the demand failing which the petitioner will be at liberty to realize the same from the respondent no. 2 in accordance with law. It is further directed that till the respondent no. 2 clears the dues of the petitioner arising out of this judgment they shall not transfer/alienate the aforesaid immoveable properties as mentioned in their aforesaid undertaking filed before this court and it will be open to the petitioner to realize the dues from the concerned respondent no. 2 by all methods including from the aforesaid immoveable properties of the concerned respondent no. 2 of each case in accordance with law.

14. All the writ petitions are allowed with aforesaid observations and directions.

(Anubha Rawat Choudhary, J.)