

Lakhanlal Etc vs The State Of Orissa & Ors.(With ... on 15 October, 1976

Equivalent citations: 1977 AIR 722, 1977 SCR (1) 811, AIR 1977 SUPREME COURT 722, 1977 TAX. L. R. 1701, 1976 4 SCC 660, 1977 (1) SCR 811

Author: P.N. Shingal

Bench: P.N. Shingal, M. Hameedullah Beg

PETITIONER:
LAKHANLAL ETC.

Vs.

RESPONDENT:
THE STATE OF ORISSA & ORS.(with connected appeals)

DATE OF JUDGMENT15/10/1976

BENCH:
SHINGAL, P.N.

BENCH:
SHINGAL, P.N.
BEG, M. HAMEEDULLAH

CITATION:
1977 AIR 722 1977 SCR (1) 811
1976 SCC (4) 660

ACT:
Bihar and Orissa Excise Act, 1915 as amended by Amend-
ing Acts of 1970 and 1971--ss. 22 and 29--Power of State to
auction exclusive privilege to vend liquor--Nature of
payment received.

HEADNOTE:
Section 22(1) of the Bihar & Orissa Excise Act, 1915,
provides that the States may grant to any person on such
conditions and for such periods as it may think fit, the
exclusive privilege of manufacturing or selling in retail
count try liquor. The proviso provides that a public
notice shall be given of the intention to grant such exclu-
sive privilege and that a decision would be taken after
considering objections. Sub-section (2) provides that no
grantee of such a privilege shall exercise it unless or

until he has received a licence in that behalf from the Collector or the Excise Commissioner.

In the present case the Collector issued a notice in form GL 10 relating to the auction of the right to open a liquor shop at the site named in the notice and the payment of the licence fee therefor. The respondent was a successful bidder at the auction. He deposited the money under r. 103 of the Excise Rules but the Government did not grant him the licences. In a writ petition filed by the respondent the State Government alleged that the bids at the auction were not satisfactory and that in the interest of revenue the State Government did not accept the bids. The High Court held (i) that the State Government had no power to interfere with the auction held by the Collector after it had become final and could not direct reauction and (ii) that the realisation at the auction was not a fee but a tax not contemplated by the Act and that the auction price for a licence was not excise duty within the meaning of Entry 51 of List II and hence r. 103(1) of the Rules providing for fixation of licence fee by auction was in excess of the rule-making power of the Board. The High Court also held that what was purported to be given under the sale notice of the Collector was not the grant of exclusive privilege under s. 22.

By the Bihar & Orissa Excise (Orissa Amendment Ordinance) 1970 which later became the Act, s. 29(2) was amended. The State Government issued an order for fresh settlement of the shops and the Collector accordingly called for tenders.

In the respondent's writ petition the High Court held that the State Government's order was invalid as the authorities for fixing the procedure.s.29(2) as amended had not been specified and the order left it to the uncontrolled discretion of the authority concerned to accept or reject any tender and to determine the adequacy of the amount offered in the tender. The State Government's order and the Collector's tender notice were quashed and the Collector was directed to issue licence to the respondent. The High Court accordingly held that the respondent was entitled to the grant of the exclusive privilege.under because he was the highest bidder in the auction.

The High Court also held in a petition filed by another respondent, that in sosfa29(2) provided that the sum payable under sub-s. (1) thereof shall be determined "otherwise" than by calling tenders or by auction it was unconstitutional; that por1029(2). should, therefore, be struck down: that s. 6 of the Amending Act, 1970 was ultra vires as there was exercise of judicial power by the legislature and, therefore, the licence fee collected by the State was illegal; but that as the respondent had already enjoyed the benefit of the licence and voluntarily participated in the auction he was not entitled to its refund.

3--1338S.C.I./76

812

Therefore the Second Amendment Act, 1971 was passed. The vires of the ~~sections~~ 21 and 29 was challenged in writ petitions but the High Court dismissed them. In appeals to this Court,

HELD: (1) The provisions of the Act and the express declarations make clear that the State Government had the power to reject a bid. In any event no right is created in the bidder by making a bid. The administration of the Excise Department and the collection of revenue within the district vest in the Collector. It is not correct to say that the notice issued by the Collector in form GL 10 was sufficient to show that the exclusive privilege for retail sale of country liquor was not proposed to be given to the successful bidders at the auction. The High Court erred in holding that a condition regarding the opening of additional shops was inserted in the Form. [821 F; 819D; 820E]

(b) It has been held by this Court that the State has the exclusive right or privilege of manufacturing and selling liquor. The State grants such right or privilege in the shape of a licence or a lease. The State has the power to hold, a public auction for grant of such right or privilege and accept payment of a sum in consideration of grant of lease, that the amount payable by the bidders as licensees was neither a fee in the technical sense nor a tax, but was in the nature of price of a privilege and that auctions were only a mode or medium for ascertaining the best price obtainable thereof. Therefore, the right granted to the bidders by public auction and the licences issued to them was clearly an exclusive privilege within the meaning of s. 22(1) of the Bihar Act and it was expressly provided in s. 29 that it would be permissible for the State not to accept payment of a sum in consideration of the grant of the exclusive privilege. [819 H; 820A-D]

Nashirwar etc. v. The State of Madhya Pradesh [1975] 2 S.C.R. 861; Hat Shankar & ors. v. The Dy. Excise and Taxation Commissioner & ors. [1975] 3 S.C.R. 254; Thakur Prasad Sac & ors. v. The Member, Board of Revenue & ors. [1976] 2 S.C.R. 850; State of Orissa & ors. v. Harinarayan Jaiswal & ors.. [1972] 3 S.C.R. 784 applied.

(c) The view of High Court that after the acceptance of the bid the Collector should have issued the licence and that he committed an illegality in ordering reauction presupposes that a binding obligation had come into existence in favour of the bidder by accepting a deposit from him even though this was done on the express condition that it was tentative and was not an acceptance of his bid. In the peculiar facts and circumstances of the auction, the bids were nothing more than offers in response to an invitation to make tenders and such auctions were the mode of ascertaining the highest offers. The basic conditions for the emergence of rights through offers or conditions made and accepted and acted upon by paying any specified or agreed

price as consideration were wanting in this case. The express and advertised terms of the auction made it clear that the money tendered was to be deemed to be deposited tentatively, pending the acceptance of the bid. The bids were neither offers nor acceptance' by the Government. They were only offers by the bidders to purchase the rights. The essentials of an agreement and mutuality of obligations were absent altogether. Since auction is only a mode of ascertaining the highest offer, the State Government can determine the sum payable by any other method and hence, the High Court was wrong in striking down the expression "otherwise". 1962 (a). [820 H; 821 A-C]

(d) These auctions are not ordinary auctions where a binding agreement could be deemed to be concluded at the fall of the hammer, creating mutually enforceable obligations but are a means for ascertaining the highest offers for the exclusive privileges which the Government alone could grant for carrying on a trade or business considered noxious under the law, and which, because of its special character, could be regulated in any way or even prohibited altogether by the Government. This special character of the trade or business would appear from the power of the State Government to grant the exclusive privilege to carry on trade in the manufacture and sale of liquor. [821 F-G]

(e) There is no justification for the argument of the respondents that it was not permissible for the State Government to issue directions for re-auction even when it found that the bids at the auction were unsatisfactory. So long as the powers of the Government to reject a bid are not used in an unreasonable or mala fide manner, their exercise cannot be questioned [821 G]

2(a) The High Court's view that r. 103(1) was ultra vires was taken under the mistaken impression that the State was collecting a tax under the garb of a fee and that the auction price for a licence could not be treated as duty within the meaning of Entry 51, List II of the Seventh Schedule. But what was sought to be raised was consideration and not fee. The use of the expression "fees" in the rule is inaccurate but that cannot detract from the real nature of the recovery. [822 A-B]

(b) The argument of the respondent that r. 103 continued to remain invalid even after the promulgation of the Amendment Act is not correct because s. 5 of the Second Amendment Act has substituted a new sub-s. (2) for the old subsection providing for auction and this sub-section stated that it shall be deemed always to have been substituted. Section 17 has validated all grants made by way of licences for manufacture and retail sale of country liquor and the amounts paid or payable therefor. [824 G-H; 825 C]

(c) The power to accept or reject a tender without assigning any reason cannot be said to be arbitrary as s. 29(2) (which has been amended with retrospective effect) itself provides that (i) it shall be exercised in the inter-

est of the Excise revenue, (ii) by the specified authority and (iii) under such control as may be specified. In the instant case the 'State Government retained the power of accepting or rejecting the tender or for calling of a fresh tender, to itself, and such an order cannot be said to be an absolute or naked power of the nature apprehended by the High Court. Moreover, the power to accept or reject the highest or any bid was expressly reserved under the impugned sale notification. [823 A-C]

(3) Even though no authority was specified for taking action under s. 29(1) it was the Collector who is in charge of the Excise Administration that took action in the present case and his action was approved by the State Government. Moreover, the State Government issued a modified order under s. 29 nominating itself as the authority to determine the sufficiency of the sum payable. [822 D]

(4) It has been held by this Court that there is no fundamental right to do trade or business in intoxicants and that in all their manifestations these rights are vested in the State and without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. There is no inherent right in a citizen to sell intoxicating liquors by retail. [823 H]

Krishan Kumar Narula etc. v. The State of J & K & ors [1967] 3 S.C.R. 50; Nashirwar etc. v. The State of M.P. [1975] 2 S.C.R. 861; Har Shankar & ors. v. The Dy. Excise & Taxation Commissioner & ors. [1975] 3 S.C.R. 254; Coovetlee Bharucha v. The Excise Commissioner [1954] S.C.R. 873 followed.

(5) Since the Bihar & Orissa Excise (Second Orissa Amendment) Act, 1971 has made good the deficiency, if any, by stating that the amending provisions in ss. 2 to 5 of the Amending Act, 1970 shall be deemed always to have been so added or inserted or substituted, the High Court was wrong in holding that there was any exercise of judicial power by 'the Legislature. [824 C-D]

JUDGMENT :

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 351-359/72. Appeals from the Judgment and Order dated 7-5-1971 of the Orissa High Court in O.J.C. Nos. 1185 to 1190, 1223 and 1224 of 1970 and 41/71 and Civil Appeal Nos. 1855-1863, 2091/72 and 1802/74. Appeals by Certificate/Appeals by Special Leave from the Judgments and Orders dated 7-5-1971, 3-2-1971 and 28-3-1974 of the Orissa High Court in O.J.C. Nos. 1185-1190, 1223, 1224 and 1226/ 70, 850/70, 589/72 and Civil Appeals Nos. 1892-1893 of 1971, 1302, 2071 and 12351236 of 1972.

Appeals from the Judgment and Orders dated 15-5-1970, 16-4-1971, and 6-9-1971 of the Orissa High Court in O.J.C. Nos. 329 and 357/70, 786/70, 242/67, 859 and 863/70.

Vinoo Bhagat for the Appellants in CAs. 351-359/72 and RR. in CAs. 1859-1862/72.

Gobind Das and G.S. Chatterjee for the Appellants in rest of the Appeals, except 1802/74 and RR. in CAs. 351- 359/72.

R.K. Garg and S.C. Agarwal for Appellants in CA 1802/74 and B.P. Maheshwari and Suresh Sethi for Respondents in CAs. 12351236/72.

B. Parthasarthy for RR in CA. 1802/74.

The Judgment of the Court was delivered by J.---These appeals by certificate or special leave are directed against judgments of the Orissa High Court dated May 15, 1970, February 3, 1971, April 16, 1971, May 7, 1971, September 6, 1971 and March 28, 1974. They arise out of several writ petitions. The facts which gave rise to the petitions changed from time to time largely because of amendments in the law, and that was the reason for the filing of separate writ petitions resulting in the impugned judgments of the High Court, but we have heard them together at the instance of the learned counsel for the parties and will dispose them of by a common judgment. The nature of the controversy in these cases is such that it will be enough to state the basic facts for the purpose of appreciating the arguments of counsel for the parties. The Collector of Mayurbhanj issued a notice on February 3, 1970 by which he invited tenders for the grant of licences for establishing 70 outstill shops for 1970-71. Ajodhya Prasad Shah gave the highest bid for a group of seven shops, in one lot, for Rs. 34,000/-per month. His bid was accepted and his name was entered in the prescribed register, and the entry was signed by the successful bidder and the Collector. Ajodhya Prasad accordingly deposited Rs. 68,000/- on account of two months' "fees", in advance, as required by rule 103 of the Board's Excise Rules, 1965. Raghunandan Saha, who was the unsuccessful bidder, felt aggrieved and filed an appeal, but it was dismissed by the Excise Commissioner on March 16, 1970. The Board of Revenue also refused to interfere. Ajodhya Prasad claimed that in the mean time he made arrangements for establishing his shops and incurred an expenditure of about Rs. 1,50,000/-. He therefore approached the authorities concerned for the issue of the licenses for running the shops from April 1, 1970. He approached , the Superintendent- ent of Excise for depositing Rs. 34,000/- for the month of April, but the Superintendent did not pass the deposit challan. Ajodhya Prasad thereupon filed a writ petition (O.I.C. No. 329 of 1970) in the High Court with the allegation that the Collector was not acting according to the law as the State Government had issued instructions to him not to. issue the licenses. Ajodhya Prasad prayed in his petition for the issue of directions for' the issue of licenses and quashing the State Government's instructions to the contrary. Raghunandan Saha also filed a petition (O.J.C. No. 357 of 1970) on April 13, 1970. The Collector issued a notice for reaction on May 1, 1970 and Ajodhya Prasad amended his petition for quashing the notice also.

The State Government and the other respondents traversed the claim in Ajodhya Prasad's writ petition and pleaded, inter alia, that the bids at the auction were not satisfactory and, in the interest of the State revenue, the State Government had passed the orders for not accepting Ajodhya Prasad's bids. The High Court examined the questions whether Ajodhya Prasad was entitled to the issue of the licenses for the seven shops and whether the State Government had the authority to

direct the withholding and re-auctioning of the licenses, and held, inter alia, that the State Government had no power to interfere with the auction held by the Collector after it had "become final in appeal and revision", and could not direct a re-auction. The High Court examined the nature of the realisation at the auction and held that it was a tax which was not contemplated by section 38 of the Bihar and Orissa Excise Act, 1915, herein-after referred to as the Act, and that rule 103(1) of the Board's Excise Rules in regard to the fees for the licenses was not authorised by the Act and was in excess of the rule-making power of the Board. The High Court also held that the "auction price for a license is not excise duty within the meaning of Entry 51 of List II of the Seventh Schedule to the Constitution" and it was not open to the Collector "to follow the process of auctioning for determining the license fee" which was really a tax in the garb of a fee. It held that the aforesaid rule 103 was incompetent and ultra vires the Act. On the question of grant of the "exclusive privilege" under section 22 of the Act, the High Court held that what was purported to be given under the sale notice was not the grant of an exclusive privilege. In taking that view the High Court stated that notice had not been issued under section 22 (1) of the Act and the Collector had no authority to issue such a notice. In that view of the matter, the High Court did not express any final opinion as to whether the licence was to be granted for an exclusive privilege to manufacture and sell 'liquor'. The High Court accordingly quashed the direction of the State Government dated April 15, 1970 for re-auctioning the license and declared that rule 103(1) of the Board's Excise Rules was ultra vires the Act. Appeals Nos. 1892 and 1893 of 1971 are directed against that judgment of the High Court dated May 15, 1970, on certificates. The State Government issued the Bihar and Orissa Excise (Orissa Amendment) Ordinance of 1970 and the State Government issued a fresh order dated August 19, 1970 under the provisions of the amended section 29(2) of the Act for fresh settlement of the shops, and wrote to the Collector of Mayurbhanj to call for tenders in accordance with that order. The Collector called for tenders within a week.

Ajodhya Prasad thereupon filed another writ petition (O.J.C. 'No. 850 of 1970) for quashing the Collector's tender notices and for a direction to the authorities concerned to grant a license to him on the basis of the earlier auction.

The Bihar and Orissa Excise (Orissa Amendment) Act, 1970 was passed on October 5, 1970 and the ordinance was repealed. That was followed by the Orissa Excise (Exclusive Privilege) Rules, 1970, which were made under section 89 of the Act.

The respondents in Ajodhya Prasad's writ petition No. 850 of 1970 pleaded that the amendments to the Act were valid and that the State Government had the right to grant an exclusive privilege for the purposes mentioned in section 22 of the Act. The money so realised was consideration for the exclusive privilege under section 22 and was neither an excise duty nor a tax nor a fee. It was also pleaded that the tender was in accordance with the rules as the authority to accept the tender was the State Government. The High Court examined Ajodhya Prasad's writ petition (No. 850 of 1970 in its Judgment dated February 3, 1971. It held that the order of the State Government dated August 19, 1970 for inviting tenders was invalid as the authorities for fixing the procedure under the amended section 29(2)(b) had not been specified, the Government had "appropriated for itself absolute and naked and arbitrary power" to accept any tender or reject any tender for any reason whatsoever or without any rhyme or reason" and the order left it to the uncontrolled discretion of

the authority concerned to determine the adequacy of the amount offered in the tender. As regards the claim for the issue of a license under section 6, the High Court held that as the petitioner was the highest bidder on February 20, 1970 and his name was entered in the bid register and the entry was signed, the petitioner was entitled to the grant of the exclusive privilege under section 22 by virtue of section 6(a) of the Amending Ordinance irrespective of the validity of rule 103 (1) of the Board's Excise Rules. The High Court accordingly held that section 6(a) of the Amending Ordinance was valid and the grant of seven shops to the petitioner, for the manufacture and retail sale of country liquor was therefore validated "as the grant of an exclusive privilege under section 22 of the Act" and he was entitled to license under sub-section (2) of that section.. The Order of the State Government dated August 19, 1970 and the Collector's tender notice were quashed and the Collector was directed to issue the license for the seven shops to him.

Siba Prasad Saha who filed the writ petition (No. 786 of 1970) in August 1970, after the first judgment of the High Court dated May 15, 1970 for refund of the license fee and for non-payment of any fee in the future, as he was a licensee for several liquor shops, amended it in the light of the subsequent developments. The High Court took the view in its judgment dated April 16, 1971 that sections 2 to 5 of the Amending Ordinance, or the Amending Act (17 of 1970) were not made retrospective. It took note of this Court's decision in Krishna Kumar Narula etc. v. The State of Jammu and Kashmir and others(1) that a citizen had the fundamental right to carry on business in liquor and all that the State could do. was to impose reasonable restriction thereon. It also held that in so far as section 29(2) of the Act provided that the sum payable under sub-section (1) thereof shall be determined "otherwise" than by calling tenders or by auction, it was unconstitutional. That portion of sub-section (2)(a) was therefore struck off. The High Court held further that what was realised by the State was not a fee or tax, as the primary purpose of the Act was to restrict the manufacture and sale of country liquor. It accordingly held as follows,---

"We are, therefore, satisfied that the provision in Section 22 of the Act for grant to any person of the exclusive privilege of manufacture and sale of country liquor for a sum, the method of determination of which is provided in Section 29, are provisions which are calculated to restrict and control trade in liquor although incidentally revenue is earned for the State thereby and that Entry in List II of the Seventh Schedule confers power on the State Legislature to enact such a regulatory measure and consequently the State Legislature has legislative competence to enact Sections 22 and 29."

The High Court accordingly held that section 22 and section 29 without the expression "or otherwise" in clause (a) of sub-section 2 were valid and constitutional. The High Court then examined the effect of section 6 of the Amending Act of 1970, and held that as retrospective effect was not given to sections 2 to 5 of that Act, the validity of the money realised by the State had to be judged with reference to the unamended provisions, and held as follows,--

"It, therefore, follows that by reason of the fact that Sections 2 to 5 of the Amending Act were not made retrospective in operation, the effect of Section 6 is that thereby the Legislature had directed the State to disregard the decision given by this Court in Ajodhya Prasad's case (I.L.R. 1971 Curt. 51) that the amount realised by the auction is illegal. This virtually amounts to judicial exercise of power by the legislature a power which the Legislature does not possess. We, therefore hold that Sections 2 to 5 of the Amending Act having not been made retrospective, Section 6 is ultra vires the powers of the Legislature."

The High Court however held that although the license fee collected by the State was illegal, the petitioner had already enjoyed the benefit under the license and had voluntarily participated in the auction, and was not entitled to an order for its refund.

A similar view was taken in the judgment dated April 16, 1971 in O.J.C. No. 242 of 1967 and the judgment dated May 7, 1971 in (1) [1967] 3 S.C.R. 50.

O.J.C. NOS. 1185-1190, 1223, 1224 and 1226 of 1970. Those judgments have given rise to civil appeals Nos. 2071, 1855- 1863 and 351-359 Of 1972 (cross-appeals). O.J. Cs. Nos. 859 and 863 of 1970 were disposed of by separate judgments dated September 6, 1971 which followed the earlier judgment dated April 16, 1971 in Siba Prasad Saha's case and that has given rise to appeals Nos. 1235 and 1236 of 1972. The Bihar and Orissa Excise (Orissa Second Amendment) Act, 1971 (10 of 1971) was passed to set right the defects in the law. Stated briefly that Act made the amendments to sections 2, 7, 29, 37' and 90 retrospective and validated the earlier acts.

A writ petition (O. J.C. No. 589 of 1972) was filed to challenge the vires of section 22 and 29 of the Act. The main judgment in the matter was delivered in O.J.C. No. 1036 of 1971, on January 3, 1974. In that judgment the High Court examined the challenge to the vires of sections 22 and 29 of the Act and the claim for refund of the money already paid with reference to the amendments to the Act. It followed the earlier decision in Siba Prasad Saha's case of April 16, 1971 (I. L.R.1971 Cuttack 777) and dismissed the writ petitions and that/ ms led to the filing of civil appeals Nos. 1235 and 1236 of 1972.

The last judgment was delivered on March 28, 1974 in O.J.C. No. 589 of 1972, in Siba Prasad saha's case. The petitioner there was the grantee of the exclusive privilege for sale of country liquor: during the year 1972-73 for some shops in Mayurbhanj district. The petitioner challenged the vires of sections 22 and 29(2) as amended, and prayed for the consequential reliefs. The High Court held that the case was completely covered by its decision dated January 3, 1974 in O.J.C. No. 1036 of 1971 and dismissed the petition.

It will tires appear that these appeals are inter-connected and that is why we have thought it desirable to examine them in a common, judgment.

As has been stated, Civil Appeals Nos. 1892 and 1893 of 1971 arise out of O.J. Cs. Nos. 392 and 357 of 1970 which have been decided by the judgment of the High Court dated May 15, 1970. It has been

argued by Mr. Govind Das on behalf of the appellants that the High Court erred in holding that the sale notice issued by the Collector was not for the grant of an exclusive privilege under subsection (1) of section 22 of the Act because the Collector had no authority to issue a notice under that sub-section, as the power of the State Government in that respect had been delegated to the Board of Revenue.

Sub-section (1) of section 22 of the Act provides that the State Government may grant to any person, On such conditions and for such periods as it may think fit, the exclusive privilege, inter alia, of manufacturing or selling retail any country liquor. The proviso to the sub-section requires that public notice shall be given of the intention to grant any exclusive privilege of that nature and that a decision would be taken after considering the objections made in that respect. Once a decision is taken under sub-section (1) to grant the exclusive privilege within any specified area, sub-section (2) provides that no grantee of such a privilege shall exercise the same "unless or until he has received a license in that behalf from the Collector or the Excise Commissioner." It has been stated at the Bar by Mr. Govind Das, and has not been controverted that, as had been averted in the memorandum of appeal, the requirement of sub-section (1) of section 22 had already been complied with by the State Government, and that the Collector was not concerned and did not in fact issue any public notice for purposes of sub-section (1) of section 22. A reading of the Collector's notice, which admittedly was in Form G.L. 10, shows that it related to the auction of the right to open a shop at the site named in the notice and the payment of the license fee therefor. The High Court therefore went wrong in holding that the issue of the notice in Form G.L. 10 negated the contention that what was proposed to be given was the exclusive privilege to manufacture and sell country liquor. By virtue of section 7(1), the administration of the Excise Department and the collection of excise revenue within the district vested in the Collector, and we are unable to think, that his notice in Form G.L. 10 was sufficient to show that the exclusive privilege for retail sale of country liquor, under the outstill system, was not proposed to be given to the successful bidders at the auction.

The true nature of the proceeds of the auction held by the Collector in such a case has been examined by this Court in *Nashirwar etc. etc. v. The State of Madhya Pradesh*, *C) Har Shankar and others v. The Dy. Excise and Taxation Commissioner and others*(2) and *Thakur Prasad Sao and others v. The Member, Board of Revenue and others etc.*(?). In *Nashirwar's case* (supra) this Court examined the constitutional validity of the provisions in the Central Provinces Excise Act for granting leases in respect of liquor by public auction, and of the Abkari Act of the Kerala State placing restrictions on the manufacture and sale etc. of liquor. After considering all the decided cases including *Narula's case* (supra) in which it was held that a citizen had a fundamental right to do business and deal in liquor, this Court referred to its decision in *State of Orissa and others v. Harinarayan Jaiswal and others*(4) in which *Narula's case* was explained, and held as follows,-

"For these reasons we hold that the State has the exclusive right or privilege of manufacturing and selling liquor. The State grants such right or privilege in the shape of a licence or a lease. The State has the power to hold a (1) [1975] 2 S.C.R. 861.

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

(3) [1976] 2 S.C.C. 850.

(4) [1972].3 S.C.R. 784.

public auction for grant of such right or privilege and accept payment of a sum in consideration of grant of lease."

While taking this view this Court held that the State Legislature was authorised to make a provision for public auction by reason of the power contained in Entry 8 List II of the Seventh Schedule to the Constitution and that there was "no fundamental right of citizens to carry on trade or to do business in liquor."

The matter again came up for consideration in Har Shankar's case (supra) with reference to the provisions of sections 27 and 34 of the Punjab Excise Act, 1914, where the appellants gave bids at public auctions. It was held that the amount payable by them, as licensees, was neither a fee in the technical sense nor a tax, but was in the nature of "price of a privilege" and that auctions were only a mode or medium for ascertaining the best price obtainable therefor. Thakur Prasad's (supra) was a case directly under the provisions of the Act. It also related to the outstill system. It was held that "the State has the exclusive right and privilege of manufacturing and selling liquor" and that it has the "power to hold a public auction for the grant of such a right or privilege and to accept payment of a sum therefor." It was accordingly held that the right granted to the appellants by public auction and the licenses issued to them was "clearly an exclusive privilege within the meaning of section 22(1) of the Act" and that it has expressly been provided in section 29 that it would be permissible for the State Government to accept payment of a sum in "consideration" of the exclusive privilege under section 22.

There can be no doubt therefore that the High Court erred in taking a contrary view.

The High Court has tried to support its view by referring to the condition stated in Form G.L. 10 for the opening of additional shops during the currency of the license, and has stated that an exclusive privilege under section 22 "cannot comprehend exercise of such power once it is granted for a specified period." This was clearly an erroneous view because it is not disputed before us that no such condition was inserted in the license at all. What the licensee therefore received under the license was an exclusive privilege of manufacturing and selling liquor under the outstill system within the meaning of section 22 of the Act.

The High Court has held that after the acceptance of the bid all that remained was to issue a license and that the Collector committed an illegality in ordering a reauction under the directions of the State Government. Such a view presupposes that a binding obligation had come into existence in favour of the bidder by accepting a deposit from him even though this was done on the express condition that it was tentative and was not an acceptance of his bid. We do not think that what the High Court held to be an "acceptance of the bid" at the "auction", even after the announcement of an express condition attached to it that the knocking down of the bid would not really be an acceptance of it by the Government, could be an acceptance of the bid at all. In the peculiar facts and

circumstances of the auction, the bids were, apparently, nothing more than offers in response to invitation to make tenders, and such auctions were the mode of ascertaining the highest offers. The basic conditions for the emergence of rights through offers or conditions made and accepted, and acted upon, by paying any specified or agreed price as consideration, were thus wanting in this case. In fact the express and advertised terms of the auction made it clear that the money tendered was to be deemed to be deposited tentatively, pending the acceptance of the bid. So what we have before us are neither offers nor acceptance by the Government. There were only offers by the bidders to purchase the rights, subject expressly to their acceptance or rejection by the State Government. The essentials of any agreement and the mutuality of obligations were thus absent altogether.

Moreover it was not an ordinary auction where binding agreement could be deemed to be concluded at the fall of the hammer, creating mutually enforceable obligations. Those were only so called auctions, adopted as means for ascertaining the highest offers for the exclusive privileges which the Government alone could grant for carrying on a trade or business. considered noxious, under the law and which, because of its special character, could be regulated in any way, or even prohibited altogether, by the Government. This special character of the trade or business would appear from the power of the State Government to grant the exclusive privilege to. carry on trade in the manufacture and sale of liquor. It will be recalled that section 22(1) provides that the State Government "may grant to any person, on such conditions and for such periods as it may think fit, the exclusive privilege" in question: Sub-section (2) of section 22 enacts that a grantee of such a privilege shall not exercise it "unless or until he has received a license in that behalf from the Collector or the Excise Commissioner."

The powers of the Government to reject a bid were thus reserved both under the provisions of law and by the express declarations made before the auction. At any rate we do not find any basis for the creation of a right merely by making a bid. The extent of the powers of the government in such matters has been indicated by this Court in *State of Orissa and others vs. Harinarayan Jaiswal and others* (supra). So long as these powers are not used in an unreasonable or mala fide manner, their exercise cannot be questioned. In the cases before us, it could not be said that either the Government or any of its officers abused the power by acting either unreasonably or in a mala fide manner, and we find no justification for the argument that it was not permissible for the State Government to issue the directions for re-auction even when it found that the bids at the auction were unsatisfactory.

The High Court has taken the view that rule 103(1) of the Board's Excise Rules regarding the manner of fixation and realisation of the consideration for the grant of a license for the exclusive privilege of retail vend of country spirit was "incompetent and ultra vires the act." The High Court took that view under the mistaken impression that the State was not entitled to collect a tax "under the garb of a fee" and the "auction price for a license is not duty within the meaning of Entry 51 of List 11 of the Seventh Schedule to the Constitution." But, as has been shown, what was sought to be raised was consideration and not "fee". The use of the expression "fees" in the rule is therefore inaccurate, but that cannot detract from the real nature of the recovery. Mr. S.C. Agarwal has challenged the validity of rule 103 on another ground, and we shall deal with it when we come to the judgment of the High Court dated April 16, 1971.

The next judgment of the High Court is that dated February 3, 1971, in O.J.C. No. 850 of 1970, which has given rise to civil appeal No. 209/of 1972 by the State of Orissa. We have already stated the findings of the High Court in regard to it.

It has been argued by Mr. Govind Das that even if the State Government failed to specify the authority which was to determine the mode of determining the sum payable under sub-section (1) of section 29, that could not be said to matter because it was the Collector, who was incharge of the administration of the Excise Department and Collection of the excise-revenue under section 7 of the Act, who took the action to issue the auction notice for the grant of the license. for the retail sale of country liquor. Moreover, the State Government did not object to his authority to do so. and, on the other hand, directed him to make a reauction merely on the ground of the insufficiency of the bids. The Collector called for fresh. tenders. It was not in dispute before the High Court that the State Government issued a special order under section 29 by which it nominated itself to be the authority to determine the sufficiency of the sum payable under section 29(1) of the Act. There is nothing in sub-section (2)(b) to show that that was not permissible.

The other question in this respect is whether the following direction in the State Government's order dated August 19, 1970 was valid, ---

"It shall be at the discretion of the State Government to accept or reject any tender without assigning any reason therefor to order for calling of fresh tender or otherwise as the case may be."

It will be recalled that the High Court has taken the view that the order dated August 19, 1970 and the tender notice issued in pursuance thereof were bad in law and were liable to be quashed. The High Court has taken the view that section 29(2)(a) did not authorise the exercise of "such absolute and naked power in determining the sum of money" as was sought to be done by the order dated August 19, 1970. It appears to us however that the power to accept or reject a tender without assigning any reason cannot be said to be arbitrary as section 29(2) (which has been amended with retrospective effect) itself provides. that (i) it shall be exercised in the interest of the Excise revenue", (ii) by the specified authority, and (iii) under such control as may be specified. As has been stated, the State Government retained the power of accepting or rejecting the tender, or for calling of a fresh tender, to itself, and such an order cannot be said to be an "absolute" or "naked" power of the nature apprehended by the High Court. Reference in this connection may be made to the decision in Jaiswal's case (supra) mentioned above. Moreover it is not disputed before us that the power to accept or not to accept the highest or any bid was expressly reserved under the impugned sale notification. Sub-section (2) of section 79 of the Act was also amended by the Bihar and Orissa Excise (Second Orissa Amendment) Act 1971 (Act 10 of 1971) with full retrospective effect. Section 17 of the Act validated both the licenses granted and amounts paid or payable therefor, and its validity has not been challenged before us.

It will be remembered that Siba Prasad Saha had filed O.J.C. No. 786 of 1970 after the first judgment of the High Court dated May 15, 1970, for refund of the license fee and for non-payment of the fee in future. The State of Orissa feels aggrieved against the decision of the High Court in that

case dated April 16,1971 that a citizen has a fundamen- tal right to deal in liquor. In taking that view the High Court relied on this Court's decision in Narula's case (supra). The decision in Narula's case was considered and explained by this Court in Nashirwar's care (supra) and it has been held as follows,--

"It is not correct to read in the deci- sion in Narula's case that there is a funda- mental right to do business in liquor. The decision is that dealing in liquor is busi- ness and a citizen has a right to do business in that commodity and the State can impose reasonable restrictions on the right in public interest. If the State can prohibit bussiness in liquor as is held in State of Bombay and Another v.F.N. Balsara (1951 S.C.R.682) this establishes that the State has exclusive right of privilege of manufac- ture, possession, sales of intoxicating liquor and therefore the Slate grants such a right of privilege to persons in the shape of license or lease."

In reaching this conclusion this Court took note of the decision in Bharucha's case(1) that there was no inherent right in a citizen to sell intoxicating liquors by retail, and that it is not a privilege of a citizen of the State, and observed that as Bharucha's case was a Constitution Bench decision like Narula's case, the latter could not be said to have overruled the former. As has been stated, the matter again came up for consideration in Har Shankar's case (supra) with specific reference to Narula's case, and it was reiterated that "there is no fundamental right to do trade or business in intoxicants" and that "in all their mani- festations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants." The contrary view of the High Court in impugned judgment is incorrect and must be set aside.

The other grievance of the appellant State is that the High Court struck down the expression "or otherwise" from clause (a) of subsection (2) of 29 of the Act as unconstitu- tional. We have given our reasons for the contrary view, and the High Court therefore went wrong in striking down the expression "or otherwise".

The High Court has also held that as sections 2 to 5 of the Amending Act of 1970 were not made retrospective in operation, the effect of section 6 amounted to a direction by the Legislature to the State to disregard the decision in Ajodhya Prasad's case that the amount realised by auction was illegal and that section 6 was therefore ultra vires the powers of the Legislature. It will be sufficient to say in this connection that the Bihar and Orissa Excise (Second Orissa Amendment) Act, 1971 (Act 10 of 1971) has made good the deficiency, if any, by stating that the amending provi- sions shall be deemed always to have been so added or inserted or substituted. In this respect also, the impugned judgment of the High Court must be rectified. Mr. S.C. Agarwal has argued that the amount realised by the State for grant of the exclusive privilege under sec- tions 22 and 29 was nothing but a tax and no such tax was permissible under Entries 45 to 63 of List II of the Seventh Schedule to the Constitution and that it was not excise duty within the meaning of Entry 51 or a fee under Entry 66. It has also been argued that Entry 8 embodying the Police powers of the State could not be invoked to sustain such an imposition. Mr. Bhagat has also argued that the collection was in the nature of a tax and section 29 was therefore ultra vires the Constitution. Mr. Bhagat has also

urged that the State was not the owner of the exclusive privilege to manufacture or sell liquor and that the Act did not empower it to part with that right on payment. We have given our reasons already for taking a contrary view, with reference to the decisions in Nashirwar's case and Har Shankar's case. The State has the exclusive right or privilege to manufacture, store and sell liquor and to grant that right to its license holders on payment of consideration, with such conditions and restrictions for its regulation as may be necessary in the public interest. The argument to the contrary is futile and is rejected.

It has been argued by Mr. Agarwal that although the Amending Act of 1970 (Act 17 of 1970) was enacted for the purpose of getting over the High Court's declaration in O.J.C.No. 357 of 1970 that rule 103 of the Board's Excise Rules, 1965, in so far as it directs that fees for license for the retail vend of excisable articles shall be fixed by auction, was ultra vires the Act, rule 103 continued to remain invalid even after the promulgation of that Act because such a rule could not be made under section 90(7) of the Act. Counsel has argued that as the rule was invalid, it was not permissible to hold the impugned public auction because that was not permissible under any other provision of the Act. This argument is also futile because section 5 of the Bihar and Orissa Excise (Second Orissa Amendment) Act, 1971 (Act 10 of 1971) has substituted a new sub-section (2) for the old sub-section as follows, providing for auction, and it has been stated that it shall be "deemed always to have been substituted".-

"(2) The sum payable under sub-section (1) shall be determined as follows,-

(a) by auction or by calling tenders or other-

wise as the State Government may, in the interest of excise revenue by general or special order direct."

Then follow other clauses with which we are not concerned. Moreover section 17 of that Act has validated all grants made by way of licenses for manufacture and retail sale of country liquor in respect of any place on or after the 7th day of August, 1965, on which date the Board's Excise Rules (including rule 103) admittedly came into force. In this view of the matter, it is not necessary for us to examine the other arguments of Mr. Agarwal which have been adopted by Mr. Bhagat regarding the invalidity of rule 103. It is not necessary to deal separately with the judgment of the High Court dated April 16, 1971 in O.J.C. No. 242 of 1967, which has given rise to civil appeal No. 2071 of 1972, or with its decision dated May 7, 1971 in O.J.Cs. No. 1185- 1190, 1223, 1224 and 1226 of 1970 (which has given rise to civil appeals Nos. 1855-1863 of 1972 and cross-appeals Nos. 351-359 of 1972) because they are based on the afore-said decision dated April 16, 1971 in O.J.C. No. 786 of 1970. So also, it is not necessary to deal separately with the decision dated September 6, 1971 in O.J.C.No. 859 of 1970 and 863 of 1970 which have given rise to civil appeals Nos. 1235 and 1236 of 1972, for the same reason.

This takes us to the judgment of the High Court dated March 28, 1974 in O.J.C.No.589 of 1972 which has given rise to civil appeal No. 1802 of 1974. That decision is based on the decision dated January 3, 1974 in O.J.C.No. 1036 of 1971. The petitioner in that case was a licensee for the retail sale

of country liquor in Mayurbhanj district. He challenged the vires of sections 22 and 29 of the Act and claimed that the monthly consideration for the license was not due from him and that he was entitled to a refund of the money already paid by him. The High Court followed that decision and dismissed the writ petition. In doing so it relied on its decision dated April 16, 1971 in Siba Prasad Saha v. State of Orissa and other (I.L.R. 1971 Cut- tack 777) and the decision of this Court in Jaiswal's case (supra) and dismissed the petition. We have already dealt with the points which arise for consideration in this case while examining the earlier cases and we see nothing wrong with the impugned judgment of the High Court by which the writ petition has been dismissed.

In the result, we order as follows,-

Civil Appeals Nos. 1892 and 1893 of 1971 are allowed, the impugned judgment of the High Court dated May 15, 1970 is set aside and writ petitions Nos. O.J.C. 329 and 357 of 1970 are dismissed.

Civil Appeal No. 2091 is allowed, the impugned judgment of the High Court dated February 3, 1971 is set aside and the writ petition No. 850 of 1970 is dismissed. Civil Appeal No. 1302 of 1972 is allowed, the impugned judgment of the High Court dated April 16, 1971 is set aside and the writ petition No. 786 of 1970 is dismissed. Civil Appeal No. 2071 of 1972 is allowed, the impugned judgment of the High Court dated April 16, 1971 is set aside and the writ petition No. O.J.C. 242 of 1967 is dismissed. Civil Appeals Nos. 1855-1863 of 1972 are allowed, the impugned judgments of the High Court dated May 7, 1971 are set aside and O.J. Cs. Nos. 1185-1190, 1223, 1224 and 1226 of 1970 are dismissed. Cross-appeals Nos. 351-359 of 1972 are dismissed.

Civil Appeals Nos. 1235 and 1236 of 1972 are allowed, the impugned judgments of the High Court dated September 6, 1971 are set aside and O.J. Cs. Nos. 859 and 863 of 1970 are dismissed.

Civil Appeal No. 1802 of 1974 fails and is dismissed. In the circumstances of these cases there will be no order as to the costs.

P.B.R.