



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No.1967 of 2020
alongwith connected matters

Reserved on: 27th October, 2020

Decided on: 4th November, 2020

1. **CWP No.1967 of 2020**

M/s Sarika Sharma

.....Petitioner

Versus

State of Himachal Pradesh and others

.....Respondents

2. **CWP No.1961 of 2020**

Aditya Nath Sharma

.....Petitioner

Versus

State of Himachal Pradesh and others

.....Respondents

3. **CWP No.1969 of 2020**

M/s Jai Shree Tilak Raj and Company
and others

.....Petitioners

Versus

State of Himachal Pradesh and others

.....Respondents

4. **CWP No.3494 of 2020**

Rakesh Kumar

.....Petitioner

Versus

State of Himachal Pradesh and others

.....Respondents

5. CWP No.3685 of 2020

M/s Rajesh and Company

.....Petitioner

Versus

State of Himachal Pradesh and others

.....Respondents

6. CWP No.3686 of 2020

M/s Rajesh and Company

.....Petitioner

Versus

State of Himachal Pradesh and others

.....Respondents

7. CWP No.3710 of 2020

S.P. Dhall and others

.....Petitioners

Versus

State of Himachal Pradesh and others

.....Respondents

8. CWP No.3733 of 2020

Seema Khanna

.....Petitioner

Versus

State of Himachal Pradesh and others

.....Respondents

9. **CWP No.3922 of 2020**

Rajinder Bhawta & Company

.....Petitioner

Versus

State of Himachal Pradesh and others

.....Respondents

10. **CWP No.3934 of 2020**

Balvinder Singh and others

.....Petitioners

Versus

State of Himachal Pradesh and others

.....Respondents

11. **CWP No.4124 of 2020**

Rajesh Bhalla and others

.....Petitioners

Versus

State of Himachal Pradesh and others

.....Respondents

12. **CWP No.4203 of 2020**

Seema Khanna

.....Petitioner

Versus

State of Himachal Pradesh and others

.....Respondents

13. **CWP No.4209 of 2020**

Surjeet Singh and others

.....Petitioners

Versus

State of Himachal Pradesh and others

.....Respondents

14. CWP No.4421 of 2020

M/s Bhavya Enterprises and others

.....Petitioners**Versus**

State of Himachal Pradesh and others

.....Respondents**15. CWP No.4562 of 2020**

Lalit Thakur

.....Petitioner**Versus**

State of Himachal Pradesh and others

.....Respondents**Coram****The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge****The Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge****Whether approved for reporting?¹ No**

Mr. Ashwani Kumar Chopra, Mr. K.D. Sood, Mr. Bipin C. Negi, Mr. Ramakant Sharma, Mr. Ankush Dass and Mr. Ajay Sharma, Senior Advocates with Mr. Sukrit Sood, Ms. Shweta Joolka, Ms. Devyani Sharma, Mr. Nitin Thakur, Mr. Amit Jamwal, Mr. Rajiv Rai, Mr. Satish Kumar Awasthi, Mr. Vivek Negi, Mr. Brahmjot Singh Nahar and Mr. Ajay Thakur, Advocates, for the respective petitioners in all the petitions.

Mr. Ashok Sharma, Advocate General with Mr. Ajay Vaidya, Senior Additional Advocate General, Mr. Shiv Pal Manhans, Mr. Nand Lal Thakur & Mr. Vinod Thakur, Additional Advocates General and Ms. Seema Sharma, Mr. Bhupinder Thakur & Mr. Yudhvair Singh Thakur, Deputy Advocates General, for the respondents-State.

Mr. Anup Rattan, Advocate, for the respective respondents in CWP Nos.1961 and 4203 of 2020.

(Through Video Conference)

¹ Whether the reporters of Local Papers may be allowed to see the judgment?

Jyotsna Rewal Dua, Judge

Petitioners-the Excise Licensees contend that steps taken by the State to compensate them for loss of revenue due to COVID-19 pandemic are not adequate and therefore, pray for allowing them to deposit the license fees for the months of June, July, August and September, 2020 on pro-rata basis. Whereas State opposes the prayer questioning the maintainability of writ petitions against policy decisions and on the strength of 'concluded excise contracts' executed between the parties permitting no variation besides emphasizing that orders already passed by the State from time to time have adequately redressed all the genuine grievances of the excise licensees.

2. Facts:-

This group of writ petitions involve common submissions of law and facts, hence, is taken up together for decision. For sake of convenience, facts and documents of lead case CWP No.1967 of 2020 are being referred to hereinafter.

2(i). Petitioner had been a holder of liquor license for past many years. She held retail license for L-2 and L-14 of Unit Nos.10 and 11 in District Kullu for the year 2019-20

as well. In February, 2020, State of Himachal Pradesh formulated and publicized excise announcements for the allotment of retail excise vends by renewal/draw of lots/tender-cum-auction for the year 2020-21.

2(ii). On 06.03.2020, a public notice was issued for renewal of retail vends of Country Liquor (L-14/L-14A), Foreign Liquor (L-2) and manufacturing & retail sale of country fermented liquor (L-20B) for the year 2020-21 on the terms & conditions prescribed in the Announcements of Excise Allotments for the year 2020-21. Renewal fee, Annual Minimum Guaranteed Quota (in short 'MGQ') and Annual License Fee for Unit (Liquor Vend) etc. were prescribed in Chapter-IV of Excise Announcements 2020-21.

2(iii). Petitioner, a holder of liquor license for the year 2019-20, applied on 13.03.2020 for renewal of her liquor license. Renewal fee fixed at 4% of the value of vend/unit for the year 2020-21 in terms of Clause 5 of Chapter-IV of Excise Announcements, was paid alongwith the application for renewal. Additionally, 8% of total license fee of the unit was deposited as advance license fees by the petitioner in different instalments as per schedule.

2(iv). All liquor vends remained closed on 22.03.2020 when one day Janta curfew was observed in the country. To contain spread of COVID-19, respondents-State Government on 23.03.2020 imposed lockdown followed by curfew in the State. Due to continuation of lockdown/curfew and consequent closure of liquor vends, respondent-Excise & Taxation Department issued a public notice on 30.03.2020 to the following effect:-

- a.** Excise Policy for the year 2019-20 was to continue to be operative till 31.05.2020.
- b.** Retail Excise Licensees in form L-2, L-14 and L-14A were to deposit license fee for the months of April and May, 2020 on pro-rata basis on the rates prescribed for the year 2019-20 in case the vends were made operational. The MGQ for these two months for three categories of licensees was to be calculated on pro-rata basis as per MGQ determined for the year 2019-20.
- c.** Excise levies w.e.f. 01.06.2020 was to be as per Excise Policy 2020-21. Retail excise units, which had been renewed or allotted for the year 2020-21, were to operate on excise levies prescribed for the year

2020-21 from 01.06.2020 to 31.05.2021. All Licenses granted on annual fixed license fee prescribed in Excise Policy 2020-21 were to deposit the enhanced renewal fee for the year 2020-21 by 31.05.2020.

- d.** Those retail license units, which had not been renewed for the year 2020-21, could exercise their option for operating the vends till 31.05.2020. Written options could be submitted to the concerned District In-charge by 01.04.2020. These retail excise units were to be put to allotment for the year 2020-21 before 31.05.2020.

In nutshell, Excise Policy for the year 2019-20 was extended upto 31.05.2020. Excise Policy 2020-21 was to come into force w.e.f. 01.06.2020 and was to continue till 31.05.2021. Further, for the months of April and May, 2020, in case the vends were operational, then the MGQ in respect of L-2, L-14 and L-14A was to be calculated on pro-rata basis as per MGQ determined for the year 2019-20.

2(v). Petitioner on 30.04.2020 represented to the respondent that there being no respite from imposition of lockdown/curfew in District Kullu-a tourist place, it will not be possible for the petitioner to operate her vends for the

year 2020-21 on already fixed annual MGQ/Minimum Vend Value (MVV) and the annual license fee calculated thereupon. Therefore, petitioner requested for reducing the MGQ for the year 2020-21 to 30% of the existing MGQ or for linking the retail excise duty to actual lifting of liquor.

2(vi). Though liquor vends were allowed to be opened on 04.05.2020 with restricted sale hours from 10:00 am to 3:00 pm, however, restrictions on tourism, closure of hotels, ban on social gatherings, events/functions continued. Curfew continued to be imposed after 3:00 pm.

2(vii). On 08.05.2020, respondent-State approved extension of Excise Policy 2019-20 upto 31.05.2020 and operation of Excise Policy 2020-21 from 01.06.2020 to 31.05.2021. Further, no excise levy was to be deposited after 22.03.2020 for the period the liquor vends remained closed due to the lockdown. Retail Excise Licensees were also allowed to lift the remaining MGQ of the year 2019-20 if due against the already deposited license fee before 31.03.2020 and in case the complete license fee had not been deposited by 31.03.2020, then such excise licensees were permitted to lift the pending quota against deposition of pending license fee for 2019-20 in the months of April

and May, 2020, on the opening of vends. There was to be no MGQ of country liquor and IMFS for the months of April/May, 2020. The license fees were to be deposited by the retailers on actual lifting for these two months. The excise licensees were not entitled for additional quota for the year 2019-20 during extended period of Excise Policy 2019-20, i.e. for the months of April-May, 2020.

2(viii). On 13.05.2020, another representation was sent by the petitioner to the respondents for reduction of MGQ by 25 to 30% for the excise year 2020-21, commencing from 01.06.2020 and ending on 31.05.2021 and for calculation of annual license fee thereupon. Alternatively, request was made for scrapping MGQ altogether and for making the license fee proportional to actual lifting of liquor by retail licensees.

2(ix). On 19.05.2020, liquor vends were allowed to function from 9:00 am to 5:00 pm. Petitioner submitted another representation on 25.05.2020 to the respondents, indicating therein that in case her request made in the earlier representations was not accepted, then it would be impossible for her to continue w.e.f. 01.06.2020 and that she would be forced to close the vend. The respondent-

Excise & Taxation Department was further requested to make arrangement to allot the vend as it deemed fit and to refund the amount of renewal fee as well as the advance license fee paid by her for 2020-21.

2(x). On 28.05.2020, the respondent-State approved charging of license fee and MGQ on pro-rata basis for Bar Licensees for the year 2020-21.

2(xi). On 01.06.2020, liquor vends were allowed to function from 10:00 am to 8:00 pm. Acknowledging the receipt of various representations from a large number of retail excise licensees expressing inability to clear excise dues owing to reduced sale of liquor on account of COVID-19 pandemic, the respondent-Department, on 01.06.2020, issued directions to the field officers to keep daily record of actual lifting and consumption of liquor during first fortnight of June, 2020 and to submit the report of the same to the Department for onward submission to government for further decision. Data was to be shown separately for tourist and non-tourist areas. Petitioner alongwith various other similarly situated licensees submitted representation on 01.06.2020 for deciding the issues raised in the previous representations

after the compilation and examination of the data collected in terms of directions issued by the respondents on 01.06.2020.

2(xii). On 16.06.2020, the respondents-State approved charging a fixed license fee and minimum annual quota on pro-rata basis for Bar Licensees for the year 2020-21. Accordingly, vide separate notifications of even date, amendments were made in Rule 18-AA(i) as well as in Schedule A of Himachal Pradesh Liquor License Rules, 1986. Whereas in respect of retail excise licensees, on 15.06.2020, time to submit FDR/Bank Guarantee of 8% of MVV of Unit was extended from earlier fixed date of 15.06.2020 to 30.06.2020, failing which licenses were to be cancelled.

3. Filing of Writ Petitions:-

3(i). Petitioner once again represented to the respondents on 26.06.2020 for acceding to the request made in her previous representations and also asserted therein that otherwise it would not be possible for her to continue w.e.f. 01.07.2020 and she shall be forced to close the liquor vend. In such eventuality, the Department was requested to make arrangements to allot the liquor vend as

deemed fit and to refund her the amount of renewal fee as well as advance license fee. The liquor vends were eventually shut by her on 01.07.2020. It is at this stage that the petitioner preferred the instant writ petition on 30.06.2020, praying for following substantive reliefs:-

- a) *Issue a writ of Certiorari by calling the records and quashing the provisions relating to Minimum Guarantee Quota (MGQ) as also Minimum Vend Value (MVV), based on MGQ for the Year 2020-21, contained in the Policy document termed as "Announcements for the allotment of retail excise vends by renewal/draw of lots/tender-cum-auction for the Year 2020-21", Annexure P/2;*
- b) *Issue a writ of Mandamus directing the Respondents to revisit the Excise Policy, 2020-21 keeping in view the change in circumstances due to the intervening event of global COVID-19 Pandemic and make suitable modifications/changes therein so as to make it conducive, practicable and possible for its implementation, as the said Policy was framed and formulated considering existence and continuance of the normal circumstances then prevailing in the State and the Country;*
- c) *Issue a writ of Mandamus directing the Respondents especially Respondents No.1 and 2 to take the decision upon the Representations, Annexures P-6, P-8, P1- & P-15 to its logical end and refix the MGQ and MVV and suitably supplement the terms and conditions of the license issue to the Petitioner for the Year 2020-21 including the license fee considering all the prevalent facts and circumstances created due to the COVID-19 Pandemic and appropriately adjust/refund the excess amount so paid against it;*
- d) *Issue a writ of Prohibition, prohibiting the Respondents from enforcing the terms and conditions which were incorporated prior to the COVID-19 Pandemic and not to take any coercive measures till formulation of conducive policy and consequent modification/changes in the conditions more particularly, with regard to the MGQ and MVV;*
- e) *In the alternative, to allow the Petitioner to lift the liquor on prorata basis as per actual consumption basis for the Year 2020-21."*

3(ii). The matter alongwith other two connected writ petitions (CWP Nos.1961 and 1969 of 2020) pertaining to

vends located in District Kullu was heard on 06.07.2020 and the following interim order was passed, whereunder pending decision on representations of the petitioners, respondents were directed to levy license fee on pro-rata basis subject to petitioners' opening their liquor vends:-

"Heard for some time. The representations made by the petitioners are yet to be considered and taken to their logical end by the respondents. Yet, we fail to understand why in the current time, especially, when the representations of the petitioners are pending, the respondents should insist on the enforcement of the provisions relating to Minimum Guaranteed Quota (MGQ) as also Minimum Vend Value (MVV) based on MGQ for the year 2020-21.

Therefore, in the intergrum, we direct that respondents shall not insist upon provisions relating to MGQ, subject to the conditions that petitioners shall also open the liquor vends.

As regards the representations of the petitioners, we direct the State to take a decision before the next date of hearing. Till then, the licence fee would be deposited by the petitioners on pro-rata basis as per Annexure P-7. Ordered accordingly.

List on 20.07.2020 in the open Court.

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3(iii). During hearing of the case on 20.07.2020, following communication dated 17.07.2020 was placed before the Court, informing that issue of MGQ will be considered by the Council of Ministers on 20.07.2020:-

"The above cited Civil Writ Petitions were listed before the Hon'ble Court on 06-07-2020 and Hon'ble court was pleased to direct the respondents to decide the representations of petitioners by the next date of hearing i.e. 20-07-2020.

It is submitted that the petitioners in the representations have mainly requested to reduce the Minimum Guaranteed Quota (MGQ) and license fee to 25% to 30% or allow to pay the license fee on the actual quantity of lifting of liquor. It may be submitted that the fixation of MGQ is a policy matter and has to be decided by the Council of Ministers, therefore, the respondents require some more time to process

the matter and forward the same to the Meeting of Council of Ministers. It is further submitted that the Meeting of Council of Ministers is scheduled to be held on 20-07-2020 and the issue regarding MGQ will also be taken up. Therefore, the respondents require some more time to comply with the order passed by the Hon'ble Court.....”

3(iv). On 01.09.2020, the Court was apprised of passing of an order dated 31.08.2020 by the Principal Secretary (E&T), deciding the representations of the Retail Excise Licensees/Petitioners. It will be appropriate at this stage to reproduce some relevant extracts from this order, which was later on brought on record of the case:-

“All the above stated observations suggest that Government has sympathetically considered the situation arising out of COVID-19 Pandemic & already granted following reliefs:

- (i) Allowed lifting of Country Liquor & IMFL on actual basis instead of enforcing Minimum Guaranteed Quota.*
- (ii) Shifted the Financial Year for the purpose of Excise Policy w.e.f. 01/06/2020 to 31/05/2020.*

Further, this is also a fact that the things are moving in the direction of normalization of all other activities in the State as we are already in the Unlock-4 stage. The data from various districts regarding lifting has also shown much improvement. However, there have been some losses during the first quarter of 2020-21 i.e. June, July & August, so the government after due consideration of their claims decided to grant a further relief on the Minimum Guaranteed Quota for the first quarter ending 31st August. Therefore, in order to provide relief to the licensees, the Government of Himachal Pradesh in the meeting of Council of Ministers has decided

- a) That the Minimum Guaranteed Quota of Country Liquor & IMFL for the first three months of the year 2020-21 i.e. June, July & August shall be reduced by 5% & 10% respectively for all L-2 & L-14 Licensees. The MGQ for the next three quarters shall remain the same.***
- b) The loss of Excise revenue amounting to 23 crores (approx.) will be recovered by enhancing the License Fee proportionately which will also lead to the nominal increase in MRP and the margin of the licensees.*

- c) The BIO (Bottled in origin) Brands will now be the part of the MGQ which were previously excluded from its purview which will again help the licensees in this quota lifting obligations.

Loss of revenue especially in tourist destinations like Shimla, Kullu & Dharamshala will be compensated during the next tourist season which starts in the month of April & May as due to extension of excise year the benefit of April & May will accrue to licensees.

Thus, to conclude there are six distinct forms in which the State Government is providing relief across the board to which the petitioner is beneficiary. These include:

1. Relaxation in MGQ requirements for one quarter as stated in para (a) above
2. Increase in License fee and a subsequent increase in Margins as stated in para (b) above.
3. Adjustment of BIO brands within the quota of the licensee as per para (c) above
4. Shifting of Financial year
5. Actual lifting based license fee for the April and May
6. Loss due to less tourist inflow during the 1st Quarter will be compensated in the next year in the month of April & May.

Such an array of benefits have not been given in any state till date. The petitioner despite his errant track record during this period will also get these benefits. There is no need or justification for any exceptional or further relief to the applicant."

(emphasis supplied)

The petitioner thereafter was permitted to amend and accordingly filed an amended writ petition, inter-alia, challenging the above-extracted order dated 31.08.2020. Petitioner till date is operating the liquor vend on the basis of interim directions.

4. Contentions:-

4(i). On behalf of the petitioners, prayer has been made for quashing the order dated 31.08.2020 and for

directing the respondents to refix the MGQ and MVV for the year 2020-21 considering all prevalent facts and circumstances arising due to COVID-19 pandemic and its actual impact on their business. The prime factual argument advanced on behalf of the petitioners is that they had applied for renewal of excise licenses when the lockdown and curfew had not been imposed. They had applied unmindful of the extent of COVID-19 spread in future and its adverse affect on their business. All liquor vends remained closed on 22.03.2020 to observe Janta curfew. Lockdown was imposed in the respondent-State on 23.03.2020 followed by curfew. Liquor vends continued to remain closed. Lockdown was extended. Taking note of prevailing situation, on 30.03.2020, State Government ordered extension of Excise Policy 2019-20 upto 31.05.2020 and permitted operation of Excise Policy 2020-21 w.e.f. 01.06.2020 to 31.05.2021. Gradually, liquor vends were allowed to function with restrictive operative hours. Lockdown was gradually eased, but social restrictions remained in force. Threat of virus never actually went away. Kullu, being a tourist place, remained worst affected due to cessation of all tourism related activities and

businesses. Petitioners though operated the vends under the interim orders of the Court, but could not lift the MGQ for the relevant period fixed in the Excise Announcements for the year 2020-21. Actual sales have remained very low. Therefore, MGQ fixed for the year 2020-21 for District Kullu should be reduced by 30% or alternatively the excise fees should be made proportional to actual lifting of the quantity of the liquor. Petitioners have also laid emphasis upon their various representations preferred in this regard to the respondents prior to 01.06.2020 and even thereafter. During hearing of the case, learned Senior Counsel appearing on behalf of the petitioners submitted that though their liquor vends have still not been able to lift the MGQ fixed in the Excise Announcements 2020-21, however, due to some leeway in resumption of tourism activities in District Kullu, the petitioners would be willing to abide by excise fee payments/MGQ/MVV of Excise Policy 2020-21 w.e.f. 01.10.2020 onwards. However, the excise levies for the period 01.06.2020 to 30.09.2020 be realized from them only on pro-rata basis and not on the basis of MGQ/MVV fixed in the Excise Policy 2020-21. With the help of tabulated figures, it has been proclaimed that

reduction in MGQ by 5 and 10% for L-2 and L-14 licenses, respectively, for first quarter of excise year 2020-21 does not recompense business strains of the petitioners.

4(ii). Learned Advocate General vehemently opposed the petitions. On facts, it was put forth that COVID-19 had already spread its tentacles by the time the petitioners applied for renewal of their excise licenses. A simile was given that the petitioners though would never share their advantage with State in case of boost in their sale, which may occasion for any reason, say for example likely spurt of tourism in the area on account of recent opening of Atal Tunnel in Rohtang, Lahaul & Spiti, but will crib over their alleged losses or inability to lift the fixed MGQ due to COVID-19 spread and wish State to come to their rescue. He further submitted that the State Government has already taken into consideration the losses during first quarter of excise year 2020-21 and various decisions have appropriately been taken for the benefit of liquor licensees of the State. No special treatment can be given to liquor licensees of District Kullu.

Relying upon **(1994) 4 SCC 104**, titled ***Assistant Excise Commissioner and others Versus Issac***

Peter and others, learned Advocate General submitted that the petitioners have entered into excise contract with the State. The terms and conditions of the same are binding upon the government and the licensees. Neither of them can depart from the same. He pressed following para 14 of the judgment in furtherance of his submissions:-

“14. The contract between the parties is governed by statutory provisions, i.e., provisions of the Act, the rules, the conditions of licence and the counterpart 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.....”

Learned Advocate General further relied upon following extract of the above judgment to highlight the point that executory contracts always carry in them an element of risk. Even then the licensees cannot wriggle out of their contractual obligations. When licensees cannot be compelled to share their advantage with the State in a converse situation, then they cannot ask the State to share their alleged losses due to COVID-19 pandemic:-

“16. 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 licensees 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 licensees to lift additional quantities to clear its own stocks? Would not the licensees 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 demonstrates amply that 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. We see no unreasonableness in this statement. We are of the opinion that in the absence of a statutory right in the licensees 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 v. State of Rajasthan*, (1975) 2 SCC 633, the onerous nature of the terms is no ground for the licensees to resile from the express obligations undertaken by them. The Court observed: (SCC p. 638, para 21)

“The licences 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 licence 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.”

23. Maybe these are cases where the licensees took a calculated risk. Maybe 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 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 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 licensees.”

Learned Advocate General also contended that there is no warrant for invoking the rule of legitimate expectation, which the licensees may have entertained and referred following para from the above cited judgment:-

“25. Learned counsel for the respondents also sought to rely upon the rule of legitimate expectation which the licensees entertained in view of the practice during previous years. Firstly, the rule cannot be invoked to modify or vary the express terms of the 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 licensees themselves that during the said excise year (1981-82) half the shops in the State remained unsold. It is inconceivable that the licensees yet expected legitimately that additional supplies equal to the previous year's additional supplies would be supplied during this year. The plea is unacceptable.”

Regarding Doctrine of fairness and reasonableness, relying upon the following para of the judgment in *Issac Peter's case, supra*, learned Advocate General contended that the doctrine of fairness is 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. It cannot be invoked to amend, alter or vary the express terms of contract executed between the parties. Para 26 of the judgment reads as under:-

“26. Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is 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 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 licensees 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 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, 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 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 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. 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 licensees do not support their proposition. In *Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay* it was held that where a public authority is exempted from the operation of a statute like Rent 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. *Shrilekha Vidyarthi v. State of U.P.* 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 of 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 and 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 not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. 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 licensees 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.”

Learned Advocate General also cited **(2008) 10 SCC 607**, titled ***State of Madhya Pradesh and others Versus Lalit Jaggi***, where the judgment in *Issac Peter's* case, *supra*, was relied upon. He further referred to **(2014) 14 SCC 272**, titled ***Mary Versus State of Kerala and others***. It was a case where the appellant was a successful

bidder in an auction governed by the Kerala Abkari Shops (Disposal in Auction) Rules, 1974, conducted for sale of privilege to vend arrack in Kalady Range for a period of one year. She deposited 30% of the bid amount and executed a temporary agreement in terms of the rules. However, in view of physical resistance from general public against the opening of Abkari shops in the birth place of Adi Shankaracharya, the law enforcing agencies could not ensure smooth conduct of appellant's business. Hence, the appellant requested the authorities not to confirm the sale citing impossibility to execute the privilege for the reasons beyond her control. She requested for rescinding the proposed contract and for refunding the security amount. The question before the Hon'ble Apex Court was as to whether the appellant could invoke the doctrine of frustration or whether she would be bound by the terms of the statutory contract. It was held as under by the Hon'ble Supreme Court vide paras 16 to 18 of the judgment:-

- “16. *It is not the case of the State that appellant has purposely, or for any oblique motive, or as a device to avoid any loss, refused to execute the agreement. It appears to us that the State was helpless because of the public upsurge against the sale of arrack at Kaladi, the birth place of Adi Shankaracharya as, in their opinion, the same will render the soil unholy. Consequently, the State also found it impossible to resell or redispense of the arrack shops.*
17. *In view of second paragraph of Section 56 of the Contract Act, a contract to do an act which after the contract is made, by*

reason of some event which the promissory could not prevent becomes impossible, is rendered void. Hence, the forfeiture of the security amount may be illegal. But what would be the position in a case in which the consequence for non-performance of contract is provided in the statutory contract itself? The case in hand is one of such cases.

18. The doctrine of frustration excludes ordinarily further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible. However, in our opinion, a statutory contract in which party takes absolute responsibility cannot escape liability whatever may be the reason. In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation. Further, in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind Section 56 of the Contract Act. Rule 5(15) in no uncertain terms provides that "on the failure of the auction purchaser to make such deposit referred to in sub-rule 10" or "execute such agreement temporary or permanent" "the deposit already made by him towards earnest money and security shall be forfeited to Government". When we apply the aforesaid principle we find that the appellant had not carried out several obligations as provided in sub-rule (10) of Rule 5 and consequently, by reason of sub-rule (15), the State was entitled to forfeit the security money."

Relying upon *Issac Peter's* case, it was held that the doctrine of reasonableness or fairness cannot be invoked to amend, alter or vary express terms of the contract. A contract of employment cannot be equated with a contract to vend arrack. The appellant was not relieved of her obligations under the contract. **(1996) 5 SCC 740, State of Orissa and others Vs. Narain Prasad and others**, was also pressed in service in support of contention that a person after securing a contract taking into account its terms cannot be allowed later on to assail the validity of

the contractual terms by invoking extraordinary jurisdiction of High Court under Article 226 of the Constitution of India.

The gist of submissions advanced by the learned Advocate General is that Excise Announcements are policy decisions. Writ petitions questioning the policy decisions are not maintainable. By way of grant of license to run the liquor business, governed by H.P. Excise Act, 2011 and Rules framed thereunder, State has parted its privilege. Relationship between the parties is statutory in nature. The petitioners have entered into statutory/excise contracts with the respondents and they cannot be permitted to back out from the same. Order dated 31.08.2020, deciding the representations of the petitioners, was passed on the directions of the Court, whereunder by way of policy decision, certain benefits by reducing the MGQ have been provided to the excise licensees. The genuine grievances of the petitioners and other licensees have already been taken care of by granting them many concessions under various orders passed from time to time including the order dated 31.08.2020. He, therefore, prayed for dismissal of the writ petitions.

5. Observations:-

Following two main points arise for consideration:-

- A.** Whether the excise contracts executed between the parties, in the peculiar facts and circumstances of the case, are to be considered as concluded contracts admitting no change whatsoever. And whether writ petitions, in essence seeking reduction of MGQ fixed in Excise Announcements for the year 2020-21, are maintainable or not.
- B.** Whether order dated 31.08.2020 is open to challenge and whether it adequately redresses the grievances projected by the petitioners and whether the grievances raised by the petitioners are genuine or not.

5(i). Excise Policy for the year 2020-21 was announced in February, 2020. It was formulated considering continuance of prevailing normal situation.

Petitioner, who was already holding Retail Excise License L-2 and L-14 for 2019-20 in District Kullu, applied for renewal of license on 13.03.2020. COVID-19 had already erupted, declared as pandemic by World Health Organization on 11.03.2020 and had started spreading world-wide by this time, though extent of its proliferation, its continuity, duration of its life cycle, its affect on all social activities, on public life, on normal life, on economy was perhaps not fathomed by ordinary mortal at that time.

A time came when due to its devastating impact on every walk of life, practically all activities ceased. Liquor vends also remained completely shut from 22.03.2020 to 03.05.2020. From 04.05.2020 to 18.05.2020, the liquor vends were allowed to open with restrictive sale hours from 10:00 am to 3:00 pm. With effect from 19.05.2020 to 30.05.2020, the operational hours of liquor vends were 9:00 am to 5:00 pm. From 01.06.2020, relaxation was given to keep the vends open till 8:00 pm. However, all this time, apart from lockdown, curfew also remained imposed in the State. Complete cessation of normal life activities for long duration followed by restrictive functioning adversely impacted sale of liquor vends. It is only recently that despite COVID-19 still looming large out there without any approved and recognized vaccine, various long imposed restrictions on social activities/gatherings are being gradually lifted in different phases of lockdown.

5(ii). The impact of emerging COVID-19 crisis on sale of liquor vends, their inability to lift MGQ fixed in Excise Policy 2020-21 formulated during normalcy and to pay correspondingly fixed license fee was realized by the respondent-Excise & Taxation Department. It is for this

reason that the Excise Policy 2019-20, which as per the executed contract would have otherwise ended on 31.03.2020, was extended by the State till 31.05.2020. State unilaterally altered the terms of the contract. License fees for the months of April and May, 2020 were ordered to be levied on pro-rata basis as per MGQ determined for the year 2019-20. MGQ for these two months was ordered to be calculated on actual lifting. State thus unilaterally changed the terms of contract executed by it with the licensees. Financial year for the purpose of Excise Policy 2020-21 was changed by the State from 01.04.2020-31.03.2021 to 01.06.2020-31.05.2021. This again was a unilateral change of contractual terms by the State. Excise Units which had not been renewed for the year 2020-21 were allowed to exercise option for operating the units till 31.05.2020. These units were to be put to allotment for the year 2020-21 before 31.05.2020. State altered the conditions of contract. Visualizing that business carried out by the liquor vends would be virtually dismal as compared to the MGQ fixed in the Excise Announcements for the year 2019-20, operation of which was extended till 31.05.2020, the State ordered that there shall be no MGQ of country liquor and

IMFS for the months of April and May, 2020. The license fee during these two months was ordered to be deposited by the retailers on actual lifting of liquor. This again conveys that the contract executed by the State with the licensees was not treated by it as concluded. The State had been altering the terms & conditions of the contract to meet out the exigencies from time to time. Therefore, the argument advanced on behalf of the State that the petitioner having executed an excise contract, which is sacrosanct, concluded forever, permitting no alteration whatsoever, cannot be accepted. Documents on record of the case demonstrate that the State had been varying the contractual terms & conditions/excise policy on its own from time to time taking stock of the situation emerging due to COVID-19 crisis. The judgments relied on behalf of the respondent-State with respect to the concluded contract and policy decisions, therefore, will not be applicable to the fact situation of the present case, where in an unprecedented scenario witnessed by the nation, the respondent-State was itself compelled to keep on varying the terms of contract executed with the retail excise licensees.

5(iii). The next related facet which arises for consideration at this stage is whether the decisions taken/ the orders passed by the State are sufficient, do they meet the situation and redress the grievances projected by the petitioners/retail licensees, whether grievances of the petitioners are genuine.

Excise Policy 2020-21 was formulated while normal conditions prevailed. District-wise Minimum Guaranteed Quota of liquor was allocated in the policy and license fee on various kinds of liquor was fixed. Clause 5.3 of Chapter V of policy required a licensee to lift 100% of MGQ for the allotted vends. Respondents are empowered under the policy to take coercive actions for non-compliance of conditions. Some of the relevant clauses of the policy are:-

2.35 The license fee shall be divided into twelve instalment as per condition No.5.3, into so that the entire license fee is cleared by 15th February of the financial year. The license fee payable for a particular month shall be deposited into the government treasury by the 15th day of the subsequent month failing which the vends of the unit shall be sealed on 16th day and no further time shall be given to the defaulter to deposit the dues, the license shall be cancelled the same day and the unit shall be put up for re-allotment. Any advance amounts or instalments deposited by the defaulting licensee shall be forfeited. The 50 percent of 8 percent advance fixed license fee payment shall be adjusted each in the month of April and May, 2020.

3.26 The MGQ allotted to a unit shall further be divided into twelve parts as per the condition No.5.3 to be lifted compulsorily on monthly basis on the payment of the License Fee there on. However, if the licensee fails to lift the minimum guaranteed quota for the month, he shall be required to deposit the license

fee for the said month and if he fails to lift the prescribed quota he shall be liable for action as per condition No.5.3 of this policy. The licensee shall have to deposit the entire License Fee on the lifted quota or the penalty on the unlifted quota as the case may be by 15th of March.

5.3 The licensee shall be required to lift 100% of the Minimum Guaranteed Quota prescribed in respect of Country Liquor and IMFS for the vends/unit allotted to him. The licensee shall lift the quota as per the prescribed percentage mentioned below:-

Sr. No.	MGQ Quarter-wise	Percentage to be lifted
1.	1 st Quarter	25
2.	2 nd Quarter	20
3.	3 rd Quarter	30
4.	4 th Quarter	25

The licensee shall be liable to pay penalty on the unlifted quota failing short of 80% MGQ payable on quarterly basis by the last day of the concerned quarter. If during a quarter, lifting fall short of 80 percent of the MGQ in respect of the vends/units allotted to him, he shall be liable to pay penalty @ Rs.370 per proof liter on IMFS and Rs.320 per proof liter on Country Liquor on such unlifted quota falling short of 80%. The concerned district incharge shall review the lifting of MGQ, calculate and intimate the penalty amount to the licensee latest by 5th day of end of the quarter and for the 4th quarter by 10th of March.”

Liquor vends are located in tourist as well as in non-tourist areas of the respondent-State. Writ Petition Nos.1967, 1961 and 1969 of 2020 were instituted on 30.06/01.07.2020. The liquor vends in these three writ petitions are located in District Kullu. It was not till October, 2020 that the State allowed resumption of some tourist activities in District Kullu. District Kullu is a tourist place. Major part of its economy depends upon tourism related activities. Closure of hotels, ban on social gatherings, sports events, other functions and cultural events, restrictions on tourism, hit hard the sale of liquor

vends in tourist place like Kullu. It has not been disputed that highest average per capita annual MGQ of IMFL at 4.39 Pls (almost double of State's average @ 2.34 Pls) has been fixed for District Kullu, where 80% sale of the liquor vendes comes from tourists. Following district-wise per capita MGQ fixed for the year 2020-21 has been placed on record by the petitioners:-

Name of District	Populations as 2011	MGQ of IMFL for the year 2020-21	Per Capita MGQ
Chamba	518844	854423	1.65
Kangra & Nurpur RD	1507223	3375808	2.24
Lahaul & Spiti	31528	114045	3.62
Kullu	437474	1919148	4.39
Mandi	999518	1518939	1.52
Hamirpur	454293	976579	2.15
Una	521057	1243553	2.39
Bilaspur	382056	873765	2.29
Solan & BBM RD	576670	2202181	3.82
Sirmaur	530164	578599	1.09
Shimla	813384	2176075	2.68
Kinnaur	84298	217411	2.58
Total	6856509	16050526	2.34

Perhaps perceiving abysmal liquor sale figures, the respondent-State on 16.06.2020, amended Himachal Pradesh Liquor License Rules, 1986 and notified that license fee and MGQ for bar licensees for the entire excise year 2020-21 shall be charged on pro-rata basis. Welfare State not only changed the terms of executed contract for Bar Licenses for the benefit of licensees, but made the altered terms valid for the entire excise year, whereas for

retail excise licensees, there was no respite for the excise year 2020-21. The time period of excise year 2020-21 remains the same despite its extension by two months. The retail licensees of the year 2019-20 were allowed to operate the vends during April and May, 2020, but the fact remains that for the most part of these two months, the liquor vends either remained closed or carried out very dismal business. It is not even the case of the respondent-State that immediately on commencement of excise year 2020-21, normalcy had returned or the retail liquor sale figures had jumped. Even the impugned order dated 31.08.2020 acknowledges this fact. Following figures in respect of lifting of liquor reflect the tale of liquor vends' business in the State of Himachal Pradesh and we focus on District Kullu as an example:-

	Lifting (IMFL)	
	Best	Worst
June	Hamirpur (40%)	Kullu (-71%)
July	Baddi (82%)	Kullu (-82%)
Aug	Kangra (28%)	Kullu (-37%)

	Lifting (Country Liquor)	
	Best	Worst
June	Solan (20%)	Kullu (-66%)
July	Sirmour (47%)	Kullu (-74%)
Aug	Bilaspur (18%)	Kinnaur (-56%)

The above tabulation is part of order passed by the respondent on 31.08.2020. For the month of June,

2020, the lifting of Country Liquor and IMFS in District Kullu was short by 66% and 71%, respectively, whereas for the month of July, 2020, it was short by 74% and 82%, respectively, when compared to data of same period of excise year 2019-20.

Since the liquor sale had been low, therefore, the Government of Himachal Pradesh in the order dated 31.08.2020 decided to reduce MGQ of country liquor and IMFL for first three months of excise year 2020-21, i.e. June, July and August, 2020, by 5% and 10%, respectively, for all L-2 and L-14 licenses. The reduction in MGQ gives credence to the grievances of the petitioners regarding loss of their business or else these decisions would not have been taken. Reduction of MGQ by 5% and 10% also adds to the argument that in the given unprecedented scenario emerging from COVID-19, the terms & conditions of the excise contract executed between the parties were not treated as concluded by the State.

5(iv). The above leads to next aspect as to whether reduction by 5% and 10% in the MGQ for all L-2 and L-14 licenses during June, July and August, 2020 as allowed in order dated 31.08.2020 meets the ends of justice or not.

Learned Advocate General would contend that considering overall position, excise licensees have already been provided various reliefs including the following major respites, therefore, no other concession needs to be granted to them:-

(a). Petitioners/Retail Excise Licensees for 2019-20 were allowed to run the vends during April and May, 2020 by extending Excise Policy 2019-20 to 31.05.2020. License fee during these months was levied only on pro-rata basis.

But the fact remains that for most of the period during these two months, either no business was transacted by liquor vends or it remained on very low side. Also no additional quota during extended Excise Policy 2019-20 was allowed to be lifted by the licensee.

(b). Excise Policy 2020-21 has already been extended till 31.05.2021. Therefore, loss of revenue especially in tourist destinations like Shimla, Kullu and Dharamshala will be compensated during next tourist season, which starts in April/May.

What future holds cannot be guessed at this stage. Fact alive today is that pandemic still predominates everything without any known cure or solution. In any case,

time period of excise year 2020-21 does not get enlarged by extension of Excise Policy 2020-21. The period remains the same.

(c). Order dated 31.08.2020 has reduced MGQ by 5% and 10% for all L-2 and L-14 licensees for the months of June-August, 2020. The figures reproduced above are an indication that liquor business especially in tourist areas like Kullu has suffered a lot. In the impugned order dated 31.08.2020, respondent-State has acknowledged loss of business in tourist destinations in following words:- *“Loss of revenue especially in tourist destinations like Shimla, Kullu & Dharamshala will be compensated during the next tourist season which starts in the month of April & May as due to extension of excise year the benefit of April & May will accrue to licensees.”* The petitioners on account of easing of restrictions and recent commencement of tourism related activities have expressed willingness to pay license fees for the months of October, 2020 onwards as per MGQ fixed in Excise Announcements 2020-21. For the months of June, July, August and September, 2020, prayer has been made to reduce MGQ fixed in Excise Policy, 2020-21 by 25 to

30% or to levy license fees on pro-rata basis on actual lifting of liquor.

From time to time, respondent-State has been altering the conditions of excise contracts executed with retail excise licensees due to situations emerging from COVID-19 crisis. For Bar Licensees, the license fee and MGQ for the entire year 2020-21 has been permitted to be calculated and levied on pro-rata basis. The same treatment, however, has not been given to the retail licensees. In the excise policy, MGQ is fixed district-wise. Under the impugned order dated 31.08.2020, MGQ of retail licensees has been reduced by 5% and 10% uniformly for all L-2 and L-14 licensees of the State respectively, for the months of June, July and August, 2020. On what basis, this reduction and that too at uniform basis has been arrived at in the impugned order is not forthcoming. The order itself alongwith its annexures reflect that lifting of liquor in District Kullu has remained as low as -74% (Country Liquor) and -82% (IMFL) during June and July, 2020, which is the lowest as compared to lifting in the other districts. No data is available to justify the reduction of

MGQ only by 5 and 10% for retail licenses L-2 and L-14, respectively.

In light of above observations and discussions, we dispose of the writ petitions with following directions:-

- (i) Interim order dated 06.07.2020 is vacated forthwith.
- (ii) With effect from 01.10.2020 onwards, the petitioners-Retail Excise Licensees shall deposit all excise levies as per MGQ/MVV etc. fixed in and as per Excise Announcements 2020-21.
- (iii) For the period from 01.06.2020 to 30.09.2020, we direct the respondents to review and reconsider the decision taken in the impugned order dated 31.08.2020 insofar as it reduces the MGQ only by 5 and 10% for L-2 and L-14 excise licensees, respectively for the months of June-August, 2020. For reconsidering percentage of reduction of MGQ fixed in Excise Policy 2020-21 for L-2 and L-14 licensees for the months of June-September, 2020, the respondents besides considering other relevant factors shall collect entire actual data pertaining to lifting of liquor from all the districts in the State for

the period, compare it with same data for the same period of excise year 2019-20 vis-à-vis comparison of MGQ fixed under Excise Policies of 2019-20 and 2020-21 and then take a rational, reasoned decision regarding:- extent of reduction of MGQ, the period for which the MGQ is considered necessary to be reduced and the areas for which such reduction would be applicable.

- (iv)** Payment of excise levies w.e.f. 01.06.2020 to 30.09.2020 shall be governed by the decision to be so taken by the respondents within a period of four weeks from today.

With the aforesaid directions, the present petitions stand disposed of, so also the pending miscellaneous applications, if any.

(Tarlok Singh Chauhan)
Judge

(Jyotsna Rewal Dua)
Judge

November 04, 2020
Mukesh