IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4613 of 2016

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Sanjay R. Kumar son of Late Raghunath Prasad, resident of Baikishunganj, P.S. Gulzarbagh, District – Patna

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Excise and Prohibition, Government of Bihar, Patna.
2. The excise Commissioner, Excise and Prohibition, Government of Bihar, Patna
3. The Deputy Commissioner of Excise, Distillery & Warehouse, Bihar, Patna

.... Respondents

With

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Civil Writ Jurisdiction Case No. 4627 of 2016

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M/s Pashupatinath Distributors Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at 2nd Floor, Chandi Vyapar Bhawan, Exhibition Road, Patna through its Director Lallan Prasad Son of Shri Ramdhyan Prasad resident of B/118, Housing Colony, P.S. Kankarbagh, District - Patna

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Excise and Prohibition, Government of Bihar, Patna
2. The Excise Commissioner, Excise and Prohibition, Government of Bihar, Patna
3. The Deputy Commissioner of Excise, Distillery & Warehouse, Bihar, Patna

.... Respondents

With

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Civil Writ Jurisdiction Case No. 4808 of 2016

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M/s Spicy Beverage Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at Gandhi Road, Dhansar, Dhanbad, Jharkhand through its Director Kamlesh Kumar Sinha son of Sri Lakshmi Narain Sinha resident of Begampur, Karmali Chak, PS Chawk, District Patna.

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Excise and Prohibition, Government of Bihar, Patna.

2. The Excise Commissioner, Excise and Prohibition, Government of Bihar, Patna.

3. The Deputy Commissioner of Excise, Distillery & Warehouse, Bihar, Patna.

.... Respondents

With

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Civil Writ Jurisdiction Case No. 4809 of 2016

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M/s Essveegee Breweries Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at 3rd Floor, Antara Tower, Opp. Sadar Thana, Pan Bazar, Guwahati, Assam through its authorized signatory Manish Pandey son of Umesh Pandey resident of Ward no. 6, Salahabad, P.S. Salempur, District - Deoriya (U.P.).

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Excise and Prohibition, Government of Bihar, Patna.

2. The Excise Commissioner, Excise and Prohibition, Government of Bihar, Patna.

3. The Deputy Commissioner of Excise, Distillery & Warehouse, Bihar, Patna.

.... Respondents

With

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Civil Writ Jurisdiction Case No. 4818 of 2016

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M/s Globus Spirits Limited, having registered office at A - 46, New Friends Colony, (East) New Delhi through its Assistant Manager Pritam Singh Son of Shri Kali Prasad Singh resident of M.B.J. 283, Kailashpur, Husenabad, P.S. Line Bazar, District - Jaunpur (UP)

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Excise and Prohibition,

Government of Bihar, Patna

2. The Excise Commissioner, Excise and Prohibition, Government of Bihar, Patna

3. The Deputy Commissioner of Excise, Distillery & Warehouse, Bihar, Patna

.... Respondents

With

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Civil Writ Jurisdiction Case No. 4978 of 2016

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M/s Ally Foods Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office Gauri Shankar Colony, Gaighat, Gulzarbagh, Patna-800007 through its Director Sanjay Kumar Gautam son of Late Ram Nagina Dwivedi resident of Anisabad P.S. Gardanibagh, District- Patna

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Excise and Prohibition, Government of Bihar, Patna

2. The Excise Commissioner, Excise and Prohibition, Government of Bihar, Patna

3. The Deputy Commissioner of Excise, Distillery & Warehouse, Bihar, Patna

.... Respondents

With

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Civil Writ Jurisdiction Case No. 5022 of 2016

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M/s Trigger Goods Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at Room No. 218, 21, Hemant Basu Sarani, Kolkata, Local office at Tripolia, P.S. Alamganj, Patna 800 007 through its Director Kajal Karmkar, resident of School Para, P.S. Islampur, District - Uttar Dinajpur, West Bengal

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Excise and Prohibition, Government of Bihar, Patna

2. The Excise Commissioner, Excise and Prohibition, Government of Bihar, Patna

3. The Deputy Commissioner of Excise, Distillery & Warehouse, Bihar, Patna

.... Respondents

With

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Civil Writ Jurisdiction Case No. 5513 of 2016

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Sona Sati Organics Private Limited, a Company incorporated under the Companies Act, 1956 having its registered office at and works at Raja Patti Kothi P.O. and P.S. - Baikunthpur, District Gopalganj through its Director Ramashankar Prasad son of Late Lal Babu Prasad resident of Mohalla Babuaganj, Patna City, P.S. - Alamganj, P.O. - Gulzarbagh, District, Patna - 800007.

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Excise and Prohibition, Government of Bihar, Patna.
2. The Excise Commissioner, Excise and Prohibition, Government of Bihar, Patna.
3. The Deputy Commissioner of Excise, Distillery & Warehouse, Bihar, Patna.

.... Respondents

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Appearance :

(In CWJC No. 4613 of 2016)

For the Petitioner/s : Mr. Satyabir Bharti, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No. 4627 of 2016)

For the Petitioner/s : Mr. Satyabir Bharti, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No. 4808 of 2016)

For the Petitioner/s : Mr. Satyabir Bharti, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No. 4809 of 2016)

For the Petitioner/s : Mr. Satyabir Bharti, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No. 4818 of 2016)

For the Petitioner/s : Mr. Satyabir Bharti, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No. 4978 of 2016)

For the Petitioner/s : Mr. Harsh Singh, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No. 5022 of 2016)

For the Petitioner/s : Mr. Satyabir Bharti, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No. 5513 of 2016)

For the Petitioner/s : Mr. Satyabir Bharti, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

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CORAM: HONOURABLE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE JUSTICE SMT. ANJANA MISHRA)

Date: 02-08-2016

In the present batch of writ applications, the petitioners seek issuance of a writ in the nature of *certiorari* setting aside and quashing the order, dated 27.02.2016, as contained in Memo No. 901 (Annexure-8), passed by the Excise Commissioner, Bihar, on the ground that the same is in utter contravention of the mandatory provisions of law and is also contrary to the undertaking given by the State, as recorded in the order, dated 09.02.2016, passed in CWJC No. 1890 of 2016, and other analogues cases.

2. By the impugned order, though an undertaking was furnished before this Court that the impugned order, dated 21.01.2016, whereby a mandatory direction was issued to supply *country liquor* at a fixed rate of Rs. 3.69**/- s**hall be modified and shall not be given effect

to, the Excise Commissioner, with the approval of the Principal Secretary, has, again, issued Memo No. 901, dated 27.02.2016 (impugned in the present application), directing the petitioners to deposit the differential amount as per the MGQ of the concerned district calculated at the rate of Rs. 3.69/- and supply *country liquor* in these district and also in other districts, when supply fell short and, in the event of failure, the manufacturing premises of the petitioners shall be sealed.

3. The petitioners further pray that any recovery, made under threat and coercion pursuant to the impugned order, may be directed to be refunded.

4. The following facts have given rise to this application:-

(i) The State Government, through resolution, dated 24.10.2013, took a policy decision for manufacture and supply of *country liquor* in PET bottles and the mode and manner for selection of contractors and various others were to be made under the contract;

(ii) In pursuance of the policy decision, a tender notice, dated 31.01.2014, was issued by the State Government inviting applications for granting exclusive privilege for manufacture and supply of *country liquor* in PET bottles;

(iii) The petitioner and others submitted their tenders for Zone No. 13 (Madhubani and Samastipur) and quoted the rate for supply at Rs. 3.86/- per 200 Ml. PET bottles and were granted exclusive privilege for the period from 01.04.2014 to 31.03.2016 for their respective zones;

(iv) A perusal of the tender notice would reveal that the entire State, for the purposes of manufacture and supply, was divided into zones and the contract, for manufacture and supply of *country liquor,* was equally divided among 17 contractors and each contractor was responsible, under the conditions of licence, to ensure smooth and uninterrupted supply of *country liquor* in their respective allotted zones.

(v) Further, in terms of Clause 3 (vi) of the tender notice, each of the contractors was made liable for payment of the differential amount between their tendered rates and the base rate on the entire Minimum Guarantee Quota (MGQ) of the zone allotted to them. It further provided that if the supply of the *country liquor* is in excess of the MGQ, they shall be liable for payment of the differential amount on such excess supply in addition to the amount already paid.

The rate of supply was inclusive of transportation cost to the godown of Bihar State Beverages Corporation Limited (hereinafter referred to as 'the BSBCL') falling within their respective zone of supply.

(vi) The petitioners, in accordance thereof, had been paying the differential amount on the MGQ of Zone No. 13, though there were some differences as the fixing of the MGQ, for the purpose of levy of differential amount, had to be adjudicated by the a Division Bench of this Court in a batch of writ applications bearing CWJC No. 4878 of 2015 and analogous cases vide its judgment, dated 17.09.2015. The Department, in compliance thereof, had revised the MGQ for each of the zones for the year 2014-15 and 2015-16 and the petitioners had been making payment of the differential amount as per the revised MGQ for Zone No. 13.

(vii) Thus, in terms of the liability for payment of the differential amount, the petitioners were liable to pay any differential amount over and above the MGQ fixed for the zone allotted to it if its supply of *country liquor* exceeds the MGQ on which differential amount had already been paid in advance. Secondly, the liability for payment of the differential amount, on such supply in excess of the MGQ, can only be demanded on the quoted rate of the petitioners at which rate it had agreed to supply in their own respective zones.

5. Learned counsel for the petitioners has submitted that in the past, on account of withdrawal/cancellation of the license of some of the contractors, or on their failure to ensure supply as per demand, the Department never required them to pay any amount of differential money, which was within the MGQ on which the differential has been paid in advance. The only stipulation is that the contractors were required to give an undertaking that they shall not demand transportation charges for supply beyond their zone. However, if they failed to ensure the supply, they would be liable for imposition of penalty upon them to the extent of loss of revenue, which includes differential amount. A perusal of Clause 8 of the license, which reveals, when translated in English language, the relevant terms and conditions were as follows:-

a) “The licensee shall be found to supply by way of sale to licensed wholesale vendors from the manufactory at which the sale of liquor under the license is for the time being permitted, liquor of the quantity or quantities and description or descriptions mentioned in the passes produced by them.

b) Failure to supply liquor as specified in condition 7 supra shall entail penalty at the discretion of the Excise Commissioner. The penalty may extend to the amount of Excise Duty on the liquor demanded by the licensed whole sellers but not supplied together with any loss of revenue that may be caused to the government in consequence of the failure to supply liquor.

c) The licensee shall supply liquor on demand by the Collector for the Excise Commissioner to the manufactory of the other licensee at the cost borne by that licensee who has failed to supply liquor of the specified quantity. The Excise Commissioner may impose such penalty at his discretion, on the failed licensee.

d) If liquor is not being supplied by the contractor appointed for any area, then as per order of the Collector or the Excise Commissioner, it will be binding upon the working contractors of the adjoining areas to supply *country liquor* to that contractor at the specified rates.

e) The licensee shall be bound by all such general or special orders which may be issued by the Excise Commissioner from time to time.

6. In terms of Clause C aforementioned, the petitioners, on default of contractors of some zone, were directed to supply in such zone, without demand of any differential amount, on a precondition that they shall not demand transportation charges and that the petitioners shall supply without any financial burden on them. However, vide order, dated 21.01.2016, the Excise Commissioner directed the petitioner to supply at the rate of Rs. 3.69/- in other zones, where the contractors had defaulted, and pay differential amount on the MGQ of the district and made it mandatory to supply, at the aforesaid rates, with effect from 1st of February, 2016, failing which its manufacturing premises shall be closed from 7th of February, 2016.

7. Learned counsel for the petitioners has also submitted that the said order was *dehors* the contract agreement inasmuch as under Clause 8 of the license, if a licensee fails to ensure the requisite supply in his zone, then, he would be liable for payment of penalty to the extent of loss of revenue, which includes differential amount. The said loss could not be realized from licensees of the other zones, who could, at best, be asked only to supply for the defaulting zone as an interim measure, at the rates at which they were supplied in their allotted zone,

without payment of the differential amount. It is contended that they have already paid the differential amount on the MGQ of their zone and the liability to pay the differential amount accrues only if supply exceeds the MGQ on which differential amounts have been paid.

8. It was under such facts and circumstances that the writ applications came to be filed in this Court bearing CWJC No. 1890 of 2016 and other analogous cases. In the said cases, the respondents, realizing the fallacy in the impugned order, invited, vide letter, dated 06.02.2016, offers from the petitioner for supply of *country liquor* in the concerned zone, wherever the manufacturing plant of *country liquor* was not functional. This offer letter was issued during the pendency of the writ application and, as such, when the matter came up for hearing on 09.02.2016, the learned Principal Additional Advocate General, appearing on behalf of the respondents, submitted before this Court that since order, dated 21.01.2016, stood modified by the letter, dated 06.02.2016, the respondents would not insist on the compliance of the earlier order, dated 21.01.2016, and the writ applications were accordingly disposed of, on 09.02.2016, after recording therein the submissions so made by the learned Principal Additional Advocate General**.** It is important to indicate here that pursuant to the order aforementioned of this Court, the State Government too, vide order, dated 18.02.2016, contained in Memo No. 749 (Annexure- 7),

rescinded the order, dated 21.01.2016 aforementioned.

9. Responding to the offer, dated 06.02.2016, the petitioners of the present writ applications filed their offers, which were opened, on 18.02.2016, in their presence or their authorized representatives. Four manufacturers did not quote any rate in the 200 ml category for want of such infrastructure; whereas one manufacturer quoted in excess, but the remaining manufacturers quoted the same rate of Rs. 5.75 per 400 ml.

10. It is submitted that the petitioner, in CWJC No. 4613 of 2016 (Sanjay R. Kumar), and the petitioner, in CWJC No. 5022 of 2016 (M/s Trigger Goods Pvt. Ltd.), have offered to supply of 400 ml in PET bottles, the petitioner, in CWJC 5513 of 2016 (Sona Sati Organics Private Ltd), has offered the same rate for supply at the rate of Rs. 5.75/- at which rate, it was awarded the contract in respect of its own zone. The petitioner, in CWJC 4978 of 2016 (M/s Ally Food Pvt. Ltd), has offered to supply at the rate of Rs.5.78/-, which is at par with the base rate. The remaining petitioners offered to supply at the rate of Rs. 5.75, which is higher than the approved rate. The higher rates, quoted by the petitioners, were offered in lieu of the increased statutory price of certified spirits after initial award of contract and enhancement of VAT rates after the initial award of contract and enhancement.

11. So far as the petitioners are concerned, they had quoted and offered to supply at the rate of Rs. 5.75, excepting petitioners in CWJC NO. 4673 of 2016, 5022 of 2016, 3315 of 2016, who had offered to supply at Rs. 5.78. However, they received a notice, dated 22.02.2016, asking them to show cause as to why their licenses be not cancelled for indulging in cartelization.

12. The said four petitioners responded to the said show cause notices stating, *inter alia,* that there is no question of cartelization inasmuch as the petitioners had offered the rate of Rs. 5.75 keeping in mind the increased cost of rectified spirit, cost of transportation, enhance VAT and other incidental costs. They further contended that they were free to offer any rate as the license could be cancelled only for violation of the terms and conditions of the license. They categorically stated that they were free to offer any particular rate for such arrears, which are beyond the contracted areas inasmuch as it amounted to a new contract under Clause 4.7 of the NIT, which, *inter alia,* provides that "*if, in a zone, for any reasons, the privileges is cancelled, then, in the said Zone, the contract shall be concluded by inviting limited tenders from the tenderers of other zones*".

13. It is submitted that the writ petitioners were, once again, directed to supply at the rate of Rs.3.69 in the vacant zone and pay

differential amount accordingly with the threat that they would face cancellation of their licence on the grounds that the petitioners had (a) indulged in cartelization and (b) the Government, under Section 22 A, could fix the price of supply and, thus, the petitioners have violated the Clauses 8 and 26 of the license.

14. Faced with such a situation and under such threats from the respondents, as indicated above, the petitioners have, once again, approached this Court, with this set of writ applications, seeking to quash the impugned notification, dated 27.02.2016 (Annexure-10), as being illegal, arbitrary and violative of Article 14 of the Constitution of India and also that the impugned order is *dehors* the terms and conditions of the settled contract between the parties.

15. We have heard learned counsel for the parties and perused the materials, which have been placed before us. The writ petitioners had earlier come to this Court, in CWJC No. 1890 of 2016 and its analogous cases, seeking redressal of their grievance against the arbitrary and excessive action of the State. In view of the fact that such action could not have been sustained, the State submitted before this Court that the impugned notification stood withdrawn and produced a copy of the letter issued by the Commissioner of Excise, Bihar, whereby the State respondents had, however, as an alternative measure,

invited the petitioners to place by 09.02.2016 their respective offers for supply of bottle of *country liquor* in the regions of Rohats, Gaya and Bhagalpur, where manufacturing units were not functional. The learned Principal Advocate General had categorically stated that the impugned notification therein, i.e., the order, dated 21.01.2016, stood modified and superseded by the decision taken on 06.02.2016 and, thus, there would be no insistence on compliance of the impugned order, dated 21.01.2016. Thus, it was directed that the aforementioned writ applications stands disposed of.

16. However, it, now, appears that the State respondents have, once again, resorted to a novel method of imposing on the petitioners a similar liability on the pretext of cartelization, though they could not achieve the same on an earlier occasion. We wholly deride the manner in which the respondents, having asked the petitioners to quote their offers for supply of *country liquor* in adjoining districts, have arbitrarily, unilaterally and illegally assumed that the rate of Rs. 3.69/- alone would be appropriate for supply of the same by the petitioners.

17. It is important to mention that the petitioners, keeping in mind the increase in the cost price of rectified spirit Grade-1 from the then existing rate of Rs. 28.80/- per bulk liter to Rs. 35.80/- bulk liter,

the cost of transportation from its warehouse to the concerned districts, increase in the VAT rate by 1 per cent and other increase in incidental costs, did not offer to supply in 200 ml as its plants and machinery were customized to supply in 400 ml and, thus, had quoted a rate of Rs. 9.76/- per 400 ml .

18. However, some of the petitioners, who had made their offer for 200 ml, were shockingly served with show cause notices alleging cartelization by them. Further, vide notice, contained in Memo No. 901, dated 27.02.2016, the petitioners, in purported reliance on the provisions of Section 22(a) of the Bihar Excise Act and also Clause VIII (ga), (gha) (anga) and Clause 26 of the license in Form 27, were called upon by the respondents to supply at the rate of Rs. 3.69/- and pay differential amount at the rate of Rs. 3.69/- with the threat that the manufacturing premises of the petitioner would be sealed if the direction for supply at the rate aforementioned was violated.

19. It is notable to mention here that while making the impugned order, the respondents have also misconstrued the provisions of Section 22-A of the Bihar Excise Act, 1915.

20. Section 22-A of the Bihar Excise Act, 1915, reads as under:-

"22-A. The Fixation of cost price

> ***of country liquor, by the State Government.*** *— (1) The State Government while granting exclusive privilege of manufacturing supplying wholesale, or of selling wholesale or retail of country liquor may fix the cost price which includes the price of the spirit, the transportation charges, warehouse maintenance charges, taxes, if any, and other charges, such as bottling, packing etc. and dividend.*
>
> *(2) Any person to whom the State Government has granted exclusive privilege of manufacturing, supplying wholesale or selling wholesale or retail country liquor during the year 1990 wherein the cost price of the country liquor was fixed by the State Government taking different components into account including warehouse maintenance charges at the rate of 70 paise per L.P. Litre shall be deemed to have been fixed under this Section.*

21. A bare perusal of the provisions embodied in Section 22A of the Bihar Excise Act, 1915, shows that the provisions aforementioned empower the State Government to fix the cost price of *country liquor* taking into consideration different components. The tenderers/contractors would be bound to supply at the said rates. Hence, the action of the respondents in issuing the impugned notice,

compelling the petitioners to supply at the notified rate, failing which they would be faced with cancellation of lease and their manufacturing units would be sealed is clearly excessive, arbitrary and defeasive of the rule of law.

22. We observe that the impugned notification also refers to sub-clauses (ga), (gha) and (anga) of Clause 8 of the license. While Clause 8 (ga) of the license mandates that on failure of the licensee to supply the liquor of specified quantity, the same shall, on demand by the Collector or the Excise Commissioner, be supplied by other licencee at the cost borne by the defaulter licencee, and penalty can also be imposed upon him for such default; Clause 8 (gha) of the license provides that the adjoining contractor, on the direction of the Collector or the Excise Commissioner, shall be bound to supply *country liquor* at specified rates to the area, where country liquor is not being supplied by the contractor appointed for the area, meaning thereby that the adjoining contractor shall supply at specified rates at which it is supplying in its own contracted districts. In any case, it could not be less than that rates at which it had agreed to manufacture and supply and further that it could be only on such rates in addition to the rates it had agreed to supply, which shall include the additional cost of transportation and other logistic, which could be recovered from the defaulting contractors. Thus, we have no hesitation in holding that any

order issued by the Excise Commissioner in contravention of such provisions would be against the mandate of law.

23. We have also noted that the rate fixed by the Excise Commissioner, i.e., at the rate of Rs. 3.69/-, is also wholly illegal and arbitrary as the base rate, determined by the State Government under Section 22-A of the Act, was already fixed. Therefore, the allegation against the petitioners, in CWJC No. 5513 of 2016, and the petitioner, in CWJC No. 4978 of 2016, who had offered a rate of Rs. 5.75/- for 200 ml PET bottles and 5.78 for 200 ml PET bottles and Rs. 9.76/- for 400 ml bottles respectively, valid from 1.04.2014 to 31.03.2019, as is evident from annexure-1 itself, that they were guilty of cartelization cannot be sustained.

24. Moreover, other petitioners against whom no show cause notices were issued and also those, who had not offered any rates for 200 ml PET bottles were arbitrarily directed to supply at the rate of Rs. 3.69/-.

25. We, thus, find and hold that the Excise Commissioner was not authorized to fix the rates and demand other rates from the petitioners contrary to the Rules and rates fixed previously and duly notified in the Bihar Gazette. Such a charge against the petitioners cannot be sustained and the impugned notification, based on such

charge, is fit to be set aside.

26. We are, therefore, clearly of the opinion and conclude that the order of the Excise Commissioner is aimed at subverting the earlier decision of this Court, which, we wholly deprecate and find that the same is fit to be set aside and quashed.

27. Accordingly, the impugned order, dated 27.02.2016, contained in Memo No. 901 (Annexure-8), is quashed. The writ applications are allowed.

28. The respondents are directed to refund the money deducted from the petitioners by coercing them to do so under threat and fear of sealing the units. The said refund should be made within a period of three months from the date of the order, failing which they shall render themselves open to further punitive action in accordance with law.

(Anjana Mishra, J)

I. A. Ansari, CJ : I agree.

(I. A. Ansari, CJ)

Jagdish/-

AFR/NAFR	AFR
CAV DATE	31.03.2016
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Transmission Date	N/A