A

THAKUR PRASAD SAO ETC.

v.

THE MEMBER, BOARD OF REVENUE & ORS.

December 18, 1975

[A. N. RAY, C.J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL, JJ.]

B

Bihar & Orissa Excise Act 1915—*Ss.* 22 *and* 30—*Licence granted under s.* 22 *an exclusive privilege—Inability to open liquor shop—If entitled to refund of fees—Incurring loss—If a ground for reduction of fees—If refund should be granted if quid pro quo is absent.*

Under the Bihar & Orissa Excise Act the holder of an outstill licence for country liquor pays a certain sum per mensem for manufacturing country spirit in his outstill and selling it by retail in his premises. No definite area is fixed C within which each outstill has the monopoly to supply country spirit but their number is regulated according to rules and five miles is taken as the minimum distance between one outstill and another.

The appellants in all the appeals were the holders of licences for the manufacturing and sale of country liquor. In the first batch of cases the appellant could not open the outsill even after more than six months of its grant despite his best efforts. The approval for opening the outstill was withdrawn and he D was asked to pay the monthly licence fee according to the terms of licence. The appellant's claim for refund of the money deposited by him, together with compensation for loss of anticipated profits and damages, was rejected. Despite this, the appellant continued to bid for licences during the subsequent three years and claimed refund and damages, which claim was rejected by the authorities. In the second batch of appeals the appellants claimed reduction of the licence fee for outstill liquor shops on the ground that they incurred losses because of the speculative bids at the auction should have been prevented by the authorities. In the third batch of cases the appellants claimed refund of sums realised from E them on the ground that there was no *quid pro quo* for the fees. In all the cases the High Court dismissed their writ petitions.

On appeal it was contended that the High Court was wrong in holding that exclusive privilege had been granted under s. 22 of the Bihar & Orissa Excise Act, 1915 but that the licences fell within the purview of s. 30 of the Act.

Dismissing the appeals,

F HELD : (1) It is futile to contend that the licences were merely licences for the retail sale of spirit for consumption on the vendor's premises within the meaning of s. 30 of the Act. The essential feature of the outstill system is that the holder of a licence acquires the right to manufacture country spirit in his outstill and sell it by retail "in his premises" without any restriction on the strength or prices at which the spirit is manufactured or sold. He has a monopoly of manufacturing and supplying country liquor within his area. The right is, therefore, an exclusive privilege within the meaning of s. 22(1)(d) of the G Act. [38A—C]

(2) The licences of the appellants remained in force for the purposes for which they were granted and by virtue of the express provisions of s. 45 they could have no claim to compensation. [38 G]

(3) Even though the High Court has held that what was granted was an exclusive privilege under s. 22, it did not notice s. 44(2) while taking the view that the petitioner was at liberty to surrender the licence. Section 44(2) clearly provides that sub-s. (1) of that section shall not apply in the case of a licence H for the sale of any country liquor in exercise of an exclusive privilege granted under s. 22(c). [38 F—G]

(4) There is nothing wrong in the view taken by the High Court that the responsibility for finding a suitable site was that of the appellant. There is no

justification for the argument that nothing was payable by the appellant because he could not locate the shop in spite of his best efforts. The appellants retained the licence all through and continued to make higher bids at the subsequent public auctions thereby preventing others from undertaking the responsibility of establishing the outstills. [40 B—D]

(5) It was permissible for the State to frame rules for the grant of licences on payment of fees fixed by auction, for that was only a mode or medium for ascertaining the best price for the grant of exclusive privilege of manufacturing and selling liquor. [41 A—B]

Nashirwar etc. v. *State of Madhya Pradesh & Ors.* [1975] 2 SCR 861 and *Har Shankar & Ors. etc.* v. *The Deputy Excise & Taxation Commissioner & Ors. etc.*, [1975] 3 SCR 254 explained.

(6) In the second group of appeals, there is nothing in the rules which could be said to give rise to a right in favour of the appellants for reduction of the amounts demanded from them. [43 A—B]

(7) In the third group of appeals the High Court was right in holding that the amounts in question were payable for the licence which had been granted for the exclusive privilege. The argument that there should be refund of fees because there was no *quid pro quo* is no longer available to the appellants in view of this Court's decision in *Nashirwar's* case and *Har Shankar's* case. [43 C—D]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 819—823 of 1975.

From the Judgment and order dated 15-3-1975 of the Patna High Court in Civil Writ Nos. 1184 of 1974.

AND

CIVIL APPEALS NOS. 824—827 *and* 1105 *of* 1975.

From the Judgment and order dated 2-1-1973 of the Patna High Court in Civil Writ P.C. Nos. 1239 to 1242 of 1971 and 1532/73 respectively.

Basudeo Prasad (In CAs. 819—827/75) for the Appellants (in all the appeals).

Balbhadra Prasad, A. G. Bihar (In Cas. 819—823), *U. P. Singh* for Respondents (In all the appeals).

The Judgment of the Court was delivered by—

SHINGHAL, J.,—These ten appeals against two judgments of the High Court of Judicature at Patna raise some common questions of law. They have been argued together, and we shall examine them in this common judgment. Civil Appeals Nos. 824—827 of 1975 arise out of a common judgment dated January 2, 1975 in a bunch of civil writ petitions; Civil Appeals Nos. 819—823 of 1975 arise out of a common judgment dated March 15, 1975 in another bunch of civil writ petitions; while Civil Appeal No. 1105 of 1975 is directed against the aforesaid judgment dated January 2, 1975 by which the civil writ petition giving rise to it was also disposed of by the High Court along with the other petitions. Certificates of fitness have been granted for all the appeals. There is no controversy in regard to some of the basic facts and they are quite sufficient for the disposal of the appeals.

A sale notice was published by the authorities concerned for the auction of licences to open country liquor shops in Singhbhum district with effect from April 1, 1966, including an outstill shop at Bhirbhania. Appellant Ayodhya Prasad gave the highest bid which was knocked down in his favour, and he deposited two months' licence fee in advance at the rate of Rs. 3,650/- per month. He applied on March 22, 1966 to the Kolhan Superintendent of Singhbhum to settle a piece of land for establishing an outstill shop at Bharbharia, but the application was rejected on September 27, 1966 because of the objection raised by some members of the District Consultative Committee. The villagers of Bharbharia also opposed the opening of the outstill shop. The shop could not therefore be established there. The appellant however obtained a piece of land in village Chittimitti and applied on July 30, 1966 for permission to open the outstill shop there. This was allowed and the appellant claimed that he began to collect the necessary material but a mob forcibly removed the building and the distillation material. He filed a report with the Police about the incident. The approval for opening the outstill shop at Chittimitti was however withdrawn on October 6, 1966 and the appellant was asked to pay the monthly licence fee for the period April 1, 1966 to January, 1967. He denied his liability to pay the fee and claimed a refund of the money which had been deposited by him. His case was recommended by the Collector for remittance of the licence fee amounting to Rs. 43,800/- for the entire year 1966-67. He also made an application to the Commissioner of Excise for refund of the deposit of Rs. 7,300/- and for payment of compensation for loss of anticipated profits and damages, but the application was rejected. It appears that the appellant went on bidding at the bids for the subsequent three years, and laid similar claims for refund and damages, but to no avail. He then filed the bunch of writ petitions referred to above for quashing the demand notices, but they have been dismissed as aforesaid by the High Court's judgment dated January 2, 1975. Civil Appeal No. 825 relates to the bid for 1966-67, Civil Appeal No. 824 relates to the bid for 1967-68, while Civil Appeals Nos. 826 and 827 relate to the bids for 1968-69 and 1969-70. These may be said to be group 'A' appeals.

Civil Appeals Nos. 819—823 of 1975 relate to the applications of appellants Thakur Prasad Sao and others for reduction of the licence fees for outstill liquor shops at Gua, Noamandi, Kiriburu, Andheri, Goiekara, Patajai and Dangusposi for 1974-75. In these cases the licensees were T. P. Sao or his relations or employees. They claimed that they incurred a loss of Rs. 55,874.79 at Gua, of Rs. 26,651.45 at Noamandi, of Rs. 39,389.53 at Kiriburu of Rs. 35,169.40 at Andheri, of Rs. 11,649.87 at Goekera, of Rs. 11,705.95 at Patajai and of Rs. 11,657.21 at Dengusposi.

The appellants claimed that there was rivalry and enmity with Bishwanath Prasad and his brother who made speculative bids at the auction, as a result of which the outstill shops were settled for uneconomic amounts. Their grievance was that the Deputy Commissioner did not discharge his duty of refusing to allow the manifestly speculative bids although the percentage of increase in the licence fees ranged between

24 to 130 per cent when for other shops the increase was below 12 per cent. The appellants filed application under section 39 of the Bihar and Orissa Excise Act, 1915, hereinafter referred to as the Act, for reduction of the fees for the year 1974-75, but they were rejected by the Board of Revenue. They then filed the aforesaid writ petitions in the High Court and have now filed the present appeals because the petitions have been dismissed by the High Court's impugned judgment dated March 15, 1975. These will be referred to as group 'B' appeals.

As has been stated, the remaining Civil Appeal No. 1105 of 1975 is also directed against the High Court's common judgment dated January 2, 1975. It relates to the grant of a licence to the appellant for establishing outstill shops at Mahuadom, Barahi, Asnair, Aksi and Kabri, in Palamau district. The appellant applied for a direction for the refund of Rs. 2,71,340/- which had already been realised from him, and for restraining the realisation of a further sum of Rs. 1,40,680/- on the ground that there was no *quid pro quo* for the fee, but without success. The High Court has taken the view that the amounts in question were not due on account of fees, but were payable for leases of the exclusive privileges which had been granted to the appellant in respect of the outstills.

It is in these circumstances that these appeals have come up for consideration before us.

As has been stated, the controversy in these appeals relates to the grant of licences for establishing outstill shops which are also known as "jalti bhattis". That system has been described in paragraph 253 of the Bihar and Orissa Excise Manual, Volume III, hereinafter referred to as the Manual, as follows :—

> "By this system a certain number of stills for the manufacture of country spirit are allowed within a certain area. The holder of an outstill licence pays a certain sum per mensem for manufacturing country spirit in his outstill and selling it by retail on his premises. No attempt is made to regulate the strengths or the prices at which spirit is manufactured or sold."

It has been stated in paragraphs 254 and 255 of the Manual that no definite area is fixed within which each outstill has the "monopoly of supply of country spirit", but their number is regulated according to rules, and five miles is taken roughly as the minimum distance of one outstill from another.

It has been argued on behalf of the appellants that what was granted to them was not the exclusive privilege of manufacturing and selling country liquor in retail, in the areas for which the licences were granted, and that the High Court erred in holding that such an exclusive privilege had been granted under section 22 of the Act. It has been urged that the licences in question fell within the purview of section 30 of the Act.

A We have described the essential features of the outstill system, and there can be no doubt that the holder of a licence under the system acquires the right to manufacture country spirit in his outstill and sell it by retail "in his premises" without any restriction on the strength or price at which the spirit is manufactured or sold. Moreover he has the monopoly of manufacturing and supplying country liquor within his area. The right is therefore clearly an exclusive privilege within B the meaning of section 22(1)(d) of the Act and it is futile to contend that the licences in question were merely licences for the retail sale of spirit for consumption on the vendor's premises within the meaning of section 30 of the Act. The High Court was therefore quite correct in taking that view.

C It may be mentioned that the appellants have not produced their licences in support of the contention that exclusive privilege of the nature referred to above was not granted to them even though the licences were for establishing outstills in the area covered by them. It is however not disputed that the licences were granted in Form 30 (Volume II, Part I, Bihar and Orissa Excise Manual) on the condition that the appellants would pay to the government, in advance, the D monthly fee mentioned therein. It is nobody's case that the licences were cancelled or suspended under section 42 of the Act for any of the reasons mentioned in the section, or that the licences were withdrawn under section 43 so as to entitle the appellants to remission of the fee payable in respect of them or to payment of compensation in addition to such remission, or to refund of the fee paid in advance. It is also not the case of the appellants that they surrendered their licences E within the meaning of sub-section (1) of section 44 so as to justify the remittance of the fee payable by them, or paid by them in advance. In fact it has clearly been provided in sub-section (2) of section 44 that the provisions of sub-section (1) 'shall not apply in the case of a licence for the sale of any country liquor in the exercise of an exclusive privilege granted under section 22. It is true that in its judgment under appeal (in Civil Appeals Nos. 824—827 of 1975) the High F Court has observed that the petitioner before it was at liberty to surrender the license, but it appears that in taking that view it did not notice sub-section (2) of section 44 even though it had held that what was granted was an exclusive privilege under section 22. The licences of the appellants therefore remained in force for the periods for which they were granted and, by virtue of the express provisions of section 45, they could have no claim to compensation.

G In such a situation, counsel for the appellants have placed considerable reliance on paragraph 121 of the Manual and have argued that the High Court erred in taking the view that the instructions contained in it had no statutory force and its benefit was not available to the appellants. Reliance in this connection has been placed on *Sukhdev Singh and others* v. *Bhagatram Sardar Singh Raghuvanshi and an-*H *other*(1), *Laljee Dubey and others* v. *Union of India and others*(2) *Union of India* v. *K. P. Joseph and others*(3).

(1) [1975] 3 S.C.R. 619. (2) [1974 2 S.C.R. 249.

(3) [1973] 2 S.C.R. 75.

Paragraph 121 of the Manual states, *inter alia,* that a person whose bid has been accepted by the presiding officer at the auction must pay the sum required on account of advance fee immediately. It states further that the purchaser would be liable for any loss that may accrue to government in case it becomes necessary to resell the shops for a lower sum in consequence of his failure to pay the sum at the time of the sale. Then there is the following sub-paragraph on which reliance has been placed by counsel for the appellants :

> "Deposits will be returned to a person to whom a licence may be subsequently refused because the Magistrate declines to grant him a certificate, or because he is unable to obtain suitable premises and satisfies the Collector that he has made *bona fide* endeavour to secure such or if a licence be refused for any other adequate reason."

It would thus appear that the sub-paragraph deals with the "deposits" made immediately on account of advance fees, the consequences of the failures to make such payment and the return of those "deposits" to the person to whom the licence may subsequently be refused because (i) the Magistrate declines to grant him a certificate or because he is unable to obtain suitable premises in spite of his *bona fide* endeavours or (ii) for any other adequate reason. But it was not the case of the appellants that the licences were "subsequently refused" to them for any reason whatsoever. So even if it were assumed, for the sake of argument, that the instructions contained in paragraph 121 were binding on the authorities concerned, that would not matter for purposes of the present controversy as it does not relate to refund of the deposits referred to in paragraph 121. In this view of the matter, it is not necessary for us to examine here the larger question whether the instructions contained in the Manual were made under any provision of the law and created any rights in favour of persons whose bids were accepted at public auctions of the shops. It may be mentioned that counsel for the appellants have not been able to refer to any other provision of the law under which the appellants could claim remission of the price or the consideration for the exclusive privilege of manufacturing and selling country liquor.

It has however been argued that as appellant Ayodhya Prasad did not succeed in locating the outstill shop at Bharbharia in spite of his best efforts, and he was also not successful in locating it at Chittimitti, he was not liable to pay the fee. It has been pointed that even the approval for locating the shop at Chitimitti was withdrawn by the Superintendent of Excise on October 6, 1966, and Ayodhya Prasad's case for remitting the sum of Rs. 43,800/- was recommended by the Deputy Commissioner of Singhbhum on May 3, 1967 on the ground that he could not open the shop for reasons beyond his control. It has therefore been urged that there was no lack of *bona fides* on the part of the appellant and it was a matter of no consequence that he did not surrender his licence.

It will be recalled that it was an incident of the outstill system that the holder of an outstill licence was allowed to manufacture country

spirit within a "certain area" and he paid a certain sum of money per mensem for manufacturing country spirit in his outstill and "selling it by retail on his premises". It was therefore permissible for appellant Ayodhya Prasad to locate the shop at Bharbharia or at some other suitable place within his area, with the permission of the Collector. The notice which had been issued for the public auction is on the record and condition No. 5 thereof expressly states that the department would not be responsible for providing the place for the location of the outstill. Moreover it was expressly stated that the outstill at Bharbharia would be settled purely as a temporary measure on condition that an undisputed site was made available for it. There is therefore nothing wrong with the view taken by the High Court that the responsibility for finding a suitable site was of the appellant, and there is no justification for the argument that nothing was payable by him because he could not locate the shop in spite of his best efforts. It may be that the Deputy Commissioner recommended his case for remission, but that would not matter when the appellant was liable to pay the money under the law governing his licence. The appellant in fact retained the licence all through and continued to make the highest bids at the subsequent public auctions for the years 1967-68, 1968-69 and 1969-70 and thereby prevented others from undertaking the responsibility of establishing the outstill and paying the price admissible to the department. As has been stated, the approval for opening the outstill shop at Chittimitti, was withdrawn on October 6, 1966, and the demand for the licence fee was made on January 9, 1967. Even so, the appellant did not take any action to save himself from any such liability in the future and, on the other hand, went on making the highest bids in the subsequent years and incurring similar liability to pay the price even though he was not able to establish his outstill anywhere in any year. It is therefore difficult to reject the contention in the affidavit of the respondents that there must have been some other reason for him to do so, particularly as the location of his shop was to be on the border of the State.

It has also been contended that the High Court erred in holding that the State Government had the power to require the appellants to pay the amounts under demand as they represented consideration for the contracts. It has been argued that this Court's decision in *Nashirwar etc.* v. *State of Madhya Pradesh and others*(1) and *Har Shankar and others etc.* v. *The Deputy Excise and Taxation Commissioner and others etc.*(2) related to the Excise laws of other States and did not bear on the present controversy. The argument is however futile for we have given our reasons for holding that what was granted to the appellants was the exclusive privilege of manufacturing and selling country liquor within the meaning of section 22(1)(d) of the Act, and it has been expressly provided in section 29 that it would be permissible for the State Government to accept payment of a sum in "consideration" of the exclusive privilege under section 22. The decisions of this Court in *Nashirwar's* case and *Har Shankar's* case have set any controversy in

(1) [1975] 2 S.C.R. 861. (2) [1975] 3 S.C.R. 254.

this respect at rest, so that it is well settled that as the State has the exclusive right and privilege of manufacturing and selling liquor, it has the power to hold a public auction for the grant of such a right or privilege and to accept the payment of a sum therefor. It was therefore permissible for the State to frame rules for the grant of licences on payment of fees fixed by auction, for that was only a mode or medium for ascertaining the best price for the grant of the exclusive privilege of manufacturing and selling liquor.

As has been stated, Group 'B' appeals relate to the claim for reduction of the licence fees for the liquor shops concerned. It has been argued by counsel for the appellants that as the Collector did not discharge his duty under the instructions contained in paragraph 130 read with paragraph 93 of the Regulations, the Board acted arbitrarily in refusing the order reduction of the amounts of the fees which were the subject-matter of the demands under challenge. It has been urged that the bids were highly speculative and should have been reduced.

It has been strenuously argued on behalf of the respondent State of Bihar that the instructions contained in the Regulations were not issued under any provision of the law and could not give rise to any right in favour of the appellants. Reference in this connection has been made to M/s *Raman and Raman Ltd.* v. *The State of Madras and others*(1) and *R. Abdulla Rowther* v. *The State Transport Appellate Tribunal, Madras and others*(2). It has been pointed out that there are three volumes of the Bihar and Orissa Excise Manual, 1919. It has been stated in the preface to Volume I that it is complete in itself and contains the whole of the law and the rules which have the force of law "relating to excise opium." Volume II contains the "whole of the law and the rules which have the force of law relating to excisable articles other than opium." It has been stated in the preface to Volume III that it consists of the Board's "instructions with regard to excisable articles other than opium" and that references have been made to the Government Rules and the Board's Rules having the force of law. There is however no such reference to any rule in regard to instructions Nos. 130 and 93. But quite apart from the question whether these instructions were legally enforceable, we have examined the question whether they could justify the argument that the appellants were entitled to reduction of the amounts of the fees payable by them.

Instruction No. 93 mentions the circumstances when it would be advisable to accept bids other than the highest. It states that it is not an absolute rule that the highest bids must, on every occasion, be accepted. It states further that the presiding officer at an auction "may also refuse bids which he considers to be purely speculative or which are the outcome of private enmity", and that what is desired is not the highest fee obtainable, but a fee that can fairly be paid out of the profits of a shop without recourse to malpractices. There is therefore nothing in the rule which could be said to give rise to a right in favour of the appellants for reduction of the amounts demanded from them. Instruction No. 130 merely states that reduction of licence

(1) [1959] Supp. (2) S.C.R. 227. (2) A.I.R. 1959 S.C. 896.

A fees, during the currency of a licence, can be made by the Board under section 39 of the Act. It does not therefore advance the case of the appellants for, under that section, the Board has been given that power, "if it thinks fit", to order a reduction of the amount of fees payable in respect of a licence, "during the unexpired portion of the grant" which is not the case of the appellants. In fact all that has been argued on behalf of the appellants is that as the instructions B contained in the note appended to paragraph 130 of the Regulations have not been complied with, their legal right to claim the benefit of the note has wrongly been denied to them. The note reads as follows,—

> "Note—Ordinarily it is not the policy of Government to allow reduction in excise settlements. The licensees to C a large extent, have only themselves to thank if they exceed in their bidding the figure which should return them a reasonable profit under normal conditions, and they are not therefore entitled to any reduction of fees as of right. The observance of this principle is the more important because it must be remembered that each remission is likely to aggravate the evil and encourage speculative bidding in the hope D that should the speculation turn out a failure, Government will not insist on full payment. A remission should not be granted merely because working at a dead loss has been actually proved. Each case should be dealt with on its own merits. Where, for example, it is proved that the Collector has not fulfilled his duty in refusing to allow manifestly speculative bids and has failed to stop the bidding when a E figure has been reached which, under normal conditions, might be expected to return a reasonable rate of profit to the vendor, the question would be whether the action of the Collector was so flagrantly opposed to the principles enunciated from time to time by Government as to necessitate remedial action. Such action should not take the form of any promise of resettlement with the existing licensees. It F can only take the form of a reduction in the amount of the existing licensees.
>
> It should not be very difficult for an officer in a contract supply area to realise the stage at which bidding becomes purely speculative. He knows the issues of spirit during the previous year and the cost to the vendor including duty, G carriage, establishment charges and the like, and should thus be able to estimate the figure beyond which a prudent man would not bid. If after warning the bidder, that this point has been reached, the latter still wishes to take the risk no case for remission can arise. The case is, however, different where exceptional reasons which would not at the time be foreseen, operate adversely to the interest of the licensee but H at the same time it is not the duty of Government to safeguard licensees from the effects of their own imprudence or ignorance."

It would appear that there is nothing in the note to justify the argument that it gave rise to a right in favour of the appellants to obtain a reduction of the fees. As has been pointed out, that was clearly a matter within the discretion of the Board of Revenue under section 39, and the wordings of the note appended to paragraph 130 could not overreach that provision of the law. Moreover, the question whether the circumstances mentioned in the note were at all in existence in the case of the appeals under consideration, was a question of fact which could not be tried in these proceedings. The decision in *Rohtas Industries Ltd.* v. *S. D. Agarwal and another*(1) to which our attention has been invited on behalf of the appellants, can be of no avail to them.

As has been stated, the writ petition which has given rise to Civil Appeal No. 1105 of 1975 raised the question whether the refund of fees claimed by the appellant was permissible on the ground that there was no *quid pro quo* for the same. The High Court has rightly rejected that contention for the reason that the amounts in question were payable for the licences which had been granted for the exclusive privilege in question and, as has been shown, that argument is no longer available to the appellant in view of this Court's decisions in *Nashirwar's* case (supra) and *Har Shankar's case* (supra).

There is thus no force in all these appeals and they are hereby dismissed with costs. It is however ordered that, as has been agreed by the Advocate-General, the authorities concerned would recover the amounts in question in instalments spreading over a period of three years in case of those appellants who are able to furnish security for payment within that period.

P.B.R. *Appeals dismissed.*

(1) [1968] 3 S.C.R. 108.