

State Of Andhra Pradesh vs Y. Prabhakara Reddy on 4 March, 1987

Equivalent citations: 1987 AIR 933, 1987 SCR (2) 513, AIR 1987 SUPREME COURT 933, 1987 TAX. L. R. 1905, 1987 CRILR(SC MAH GUJ) 418, (1987) 1 JT 637 (SC), 1987 21 STL 84, (1987) 1 APLJ 72, (1987) 12 ECC 41, 1987 (2) SCC 136

Author: O. Chinnappa Reddy

Bench: O. Chinnappa Reddy, M.M. Dutt

PETITIONER:
STATE OF ANDHRA PRADESH

Vs.

RESPONDENT:
Y. PRABHAKARA REDDY

DATE OF JUDGMENT 04/03/1987

BENCH:
REDDY, O. CHINNAPPA (J)
BENCH:
REDDY, O. CHINNAPPA (J)
DUTT, M.M. (J)

CITATION:
1987 AIR 933 1987 SCR (2) 513
1987 SCC (2) 136 JT 1987 (1) 637
1987 SCALE (1) 525

ACT:

Andhra Pradesh Excise Act, 1968: ss.2(10), 17, 21-23/Andhra Pradesh (Arrack, Retail Vend Special Conditions of Licences) Rules, 1969: rr. 7, 11 & 15/Andhra Pradesh (Lease of Right to Sell Liquor in Retail) Rules 1969: rr.2(ix), 3, 16, 18 & 22/Andhra Pradesh Excise (Amendment) Act, 1984--Minimum guaranteed quantity of arrack short drawn--Contractor whether entitled to deduct from issue price excise duty component--Issue price--Connotation of.

HEADNOTE:

Section 17 of the Andhra Pradesh Excise Act 1968, as it stood at the relevant time, provided for the grant of lease

for the manufacture or sale of an intoxicant. It also provided that a lease shall not take effect until a licence under the Act was also issued. Section 23 provided that the sum accepted in consideration for the grant of any lease under s.17 was to be the excise duty payable in respect of that excisable article.

Rule 3 of the Andhra Pradesh (Lease of Right to Sell Liquor in Retail) Rules, 1969 prescribes that every lease of right to sell liquor in retail shall be granted by auction. Rule 7 of the Andhra Pradesh (Arrack Retail Vend Special Conditions of Licences) Rules, 1969 requires the licences to purchase arrack from the distillery, warehouse or depot allotted by the Government and to pay 'issue price' as notified. Rule 15 provides for the purchase of a specified minimum guaranteed quantity of arrack every month and for the adjustment of the issue price in case of any short-fail in the purchase of the minimum guaranteed quantity of liquor.

A question arose as to whether under the Excise-Law prevailing in the State, the Government was entitled to claim from the excise contractors, who failed to lift the minimum guaranteed quantity of liquor, the amount said to represent the excise duty component in the issue price of liquor relating to such unlifted quantity of liquor.

A Full Bench of three Judges of the High Court in *V. Narasimha Rao v. Superintendent of Excise*, (AIR 1974 AP 157) held in favour of the Government. It took the view that three items, namely, duty, cost

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and sales tax constituted the issue price. This view, however, was overruled by the Full Bench of Five Judges of the same High Court in *Atluri Brahmanandam v. Tahsildar of Gannavaram*, (AIR 1977 AP 196) wherein it was held that the Government could not do so. It treated the excise duty as a severable element of issue price. That judgment was assailed in the appeals and petitions filed by the Government.

To nullify the effect of that judgment and to validate the demands raised by the Government the State Legislature enacted the Andhra Pradesh Excise (Amendment) Act X of 1984. The amended s.17 provides for grant of lease or licence for exclusive privilege of manufacture, supply by wholesale or sale of any liquor or other intoxicants. The new s.23 empowers the competent officer to accept payment of a sum in consideration of the grant of lease or licence or both for the exclusive privilege in respect of the liquor or any other intoxicant under s.17. Section 4 of the Amending Act, provides for the validation of earlier demands made in respect of issue price of short drawn minimum guaranteed quantity of liquor. Demands raised pursuant to the Amending Act were upheld by the High Court by a later judgment.

The aggrieved excise contractors filed appeals to this court. Some of the contractors who had originally succeeded because of the decision of Five Judges Bench and were again

called upon to make good the deficit after the Amending Act was passed, having failed in the High Court filed special leave petitions to this Court.

It was contended for the aggrieved contractors that what was sought to be recovered from them was excise duty on unlifted quantity of liquor which was not authorised by the provisions of the Act, as the excise duty being a part of the issue price it could only relate to liquor drawn by them and not pertain to undrawn liquor, that without amending ss.21 and 22 of the Excise Act the amendment of s.23 affected by the Legislature led nowhere towards achieving the result aimed at by the Legislature and that the Legislature could not validate the demands earlier made and struck down by the Courts, merely by enacting that the demands were to be deemed to be valid without removing the vices and the defects.

Disposing of the appeals and the special leave petitions, the Court,

HELD: 1.1 Once 'issue price' is determined its components, such as excise duty, cost price, transport charges etc. cease to retain their individual character. They cannot then be severed from the issue

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price and dealt with separately. The Five Judges Bench of the High Court was, therefore, wrong in holding that excise duty was a severable element of issue price. [526H; 527A-B]

1.2 Issue price is the sum total of whatever has gone into the price of liquor at the time it is issued and it is a single pre-determined definite sum per bulk litre and not the total of separate sums representing to many specified components. The 'issue price' is that which is notified as issued price and not its components, if any. These components which have come together to become 'issue price' are rendered incapable of being separated again. Excise duty loses its identity, as it were, and becomes an inseparable part of 'issue price'. [525H; 526A]

A lessee-licensee, therefore, was not entitled to claim deduction from the issue price payable by him in respect of short drawn quantity of arrack the amount attributable to the excise duty. [528F]

V. Narasimha Rao v. Superintendent of Excise, AIR 1974 AP 157, distinguished.

Atluri Brahamanandam v. Tahsildar of Gannavaram, AIR 1977 AP 196, overruled.

2.1 The issue price is no more and no less than the price which the contractor agrees to pay for the grant of the privilege to sell liquor, drawn or undrawn. The minimum guaranteed quantity of liquor as well as the issue price are both fixed well in advance of the auction in regard to each shop and it is with full knowledge of the issue price and the minimum guaranteed quantity that every bidder participates in the auction. [527D; 526C-D]

2.2 There can be no question that issue price must

generally relate to liquor which is drawn by the contractor but it does not follow therefrom that issue price cannot be adopted by agreement between the parties as a measure of compensation to be paid in the case of undrawn liquor. [527C-D]

Panna Lal v. State of Rajasthan, [1975] 2 SCR 633, referred to.

3.1 Even prior to the 1984 amendment, the amount which each of the contractors was required to pay or to have adjusted was not excise duty on undrawn liquor, but was part of the price which he had agreed to pay for the grant of the privilege to sell liquor. [527D]

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3.2 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. [527E-F]

3.3 Reading sections 17 and 23 of the Andhra Pradesh Excise Act 1968 together with the Andhra Pradesh Excise (Lease of Right to Sell Liquor in Retail) Rules 1969 and Andhra Pradesh (Arrack Retail Vend Special Conditions of Licences) Rules 1969, makes it evident that the privilege of selling liquor, which includes the lease of the shop for an area and the licence to sell liquor therein may be granted by the State by public auction subject to: (1) payment of rental being the highest bid at the auction, (2) the requirement that the licensee shall purchase arrack at the issue price, and (3) the further requirement that the licensee shall purchase a minimum guaranteed quantity of arrack, which he has to make good in case of short fail. The consideration for the grant of the privilege to sell liquor is not merely the rental to be paid by the lessee but also the issue price of the arrack supplied or treated as supplied in case of short fail, which is also to be paid by the lessee-licensee. There is no question of the lessee-licensee having to pay the excise duty though it may be that the issue price is arrived at after taking into account the excise duty payable. [528B-E]

Panna Lal v. State of Rajasthan, [1975] 2 SCC 633; State of Haryana v. Jage Ram, [1980] 3 SCR 746 and Har Shankar & Ors. v. The Dy. Excise & Taxation Commr. & Ors., [1975] 1 SCC 737, referred to.

Bimal Chandra Banerjee v. State of Madhya Pradesh, [1971] 1 SCR 844; Madhya Pradesh v. Firm Cappulal etc., [1976] 2 SCR 1041 and Excise Commissioner, Uttar Pradesh v. Ram Kumar, 1976 (Suppl) SCR 532, distinguished.

4. The new s.17 of the Excise Act makes it clear that what is proposed to be granted is the exclusive privilege to manufacture or sell liquor in the shape of a lease or licence or both. The explanation makes it clear that the lease shall not take effect unless a licence is issued. Having

regard to the vital amendment of s. 17, no further amendment of s.21 and 22 was necessary. In the new s.23 it is now specified that the payment in consideration of the grant of lease or licence or both for the exclusive privilege is to be instead of or in addition to any excise duty or fees leviable in ss.21 and 22. The amendments effected to ss.17 and 23,

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therefore, have fulfilled the object of removing the vices or defects in the Act if indeed there were any. [533C-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 437448 Of 1978 Etc. From the Judgment and Order dated 18.1. 1977 of the Andhra Pradesh High Court in Writ Petition No. 4485, 3399, 4979, 5819 of 1974.

Y.S. Chitale, Soli J. Sorabjee, P.P. Rao, A.S. Nambiar, A. Chitale, T.V.S.N. Chari, N. Mathur, W. Quadri, Ms. V. Grover, Ms. Sunita Mudigouda, T.D. Ramayya, A. Mariarputham, T.C. Gupta, K.V.G. Rama Rao and G. Narayana Rao for the appearing parties.

The Judgment of the Court was delivered by CHINNAPPA REDDY, J. The primary question involved in these appeals and petitions is whether under the 'Excise- Law' prevailing in the State of Andhra Pradesh, the Govern- ment is entitled to claim from the Excise Contractors who have failed to lift the 'Minimum Guaranteed Quantity' of liquor the amount said to represent the 'excise duty compo- nent' in the issue price of liquor relating to such unlifted quantity of liquor. A full bench of three judges of the High Court of Andhra Pradesh, in V. Narasimha Rao v. Superintend- ent of Excise, AIR 1974 AP 157 held that the Government could but this view was overruled by a Full Bench of Five Judges of the same High Court in Atluri Brahmanandam v. Tahsildar of Gannavaram AIR 1977 AP 196 where it was held that the Government could not. It is the judgment of the Full Bench of Five Judges which is in question in the ap- peals and petitions filed by the Government. With a view to cure the defects pointed out by the Full Bench of Five Judges and to validate the demands raised by the Government, the Andhra Pradesh Legislature enacted the Andhra Pradesh Excise Amendment Act X of 1984. Demands raised pursuant to the Amending Act were upheld by the High Court by a later judgment. The aggrieved Excise Contractors have filed ap- peals and they are also before us. In some cases the con- tractors who had originally succeeded because of the deci- sion of the Five Judge Full Bench were again called upon to make good the deficit after the Amending Act was passed. They questioned the fresh demands but failed in the High Court. Their petitions for Special Leave to Appeal are also before us.

Entry 51 of List II of the seventh schedule to the Constitution empowers the State to levy duties of Excise on alcoholic liquors for human consumption (not including medicinal and toilet preparations containing alcohol) manu- factured or produced in the State' and counter availing duties on such alcoholic liquors manufactured or produced elsewhere in India. An Excise duty levied by the State on alcoholic liquors is therefore. primarily a duty on the manufacture or production of such

alcoholic liquors. Section 2(10) of the Andhra Pradesh Excise Act, 1984 defines "Excise Duty" or "Countervailing duty" to mean "the duty of Excise or countervailing duty, as the case may be mentioned in Entry 51 in List II of the Seventh Schedule to the Constitution." 'Excise Revenue' is defined by s.2(12) to mean 'Revenue derived or derivable from any duty, fee, tax, rent, fine, penalty or confiscation levied, imposed or ordered under the provisions of this Act or other law for time being in force relating to intoxicating drugs'. Section 17 of the Act, before and after the amendment was and is as follows:

"Section 17 before amendment Section 17 as amended by Act No.10 of 1984.

Power to grant lease: Sec. 17: Grant of exclusive

(i) The Government may, subject to the provisions they may deem fit to impose, of

subject to such conditions as (1) subject to the provisions they may deem fit to impose, of s.28 and any rules made grant for a fixed period to in this, the Govt. may, subject any person, at any place a to such conditions as they lease jointly or severally may deem fit to impose, grant for the supply, manufacture for a fixed period to any or sale of any intoxicant. person at any place a lease or licence or both either Explanation: A lease shall jointly or severally for the not take effect until the exclusive privilege- collector or any other comp-

entent officer has issued (i) of manufacturing or of a licence under this Act. supplying by wholesale or of both, or (2) The Government may (ii) or selling by wholesale confer on any officer the or by retail, or power mentioned in sub-

section(1). (iii) of manufacturing Or Of supplying by wholesale, or of both, and of selling by retail, any liquor or other intoxicant within any such area in the State as may be specified in the said order.

Explanation: A lease shall not take effect until the Collector or any other competent officer has issued a licence under this Act.

(2) The Government may confer on any officer the power mentioned in sub-section(1)."

Sections 21 and 22 which remained unchanged are as follows:

"Section 21: Excise duty or Countervailing duty on excisable articles: (1) The Govt. may, by notification levy an excise duty on any excisable article manufactured or produced in the State at such rate, not exceeding the rates mentioned in the Schedule, as may be specified in the notification. (2) The Govt. may by notification, levy a countervailing duty on any excisable article manufactured or produced elsewhere in India and imported into the State at such rate as may be specified in the notification which may not exceed the rates on excise duty on similar excisable articles levied under sub- section(1).

(3) Different rates may be specified in sub-

section(1) and (2) for different kinds of excisable articles and different modes of levying duties under s.22.

Section 22:- Modes of levying duties: The excise duty and the countervailing duty under s.21 shall be levied in one or more of the following modes:

(a) rateably, on the quantity of any excisable article produced or manufactured in or issued from a distillery, brewery or manufactory or warehouse or imported into the State;

(b) in the case of spirits or other liquors produced in any distillery, brewery or manufactory in according with its quality or strength or in accordance with such scale of equivalents calculated on the quantity of materials used, or by the degree or attenuation of the wash or wort as the case may be, prescribed;

(c) In the case of toddy, in the form of a tax on each variety of excise tree from which toddy is drawn having due regard to the period during which such tree is capable of yielding toddy;

(d) by fees on licences for the manufacture supply or sale of any excisable article."

Section 23 before and after amendment was as follows:

"Section 23 before amend Section 23 as substituted by ment Act 10 of 1984- Excise duty in respect of Sec. 23: Payment for exclusive privilege: Notwithstanding any- sive privilege: Instead of or thing in Sections 21 and in addition to any excise 22, the sum accepted in consideration of the grant sections 21 and 22, the of any release relating to Commissioner or any any other any excisable article under competent officer may accept s. 17, shall be the excise payment of a sum in consideration of the grant of duty payable in respect of lease or licence or both the excisable article, in for the exclusive privilege addition to any duty or in respect of the liquor or fees paid under s.21 & 22. any other intoxicant under sec. 17.

Validation: Where before the commencement of this Act., any issue price (which includes excise duty also) has been collected or recovered from the licensee in respect of short-drawn or undrawn minimum guaranteed quantity of arrack in pursuance of rule 15 of the A.P. Excise (Arrack Retail, Vend and Special conditions of Licences) Rules, 1969, by deducting such price from the advance money paid by the licensee, then, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority to the contrary, the price so collected or recovered shall be deemed to be and shall be deemed always to have been validly collected or

recovered as consideration for the grant of lease or licensee or both to the lessee or licensee for the exclusive privilege in respect of sale of liquor in accordance with the provisions of the principal Act as amended by this Act as if the amendments made to the principal Act by sections 2 and 3 of this Act had been in force at all material times and accordingly

(a) all acts, proceedings or things done or taken by the State Govt. or by any officer of the State Govt. or by any other authority in connection with the collection of such price shall for all purposes, be deemed to be and to have always been done or taken in accordance with law;

(b) no suit or other proceeding shall be maintained or continued in any Court or before any authority for the refund of and no enforcement shall be made by any Court or other authority of any decree or order directing the refund of any such price which has been collected as if the provisions of the principal Act as amended by this Act had been in force at all material times."

The first entry in the Schedule to the Act is as follows:

"No. Description of Mode of levying Maximum rate excisable article duty of duty

1. Arrack on the quantity Rupees eight per issued from the litre of the distillery of ware- strength of house. proof spirit."

We mentioned earlier that the Andhra Pradesh Legislature amended the Andhra Pradesh Excise Act to nullify the effect of the Full Bench judgment in *Atluri Brahmanandam v. Tahsil-dar of Gannavaram* (supra). We may refer to the provisions of the amending Act. Section 2 of the Amending Act provides for the substitution of a new s. 17 for the old. s. 17. We have already extracted both the old and the new sections. Section 3 of the amending Act provides for the substitution of old s.23 by a new s.23. We have already extracted both the old and the new sections. Section 4 of the amending Act provides for the Validation of earlier demands made in respect of issue price of short-drawn minimum guaranteed quantity of liquor. It is necessary to set out the whole of this provision. It is as follows:-

"4. Validation --Where, before the commencement of this Act, any issue price (which includes excise duty also) has been collected or recovered from the licensee in respect of short-drawn or undrawn minimum guaranteed quantity of arrack in pursuance of rule 15 of the Andhra Pradesh Excise (Arrack Retail, Vend and Special Conditions of Licences) Rules, 1969, by deducting such price from the advance money paid by the licensee, then, notwithstanding anything contained in any judgment decree or order of any court, tribunal or other authority to the contrary, the price so collected or recovered shall be deemed to be and shall be deemed always to have been validly collected or recovered as consideration for the grant of lease or licence or both of the lessee or licensee for the exclusive privilege in respect of sale

of liquor in accordance with the provisions of the principal Act as amended by this Act as if the amendments made to the Principal Act by sections 2 and 3 of this Act had been in force at all material times and accordingly, :-

(a) all acts, proceedings or thing done or taken by the State Government or by any offi-

cer of the State Government or by any other authority in connection with the collection of such price shall for all purposes be deemed to be and to have always been done or taken in accordance with law.

(b) no suit or other proceeding shall be maintained or continued in any court or before any authority for the refund, of, and no enforcement shall be made by any Court or other authority of any decree or order direct- ing the refund of, any, such price which has been collected and which would have been validly collected as if the provisions of the Principal Act as amended by the Act had been in force at all material times."

The Andhra Pradesh(Arrack, Retail Vend Special Condi- tions of Licences) Rules, 1969 were made by the Government of Andhra Pradesh in exercise of the powers conferred by various provisions of the Andhra Pradesh Excise Act. Rule 7 obliges the licensee to buy arrack from a recognised distillery, warehouse or depot as may be allotted by the de- partment at the issue price as notified by the Commissioner from time to time. Rule 11 provides for remittences of duty etc. into the Government treasury. Rule 15 deals with mini- mum guaranteed quantity of liquor. It is necessary to ex- tract the first two clauses of rule 15 and they are as follows:-

"15. Minimum guaranteed quantity of arrack-- (1) No licensee shall purchase arrack less than the speci-

fied minimum guaranteed quantity in any month. If in any month, quantity less than the minimum guaranteed quantity fixed for that month is drawn, at the end of that month issue price to the extent of deficit purchase shall be deducted from the advance money paid by the licensee under the minimum quantity of arrack guaranteed by him and the licensee shall be called upon to indemnity the amount so adjusted by the end of the succeeding month in which short drawn quantity had occurred.

Provided that the Excise Superintendents may permit the licensee to lift the short drawn minimum guaran- teed quantity of the previous month in the succeeded month for special reasons expert for the month of September, unless the licensee has committed default in lifting the minimum guaranteed quantity for two successive months; Provided further that where the Commissioner deems it necessary to permit a shop keeper to draw the deficit quantity short drawn in any month in the subsequent, he shall obtain the prior approval of the Government for grant- ing such permission.

(2) Where a licensee fails to lift the arrack as permitted by the Excise Superintendent or to indemnify the advance amount so adjusted by the end of the succeeding month in which the short drawal of quantity had occurred, the right acquired by the defaulting licensee shall be reaucted forthwith."

Rule 17 prescribes "every licensee shall be bound by the provisions of Andhra Pradesh Excise Act, 1968, and the rules and orders made under from time to time."

The Andhra Pradesh Excise(Lease of right to sell liquor in retail) rules 1969 are another set of rules made under the various provisions of Andhra Pradesh Excise Act. Rule 2(ix) defines "rental" to mean 'the rent payable in respect of a shop or group of shops in consideration of the grant of lease for sale of liquor'. Rule 3 provides for the lease of the right to sell liquor in retail. Clause 1 of Rule 3 may be usefully extracted here and it is as follows:

"3. Lease to right to sell liquor in retail:

(1) Subject to the provisions of these rules, every lease of right to sell liquor in retail shall be granted by auction.

The lease shall ordinarily be for a period of one excise year;

Provided that where the Commissioner considers it necessary to grant the lease of right to sell liquor in retail in any other manner, he shall do so with the prior approval of the Government."

The rest of the rules relate to the procedure to be followed at the auction and thereafter. Rule 16 requires the auction purchaser to pay 2 per cent of the annual rental as earnest money together with one month's rental on the day of auction immediately after the acceptance of tender or bid as the case may be. The earnest money and one month's rental are to be in addition to the deposit of rental prescribed by Rule

18. Rule 18(1) provides for the deposit by auction purchaser within fifteen days from the date of auction, two months' rental in cash or in fixed deposit certificates. Rule 21 provides for execution of counterpart agreement by the licensee in form 42. This is required to be done before taking out a licence in respect of lease granted to him for the sale of liquor. Rule 22 provides that the lease shall not take effect until the auction purchaser obtains a licence. Rule 24 prescribes that every auction purchaser shall be bound by all the provisions of the Excise Laws which are in force or which may come into force and of the rules or orders made from time to time by the Government or Commissioner or by the competent authority. The prescribed form for the counterpart agreement provides among other thing for an undertaking that the licensee shall abide by all the provisions of the Andhra Pradesh Excise Act and the Rules and Orders thereunder existing and also those that would be issued from time to time in that respect. The Andhra Pradesh Excise (Lease of right to sell liquor in retail) Rules, 1969 and the Andhra Pradesh Excise(Arrack, Retail Vend Special Conditions for Licences) Rules were duly amended in 1984. It is to be mentioned here that the issue price of arrack is notified well in advance of the Excise year and the minimum guaranteed quantity of liquor is also

fixed in regard to each shop well in advance of the auction. The issue price is always a definite sum per bulk litre of liquor. The notification specifying the issue price does not attempt to split up the issue price into various components such as cost price, Excise duty, transport charges etc. Cost price, Excise duty and transport charges are not separately and individually charged. Issue price is the sum total of whatever has gone into the price of liquor at the time it is issued and it is a single pre-determined definite sum and not the total of separate sums representing so many specified components. For example, the issue price of arrack for the year 1979~80 was notified in the following manner:-

"In exercise of the powers conferred by Rule 7(1) of the Andhra Pradesh Excise (Arrack, Retail sale Special Conditions for Licences) Rules, 1969, the Commissioner of Excise, Andhra Pradesh, hereby notifies the issue price of arrack for the Excise Year 1979-80 at Rs.5.10 per bulk liter of 30x U.P. strength and Rs.3 per bulk liter of 60x U.P. strength."

It is however not disputed that excise duty does enter the determination of the issue price but that has nothing to do with the excise contractor whose obligation is to pay the whole of the issue price. As we said the issue price as well as minimum guaranteed quantity are both fixed well in advance and it is with full knowledge of the issue price and the minimum guaranteed quantity that every bidder participates in the auction. We wish to emphasise here that the 'issue price' is that which is not notified as issue price and not its components, if any. These components which have come together to become 'issue price' are not to be separated again. To borrow the analogy of Chemistry it is a chemical compound and not a mechanical mixture. Excise duty loses its identity, as it were, and becomes an inseparable part of 'issue price'. The learned counsel for the contractors however, argued that excise duty was admittedly a part of issue price and that the legislature, while amending the Excise Act in 1984, had also recognised the distinctive duty element in issue price. He also invited our attention to *Narasimha Rao v. Superintendent of Excise* (supra). It is true that it is not disputed that the element of excise duty has entered the issue price but that does not mean that it continues to retain its character as Excise duty. In *V. Narasimha Rao v. Superintendent of Excise* (supra), the High Court of Andhra Pradesh, after referring to Rule 11 of the retail vend Rules, observed that it could be safely taken that the three items, namely, duty, cost and sales tax constituted the issue price. It is one thing to say that several elements enter into the determination of issue price but it is altogether a different thing to say that these erstwhile constituent elements retain their character and individually as such even after determination of issue price. In the statement of objects and reasons of the amending Act there is reference to 'issue price' together with excise duty' and 'issue price including excise duty'. In s.4 of the amending Act there is a reference to 'issue price(which includes excise duty also)'. These references to issue price and excise duty are made in the context of the judgment of the Five Judge Full Bench of the Andhra Pradesh High Court which has treated excise duty as a severable element of issue price, the effect of which was sought to be got rid by the amending Act. It was in that context that there was a reference to the excise duty element of issue price. We do not think that it is permissible for us to hold that the element of excise duty which has gone into the determination of issue price continues to retain its individual character so as to be capable of being severed and dealt with separately.

Basing himself on an observation made in *Panna Lal v. State of Rajasthan*, [1975] 2 SCC 633 it was argued by the learned counsel on behalf of the Excise Contractors, that issue price can only relate to liquor drawn by the contractors and cannot pertain to undrawn liquor. There can be no question that issue price must generally relate to liquor which is drawn by the Contractors but it does not follow therefrom that issue price cannot be adopted by agreement between the parties as the measure of compensation to be paid in the case of undrawn liquor. In fact, it may not be quite correct even to view it as compensation as we shall presently see. It is no more and no less than the price which the contractor agrees to pay for the grant of the privilege to sell liquor, drawn or undrawn. We may now examine the situation as it obtained before the amending Act, 1984. It is well settled that all right 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. Section 17 of the Andhra Pradesh Excise Act as it stood before the amendment provided for the grant of a lease for the manufacture or sale of an intoxicant subject to such conditions as the Government deemed fit to impose. It also provided that a lease shall not take effect until a licence under the Act was also issued. Section 21 provided for the levy of Excise duty on excisable articles and s.22 prescribed the mode of levy of excise duty. Section 23 provided that, notwithstanding anything in sec. 21 and 22, the sum accepted in consideration for the grant of any lease under s. 17 was to be the excise duty payable in respect of that excisable article. The marginal note of s.23 is "Excise duty in respect of lease". Rental we have seen has been defined in the Andhra Pradesh (Lease of right to sell liquor in retail) Rules, 1969, as meaning "the rent payable in respect of a shop or group of shops in consideration of the grant of lease for the sale of liquor". Rule 3 prescribes that every lease of right to sell liquor in retail shall be granted by auction. Rule 7 of the Andhra Pradesh (Arrack Retail Vend Special Conditions of Licences) Rules prescribes that the licensee shall purchase arrack from the distillery, warehouse or depot allotted by the Government and shall pay issue price as notified by the Commissioner from time to time. Rule 15 provides for the purchase of a specified minimum guaranteed quantity of arrack every month and for the adjustment of the issue price in case of any short-fall in the purchase of the minimum guaranteed quantity of liquor. Thus reading sections 17 and 23 of Andhra Pradesh Excise Act together with the Andhra Pradesh Excise (Lease of Right to sell liquor in retail) Rules, 1969 and Andhra Pradesh (Retail Vend Special Conditions of Licences) Rules, the picture which emerges is that the privilege of selling liquor which includes the lease of the shop for an area and the licence to sell liquor therein may be granted by the State by public auction subject to (1) payment of rental being the highest bid at the auction (It is to be noted here that rental is the rent payable in consideration of grant of lease for the sale of liquor but it is not the sale or exclusive consideration for the lease), (2) the requirement that the licensee shall purchase arrack at the issue price, and (3) the further requirement that the licensee shall purchase a minimum guaranteed quantity of arrack, which he has to make good in case of short fall. The consideration for the grant of the privilege to sell liquor is not merely the rental to be paid by the lessee but also the issue price of the arrack supplied or treated as supplied in case of short fall, which is also to be paid by the lessee-licensee. There is no question of the lessee-licensee having to pay the excise duty though it may be that the issue price is arrived at after taking into account the excise duty payable. If this is the true position, the question arises whether the contractor can claim to deduct from the issue price payable by him in respect of short drawn arrack, the amount said to be attributable to excise duty.

Once we have understood the true nature of 'issue price' and the true consideration for the grant of the exclusive privilege to sell liquor, the question posed in the previous paragraph is not difficult to answer. We have guidance from several decisions of this Court.

The first of the cases on which the learned counsel for the liquor contractors relied was that of *Bimal Chandra Banerjee v. State of Madhya Pradesh*, [1971] 1 SCR 844. The successful bidders at an excise auction who had failed to take delivery of the prescribed minimum quantity of liquor which they were required to sell under the condition of auction were called upon to pay excise duty on the quantity of liquor which they had failed to take. Clause 2(c) of the notification prescribing the conditions of auction provided that the contractor had to make good every month "the deficit of monthly average of the total minimum duty". The court found that none of the provisions of the Act empowered the rule making authority viz. the State Government to levy tax on excisable articles which had not been either imported, exported, transported, manufactured, cultivated or collected under any licence or manufactured in any distillery established or distillery or brewery licenced under the Act. The Court said, "Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to exercise a power which it did not possess. No tax can be imposed by any by-law or rule or regulation unless the statute itself under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive."

This was clearly a case where the State purported to levy excise duty on the unlifted quantity of liquor' and this could not be done under the authority of law. The second case on which the learned counsel relied was that of *State of Madhya Pradesh v. Firm Gappulal etc.*, [1976] 2 SCR 1041. In that case there was no dispute that the demand made on the contractors was in respect of duty on liquor which had not been lifted. It was held that the demand could not be made. The decision of the court in *Panna Lal's* case was distinguished on the ground that in that case there was not levy of excise duty in enforcing the payment of the guaranteed sum or the stipulated lump sum mentioned in the licences. It was also pointed out that in *Panna Lal's* case the excise duty component of the issue price was found to be a measure of the quantum of or extent of the concession or the remission to be given to the liquor contractors. The lump sum amount payable for the exclusive privilege was not to be confused with the issue price. In essence, it was said, what was sought to be recovered from the liquor contractors in *Panna Lal's* case was the shortfall occasioned on account of failure on the part of liquor contractors to fulfil the terms of licence. *Gappulal's* case is not of any assistance to the contractors in the present case as what was sought to be recovered there, was undoubtedly excise duty which was not leviable on unlifted liquor. The third case relied on by the learned counsel for the con-

tractors was that of *Excise Commissioner, Uttar Pradesh v. Ram Kumar*, [1976] Suppl SCR 532. The licence granted to each of the contractors in this case provided that on his failure to lift the monthly proportionate quota in any month, he shall be liable to pay compensation to the State Government at the rate equal to the rate of still head duty ... on the quantity falling short of such monthly proportionate quota. The contractors having failed to lift or sell the minimum quantity of quota of liquor were required to compensate the State as provided by the licence. The Court held that the demand though disguised as compensation was in reality a demand for excise duty on the unlifted

quantity of liquor and that was not authorised by the provisions of the Act. Thus we see that in Bimal Chandra Banerjee's case and Gappulal's case, what was sought to be recovered, was excise duty and in Ram Kumar's case also what was sought to be recovered was excise duty, though disguised as compensation. Such excise duty on unlifted liquor was not leviable. Referring to these cases, Chandrachud, CJ. observed in *State of Haryana v. Jage Ram*, [1980] 3 SCR 746.

"In Bimal Chandra Banerjee's case, it was held by this court that the levy of excise duty on undrawn liquor was beyond the power of the State Government and that therefore, the rule imposing the condition to that effect was invalid. That decision was followed in *State of Madhya Pradesh v. Firm Gappulal* where also the licensees were required to pay what was described as 'Pratikal' which was nothing but excise duty on undrawn liquor. The same situation obtained in *Excise Commissioner v. Ram Kumar* because the real nature of the payment which the licensee were required to pay there, was excise duty on undrawn liquor. "These decisions cannot hold the respondents because the true position, as we stated earlier, is that the amount which the respondents are called upon to pay is not excise duty on undrawn liquor but is the price of a privilege for which they bid at the auction of the vend which they wanted to conduct."

The learned counsel for the State of Andhra Pradesh relied on *Har Shankar & Ors., v. The Dy. Excise & Taxation Commr. & Ors.*, [1975] 1 SCC 737; *Panna Lal v. State of Rajasthan* (supra) and *State of Haryana v. Jage Ram* (supra). In *Har Shankar's* case, it was held by a Constitution Bench of the Court (Chandrachud, J. speaking for the Court) that since rights in regard to intoxicants belonged to the State, it was open to the Government to part with those rights for a consideration. In a scheme providing for the parting of the right for a consideration, it was not of the essence whether the amount charged to the licences was pre-determined or whether it was left to be determined by bids offered in auctions. The power of the Government to charge a price for parting with its rights and not the mode of fixing that price was constituted the essence of the matter. Nor indeed did the label affixed to the price determine either the true nature of the charge left by the Government or its rights to levy the same. The amount charged was neither a fee properly so-called nor indeed a tax but was in the nature of a price of the privilege which the purchaser had to pay in any trade or business transaction. Once it was appreciated that the auctions were only a mode or medium for ascertaining the best price obtainable for the grant of a privilege to sell liquor, there would be no further contradiction in them. In *Panna Lal's* case, the court held:

"The agreements gave the liquor contractors an exclusive privilege to sell country liquor in a specified area for the period fixed for a stipulated sum of money for enjoying the privilege. If the contractors do not sell any liquor, they are yet bound to pay the stipulated sum. If they sell liquor, they are given the benefit of remission in the price of the exclusive privilege. The measure for this remission is the excise duty leviable to the extent that the liquor contractor can neutralise the entire amount of exclusive privilege in the excise duty payable by them. If the contractors fail to lift adequate quantity of liquor and thereby fail in neutralising the entire price of exclusive privilege, the contractors are not called upon to pay excise duty."

It was held that there was no leviable excise duty in enforcing the payment of the guaranteed sum or the stipulated lump sum mentioned in the licence. We have already referred to the references made to 'rental' and 'issue price'. We finally come to the State of Haryana v. Jage Ram (supra) which we may now take to be the last word on the subject. Chandrachud, CJ spoke for the Court and said,:

"The amount which the respondents agreed to- pay to the State Government under the terms of the auc- tion is neither a fee properly so called which would require the existence of a quid pro quo, nor indeed is the amount in the nature of excise duty, which by reason of the constitu- tional constraints had to be primarily a duty on the production or manufacture of goods produced or manufactured within the country. The respondents cannot therefore complain that they are being asked to pay 'excise duty' or "stillhead duty" on quota of liquor not taken, lifted or purchased by them. The respondents agreed to pay a certain sum order the terms of the auction and the Rules only prescribe a convenient mode whereby their liability was spread over the entire year by splitting it up into fortnightly instalments. The Rules might as well have provided for payment of a lump sum and the very issuance of the licence could have been made to depend on the payment of such sum. If it could not be argued in that event that the lumpsum payment represented excise duty, it cannot be so argued in the present event merely because the quota for which the respondents gave their bid is re- quired to be multiplied by a certain figure per proof litre and further because the re- spondents were given the facility of paying the amount by instalments while lifting the quota from time to time. What the respondents agreed to pay was the price of a privilege which the State parted with in their favour. They cannot therefore avoid their liability by contending that the payment which they were called upon to make is truly in the nature of excise duty and that no such duty can be imposed on liquor not lifted or purchased by them".

The result of our discussion is that even prior to the 1984 amendment, the amount which each of the contractors was required to pay or have adjusted was not excise duty on undrawn liquor, but was part of the price which he had agreed to pay for the grant of the privilege to sell liquor. The judgment of the High Court of Andhra Pradesh in Atluri Brahmanandam v. Tahsildar of Gannvaram (supra) is reversed. The appeals filed by the State of Andhra Pradesh are al- lowed.

We mentioned that in order to remedy the situation resulting from the Full Bench judgment of the Andhra Pradesh High Court, the Andhra Pradesh Legislature enacted the Andhra Pradesh Excise (Amendment) Act 10 of 1984. In the view that we have now taken the amendment of the Act has become a needless exercise. However, we may briefly consider the attack on the amending Act. It was argued that the amending Act did not effectually remove the vices or defects pointed out by the Full Bench in Brahmanan- dam's case (supra) as secs. 21 and 22 were left in tact. It was said that without amending secs. 21 and 22, the amend- ment of sec. 23 effected by the Andhra Pradesh Legislature led no where towards achieving the result aimed at by the Legislature. Nor could the Legislature validate the demands earlier made and struck down by the courts merely by enact- ing that the demands were to be deemed to be valid without removing the vices or defects from which those demands suffered. We are not inclined to agreed with these submis- sions.. Sec. 17 of the

Andhra Pradesh Excise Act which deals with the grant of the right to sell liquor has been substantially amended. Even the marginal note has been changed from "power to grant lease" to "grant of exclusive privilege of manufacture, etc." The new sec. 17 makes it clear that what is proposed to be granted is the exclusive privilege to manufacture or sell liquor in the shape of a lease or licence or both. The explanation makes it clear that the lease shall not take effect unless a licence is issued. Having regard to the vital amendment of sec. 17, no further amendment of secs. 21 and 22 was necessary. The consequential amendment to sec. 23 has however been made. Again the marginal note has been changed from "excise duty in respect of lease" to "payment for exclusive privilege." It is now specified in the new section that the payment of the same in consideration of the grant of lease or licence or both for the exclusive privilege is to be instead of or in addition to any excise duty or fees leviable in secs. 21 and 22. We are, therefore, satisfied that the amendments effected to secs. 17 and 23 have fulfilled the object of removing the vices or defects pointed out by the Full Bench in Atluri Brahmanandam's case, if indeed there were defects or vices. In the result, the petitions for special leave to appeal filed against the judgments of the Andhra Pradesh High Court upholding the amending Act and the demands made by the excise authorities are dismissed.

P.S.S.
dismissed.

Appeals & Petitions