

## State Of U.P vs Sheopat Rai on 7 September, 1993

**Equivalent citations:** 1994 AIR 813, 1994 SCC SUPL. (1) 8, AIR 1994 SUPREME COURT 813, 1994 AIR SCW 134, 1994 ALL. L. J. 199, 1994 (1) SCC(SUPP) 8, (1993) 5 JT 206 (SC), (1994) 1 APLJ 61, 1994 SCC (SUPP) 1 8

**Author:** N Venkatachala

**Bench:** N Venkatachala, B.P. Jeevan Reddy

PETITIONER:  
STATE OF U.P.

Vs.

RESPONDENT:  
SHEOPAT RAI

DATE OF JUDGMENT 07/09/1993

BENCH:  
VENKATACHALA N. (J)  
BENCH:  
VENKATACHALA N. (J)  
JEEVAN REDDY, B.P. (J)

CITATION:  
1994 AIR 813                      1994 SCC Supl. (1) 8  
JT 1993 (5) 206                1993 SCALE (3) 649

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by VENKATACHALA, J.- This appeal on a certificate of fitness to appeal to this Court granted by the High Court of Judicature at Allahabad relates to its judgment dated August 29, 1972 in Civil Miscellaneous Writ Petition No. 4163 of 1972.

2. Antecedent facts of this appeal, which need brief mention, are these:

On June 30, 1972, the Uttar Pradesh Excise (Amendment) Ordinance, 1972 (U.P. Ordinance 13 of 1972)\*, hereinafter referred to as "the Ordinance", was promulgated by the Governor of Uttar Pradesh in exercise of the powers conferred upon him by clause (1) of Article 213 of the Constitution. The Ordinance, which omitted clause (3) of the proviso to Section 21 and sub- \* Ed.: See 1972 LLT-IV - 134 section (3) of Section 40 of the United Provinces Excise Act, 1910, hereinafter referred to as "the U.P. Excise Act", inserted therein Section 24-A which read:

"24-A. (i) Subject to the provisions of Section 31, the Excise Commissioner may grant to any person a licence or licences for the exclusive privilege of selling by retail at shops (for consumption both on and off the licensed premises or for consumption off the licensed premises only) any foreign liquor in any locality.

(2) The grant of licence or licences under sub-section (1) in relation to any locality shall be without prejudice to the grant of licences for the retail sale of foreign liquor in the same locality in hotels and restaurants for consumption on their premises. (3) Where more licences than one are proposed to be granted under sub-section (1) in relation to any locality over the same period, advance intimation of the proposal shall be given to the prospective applicants for every such licence.

(4) The provisions of Sections 25 and 30 and the proviso to Section 39 shall apply in relation to the grant of a licence for an exclusive privilege under this section as they apply in respect of the grant of a licence for an exclusive privilege under Section 24."

3. Reasons for promulgation of the Ordinance were given in its preamble, thus:

"And whereas while the said Act makes express provision for the grant of licences for the exclusive privilege of selling country liquor by retail in any local area it does not contain express provision in similar terms in respect of foreign liquor;

And whereas it is expedient in the public interest to make express provision enabling the adoption of the system of grant of licences prevailing in respect of country liquor with necessary modifications for the grant of licences in respect of foreign liquor with a view to affording to all suitable applicants equality of opportunity to obtain such licence and also with a view to raising additional public revenues (through increased licence fees) out of the consumption of foreign liquor which is a luxury;"

4. For giving due effect to the Ordinance, the U.P. Excise (Amendment) Rules, 1972, hereinafter referred to as "the Excise (Amendment) Rules", which amended the U.P. Excise Rules, were brought into force with effect from August 1, 1972, as per Notification dated July 5, 1972 issued by the Excise Commissioner, U.P. under Section 41 (c) of the U.P. Excise Act. Rule 2(1) thereof read:

"The licence fees for the retail vend of the following commodities under the auction system, is fixed by public auction periodically, but the Excise Commissioner reserves

the right to grant any licence on payment of a fixed fee or fee determined in accordance with a graduated or uniform scale.

(a) Country spirit.

(b) Tari in areas other than those under the Tree Tax system.

(c) Foreign liquor for consumption 'on and off' the premises in Form FL-4 and 'off' premises in Form FL-5.

(d) (i) Hemp drugs: Note (1) the settlement of Tari shops under the auction-cum-tree tax system is also made by public auction.

(ii) Ganja shops are at present settled under the Uniform Surcharge fee system:

Provided that the licence for the retail vend of foreign liquor for consumption off the premises only in Form FL-5 in the prohibition area shall be determined in accordance with a uniform scale."

5. Shop Licence Form in "FL-4" for retail vend of foreign liquor, for consumption both on and off the premises and 'Shop Licence Form' in "FL-5" for the retail vend of foreign liquor for consumption off the premises, the issue of which had been provided for under the U.P. Excise Rules, were also duly changed under the Excise (Amendment) Rules, for bringing into effect the Ordinance as regards retail vend of foreign liquor in accordance with the Excise (Amendment) Rules.

6. Thus, the Ordinance and Excise (Amendment) Rules, enabled the Excise Commissioner to grant on behalf of the State Government periodical licence(s) for retail vend of foreign liquor either on the basis of 'fixed fee system' i.e. granting periodic shop licence(s) on 'fixed fee' determined in accordance with graduated or uniform scale, or on the basis of 'auction system', i.e. granting periodic shop licence(s) on 'licence fee' which was the highest amount of bid in a public auction, as was done in granting periodic shop licence(s) for retail vend of country liquor under the U.P. Excise Act and the U.P. Excise Rules. This situation led the U.P. Government, by its Notification dated July 5, 1972, to announce dates of public auction to be held commencing from July 18, 1972, for grant of periodic shop licence(s) for retail vend of foreign liquor in as many as 50 out of 54 districts of the State.

7. Respondents 1 to 3 herein, each of whom was, at the time of the announcement of public auctions, carrying on retail vend of foreign liquor in shops at Allahabad, Agra and Lucknow, respectively, on the basis of licence form "FL- 5" obtained according to 'surcharge system' prevailing under the U.P. Excise Act and the U.P. Excise Rules, i.e., system of payment of 'licence fee' for the total quantity of foreign liquor to be sold in a year worked out at a fixed unit rate, challenged the constitutional validity of the Ordinance and the Excise (Amendment) Rules, by filing a writ petition in the Allahabad High Court. Respondent 4 herein, is an association of foreign liquor licensees of the U.P. State, registered as a society, which joined respondents 1 to 3 herein, i.e., petitioners 1 to 3 in the

writ petition, to support the challenge made therein.

8. The High Court which examined the challenge in the writ petition with reference to the contentions raised, both for and against such challenge, concluded:

(i) That the licence fee leviable by the State Government under Section 3(i) and (iv) of the Ordinance [Section 24-A(1) and (2)] making applicable Section 30 of the U.P. Excise Act, for grant of periodic shop licence either to the bidder of highest amount of bid in a public auction or to the person paying 'fixed fee' determined by the Excise Commissioner, entitling such bidder or other person to have the exclusive privilege of selling foreign liquor in a locality was ultra vires the Constitution for the reason that the Ordinance providing for imposition of such levy was not justifiable with reference to entries in List II of Seventh Schedule to the Constitution, i.e., Entries 8, 51, 62 and 66 thereof.

(ii) That the Excise (Amendment) Rules issued under Section 41(c) of the Excise Act authorising the Excise Commissioner to provide for the mode of levying and collecting 'licence fee' or 'fixed fee' for grant of any licence, permit or pass or of the storing of any intoxicants were ultra vires Section 41(c) of the U.P. Excise Act for the reason that the Ordinance by which 'licence fee' or 'fixed fee' was leviable for grant of shop licence for retail vend of foreign liquor was itself ultra vires the Constitution.

9. The said conclusions reached by the High Court in its judgment dated August 29, 1972, made it allow the writ petition and issue directions to the appellants herein (respondents in the writ petition) - (i) not to give effect to the Ordinance providing for levy of 'licence fee' for vend of foreign liquor under a shop licence by a licensee in any locality of the State; (ii) not to grant shop licence to any person to vend foreign liquor, under the Ordinance and the Excise (Amendment) Rules and (iii) to renew the licences of respondents 1 to 3 (writ petitioners 1 to 3) for the remaining part of the Excise Year 1972-73 under the old 'surcharge system'. However, the High Court, by its order dated November 6, 1975, granted to the appellants herein, who were respondents in the writ petition, a certificate of fitness to appeal to this Court against its judgment dated August 29, 1972. Thus, this appeal was entertained on the basis of the said certificate. But, this appeal, has now, to be considered as against respondents 1 and 3 only, since it is already dismissed on December 17, 1984 as against respondents 2 and 4, for non-prosecution.

10. However, what needs our examination in this appeal is the sustainability of the said conclusions reached by the High Court in its judgment under appeal, viz. (i) that the Ordinance providing for grant to a person a periodic licence for the exclusive privilege of selling foreign liquor in a specified locality of the U.P. State on 'licence fee' or 'fixed fee' was ultra vires the Constitution, for the reason of such levy of 'licence fee' or 'fixed fee' being not justifiable with reference to any of the entries in List II of the Seventh Schedule to the Constitution and (ii) that the U.P. Excise (Amendment) Rules providing for the mode of levying and collection of such 'licence fee' or 'fixed fee' were ultra vires for the reason that the Ordinance providing for such levy itself was ultra vires.

11. Since the matters concerning the sustainability or otherwise of the said conclusions of the High Court, could be examined with advantage in the background of the answers to be given by us on two preliminary questions, we shall endeavor to find answers to them, at the first instance.

12. The two preliminary questions to which answers are to be given by us, may be formulated thus:

(i) What do the terms 'licence fee' and 'fixed fee', the levy and collection of which is permitted under the Ordinance and the U.P. Excise (Amendment) Rules, exactly connote in the context of grant of licence to a person to have the exclusive privilege or right of vending foreign liquor in specified vends of a locality in the State of U.P.? and

(ii) Whether those terms 'licence fee' and 'fixed fee' are referable to the subjects mentioned as 'fee', 'tax' or 'duty' or 'cess' in one or the other entry in List 11 of the Seventh Schedule to the Constitution, on which State is authorised to legislate?

13. The terms 'licence fee' and 'fixed fee' are, admittedly, not defined under the U.P. Excise Act or the Ordinance or the U.P. Excise Rules or the Excise (Amendment) Rules. Section 24-A(1) inserted in the U.P. Excise Act by clauses (i) and (iv) of Section 3 of the Ordinance empowered the Excise Commissioner, subject to the provisions of Section 31, to grant to any person a licence or licences for exclusive privilege of selling by retail at shops in any locality of any foreign liquor (for consumption both on and off the licensed premises only). Section 31 is a provision which provides for payment of fee for grant of a licence. Section 24-A(4), inserted in the U.P. Excise Act by the Ordinance makes the provisions of Sections 25 and 30 and the proviso to Section 39 of the U.P. Excise Act, as to the grant of a licence for the exclusive privilege of carrying on certain activities in relation to country liquor under Section 24, apply to the grant of a licence for the exclusive privilege of selling foreign liquor in shops in any locality of the State. Since Sections 24 and 30 of the U.P. Excise Act pertaining to grant of licence to any person for the exclusive privilege of carrying on specified activities in respect of country liquor or intoxicating drug within any local area are made to apply equally to foreign liquor, they are of importance and require reference:

"24. Grant of exclusive privilege of manufacture, etc.- Subject to the provisions of Section 31 the Excise Commissioner may grant to any person a licence for the exclusive privilege-

(1) of manufacturing or of supplying by wholesale or of both, or (2) of selling by wholesale or by retail, or (3) of manufacturing or of supplying by wholesale, or of both, and of selling by retail, any country liquor or intoxicating drug within any local area.

30. Payment for- exclusive privilege.-

Instead of or in addition to any duty leviable under this chapter the Excise Commissioner may accept payment of a sum in consideration of the grant of licence for any exclusive privilege under Section 24."

14. Sub-rule (1) of Rule 2 in the Excise (Amendment) Rules, which substituted the relevant rule in the U.P. Excise Rules, since refers to commodities including 'foreign liquor' for the retail vend of which periodic I shop- licence' could be granted to a person on the basis of 'auction system' or 'fixed fee system', it requires reference, insofar as, is material:

"(1) The licence fees for the retail vend of the following commodities under the auction system, is fixed by public auction periodically, but the Excise Commissioner reserves the right to grant any licence on payment of a fixed fee or fee determined in accordance with a graduated or uniform scale.

(a) Country spirit.

(b) Tari in areas other than those under the Tree Tax system.

(c) Foreign liquor for consumption 'on and off' the premises in Form FL-4 and 'Off' premises in Form FL-5."

15. A combined reading of the said provisions of the Excise Act, the Ordinance with its preamble, the Excise Rules and the Excise (Amendment) Rules, reveals that the amount realisable as consideration under the 'auction system' that is, the highest bid amount receivable from the bidder in a public auction for grant of licence to such bidder, conferring upon such bidder the exclusive privilege of carrying on, any of the activities mentioned in Section 23 of the U.P. Excise Act including the activity of vending foreign liquor in specified vends (shops) of any locality, is 'licence fee' and an amount to be determined on a graduated or uniform scale by the Excise Commissioner in lieu of 'licence fee' is 'fixed fee'. From this, it follows, that the term 'licence fee' or the term 'fixed fee' in the context of the U.P. Excise Act, the Ordinance with its preamble and the Excise (Amendment) Rules, connotes the idea of payment of a sum by a person to the grantor of a licence as consideration for conferring upon such person by the grant of shop-licence, the exclusive privilege or right to carry on certain activities in respect of country liquor, or foreign liquor or intoxicating drug, within any local area of U.P. State, the carrying of which activities would have been otherwise the exclusive privilege or right of the grantor (Government). This situation, makes us take the view that the State Government's exclusive privilege or right to carry on certain activities in country liquor, foreign liquor or drugs when are given or sold by it to a private person under a licence (contract) for the bid amount receivable under the U.P. Excise Act, the Ordinance or the Excise (Amendment) Rules, such amount constitutes the consideration for licence (contract) and that consideration is termed as 'licence fee'. Similarly, the fee to be determined by Excise Commissioner on a graduated or uniform scale under the sub- rule in lieu of 'licence fee', makes us take the view that it Could be termed as 'fixed fee', and constitutes consideration for licence (contract).

16. We find that the said view of ours that the term 'licence fee' in the context of the U.P. Excise Law connotes the idea of it being the consideration in money receivable by the Government from a private person by grant of a licence (contract), for parting in such person's favour, its exclusive privilege or right of carrying on certain activities in respect of country liquor or drugs under ,auction system' in public auctions, and the term 'fixed fee' is a fee determined by the Excise Commissioner,

in lieu of 'licence fee', well accords with the view taken by the Constitution Bench of this Court in *Har Shankar v. Deputy Excise and Taxation Commissioner*<sup>1</sup>. In that case, the Constitution Bench, which was concerned with the meaning to be given to the terms 'licence fee' and 'fixed fee' in the context of Bihar Excise Act and its Rules, which provided for grant of a shop licence to any person the exclusive privilege for selling foreign liquor in specified vends of a locality, under 'auction system' or 'fixed fee system', held that the term 'licence fee' meant "the price or consideration which the Government charges for parting with its privileges and granting them to the licensees" while the term 'fixed fee' meant the 'fee' determined by the Excise Commissioner in lieu of 'licence fee'. Therefore, what is said by the Constitution Bench of 'licence fee' and 'fixed fee' as to grant of shop licences under 'auction system' and 'fixed fee system' respectively in the context of Bihar Excise Law, apply with equal force, to 'licence fee' and 'fixed fee' for grant of shop licences by 'auction system' and 'fixed fee system' under the U.P. Excise Law, since the relevant provisions of Bihar Excise Law on the subject are analogous to the relevant provisions of the U.P. Excise Law on the same subject.

1 (1975) 1 SCC 737 : AIR 1975 SC 1121

17. The term 'licence fee' or 'fixed fee' used in the context of the U.P. Excise Act, the Ordinance read with the preamble and the Excise (Amendment) Rules, if, as indicated by us, is the amount of consideration receivable by the State Government for parting with its exclusive privilege or right in dealing with liquor or drugs including the exclusive privilege of vending foreign liquor in favour of a private party under a licence (contract), the next question is whether such amount of consideration receivable by the Government could form the subject - 'fee' or 'tax' or 'duty' or 'cess', referred to as such, in one or the other entry of List II of the Seventh Schedule to the Constitution, on which a State gets competence to legislate. Our answer to this question, ought to be in the negative, for the reasons which we shall presently state.

18. In *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*<sup>2</sup> this Court considered the question as to what are the indicia or special characteristics that distinguish a fee from a tax proper. B.K. Mukherjea, J. (as he then was), who spoke for the seven-Judge Bench of this Court in the case, opined that 'tax' defined as "a compulsory exaction of money by public authority for public purposes enforceable by law and not payment 'for services rendered' " by Latham, C.J. of the High Court of Australia in *Mathews v. Chicory Marketing Board*<sup>3</sup> had brought out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, were included within it. Describing the characteristic of compulsion involved in taxation, as the essence of taxation, the learned Judge, approved the statement - "it (tax) is imposed under statutory power without the taxpayer's consent and the payment is enforced by law" - found in *Lower Mainland Dairy v. Crystal Dairy Ltd.*<sup>4</sup> Then, to describe the second characteristic of tax - as an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax, the learned Judge called attention to a statement in *Findlay Shirras on Science of Public Finance* (Vol.I, p.

203), where the second characteristic of tax was found described, thus:

"... that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of 'quid pro quo' between the taxpayer and the public authority."

Further, describing the third characteristic of tax, as another feature of taxation, the learned Judge opined:

"... that as it (tax) is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay,"

Thereafter, the learned Judge, who adverted to 'fee', although expressed the view that formulation of a definition of 'fee' would not be possible having regard to several kinds of fee, which may be imposed, relied upon the passage at page 215 in Public Finance by Lutz, to describe the general characteristics of 'fee' as : (i) a charge for a special service rendered to individuals by some governmental agency; (ii) an amount levied supposedly to cover the expenses 2 AIR 1954 SC 282: 1954 SCR 1005 3 60 CLR 263, 276 4 1933 AC 168 17 incurred by the Government in rendering the 'service', though in many cases, costs are arbitrarily assessed, and

(iii) ordinarily, a uniform amount since it was not levied taking account of the varying abilities of persons required to pay fee.

19. Later, the learned Judge, adverting to features which distinguish 'fee' from 'tax', opined:

(i) that the element of compulsion or coerciveness being present in 'tax' as well as 'fee', though the degree of such compulsion may vary from one to another, the compulsive nature of the levy itself cannot be a sole or material feature, to distinguish 'tax' from 'fee';

(ii) that a 'tax' levied is a common burden while a 'fee' is a payment demanded for a special benefit or privilege conferred on the individual, that itself was the primary feature which distinguished 'tax' from 'fee';

(iii) that the special benefit accruing to the individual is the reason for payment in the case of fee while, the particular advantage, if it exists at all in the case of tax is an incidental result of State action.

20. The 'fee', according to the learned Judge, if had to be regarded as a sort of service or consideration for services rendered, on the face of the legislative provision, it (fee) must be co-related to the expenses incurred by Government in rendering the services.

21. Ultimately, the learned Judge stated, that our Constitution recognises for legislative purposes, a distinction between 'tax' and 'fee', in that, several entries in the lists to the Seventh Schedule refer to matters on which 'tax' or 'duty' or 'cess' can be levied by a legislative measure, while there is



reference to only one entry in each of the lists relating to 'fee' that could be levied with reference to governmental action when a legislative measure is brought into existence in relation to any subject-matter of an entry in the given list.

22. What the 'tax' was; and what the 'fee' was; and what were the features which distinguished 'tax' from 'fee'; if were questions considered and answered by the learned Judge as above, those answers were applied by him to hold that the levy imposed on religious institutions under the impugned statute was not a 'fee'. However, the learned Judge, in taking the view that the impugned levy even if was expressed in the statute to be a fee levied in return for services, 'he' having regard to its nature, observed:

"...that the public interest though seems to be the basis of all impositions, imposition of a fee was permissible only if it conferred special benefit which the individual receives."

23. In *H.H. Sudhundra Thirtha Swamiar v. Commissioner for Hindu Religious & Charitable Endowments, Mysore*<sup>5</sup> this Court reiterated the view taken by it in its earlier decision in *Sri Shirur Mutt* case<sup>2</sup> as to the nature of services to be rendered in return for levy of 'fee' by a statute, thus:

"If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected, there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax."

Proceeding further, it was stated, thus:

5\_ 1963 Supp 2 SCR 302: AIR 1963 SC 966 "A fee being a levy in consideration of rendering service of a particular type, co- relation between the expenditure by the Government and the levy must undoubtedly exist....."

24. *Hingir-Rampur Coal Co. Ltd. v. State of Orissa*<sup>6</sup> is a case where this Court was concerned with the validity of imposition of levy by a statute on coal-mines in a certain area and creation of a fund with it. Upholding the levy under the impugned statute to be a 'fee', it was stated:

"If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee."

25. In *Guruswamy & Co. v. State of Mysore*<sup>7</sup> a Constitution Bench of this Court having regard to the nature of excise duty leviable under the statute impugned therein, held that:

"Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country."

In Har Shankar case<sup>1</sup> a Constitution Bench of this Court, it has to be mentioned, by referring to this Court's earlier decisions adverted to in Sri Shirur Mutt case<sup>2</sup> endorsed the correctness of the view expressed in them as to the characteristics of 'fee', 'tax', 'excise duty' by stating thus: (SCC pp. 759-60, para 56) "The distinction which the Constitution makes for legislative purposes between a 'tax' and a 'fee' and the characteristics of these two as also of 1 excise-duty' are well known."

In the State of A.P. v. Y. Prabhakara Reddy<sup>8</sup> Chinnappa Reddy, J., who spoke for this Court on the question of vesting of rights as regards sale and manufacture of intoxicants in the State, observed: (SCC p. 147, para 8) "It is well settled that all rights in regard to manufacture and sale of intoxicants vest in the State. It is open to the State to part with those rights for a consideration. The consideration for parting with the privilege of the State is neither excise duty nor licence fee but it is the price of the privilege."

26. We shall now turn to the two concepts of 'fee', that is, 'fee for licences' and 'fee for services rendered' recognised by sub-article (2) of Article 199 of the Constitution, to find as to which of them could be the subject 'fee' in the entry in List 11 of the Seventh Schedule to the Constitution respecting which State has the competence to legislate.

27. Sub-article (2) in both Articles 110 and 199 is couched in the Sam language thus:

"(2) A Bill shall not be deemed to be a Money Bill by reason only the it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes."

(emphasis supplied 6 (1961) 2 SCR 537AIR 1961 SC 459 7 (1967) 1 SCR 548AIR 1967 SC 1512 8 (1987) 2 SCC 136:AIR 1987 SC 933 In Corporation of Calcutta v. Liberty Cinema<sup>9</sup> a Constitution Bench of this Court, in its majority judgment although recognised the distinction that exists between the concept of 'fee for licences' and the concept of 'fee for services rendered', in the context of examining the meaning of 'licence fee' imposed on cinema houses under Section 548 of the Calcutta Municipal Act, held that 'licence fee' does not necessarily lead to the conclusion that the fee must be only for services rendered by observing thus:

"This contention is not really open to the respondent for Section 548 does not use the word 'fee'; it uses the words 'licence fee' and those words do not necessarily mean a fee in return for services. In fact in our Constitution fee for licence and fee for services rendered are contemplated as different kinds of levy. The former is not intended to be a fee for services rendered. This is apparent from a consideration of Article 110(2) and Article 199(2) where both the expressions are used indicating thereby that they are not the same. In George Walkem Shannon v. Lower Mainland Diary Products Board<sup>10</sup> it was observed at pp. 721-722, (AC):

"... if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province or for both purposes .... It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue.' It would, therefore, appear that a provision for the imposition of a licence fee does not necessarily lead to the conclusion that the fee must be only for services rendered."

28. But, the term 'licence fee' and the term 'fixed fee' in the context of the U.P. Excise Act, the Ordinance and the Excise (Amendment) Rules being the consideration which the Government receives from a private party to part in latter's favour its exclusive privilege or right to vend foreign liquor in specified shops of any locality in U.P. State under a contract - by way of Shop Licence Form (Form FL-4) or (Form FL-5), it is held by us, to be not 'fee' at all, falling in line with the view expressed in this regard by a Constitution Bench of this Court in Har Shankar case<sup>1</sup> and other decisions adverted to. If that be so, the 'licence fee' or 'fixed fee' cannot partake of the character of either 'regulatory fee' or 'compensatory fee' so as to regard it as 'fee'. Thus, neither the 'licence fee' nor 'fixed fee' realisable from a private party for granting the privilege or right to sell or vend foreign liquor to such party can fall within the ambit of the subject 'fee' in the entry to List II of the Seventh Schedule to the Constitution. Then, the 'licence fee' or the 'fixed fee' under consideration, cannot be regarded as 'tax' since the characteristics of tax, namely, its levy being compulsive in nature, its burden being common, it being payable according to the varying abilities of the person to be charged, are wholly absent in both of them. As 'duty' or 'cess' stand on the same footing as 'tax', the 'licence fee' or 'fixed fee' under consideration, cannot be regarded either as 'duty' or 'cess'. Hence, the terms the 'licence fee' or the 'fixed fee' used in the context of the U.P. Excise Law, under our consideration fall outside the entries in List 11 of the Seventh Schedule to our Constitution which enables the making of legislation 9 AIR 1965 SC 1107 : (1965) 2 SCR 477 10 1938AC708,721-22: AIR 1939 PC 36,38-9 for imposition of tax, duty or cess. The observations of Chandrachud, J. (as he then was), who rendered the judgment on behalf of the Constitution Bench of this Court in Har Shankar case<sup>1</sup> which fully support our view of what is 'licence fee' and what is 'fixed fee' under the U.P. Excise Law, depict the correct legal position, thus: (SCC pp. 759- 60, para 56) "The distinction which the Constitution makes for legislative purposes between a 'tax' and a 'fee' and the characteristics of these two as also of 1 excise duty' are well known. 'A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered'. A fee is a charge for special services rendered to individuals by some governmental agency and such a charge has an element in it of a quid pro quo<sup>2</sup>. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. Guruswamy & Co. v. State of Mysore<sup>7</sup>. The amounts charged to the licensees in the instant case are, evidently, neither in the nature of a tax nor of excise duty. But then, the 'Licence fee' which the State Government charged to the licensees through the medium of auctions or the 'Fixed fee' which it charged to the vendors of foreign liquor holding licences in Forms L-3, L-4 and L-5 need bear no quid pro quo to the services rendered to the licensees. The word 'fee' is not used in the Act or the Rules in the technical sense of the expression. By 'licence fee' or 'fixed fee' is meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the State can carry on a trade or business, such a charge is the normal incident of a

trading or business transaction."

29. Since our above answers to the preliminary questions as to what the terms 'licence fee' and 'fixed fee', the levy and collection of which is provided for under the U.P. Excise Law, the Ordinance and the U.P. Excise (Amendment) Rules, exactly connote in the context of grant of shop licence to a person to have the exclusive privilege or right of vending foreign liquor in specified vends of a locality in the State of U.P. and as to whether such terms 'licence fee' and 'fixed fee' are referable to 'fee', 'tax', or 'duty' or 'cess' falling in one or the other entry in List II of the Seventh Schedule to the Constitution, furnish the background in which the sustainability or otherwise of the conclusions of the High Court to which we have adverted to earlier could be examined, we shall proceed, accordingly.

30. The High Court's first conclusion is that the licence fee leviable by the State Government under the provisions of the Ordinance for grant of periodic shop licence either to the highest bidder in a public auction or to the person paying fixed fee determined by the Excise Commissioner entitling such bidder or other person to have the exclusive privilege of selling foreign liquor in a locality was ultra vires the Constitution for the reason that the Ordinance providing for imposition of such levy was not justifiable with reference to entries in List II of the Seventh Schedule to the Constitution i.e. Entries 8, 51, 62 and 66 thereof. The first conclusion, therefore, relates to. the constitutional invalidity of the Ordinance for want of legislative competence on the part of the State.

31. Entries 8, 51, 62 and 66 in List 11 of the Seventh Schedule to the Constitution were the entries relied upon on behalf of the State in support of the State's legislative competence for promulgation of the Ordinance. Those entries read:

"8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-

paragraph (b) of this entry.

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

66. Fees in respect of any of the matters in this List, but not including fees taken in any Court."

32. The High Court found that the 'licence fee' and 'fixed fee' leviable and realisable from a private party by the State Government for the grant by way of shop licence, of the exclusive privilege, for sale of foreign liquor in specified shops by such party because of the Ordinance and the Excise (Amendment) Rules, made pursuant thereto constituted the consideration for such licence (contract). But, according to it, one or other such consideration for grant of shop licence, not being 'duties of excise', 'taxes on luxuries' or 'fees' the subject matters of Entries 51, 62 and 66 respectively, for the levy and collection of which the State Legislature was competent to make the law, the Ordinance relating to grant of shop licences in any locality to sell in specified shops thereof foreign liquors, on such consideration of levying 'licence fee' or 'fixed fee', had to be regarded as that promulgated on a subject on which State had no legislative competence. Since, it was not contended before us on behalf of the State that the High Court was unjustified in its view that the Ordinance could not be regarded as that competently made by the State under Entries 51, 62 and 66 of List II, no need arises for us to examine the correctness of the said view of the High Court.

33. Then, what remains for our consideration is the question as to whether the Ordinance promulgated enabling the State to grant shop licences for sale of foreign liquors to private parties on 'licence-fee' or 'fixed fee' could have been regarded by the High Court as a subject on which the State Legislature had competence to legislate under Entry 8 of List II of the Seventh Schedule to the Constitution, for admittedly neither the Union nor a State Legislature is competent to make a law on a subject not covered in one or the other entry in the Legislative Lists of the Seventh Schedule to our Constitution. If our answer to this question has to be in the affirmative, the High Court's first conclusion, necessarily becomes unsustainable. A satisfactory answer to this question since could be found from the Constitution Bench decision of this Court in *Har Shankar* case<sup>1</sup> and the seven-Judge Bench decision of this Court in *Synthetics and Chemicals Ltd. v. State of U.P.*<sup>11</sup> where this Court has exhaustively dealt with the law relating to the very question under consideration by reviewing all 11 (1990) 1 scc 109 its earlier decisions rendered thereon, we find it unnecessary to make any detailed reference, to the other decisions of this Court or other Courts.

34. *Har Shankar* case<sup>1</sup> a Constitution Bench decision of this Court, is referred to by us already to sustain our view that the 'licence fee' or the 'fixed fee' levied and realisable under the Ordinance and the Excise (Amendment) Rules as price or consideration received by the State Government from a private party for parting in such party's favour the exclusive right to vend foreign liquor, cannot be regarded as a tax or excise duty or fee respecting which State had competence to legislate under Entries 51, 62 and 66 of List II of the Seventh Schedule to the Constitution. We shall, now refer to that decision, to find the views expressed by the Constitution Bench on State Legislature's competence to provide for levy of 'licence fee' or 'fixed fee' by legislation for granting shop licences (contracts) conferring upon private parties the exclusive privilege of selling foreign liquor in specified shops of any locality of a State and to find further whether such 'licence fee' or 'fixed fee' is nothing but a large sum of consideration for grant of shop licences not being fee, tax, duty or cess covered by entries in List 11 of the Seventh Schedule to the Constitution. The case before the Constitution Bench was, where private parties, who had obtained licences under the Punjab Excise Act, 1914 and the Rules made thereunder in having given highest bids in public auction for obtaining an exclusive right of selling country liquor, sought to avoid their liability to pay the 'licence fee' and 'fixed fee', questioning the constitutional validity of the provisions of that Act and those Rules, as

also the competence of the State Legislature to impose such levy, by filing writ petitions in the High Court of Punjab & Haryana. Since they did not succeed in the High Court, they sought a decision in the matter from this Court on a certificate of fitness to appeal granted to them by the High Court. It has to be noted here that the relevant provisions of the Punjab Excise Act are in 1 pari materia' with the relevant provisions of the U.P. Excise Act and the Ordinance with which we are concerned. The Constitution Bench itself refers to the matters that arose for its consideration in the appeal, thus: (SCC p. 749, para 25) " The challenge now is generally based on the ground that there is no quid pro quo between the fees imposed on the licensees and the services rendered to them; that the fees are in the nature of a tax which there is no authority to impose; that the levy is beyond the legislative competence of the State Government; or that the terms and conditions of the licence constitute an unreasonable restriction on the fundamental right of the citizen to carry on business for the sale of liquor."

35. Thereafter, the Constitution Bench, by referring to its earlier decisions of five Constitution Benches in State of Bombay v. F.N. Balsara<sup>12</sup>, Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner, Ajmer", State of Assam v. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong<sup>14</sup>, Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam<sup>5</sup> and Amar Chandra Chakraborty v. Collector of Excise, Government of 12 1951 SCR 682: AIR 1951 SC 318 : 52 Cri LJ 1361 13 1954 SCR 873 AIR 1954 SC 220 14 1957 SCR 295 AIR 1957 SC 414 15 1958 SCR 1240: AIR 1958 SC 398 Tripura<sup>16</sup> as regards State's competence to make laws on liquor business observed, thus: (SCC p. 755, para 47) "These unanimous decisions of five Constitution Benches uniformly emphasized after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to the health and welfare of the public, that elimination and exclusion from business is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by themselves by all civilized communities."

36. Further, it summarised the true legal position which governed the dealings in intoxicants, as stated and reflected by the aforesaid five Constitution Benches' decisions as also by the decisions in State of Bombay v. R.M.D. Chamarbaugwala<sup>17</sup>, State of Orissa v. Harinarayan Jaiswal<sup>18</sup> and Nashirwar v. State of M.P. 19 by observing thus: (SCC p. 758, para 53) "There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession."

However, later, referring to the judgment in Krishna Kumar Narula v. State of J&K<sup>20</sup> wherein it was held-

"... that dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make a law imposing reasonable restrictions on the said right, in public interests." it was stated:

(SCC p. 759, para 54) "It is significant that the judgment in Krishna Kumar Narula case<sup>20</sup> does not negate the right of the State to prohibit absolutely all forms of

activities in relation to intoxicants. The wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants on such terms of general application as the State deems expedient."

37. The Constitution Bench, which referred to the true legal position as above, dismissed the appeal before it holding, inter alia, that the appellants were liable to pay the amounts for which they had purchased the privilege of vending liquor by way of 'licence fee' or 'fixed fee'.

38. The other decision of a seven-Judge Bench of this Court is that in *Synthetics and Chemicals Ltd.*" where the question which arose for consideration was whether the U.P. State Legislature had the competence to legislate in respect of industrial alcohol? Sabyasachi Mukharji, J. (as he then was), who spoke for six Judges constituting the seven-Judge Bench of this Court, adverted to the earlier decisions of the Constitution Benches and the decision of this Court in *Har Shankar case*' besides other decisions of Constitution Benches wherein it was observed:

16 (1972) 2 SCC 442: (1973) 1 SCR 533 17 1957 SCR 874: AIR 1957 SC 699 18 (1972) 2 SCC 36: (1972) 3 SCR 784 19 (1975) 1 SCC 29: AIR 1975 SC 360 20 (1967) 3 SCR 50: AIR 1967 SC 1368 "... that the 'police power' of the State enables regulations to be made regarding manufacture, transport, possession and sale of intoxicating liquor."

However, the learned Judge did not agree with the said observation that there was police power which could be exercised by a State in India in the matter of making law under our Constitution, although he described that police power to be the American Doctrine. But, the learned Judge, then attributed the power of the State to make such laws under our Constitution to State's sovereign power, thus:

(SCC p. 148, para 61) "The American doctrine of police power is not perhaps applicable as such in India, but powers of the sovereignty to regulate as part of the power of the competent legislature to effectuate its aim are there."

The said view was reiterated as well, thus: (SCC p. 149, para 64) "We recognise power of the State to regulate though perhaps not as emanation of police power, but as an expression of the sovereign power of the State."

39. Ultimately, dealing with the power of the Union to legislate on industrial alcohol vis-a-vis the power of State legislature to legislate on alcohol for human consumption, the learned Judge observed: (SCC pp. 157-8, para 85) "After the 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as Item 26 of the First Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non-potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the central licences under IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which they do not possess. Nor can the States claim exclusive right to produce and manufacture industrial

alcohol which are manufactured under the grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under such grant be amenable to States' claim of exclusive possession of privilege. The State can neither rely on Entry 8 of List II nor Entry 33 of List III as a basis for such a claim. The State cannot claim that under Entry 33 of List III, it can regulate industrial alcohol as a product of the scheduled industry, because the Union, under Section 18-G of the IDR Act, has evinced clear intention to occupy the whole field. Even otherwise sections like Sections 24-A and 24-B of the U.P. Act do not constitute any regulation in respect of the industrial alcohol as product of the scheduled industry. On the contrary, these purport to deal with the so called transfer of privilege regarding manufacturing and sale. This power, admittedly, has been exercised by the State purporting to act under Entry 8 of List II and not under Entry 33 of List III." (emphasis supplied)

40. It is significant to note here that Section 24-A of the Act noticed above is that which was inserted in the U.P. Excise Act under the Ordinance and which under a subsequent legislative enactment of the State has become a part of the U.P. Excise Act. Thus, it becomes clear that Section 24-A inserted in the U.P. Excise Act by the Ordinance, which was held to be ultra vires the Constitution for want of legislative competence by Allahabad High Court stands negated by this Court's Constitution Bench decision in Har Shankar case<sup>1</sup> and the seven-Judge Bench decision in Synthetics and Chemicals Ltd. 11

41. Thus, we are not left in doubt that the first conclusion of the High Court adverted to above, is unsustainable.

42. Now, coming to the second conclusion relating to the power exercisable by the Excise Commissioner in the matter of the mode of levy and collection of the 'licence fee' and 'fixed fee' under the Excise (Amendment) Rules, the High Court took the view that having regard to its conclusion about State Legislature's legislative incompetence on the subject of the Ordinance, it had to hold that the impugned Rule under the Excise (Amendment) Rules was also ultra vires the Constitution. Since, we have found that High Court's view of the constitutional invalidity of the Ordinance is contrary to the decisions of this Court, in Har Shankar case<sup>1</sup> and Synthetics and Chemicals Ltd. 11 the second conclusion of the High Court under consideration as to invalidity of the Excise (Amendment) Rules, based on the constitutional invalidity of the Ordinance also becomes unsustainable.

43. In the result, we allow this appeal, set aside the judgment of the High Court under appeal and dismiss the writ petition in which that judgment is rendered. However, in the facts and circumstances of the case, we direct the parties to bear their respective costs of this appeal.

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