**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 5751 OF 2008**
**(Arising out of S.L.P.(C) No.14286/2006)**

**State of M.P. & Ors.** ...Appellant(s)

**Versus**

**Lalit Jaggi** ...Respondent(s)

**CIVIL APPEAL NOS. 5752 TO 5756 OF 2008**
**(Arising out of S.L.P.(C) Nos.14287, 14288, 14290, 14291 of 2006 & 3788 of 2007)**

**O R D E R**

**Leave granted.**

**This Civil Appeal (arising out of S.L.P.(C) No.14286/2006) is filed by the State of Madhya Pradesh against the judgment of the High Court dated 17th January, 2006 in Writ Petition No.9310/2005. This judgment has been followed in all conjoint matters, namely, Civil Appeals arising out of S.L.P.(C) Nos.14287, 14288, 14290, 14291/2006 and 3788/2007.**

**By a Notification dated 21st February, 2005, the State Government framed a Liquor Policy for the year 2005-2006. Clause 13 of that Policy prescribed the procedure for depositing the licence fee by a retailer of liquor. Sub-clause (1) of Clause 13 of the Policy stipulated that the annual licence fee would be divided into 24 equal**

**fortnightly instalments. It further stipulated that in lieu of the quantity of liquor purchased by the licence-holder, duty deposited at the prescribed rates shall be adjusted against his licence fee equivalent to the demand for the concerning fortnight (see Clause 13.1). Under Clause 13.3, it was stipulated that if any retail seller of liquor fails to deposit the prescribed fortnightly instalment of licence fee before expiry of the next instalment due, then the license so granted could be revoked and some other arrangement will be made to operate the respective liquor shops. Under Clause 13.4, it was stipulated that if any licence-holder of retail shop of any liquior deposits the prescribed fortnightly instalment before the expiry of the fortnight but for some reason liquor could not be supplied within the fortnight, then he shall be supplied liquor immediately after the expiry of that fortnight.**

**Following the said Policy, a Circular came to be issued by the Excise Commissioner on 9th August, 2005 clarifying certain doubts expressed by District Excise Officers who had granted permission to supply liquor even when the deposit of fortnightly licence fee was made belatedly. By the said Circular, it was clarified that liquor will be supplied to the contractors in a specific fortnight against the amount deposited and, in case, if there is short-deposit, then the duty will be deposited in the next fortnight but no liquor will be supplied during the fortnight in respect of which there is a default.**

**The said Clause 13.3 and Clause 13.4 of the Policy and the Circular referred to above came to be challenged vide Writ Petition Nos.9310/2005, 1676/2006, 10799/2005, 11204/2005, 11202/2005 and 311/2006.**

**By the impugned judgment, Clauses 13.3 and 13.4 were declared to be ultra**

**vires Article 14 of the Constitution and Section 25 of the M.P. Excise Act, 1915. Hence these Civil Appeals.**

**The key question which arises for determination in these Civil Appeals is: What is the nature of payment which the auction purchaser makes to the State Government as and by way of licence fee for a given fortnight? In our view, before we come to the relevant judgments on this aspect, it may be stated that the licence fee, payable in advance in 24 equal instalments, is in essence rent charged for parting with the State's privilege for manufacturing and vending liquor and it is not a consideration for sale of liquor. It is different from Issue Price. However, it has been urged before the High Court on behalf of the auction purchaser that the licence fee contains an element of excise duty and, consequently, the State had no authority under the Act to impose duty in advance on undrawn liquor.**

**While striking down Clauses 13.3 and 13.4 of the Policy, the Division Bench of the High Court relied upon two judgments of this Court in the case of State of Madhya Pradesh Vs. Firm Gappulal & Ors., reported in [1976] 1 SCC 791, and in the case of Bimal Chandra Banerjee Vs. State of M.P. etc., reported in AIR 1971 SC 517.**

**Before we come to the relevant judgment, at the very outset, it may be stated that these two judgments have no application for the simple reason that there is a basic difference between excise duty and licence fee. Both the judgments dealt with levy of excise duty on undrawn liquor. As stated above, rental is the consideration for the privilege granted by the Government for manufacturing and vending liquor. There is no levy of excise duty in enforcing payment of a stipulated sum mentioned in the licence. The concepts of advance licence fee and excise duty are entirely different and**

**this has been very succinctly brought out in two judgments of this Court which we shall presently refer.**

**In the case of State of Orissa & Ors. Vs. Narain Prasad & Ors., reported in (1996) 5 SCC 740, a Division Bench of this Court (B.P.Jeevan Reddy and K.S.Paripoornan, JJ.) in a language which has all the clarity at its command, has held:-**

> **"33. A review of the decided cases of this Court on the subject indicates a clear shift in the way this matter has been looked at. Initially, the matter was looked at from the point of view of the levy of excise duty. On that basis, it was held that unless there is a sale, no duty can be collected (*Bimal Chandra Banerjee, Gappulal and Ram Kumar*). But then a different view point emerged with the Constitution Bench decision in *Har Shankar* which was carried forward in *Panna Lal, Jage Ram and Y. Prabhakara Reddy*. These decisions look at the matter from the point of view of the several payments being, in truth and effect, consideration for the grant of privilege/licence. They point out that the excise duty is a duty on manufacture and production and not on sale. It was a case, they said, where the duty was being passed on to the licensee who in turn passed it on to the consumer. What all the licensee paid, they held, is nothing but consideration for the grant of licence and the mere fact that the total consideration fixed comprises several elements (including excise duty), it cannot be said that excise duty is levied upon the licensee. In our opinion, the Orissa matters fall under the ratio of *Panna Lal and Y. Prabhakara Reddy* and not under the ratio of *Bimal Chandra Banerjee, Gappulal* and *Ram Kumar*. The amounts mentioned in Rules 6 and 6-A, as also the undertakings contained therein, together constitute the consideration for grant of privilege/licence, determined by auction, as contemplated by Section 29 of the Act. As explained hereinbefore, the obligation to remit the excise duty is independent of the sale/purchase of liquor; it is payable on or before the specified dates every month; *it is an addition to the monthly instalment payable under Rule 6*; its remittance is not tied up to the purchase of M.G.Q. except to the extent that the licensee has to pay the prescribed instalment of excise duty prior to the lifting of the liquor. It, therefore, cannot be said that there is any levy of excise duty upon the licensee. The concept here is altogether different. It is a case where *the consideration payable by the licensee for grant of licence is made up of monthly***

***rental plus excise duty besides the obligation to purchase the M.G.Q.*** **The licensee pays the rental and excise duty as undertaken by him under the agreement/contract executed by him and as required by conditions of the licence under which he is doing business, i.e., as and by way of consideration. Indeed, the Rules could have provided that the entire amount provided under Rules 6 and 6-A should be paid in advance before the issuance of licence in which event it could not have been contended that it is not in consideration of grant of licence. Merely because the Rules provide a concession and provide for collection of the said amounts in convenient instalments spread over the year, the nature and character of the payments cannot change."**

**The judgment of this Court in State of Orissa Vs. Narain Prasad, which has considered the earlier two judgments of this Court, has not been considered by the High Court in its impugned judgment.**

**In the case of Asstt. Excise Commissioner & Ors. Vs. Issac Peter & Ors., reported in (1994) 4 SCC 104, a three Judge Bench of this Court once again, speaking through Justice Jeevan Reddy, has succinctly brought out the concept of the licence fee payable by the auction purchaser vide para 26 which we quote in extenso hereinbelow:-**

> **"Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory —- at least to the extent of previous year's supplies –- by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of**

**fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract — or rather more so. It is one thing to say that a contract — every contract – must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. The one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In *Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay* it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. *Shrilekha Vidyarthi v. State of U.P.* was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a *public office*, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the**

**State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."**

**We are surprised that despite exhaustive exposition of law by this Court on the nature of the payment of licence fee by the auction purchaser, the High Court in its impugned judgment has not considered any of the above judgments while striking down the relevant clauses of the Policy and the Circular. Moreover, the reasoning given in the judgment is cryptic. When the High Court strikes down the Policy/Circular as ultra vires, we expect the High Court to give detailed reasons for saying so. No reasons are given in the impugned judgment.**

**Before concluding, we may state that the entire controversy arises in the contractual field. The Sale Memo signed by the auction purchaser is nothing but the contract. The High Court has not even considered the General Licence Conditions stipulated in the Rules under the Act 1915 which stands incorporated in the Sale Memo and which, inter alia, deals with payment of annual licnece fee in instalments. None of the above facts have been considered by the Division Bench of the High Court while proceeding to set aside Circular/Policy as ultra vires Section 25 of the M.P. Excise Act, 1915.**

**For the afore-stated reasons, the impugned judgment is set aside and the Civil Appeals stand allowed with no order as to costs.**

**.....J.**
**(S.H. KAPADIA)**

**.....J.**
**(B. SUDERSHAN REDDY)**

**New Delhi,**
**September 17, 2008.**