

ASSISTANT EXCISE COMMISSIONER AND ORS. ETC. ETC.

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v.

ISSAC PETER AND ORS. ETC. ETC.

FEBRUARY 22, 1994

[J.S. VERMA, YOGESHWAR DAYAL AND  
B.P. JEEVAN REDDY, JJ.]

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*Excise: Kerala Abkari Act/Kerala Abkari Shop (Disposal in Auction) Rules, 1974—Sections 18-A, 21, 25, 28, 29, /Rules 6(26), (39), 8(1), (3)—Liquor vend—Supply of arrack to licensees by State—State's obligation—Contract between State and licensees governed by statutory rules and conditions of licence—Supply of additional quantities demanded by licensees not obligatory on State—Obligation only in respect of monthly quota—Rebate/remission or adjustment cannot be claimed for non-supply/short supply of additional quantity—Executory contract—Sections 55, 56 of Contract Act cannot be invoked—Doctrines of unjust enrichment, promissory estoppel, estoppel by conduct, legitimate expectation, fairness and reasonableness—Not attracted.*

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*Contract Act, 1872: Sections 55 and 56—Frustation of contract—Contract between State and contractor—Minimum guarantee quota of goods—Supplied by State to Contractor—State unable to supply additional quantity demanded by Contractor—Such supply being discretionary, contractor cannot invoke the provisions of Ss.55 and 56.*

D

*Administrative law: Doctrines—Unjust—Promissory estoppel—Estoppel by conduct—Legitimate expectation—Fairness and reasonableness under Natural justice—Applicability of in contracts between State and contractors for supply of additional quantity of goods which is discretionary and governed by statutory provisions.*

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*In Kerala the auction for the arrack shops for the excise year 1981-82 was held on 27.3.1981. The successful bidders commenced their business after obtaining the necessary licences. The monthly quota of arrack announced for the shops was regularly supplied by the Government. However, the Government could not supply in full the additional quantities applied for by the licensees from time to time. They filed writ petitions before the High Court alleging that the authorities could not supply the additional quantities requested by them and were at the same time,*

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A demanding the instalments due. The Writ Petitions were allowed by a Division Bench of the High Court. However, another Division Bench of the High Court took a different view mainly on the basis of Rule 6(26) and held that the licensees cannot claim any remission or abatement in the amount payable by them nor can they claim any damages for non-supply of additional quantities demanded. The present appeals were preferred both by the State of Kerala and the licensees.

On behalf of the State it was contended that under the Auction Rules the Government was obliged to supply the monthly quota and the supply of additional quantities was in the discretion of the authorities; that Rule

C 6(26) was a total bar to the claim for remission/abatement by the licensees; that whatever additional quantities were available with the Government had been issued to the licensees according to Rules; and that there was no promissory estoppel on the part of the Government.

D On behalf of the licensees it was contended that Rule 8(1) of the Kerala Abkari Shops(Disposal in Auction) Rules, 1974 read with the conditions of licences created a statutory obligation upon the Government to supply the additional quantities to meet the requirements of the consuming public; that the Government was estopped from contending that its obligation was only to supply the monthly quota and nothing more, that the monthly quota fixed was unrealistic and insufficient; that there was legitimate expectation on the part of the licensees; that the doctrine of fairness was applicable; and that since the failure to supply additional quantities resulted in partial frustration of the contract, the licensees were entitled to claim abatement/remission of the amounts payable by them.

E F Allowing appeals by the State and dismissing the appeals preferred by the licensees, this Court

G HELD: 1. According to sub-rule(1) of Rule 8 of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974, supply of monthly quota is obligatory upon the government while the supply of additional quantity/quota is discretionary. The condition of licence is however of ambiguous nature. While the first Division Bench of the High Court understood the said condition as saying that "the Assistant Commissioner would permit issue of arrack in excess of the announced monthly quota", H the latter Division Bench understood the said clause as saying "the Assis-

tant Commissioner *may* permit issue of arrack in excess of announced monthly quota". This difference of opinion has arisen because the original licence form is in Malayalam language. Both Benches have translated it differently. In the face of such ambiguity, it would be proper to read the said condition of licence consistent with Rule 8(1). It would not be reasonable to presume that the rule-making authority used the expression 'may' in the Rule but chose to use the expression 'would' in the Form of licence. [82-F-H, 83-A]

2. The concept of monthly quota is a well-known one in excise contracts all over the country. In several States it is called 'minimum guarantee quota'. It is true that the expression 'minimum guarantee quota' is not used in Rule 8(1) which speaks of 'monthly quota'. But if the said expression is read along with the accompanying words it would be evident that it means 'minimum guarantee quota' alone. The first sentence in Rule 8(1) says "the monthly quota of arrack which *shall* be allowed for the shop". As against this, the next sentence says "the Assistant Excise Commissioner *may*, however, *permit* the issue arrack in excess of the announced monthly quota." The use of words "may" and "permit" clearly indicate a discretion in the authority. In the face of the said language, it cannot be said that the State is under an obligation to supply all the quantity that is asked for by the licensee, or quantities equal to the previous years' supplies. Rule 8(3) is an independent power. Even where ample supplies are available, the Board of Revenue can yet restrict the supply of additional quota to a shop having regard to the local requirements. But Rule 8(3) cannot be relied upon to say that unless the Board of Revenue places a restriction, the Assistant Commissioner of Excise is bound to supply all that is demanded, irrespective of the availability of arrack an the requirements of other licensees. No such absolute right can be recognized.[83-B-E]

*State of Rajasthan v. Nandlal*, [1993] Suppl. 1 SCC 681, relied on.

*State of M.P. v. Sunder Lal Jaiswal*, (1976) M.P.L.J. 254 at 263, G approved.

*Churchward v. The Queen*, (1865) 66(1) Q.B.D. 173, referred to. *Interpretation of Statutes by Lewison. Chapter V - 'Implied Terms'* - pages 97 - Para 3.02 and para 5.07 at page 106, referred to. H

A 3.1. Rule 6(26) says that no remission or abatement in the licence fee shall be "claimable" by the licensee "on any account whatsoever". This sub-rule should no doubt be read alongwith Rule 8(1), which sets out the only situation in which the duty and commission payable wilf be adjusted. Not only the conditions are statutory in this case but they are formally drawn in the shape of statutory Rules. In such a situation, it would not be permissible to say that there was some other condition or term agreed upon or implied between the parties which is not found therein. Moreover any implied term should be consistent with the express terms of the contract and not otherwise. [83-G-H, 84-A-B]

C 3.2. There is no right in the licensees to compel the government to supply what all they demand nor has the State the right to compel the licensees to purchase all that it proposes to sell to them. In the absence of a statutory right in the licensee to get additional supplies there is no basis in law for the claim of remission or rebate.[85-A, B]

D *Panna Lal and Others v. State of Rajasthan and Others, [1973] 2 S.C.C. 633, relied on.*

E 4. Not only monthly-quota was supplied in full for the whole of the year, additional quantites were also supplied to a substantial extent. So there is no question of the licensees not being able to observe the requirement of Rule 6(14). There is also no room in the facts of these cases for importing the plea of frustration of contract or for that matter, the principle of Section 55. In the absence of a legal right to claim additional supplies, the claims based on sections 55 and 56 of the Contract Act cannot F be countenanced. [86-C, D]

*Union Territory of Pondicherry and Ors. v. P.V. Suresh etc. etc. & Ors., J.T. (1993) S.C. 410, distinguished.*

G 5. The government had made everything clear. If the licensees offered their bids with their eyes open they cannot blame anyone else for the loss, if any, sustained by them, nor are they entitled to say that licence fee should be reduced proportionate to the actual supplies made. [89-E]

H 6. It is well known that in executory contracts there is always an element of risk. Many an unexpected development may occur which may

either cause loss to the contractor or result in large profit. Such contracts did not imply a warranty - or a guarantee - of profit to the contractor. It is a business for him - Profit and loss being normal incidence of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the licensees. [89-H, 90-A-C]

7. Rules of promissory estoppel and estoppel by conduct can not be invoked to alter or amend specific terms of contract or against statutory provisions. [90-D]

8. The Rule of legitimate expectation cannot also be invoked to modify or vary the express terms of contract, more so when they are statutory in nature. [90-E]

9. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions. It is one thing to say that a contract must be construed reasonable having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. It is difficult to appreciate the one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly. [91-D-G]

*Issac Peter v. The Assistant Excise Commissioner, Calicut & Ors.*, reversed.

*Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay, [1989]* H

A 3 SSC 293; *Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others*, [1991] 1 S.C.C. 212 and *Mahabir Auto Stores and Others v. Indian Oil Corporation and Others*, [1990] 3 S.C.C. 752, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3442-

60/84.

B From the Judgment and Order dated 14.11.83 of the Hight Court of Kerala, in O.P. No. 2325/81.

V.B. Nambiar, Santosh Hegde, G.Ramaswamy, V M. Tarkunde, C.S.

C Vaidyanathan, EMS Anam, J.P. Verghese, S.P. Sharma, Sanjay Kumar, R.M. Keshwani, M.T. George, Viswanathan, Praiap Venugopal and K.J. John for the appearing parties.

D The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. Leave franted in the S.L.Ps.

E In this batch of appeals, some are preferred by the State and some by the licencees/contractors. The matters arise under the Kerala Abkari Act. All of them pertain to the excise, year 1981-82. The question is

F whether there was a failure on the part of the State in supplying the arrack undertaken by it to supply and whether the licencees, are entitled to any rabate/remission in the amounts payable by them under the contracts, on account of such failure, if any. The earliest decision is in O.P.No. 2325 of 1981 - I (*Issac Peter v. The Assistant Excise Commissioner, Calicut and Ors.*). It was a writ petition filed by the licensee. It was allowed by a

G Division Bench of the Kerala High Court on 14th November, 1983 against which the State of Kerala and its officers have filed C.A.No.3442 (NT) of 1984. Several other matters were allowed following the said decision against which the State has filed appeals. Another Division Bench of the

H High Court, however, took a contrary view in A.S. No. 293 of 1983 and batch disposed of on 26th October, 1980. By this judgment, the suits filed by licencees/contractors were dismissed. Following the said judgment, several other appeals were disposed of in favour of the State. The licencees have filed appeals against those judgments.

I The Kerala Abkari Act (1 of 1077-corresponding to 1902 AD) was

enacted to consolidate and amend the law relating to Import, Export, A Transport, Manufacture, Sale and possession of intoxicating liquors and of intoxicating drugs in the State. Section 15 says that no liquor or intoxicating drug shall be sold without a licence from the Commissioner. Section 18A provides for grant of exclusive of other privilege of manufacture and sale of liquor. Sub-section (1) says: "it shall be lawful for the Government to grant to any person or persons, on such conditions and for such period as they may deem fit, the exclusive or other privilege (i) of manufacturing or supplying of wholesale or (ii) of selling by retail or (iii) of manufacturing or supplying by wholesale and selling by retail, any liquor or intoxicating drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other method as may be determined by the Government, from time to time, and may be collected to the exclusion of, or in addition to, the duty or tax leviable under sections 17 and 18." Section 24 prescribes the forms and conditions of licence. Section 25 prescribes the counterpart agreement to be executed by licensee. Section 28 says that all duties, taxes, fines and fees payable to the Government under any of the provisions of the Act or of any licence or permit issued thereunder may be recovered as if they are arrears of Land Revenue. Section 29 empowers the Government to make rules for carrying out the purposes of the Act. It is not necessary to notice other provisions of the Act. B C D E

Rules have been made by the Government governing the mode of grant of licences, called the Kerala Abkari Shops (Disposal in Auction), Rules 1974. Rule 6 prescribes the general conditions applicable to licensees or arrack shops, both retail and wholesale. Sub-rule (26) of Rule 6 which constitutes the basis of the later judgment of the Division Bench of the High Court reads: "No remission or abatement of the rental shall be claimable by the licensee on any account whatsoever." Sub-rule (39) says that "the licensee shall be bound by all the rules which have been passed under the Abkari Act and which may hereafter be made under the said Act or under any law relating to Abkari Revenue which may hereafter be made." Rule 8 prescribes the special conditions applicable to licensees for the privilege of vending arrack in independent shops. Having regard to their crucial relevance, sub-rules (1), (2) and (3) of Rule 8 may be extracted F G H

A here :

"8. (1) The monthly quota of Arrack which shall be allowed for the shop that is put up to auction shall be announced by the auctioning officer. The Assistant Excise Commissioner may however permit the issue of arrack in excess of the announced monthly quota on realisation of commissioner at a rate to be fixed by the Board of Revenue. The Assistant Excise Commissioner shall be competent to permit the issue of the undrawn quantity in any quarter for any shop in the next quarter. The Range Inspectors shall be competent to issue the lapsed quota of arrack of a month during the succeeding month of the same quarter. In case the duty and commission had been remitted by the contractor for the additional quota of arrack for the last quarter of the contract period and the quantity in full or part thereof could not be issued before the completion of the contract, the Assistant Excise Commissioner shall be competent to adjust the duty and commission on the quantity of arrack which could not be issued, towards the abkari dues of the contractor.

E (2) All Arrack kept or offered for sale shall be unadulterated and undiluted and it shall be of the same quality and strength as issued from the distillery or warehouse by the supply contractor. Nothing shall be added to it to increase its intoxicating power or for any other purpose.

F (3) If a licensee's demand for Arrack at any time be found in excess of the total requirements of the shop it shall be competent to the Board of Revenue to restrict such demand to what it considers to be necessary for the purpose of sale in the shop. The Board of Revenue is also competent to fix the quantity of Arrack that may be sold in any shop or locality."

H An analysis of rule 8(1) discloses the following features: (i) the Rule contemplates a monthly quota of arrack "which *shall* be allowed for the shop" and which shall be announced by the auctioning officer at the time of the auction.

(ii) Additional supplies of arrack which the Assistant Excise Commissioner "may ..... permit in excess of the announced monthly quota on realisation of commission at a rate to be fixed by the Board of Revenue." A

(iii) Any undrawn quantity in any quarter can be allowed to be drawn in the next quarter by the Assistant Excise Commissioner. Similarly, Range Inspectors are competent to issue the lapsed quota of arrack of a month during the subsequent month of the same quarter. B

(iv) In case the Government is unable in the last quarter to supply wholly or partly any additional quota for which the contractor has remitted the duty and commission, the Assistant Excise Commissioner shall be competent to adjust the duty and commission on the arrack not issued towards the Abkari dues of the contractor. C

Sub-rule (3) empowers the Board of Revenue to restrict the additional demand in respect of any shop if it finds that the demand in respect of any shop is in excess of the total requirements of that shop. D

The excise year in Kerala corresponds to the financial year. The auctions are normally conducted before the commencement of the excise year. For the excise year 1981-82, with which we are concerned in this batch of appeals, auctions were notified to be held in the month of March. For the sake of convenience, we shall take the facts in C.A.3442/84 as broadly representative of the facts in all the other matters. It concerns 18 shops out of 28 in Sultan Battery range and 15 out of 18 shops in Kalpetta range. The first date of auction notified was 18th March, 1981. There were no bidders on that day and no auction could take place. The reason for this is stated to be the scarcity of arrack that had developed during the last two months of the previous excise year, i.e., February and March 1981. The auction was adjourned to 26.3.1981. It is stated by the licencees that on 19th March, 1981 the Minister for Excise, Kerala made a statement to the effect that steps will be taken by the Government to supply requisite quantities of arrack to the licencees. Even so, no bidders were present on 26th March, 1981, whereupon the auction was adjourned to the next day, i.e., 27th March, 1981. At that auction the bid of Issac Peter, (respondent in Civil Appeal 3442 of 1984), being the highest, was accepted in respect of the aforesaid shops in the two ranges. The particulars of the shops obtained by the respondent are as follows : E F G H

A	Range	Bid Amount	Monthly quota of Arrack announced
		Rs.	Liters
Sultan Battery (18 shops)		50,43,000.00	1,350.00
Kalpetta (15 shops)		51,11,000.00	2,353.00

The respondent deposited 30 percent of the bid amount (Rs. 15,12,900) as required by Rules and also executed the counterpart agreements on the same day. He took out licences and commenced the business.

The monthly quota announced for the shops was regularly supplied. There is no complaint on that score. The complaint is only about non-supply of additional quantities applied for by the respondent from time to time which could not be fully met by the Government. The Respondent has filed a statement showing particulars of licence fee, monthly quota, additional supplies demanded and supplied for the previous two years, for the year 1981-82 as well as for the subsequent year. It is, however, necessary to mention that the Sultan Battery range comprises 28 shops out of which the respondent had taken only 18 shops; similarly Kalpetta range comprises of 18 shops, out of which the respondent had obtained only 15. The particulars in the following table are furnished for all the 28 shops in Sultan

Battery and all the 18 shops in Kalpetta:

F	Year	Range of shops	Bid amount	Monthly quota supplied	Addl. quota supplied	Addl. quota supplied
G	1979-80	Kalpetta (13 shops)	45,96,000	34,800	1,45500	1,45,500
		S.Battery (9 shops)	60,01,000	25,000	1,52,700	1,52,700
			1,05,97,000	60,000	2,98,200	2,98,200
H	1980-81	Kalpetta (13 shops)	50,76,000	34,810*	40,000	1,29,650
		S.Battery (9 shops)	70,01,000	25,150	50,000	1,51,400
			1,20,77,000	59,950		2,81,050

\*For Feb. & March application for addl. quota was Kalpetta Battery Supply nil.

1981-82	Kalpetta (18 shops)	64,23,000	34,800	4,58,200	1,04,200	A
1981-82	S. Battery (28 shops)	77,03,000	25,200	4,10,000	77,250	
		1,41,26,000	60,000	8,68,200	1,81,450	B
1982-83	Kalpetta (18 shops)	42,01,000	34,800		2,05,864	
1982-83	S. Battery (28 shops)	52,01,000	25,200		2,28,205	
		94,02,000	60,000		4,34,069	C

(The increase in the number of shops in each range, it is stated, makes no difference, since the area remains the same. Only the number of shops has gone up.)

The particulars mentioned above disclose that for Kalpetta range, the additional supplies during the previous excise year (1980-81) were 1,29,650 liters whereas for the relevant excise year (1981- 82), they totalled 1,04,200 liters, for Sultan Battery, the additional supplies in the previous excise year were 1,51,400 whereas for 1981-82 the supplies were 77,250 liters. A fact worth noticing is the very high level of demand by the Respondent during 1981-82 as compared to the previous year 1979-80. (Particulars of demand for the excise year 1980-81 are not furnished.) Be that as it may, the fact remains that the additional quantities supplied by the Government during the excise year 1981-82 were less than those supplied during the previous year for both these ranges. The respondent has, of course, not furnished particulars relating to his shops separately. In that sense, correct picture with respect to his shops is not available.

The respondent filed the writ petition in the Kerala High Court even during the currency of the excise year, i.e. on 11th May, 1981. His grievance in the writ petition was that during the months of April and May the authorities could not supply the additional quantities requested for by him and at the same time they were demanding the instalments due. He sought

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A the following reliefs in the writ petition:

(a) to declare Rule 6(26) of the Auction Rules as *ultra vires*;

(b) to direct the respondents to supply additional quantity of arrack as requested by the petitioners;

B (c) to direct the respondents not to enforce monthly payments due except that amount as is payable on the basis of arrack actually supplied; and

C (d) to prevent the Government from conducting the re-auction or from terminating his licence.

D The writ petition was allowed by the Division Bench on 14th November, 1983. Several other matters were disposed of following the said decision. Several suits were also filed by licencees against the Government for similar reliefs in addition to claim for damages against the government for its failure to supply additional quantities demanded. Some suits were decreed while some were dismissed. All of them reached the High Court by way of appeals. On this occasion, however, another Division Bench took a different view mainly on the basis of Rule 6(26). It held that by virtue of E the said Rule the licencees cannot claim any remission or abatement in the amount payable by them nor can they claim any damages for non-supply of additional quantities demanded.

F Shri V.R. Reddy the learned Additional Solicitor General appearing for the State of Kerala urged the following contentions.

G (1) Under the Auction Rules the only obligation of the Government is to supply the monthly quota. Supply of additional quantities over and above the monthly quota is in the discretion of the authorities. If sufficient arrack is available, additional quantities will be supplied. In the absence of H availability of arrack there is no obligation upon the Government to supply the additional quantities demanded. Indeed, the Government cannot be expected to supply whatever quantity is demanded by the licencees. The licencees have no statutory right to supply of additional quantities. Nor can they seek any remission/abatement in the commission and other amounts payable on account of non-supply of any of the additional quantities

demanded.

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(2) Rule 6(26) is a total bar to the claim for remission/abatement by the licencees. Rule 8(1) specifies that the only situation in which the licensee can ask for adjustment of the amount remitted by him. Except in the situation provided in Rule 8(1), no other claim for remission/abatement can be made in law.

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(3) There is no complaint by any of the licencees herein that the Government did have supplies and yet it did not supply additional quantities to the licencees. Nor is there any complaint of inequitable distribution. Whatever additional quantities were available with the Government have been issued to the licencees as and when they asked and paid for it according to Rules. There is no further or other obligation upon the Government.

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(4) The writ petitions filed by the licencees are not maintainable in law. The remedy under Article 226 cannot be resorted to either for enforcing or for avoiding contractual obligations.

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(5) The Auctioning authorities made no promise nor did they give any assurance that whatever quantities were demanded will be issued nor did they hold out any promise or assurance that additional quantities equal to the previous year's supplies will be maintained during the excise year 1981-82.

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(6) The argument of the licencees that inasmuch as they were selling arrack at the rate of Rs. 25 to Rs. 30 per liter they must be supplied additional arrack in such quantities as to enable them to realise the amounts payable to the Government by them - in addition to their expenses and profit - is unacceptable for the reason that there is no such statutory obligation cast upon the government. Indeed, the previous year's supply does not meet the said test. In case of Sultan Battery, for the excise year 1980-81, while the total bid amount payable was Rs. 70,01,000, the total quantity of arrack issued was 1,76,550 liters which means that they had to sell the liquor at the raise of Rs. 40 per liter in order to pay the licence fee *alone*, let alone meet their establishment charges, other expenses and profits. The said basis put forward by the licencees is, therefore, unacceptable.

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A On the other side, S/Shri Vaidyanathan, V.B.Nambiar, Tarkunde, V.J. Francis and G. Ramaswamy urged the following submissions:

(1) Rule 8(1) read with the conditions of licences created a statutory obligation upon the Government to supply the additional quantities to meet the requirements of the consuming public of the concerned area.

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(2) The monthly quota announced for each of the shops/groups is wholly unrealistic, which would be evident from the level of supplies made during the previous excise years as also during the subsequent excise years. For example, if confined to the monthly quota alone in the case of Sultan

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Battery, the licensee would have had to sell each liter of arrack at the price of not less than Rs. 310 in order to pay the licence fee alone due to the Government, which was an impossibility. The supply of additional quantities was, therefore, implicit in the circumstances. The past conduct coupled with the assurances given by the Minister of Excise and the

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Auctioning Authorities obligated the authorities to supply additional quantities at least at the level of the previous year's additional supplies. The Government is estopped from contending that its' obligation is only to supply the monthly quota and nothing more.

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(3) The Board of Revenue has not passed any orders as contemplated by Rule 8(3) holding that the additional supplies demanded by the licencees are not really required nor has it fixed the quantity of arrack to be sold in each shop. If so, the Assistant Excise Commissioner was bound to supply additional quantities as may have been demanded by the licencees - at any rate, to the extent of the additional quantity supplied

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during the previous excise year.

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(4) Sub-rule (14) of Rule 6 obliges the licensee to keep available arrack in quantities sufficient to meet the local requirements on any given day. This obligation cannot be discharged by the licensee unless he is supplied additional quantities. The monthly quota fixed by the Rules is hardly sufficient for a day in any shop.

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(5) Having regard to the past practice over the several years, the licencees entertained a legitimate expectation that supplies consistent with the previous year's supplies' will be maintained during 1981-82 as well. Had they been told that they would not be entitled to any supplies over and

above the monthly quota, they would never have offered such huge bids as A has been done by them.

(6) While interpreting the Government contracts, which involve State power, the doctrine of fairness has necessarily to be brought in, as has been held by this Court on more than one decision. When the State entered into the contracts with the licencees herein, it postulated that sufficient quantities of arrack were available and will be supplied as usual. While interpreting such contracts, it is permissible to look to the surrounding circumstances including the circumstances obtaining during the previous years. B

(7) The failure to supply the additional quantities resulted in partial frustration of the contract, on which basis the licensee would be entitled to claim abatement/remission of the amount payable under sections 55 and 56 of the Contract Act. C

(8) Where the injustice and inequity is glaring, the Court should step in to do justice between the parties. The Government cannot be allowed to make capital out of the misery of the licencees. If the contract between the parties is understood in the sense urged by the Government, it would be an impossible contract. It would be a contract in which loss is inherent and implicit. There can be no such contract. The Court should mould the relief in such situations to suit the circumstances, as has been done by it in similar matters. D E

The contract between the parties is governed by statutory provisions, i.e., provisions of the Act, the rules, the conditions of licence and the counter-part agreement. They constitute the terms and conditions of the contract. They are binding both upon the Government and the licensee. Neither of them can depart from them. It is not open to any officer of the Government to either modify, amend or alter the said terms and conditions, not even to the Minister for Excise. It is, therefore, not really necessary for our purpose to examine what precisely was the statement made by the Minister for Excise on 19.3.1981 or by the auctioning authorities at the time of auction. Even according to the licensee, the Minister merely stated that steps will be taken in the coming days to supply requisite quantities. The statement is sought to be proved by producing a newspaper report, Deshabhimani, dated 19.3.81. On the basis of this newspaper report, it is difficult to record a finding as to what exactly did F G H

A the Minister say. In any event, even the newspaper report does not say that he held out an assurance to supply all such additional quantities as may be demanded by the licencees or additional quantities equal to previous year's supply. All he said was that "steps will be taken" to supply requisite quantities to arrack shops - a general declaration of intent and no more.

B Similarly we do not know what precisely was the assurance held out by the auctioning authorities, namely, the District Collector and the Assistant Excise Commissioner who conducted the auction relating to Sultan Battery and Kalpetta ranges. According to the respondent (para 5 of W.P.), they "assured that necessary excess quantity of arrack should be supplied as in the previous year". The respondents in the Writ Petition (appellants)

C have denied the said averment. The High Court has accepted the respondents' averment in the writ petition on the ground that neither the Collector nor the Assistant Excise Commissioner filed affidavits denying the said averments. Learned Additional Solicitor General criticized the High Court's view on the ground that the Collector was not obliged to file his affidavit unless he was impleaded as a respondent *es nomine*. In any event, he says, it was not competent to any of the authorities to make any promise or give any assurance over and above those contained in the statutory provisions including the Rules and conditions of licensee. We agree with the latter part of the submission of the learned Solicitor General. We do not wish to go into the disputed question whether any such

E statement was indeed made by the said officials. It is enough to note that they were not competent to hold out any such promise nor any such promise can clothe the licencees with any legally enforceable rights. We shall, therefore, go strictly by what is contained in the Statutory provisions.

F Sub-rules (1) to (3) of Rule 8 have already been set out by us. According to sub-rule (1), supply of monthly quota is obligatory upon the government while the supply of additional quantity/quota is discretionary. The condition of licence upon which reliance is placed by the appellants appears to be of an ambiguous nature. While the first Division Bench understood the said condition as saying that "the Assistant Commissioner *would* permit issue of arrack in excess of the announced monthly quota", the latter Division Bench understood the said clause as saying "the Assistant Commissioner *may* permit issue of arrack in excess of announced monthly quota". This difference of opinion has arisen because the original licence form is in Malayalam language. Both Benches have translated it

H differently. In the face of such ambiguity, it would be proper to read the

said condition of licence consistent with Rule 8(1). It would not be reasonable to presume that the rule-making authority used the expression 'may' in the Rule but chose to use the expression 'would' in the Form of licence. A

The concept of monthly quota is a well-known one in excise contracts all over the country. In several States it is called 'minimum guarantee quota'. It is true that the expression 'minimum guarantee quota' is not used in Rule 8(1). Rule 8(1) speaks of 'monthly quota'. But if the said expression is read along with the accompanying words it would be evident that it means 'minimum guarantee quota' alone. This first sentence in Rule 8(1) says "the monthly quota of arrack which *shall* be allowed for the shop". As against this, the next sentence says "the Assistant Excise Commissioner *may* however, *permit* the issue of arrack in excess of the announced monthly quota.....". The use of words "may" and "permit" clearly indicate a discretion in the authority. In the face of the said language, it is difficult for us to accept the contention that the State is under an obligation to supply all that quantity that is asked for by the licensee, or quantities equal to the previous years' supply or for that matter, equal to the average of previous three years supplies. Reliance upon Rule 8(3) is of not help. Rule 8(3) is an independent power. Even where ample supplies are available, the Board of Revenue can yet restrict the supply of additional quota to a shop having regard to the local requirements. But Rule 8(3) cannot be relied upon to say that unless the Board of Revenue places a restriction, the Assistant Commissioner of Excise is bound to supply all that is demanded, irrespective of the availability of arrack and the requirements of other licencees. No such absolute right can be recognized. This is also the view taken by this Court in *State of Rajasthan v. Nandlal*, [1993] Suppl. 1 SCC 681 and this is how it has been understood all these years. See *State of M.P. v. Sunder Lal Jaiswal*, (1976) M.P.L.J. 254 at 263. Now, coming to the licencees' right to claim rebate/remission/abatement, Rule 6(26) says that no remission or abatement in the licence fee shall be "claimable" by the licensee "on any account whatsoever". This sub-rule should no doubt be read alongwith Rule 8(1), which sets out the only situation in which the duty and comission payable will be adjusted. (Of course, where the government fails to perform its statutory *obligation* e.g., if it fails to supply the monthly quota referred to in Rule 8(1) it may not be open to the government to

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A invoke Rule 6(26).) In such a situation, it is not possible to say that in addition to the situation contemplated by Rule 8(1) there are other situations also wherein such rebate/remission or adjustment is permissible. Not only the conditions are statutory in this case but they are formally drawn in the shape of statutory Rules. In such a situation, it would not be permissible to say that there was some other condition or term agreed upon or implied between the parties which is not found therein. Moreover any implied term should be consistent with the express terms of the Contract and not otherwise. This principle was affirmed as far back as 1865 by Cockburn, C.J., in *Churchward v. The Queen*, [1865-66] 1 Q.B.D. 173. The learned Chief Justice said :

"Where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent; and, above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. This I take to be a sound and safe rule of construction with regard to implied covenants and agreements which are not expressed in the contract."

E Also see *Interpretation of Statutes* by Lewison. Chapter V - 'Implied Terms', pages 97 - para 3.02 and para 5.07 at page 106. If the express term says that the Assistant Commissioner of Excise "may permit", an implied term cannot be inferred and read into the contract to read it as "shall permit". Even otherwise, having regard to the context and the object underlying, there is no warrant for holding that the words "may permit" in Rule 8(1) should be read as "shall permit". The fallacy in the contention advanced by the licencees can be demonstrated by taking a converse case. Suppose in a given year, the production of arrack is abundant. The government has huge stocks of arrack, and they are piling up. Can the government force and compel the licencees to lift additional quantities to clear its own stocks? Would not the licencees say in such a case that they cannot be forced to lift quantities which they are not able to sell? If they cannot be so forced, on what parity of reasoning is it claimed that even if there are no supplies with the government, it must somehow supply the additional quantities demanded and if it cannot so supply, it is not entitled

to demand the monies as per the contract? All this demonstrate amply that there is no right in the licencees to compel the government to supply what all they demand nor has the State the right to compel the licencees to purchase all that it proposes to sell to them. We see unreasonableness in this statement. We are of the opinion that in the absence of a statutory right in the licensee to get additional supplies demanded by him, there is no basis in law for the claim of remission or rebate. As stated by this Court in *Panna Lal and Others v. State of Rajasthan and others*, [1975] 2 S.C.C. 633 the onerous nature of the terms is no ground for the licencees to resile from the express obligations undertaken by them. The Court observed:

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"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."

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May be that the monthly quota fixed in these cases is unrealistic in the sense that with that quantity it is not possible for the licencees to do the business and pay the amount agreed to be paid by them. We may also agree that the discretion vested in the Assistant Excise Commissioner by Rule 8(1) has to be exercised in a fair and reasonable manner. But all that only means that the available supplies will be distributed equitably among the licencees. The said sub-rule can in no event be read as creating an obligation upon the State to supply the quantities demanded by the licensee even if no such supplies are available. *In this case the state has not contented itself by supplying the monthly quota alone; it supplied whatever additional quantities it could.* There is no grievance on this score. It is not the case on any licensee that the State did not supply arrack to them even though it was available with it nor is there any complaint of inequitable distribution in any of these cases. If we look at the figures relating to the 1981-82, this fact becomes evident. As against the supply of 1,29,650 liters of additional supplies for Kalpetta range during the previous excise year

A (1980-81) the Government supplied 1,04,200 liters (in addition to the full monthly quota) during the year in question (1981-82) - the shortfall is only about 25,000 liters for the whole range. In the case of Sultan Battery as against the previous years' additional supplies of 1,51,400, the supplies during the relevant year were 77,250 (in addition to the full monthly quota).

B We do not, however, know what portion of this additional supplies were made to the 18 shops of the respondent in Sultan Battery since the particulars furnished relate to the entire 28 shops in that range and not separately to the 18 shops of the respondent. Even so the additional supplies (in addition to the full supply of monthly quota) are half that of previous year. In such state of facts, reliance upon Rule 6(14) is of no avail.

C Not only monthly quota was supplied in full for the whole of the year, additional quantities were also supplied to a substantial extent. If so, there is no question of the licencees not being able to observe the requirement of Rule 6 (14). Nor is there any room in the above facts for importing the plea of frustration of contract or for that matter, the principle of Section 55. In the absence of a legal right to claim additional supplies, the arguments based on sections 55 and 56 of Contract Act cannot be countenanced. In this context, It appears relevant to note that the demand of the respondent for additional quota during the excise year 1981-82 has been highly exaggerated, as the particulars in the Table (supra) would indicate. This was done probably with the full knowledge that there is shortage of availability of arrack. It is reasonable to assume that the respondent hiked up his demand artificially to create a case, and to create evidence in support of his case, in the writ petition. Otherwise there is no explanation for the said excessive demand - three times the previous year's demand. Be that as it may, the indisputable factual position is that the Government has supplied whatever it could. The question that arises is whether in such a situation the licencees are entitled to any remission or abatement in the licence fee and other amounts payable under the Contract. The answer must be in the negative.

G We are unable to appreciate the argument of loss put forward by the licencees. It is pointed out that the selling price of arrack during that year ranged between Rs.25 and Rs.30 and that they had to sell arrack in such quantity as not only to be able to pay the amount due to the Government but also to meet their establishment and other expenses

besides making some profit. It is pointed out that by selling the arrack A actually supplied the licencees would not be able to pay even the amount due to the Government let alone meet the expenses and make profit. But as pointed out by the learned Additional Solicitor General this argument breaks down even with respect to the previous year if we take the figures relating to Sultan Battery or even for that matter Kalpetta. To wit, for the excise year 1980-81, while the licence fee for the Sultan Battery was 70,01,000 the total quantity supplied including the monthly quota, was 1,76,550 liters. For paying the aforesaid licence fee *alone*, the licensee had to sell liquor at the rate of not less than Rs.40. If we apply the same calculation to Kalpetta range for the year 1981-82, the rate at which the licensee had to sell the arrack, just for paying the amounts due to government, would be about Rs 32 per litre - the position is better than that of previous year. This only shows that the basis put forward by the licencees for establishing loss is not acceptable. May be there are some other reasons which impel the licencees to stick on to a particular shop or group of shops. It may be to maintain the continuity of their business or to prevent any new person entering that area. May be, there are other reasons.

We may at this stage deal with the decision in *Union Territory of Pondicherry and Ors. v. P.V. Suresh etc. etc. and Ors.*, J.T. [1993] S.C. 410 - a decision rendered by a Bench comprising one of us (Jeevan Reddy, J.) and S.P. Bharucha, J. - upon which strong reliance is placed by Sri Vaidyanathan. According to the learned counsel, the facts of that case are similiar to the present cases and, therefore, a relief similiar to the one granted therein must also be granted to the licencees herein. In our opinion, the learned counsel is not right in his submission that the facts of both the cases are similar. In that case, the Administration had kept back - did not disclose - one basic term of the Contract. For the preceding year, the supply of arrack was fixed at one decalitre a day for an annual bid amount of Rs.18,000. At the time of auction, it was not disclosed by the authroities that they have changed the rate of suply to one decalitre to the annual bid of Rs.40,000 - a very substantial reduction of supply. The said change in rate of supply was disclosed to the licencees for the first time after they commenced their business. It was thus found by the High Court and this Court that the Adiministration was at fault in suddenly changing the rate of supply at the very inception of the contract. The second distinguishing feature is that in that case the sale price (at the hands of the

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A. licencees) was fixed by the Administration itself. No licensee could charge more. Whereas in this case, neither any term of contract - much less, an essential term - has been kept back from the licencees nor is the sale price of arrack fixed by the government. Mr. Vaidyanathan, however, relied upon the following observations in the said judgment:

B. "In the circumstances of this case, our enquiry is limited to the question whether the contract was so constructed that loss was inherent and implicit in it; if so, it ought to be modified. Otherwise, the Court has no jurisdiction to alter the terms or rewrite the contract between the parties."

C. In our opinion, the said query was posed in the particular facts and circumstances of that case, which were found to be "exceptional and unusual". It cannot be torn from the context, nor can it be reduced to a general proposition that if a person freely enters into a contract, which is

D. bound to cause loss to him, such a contract is not enforceable. The paragraph relied upon starts with the words "in the circumstances of this case", which means and refers to the peculiar facts of that case including the two basic facts mentioned above. More important, it was a case where the government was found to be at fault; hence the formula evolved therein.

E. The said observations cannot, therefore, be read or understood in an absolute sense dissociated from the facts of that case. It is for that reason that the Bench took care to caution - "We must reiterate that the formula evolved by us is peculiar to the facts of this case and has been evolved in view of the exceptional facts and circumstances of this case, and shall not be treated a precedent." The said decision cannot, therefore, be cited as a precedent.

F. There is yet another reason which militates against the licencees herein. Even according to them there was scarcity of arrack during the months of February and March 1981, i.e., towards the end of the previous excise year. It is also their case that auctions had to be postponed repeatedly because no bidders were coming forward in view of the said scarcity and that half the shops in the State could not be sold during that excise year for the very same reason. It is equally clear that the intending bidders were not prepared to implicitly believe the statement of the Minister for Excise

G. made on 19th March, which is evident from the fact that no bidders were

present on the adjourned date of auction, *viz.*, is 26th March, 1982. We do not know what circumstances weighed with the respondent in offering his bids on the third date of auction (27.3.82). The respondent attributes it to the assurance held out by the auctioning authorities. If he was not prepared to act upon the statement of the Minister for Excise, it is rather curious that he claims to have believed and acted upon the alleged assurance of the auctioning authorities. Having regard to the number of shops and the amounts of bids offered by the Respondent, we would be justified in presuming that the respondent was an experienced businessman. It is unlikely that he - or for that matter, other licencees - believed implicitly the alleged assurance or the Excise Officers. As experienced businessmen they must have anticipated that there would be problems in supply since such things can not be rectified overnight. In any event, the only assurance was that the authorities would take steps to ensure additional supplies as in the previous year. It cannot be understood as a firm promise - assuming for the sake of argument that they were not competent to hold out such promise (which we have found, they were not competent to). As a matter of fact, they did whatever they could. Whatever they could supply, they did supply. It is not a case where any essential term of contract was kept back or kept undisclosed. The government had placed all their cards on the table, if we can use that expression. If the licencees offered their bids with their eyes open in the above circumstances they cannot blame anyone else for the loss, if any, sustained by them, nor are they entitled to say that licence fee should be reduced proportionate to the actual supplies made. Question may arise, proportionate to what ? Proportionate to their demand, proportionate to previous year's supply or proportionate to the average of previous three years' supplies ?

There cases cannot be equated to cases of persons buying airline tickets, where certain conditions are printed in small print. These are cases of formal contracts arrived at pursuant to a public auction or submission of tenders, and in some cases, by negotiation.

May be these are cases where the licencees took a calculated risk. May be they were not wise in offering their bids. But in law there is no basis upon which they can be relieved of the obligations undertaken by them under the contract. It is well known that in such contracts - Which may be called executory contracts - there is always an element of risk. Many

- A an unexpected development may occur which may either cause loss to the contractor or result in large profit. Take the very case of arrack contractors. In one year, there may be abundance of supplies accompanied by good crops induced by favourable weather conditions; the contractor will make substantial profits during the year. In another year, the conditions
- B may be unfavourable and supplies scarce. He may incur loss. Such contracts do not imply a warranty - or a guarantee - of profit to the contractor. It is a business for him - profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the licencees.

- C Learned counsel for the Respondents sought to invoke the Rule of Promissory estoppel and estoppel by conduct. The attempt is a weak one
- D for the said Rules cannot be invoked to alter or amend specific terms or contract nor can they avail against statutory provisions. Here, all the terms and conditions of contract, being contained in the statutory Rules, prevail.
- E Learned counsel for the Respondents also sought to rely upon the Rule of legitimate expectation which the licencees entertained in view of the practice during previous years. Firstly, the Rule cannot be invoked to modify or vary the express terms or contract, more so when they are statutory in nature. No decision has been brought to our notice supporting the said proposition. Secondly, in view of the scarcity that had developed during the last two months of the previous excise year (i.e., during February and March, 1981), the plea of legitimate expectation sounds quite weak. That the bidders were apprehensive and highly sceptical of alleged official assurances is proved by the repeated adjournment of auction and the fact pleaded by the licencees themselves that during the said excise year (1981-82) half the shops in the State remained unsold. It is inconceivable that the licencees yet expected legitimately that additional supplies equal to the previous year's additional supplies would be supplied during this year. The plea is unacceptable
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- H Learned counsel for Respondents then submitted that doctrine of

fairness and reasonableness must be read into contracts to which State is A a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as B obligatory - at least to the extent of previous year's supplies - by applying the said doctrine. It is submitted that if this is not done, the licencees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness of the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language. But this is not what the licencees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant supplies and wants the licencees to lift all that stocks. The licencees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licencees do not support their proposition. In *Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay*, [1989] 3 SCC 293, it was held that where a public authority is exempted from the operation of a Statute like Rent C D E F G H

A Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case.

B *Kumari Shrilekha Vidyarthi And Others v. State of U.P. and Others*, [1991] 1 S.C.C. 212 was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case non-government servant holding a *public office*, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does no guarantee profit to the licencees in such contracts. There is no warranty against incurring losses. It is a business for the licencees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the Contract. It is not as if the licencees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.

Counsel for Respondents also relied upon the decision in *Mahabir Auto Store and Others v. Indian Oil Corporation and Others*, [1990] 3 S.C.C.

752. But that case turned on its peculiar facts. All that was done was to A advise the I.O.C. to take the appellant into confidence before putting an end to his long-enjoyed right. The observations in the judgment are confined to the particular facts of that case. It is significant to note that is was not a case where the rights of the parties were governed by a contract. This decision cannot, therefore, support the contention of the Respondents. B

For the above reasons, the appeals preferred by the State are allowed and the appeals preferred by the licencees - contractors are dismissed. No costs.

G.N.

Appeals allowed.