IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12386 of 2015

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1. M/s Hindustan Spirits Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at D-14, Preet Vihar, 2nd Floor, New Delhi through its Authorised Signatory Hare Ram Pandey son of Late Mukhti Nath Padey resident of Village Bahaliya, P.S Ghutni, District- Siwan

.... *PRT*itioner/s

Versus

1. The State of Bihar through the Secretary, Excise & Prohibition Department, Bihar, Patna
2. The Secretary, Excise & Prohibition Department, Bihar, Patna.
3. The Excise Commissioner, Bihar, Patna
4. The Joint Commissioner of Excise, Bihar, Patna
5. The Collector, Begusarai
6. The Superintendent of Excise, Begusarai

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 10092 of 2015

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1. M/s Trigger Goods Pvt. Ltd., Registered Office at Room No. 218, 21, Hemat Basu Sarani, Kolkata, Local Office at Tripolia, P.S. Alamganj, Patna-7 through its Director Kajal Karmkar, resident of School Para, P.S. Islmapur, District Uttar Dinajpur, West Bengal.

.... *PRT*itioner/s

Versus

1. The State of Bihar through the Secretary, Excise & Prohibition Department, Bihar, Patna
2. The Secretary, Excise & Prohibition Department, Bihar, Patna.
3. The Excise Commissioner, Bihar, Patna
4. The Joint Commissioner of Excise, Bihar, Patna
5. The Superintendent of Excise, Siwan.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 10592 of 2015

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1. Sanjay R Kumar, s/o Shri Raghunath Prasad, r/o Balkishunganj, P.S. Gulzarbagh, District- Patna.

.... *PRT*itioner/s

Versus

1. The State of Bihar through the Secretary, Excise & Prohibition Drpartment, Bihar, Patna.
2. The Secretary, Excise & Prohibition Department, Bihar, Patna.

3. The Excise Commissioner, Bihar, Patna.
4. The Joint Commissioner of Excise, Bihar, Patna.
5. The Superintendent of Excise, Madhubani.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 11554 of 2015

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1. M/s Ally Food Pvt. Ltd., Regd. Office at Gauri Shankar Colony, Gaighat, Gulzarbagh, Patna-7 through its Director Sanjay Kumar GAutam, s/o Late Ram Nagina Dwivedi, r/o Anisabad, P.S. Gardanibagh, District Patna.

.... *PRT*itioner/s

Versus

1. The State of Bihar through the Secretary, Excise & Prohibition Department, Bihar, Patna.
2. The Secretary, Excise & Prohibition Department, Bihar, Patna.
3. The Excise Commissioner, Bihar, Patna.
4. The Joint Commissioner of Excise, Bihar, Patna.
5. The Superintendent of Excise, Darbhanga.

.... Respondent/s

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Appearance :

(In CWJC No.12386 of 2015)
For the *PRT*itioner/s : Mr. Jitendra Singh, Sr. Advocate
With Mr. Satyabir Bharti
For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No.10092 of 2015)
For the *PRT*itioner/s : Mr. Jitendra Singh, Sr. Advocate
With Mr. Harsh Singh
For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No.10592 of 2015)
For the *PRT*itioner/s : Mr. Jitendra Singh, Sr. Advocate
With Mr. Harsh Singh
For the Respondent/s : Mr. Lalit Kishore, PAAG

(In CWJC No.11554 of 2015)
For the *PRT*itioner/s : Mr. Jitendra Singh, Sr. Advocate
With Mr. Harsh Singh
For the Respondent/s : Mr. Lalit Kishore, PAAG

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
And
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date: 02-05-2016

The present batch of applications, filed under Article 226 of the Constitution of India, involve an identical question as to whether the action of the State-respondents in levying and realizing differential amount from the petitioners under Clause 3 (vi) of the Notice Inviting Tender (for short 'NIT'), dated 03.02.2014, on applicable rates of 200 ml *PET* (Polyethylene terephthalate) bottles, despite the admitted fact that the petitioners manufactured and supplied country liquor in their respective integrated Zones in 400 ml *PET* bottles alone, as per the demand in the concerned zone.

2. With the consent of the parties, therefore, all the applications have been heard together and are being disposed of by the present common judgment and order.

3. We have heard Mr. Jitendra Singh, learned Senior Counsel, appearing on behalf of the petitioners, and Mr. Lalit Kishore, Learned Principal Additional Advocate General, representing the State of Bihar, at length.

4. The petitioners are holders of exclusive privilege and licence for manufacture of country liquor and by making present applications under Article 226 of the Constitution of India, they seek a direction to the respondents to realize differential amount as envisaged in Clause 3(vi) of the NIT on applicable rates for 400 ml *PET* bottles and not on applicable rates for 200 ml *PET* bottles, since supply of country liquor was in 400 ml *PET* bottles only in the Zones allotted to them. They have also sought for a direction to reconcile the differential

amount on the basis of rates applicable for 400 ml *PET* bottles and refund of the excess amount realized from them (i.e., petitioners).

5. In order to appreciate the controversy involved in the present batch of applications, the uncontroverted facts, which are common in all the cases, need to be taken note of.

6. The State of Bihar, through its Registration, Excise and Prohibition Department, came out with a resolution, dated 24.10.2013, containing policy for manufacture and bottling of country liquor for wholesale supply to Bihar State Beverage Corporation Limited (hereinafter referred to as 'BSBCL').

7. Before the policy came into force with effect from 01.04.2014, there was a system of supply of country liquor in sachets. In terms of the said policy, the exclusive privilege for grant, manufacture and supply of country liquor in *PET* bottles to BSBCL was to be granted to agents selected through tender process. The entire State of Bihar was divided into 17 Zones and the tenders were to be granted for a period of five years. The successful tenderers were required to establish plants for manufacture of *PET* bottles and bottling of country liquor.

8. In terms of the said policy, before issuing tender, base rates for supply of 200 ml and 400 ml bottled country liquor was to be fixed by a Committee constituted under the Chairman-cum-Member, Board of Revenue. The base rate was to be fixed for supply of bottled country liquor to BSBCL Godown (including all kinds of expenses) with

VAT to be calculated subsequently. The tenderers were required to submit their tenders keeping in mind the base rate. The lowest tenderer was to be allotted the most preferred supply Zone out of the said 17 Zones. On the basis of difference between the base rate determined by the Department and the rate quoted by the tenderer, the differential amount was to be calculated on *MGQ* (Minimum Guarantee Quota) for the entire year.

9. Thus, the difference between the base rate and the tendered rate multiplied by the *MGQ,* as fixed by the Department for the entire year, was required to be paid by the tenderers, in advance, to the State Government in 3-3 month's equated installments. The first installment, as per the said policy, was to be paid within seven days from the date of the finalization of the tender, whereafter, the installment of every three months was to be deposited on 15th June, 15th September, 15th December and 15th March.

10. As per Clause 3 (vii) of the said Policy, a tenderer was to quote separate rates for 200 ml and 400 ml packed sizes for the entire State and not for any particular Zone.

11. Clause 4 of the said policy laid down that *MGQ* for every district and Zone shall be based on consumption in previous year.

12. In tune with the said policy decision, NIT, dated 30.01.2014, was issued, which contained, *inter alia*, *MGQ* (monthly and annual) for each of the Zones for the previous year 2013-14.

13. The NIT prescribed, in Clause 3, the procedure for

determination of supply of country liquor. Base rate of 200 ml was fixed as Rs. 5.78 and for 400 ml Rs. 9.76 clearly indicating thereby that the base rate shall be for supply to BSBCL Godown at which rate the suppliers shall be paid. The payment of differential amount between the tendered rate and the base rate was, in accordance with the procedure prescribed in the NIT, required to be paid by the tenderer to the Government. In terms of Clause 3(iii) of the NIT, a tenderer, keeping in mind the base rate of 200 ml, was to submit his tender in sealed envelope. The rate of 400 ml was to be 1.688 times the rate quoted for 200 ml. The NIT specifically provided that no separate rates would be acceptable for 400 ml and if separate rate was given for 400 ml, the same shall be rejected.

14. Evidently thus, a tenderer was required to submit the base rate of 200 ml fixed by the authorized Committee. As the NIT stipulated, the tendered rate for 400 ml was to be treated to be 1.688 times the rate quoted for 200 ml. Clause 6 of the NIT prescribed that on the basis of differential amount of the base rate determined by the Department and the rate quoted by the tenderer, the amount shall be calculated on the *MGQ* of the entire year and the said amount shall be paid by the tenderer in advance to the State Government in 3-3 months equated installments. The formula for calculating the differential amount can be more clearly delineated as (Base rate-tendered rate) x *MGQ*.

15. The controversy lies here. The base rate for 200 ml has

been fixed as Rs. 5.78. Base rate for 400 ml as Rs. 9.76, which is evidently not the double of the base rate fixed for 200 ml and is substantially less than double the base rate fixed for 200 ml (Rs. 11.56). Similarly, the tendered rate for 400 ml was to be treated as 1.688 times the rate quoted for 200 ml and not separate rate for 400 ml could be quoted by a tenderer at the time of submitting his bid.

16. The differential amount, if calculated solely on the basis of base rate and tender rate for 200 ml, would be on higher side as compared to the same calculated solely on the basis of base rate fixed for 400 ml and the tendered rate, i.e. the 1.688 times the rate quoted for 200 ml.

17. It is the case of the petitioners that there was nothing in policy of the State Government nor was anything mentioned in the NIT to the effect that differential amount shall be calculated and demanded on the basis of applicable rates of 200 ml only, even in case the demand for the concerned Zone and supply against the same was of 400 ml only, without any exception.

18. The effect of calculating and demanding differential amount, on the basis of applicable rates of 200 ml, has been dealt by the learned Senior counsel for the petitioners by citing an illustration, referring to the case of the tenderer who was declared successful for Zone 17 (M/s Hindustan Spirits Limited, the petitioner of CWJC No. 12386 of 2015):-

"(i) Base Rate of 200 ml-Rs. 5.78' 400 ml- (5.78x

1.688)

(ii) Rate quoted by petitioner: 4.66 per 200 ml (Successful for Zone 17)

(iii) Differential rated if supplied in 200 ml= Rs. 5.78-4.66= Rs. 1.12/per 200 ml.

(iv) Applying the multiplier: Rs. 4.66 x 1.688= Rs. 7.86 per 400 ml.

(v) Differential rate if supplied in 400 ml= Rs. 9.76-7.86 per 400 ml.

Therefore, if supply in 400 ml, the differential @ Rs. 1.90/- per 400 ml payable. However, even if supply in 400 ml, the calculation and demand of the differential rate, is in the following manner:

400 ml=200 ml x 2= 1.12 x2= Rs. 2.24."

19. It is the case of the petitioners that differential amount, at higher rate, having difference of Rs. 0.34 per 400 ml bottled (Rs. 2.24- Rs.1.90) is wrongly being demanded and the petitioners have been forced to pay. The petitioners are said to have represented before the concerned authorities for levy and realization of the differential amount on the applicable rates for 400 ml, which was rejected compelling the petitioners to file the present applications.

20. Mr. Jitendra Singh, learned Senior Counsel appearing on behalf of the petitioners, has submitted that though the tenderers were required to quote rate for 200 ml, only quoting of rate for 200 ml itself determined the quoted rate for 400 ml packed size by multiplying the rate quoted for 200 ml by 1.688. He, accordingly, submits that for all practical purpose, a tenderer is said to have quoted rates for 200 ml

and 400 ml packed size. Referring to Clause 1 of the policy, Mr. Singh contends that the Department, while determining the modalities for allotment of Zones, had decided that the rate for 200 ml, quoted by tenderers, shall be the basis for award of Zones from L-1 to L-17. The tenderers were to be paid base rate on the actual supply in 200 ml or 400 ml as the case might be. According to him, thus, if the supply was in 400 ml, payment of differential amount was not to be made on the double the base rate of 200 ml, but at the rate 1.688 times the base rate of 200 ml. Mr. Singh submits that if the differential amount is calculated only on the applicable rates of 200 ml irrespective of the supplies having been made in 400 ml, the terms of policy, particularly, Clause 3 (vii), Clause 3 (iii) and Clause 4 (iii) of the NIT would become inconsequential. According to him, therefore, this will amount to breach of the terms of the policy in question.

21. Mr. Lalit Kishore, learned Principal Additional Advocate General, has, on the other hand, submitted that the plea, as has been taken in the present proceedings by the petitioners, with respect to determination of the differential amount, was available to them at the time of filing of another writ applications being CWJC No. 4921 of 2015 (M/s Trigger Goods Pvt. Ltd. vs. The State of Bihar & ors) and other analogous cases. Omission to raise the plea, as taken in the present proceedings, in earlier writ applications, dis-entitled them to raise the same in the present proceedings. He has placed reliance upon the Supreme Court's decision in case of ***Inacio Martins Vs Narayan Hari***

Naik and others (1993) 3 SCC 123 and in case of ***Alka Gupta Vs. Narender Kumar Gupta 2011 (1) PLJR (SC) 65.***

22. Responding to this contention, it has been argued by learned Senior Counsel for the petitioners that the issue, involved in CWJC No. 4921 of 2015 and batch of other writ applications, were entirely different concerning arbitrary fixation of *MGQ* in breach of the policy of the State Government, which envisaged that *MGQ* had to be fixed on the basis of actual consumption in the previous year. He has, thus, contended that these two issues are entirely different and, therefore, the objection, taken by the learned Principal Additional Advocate General to this effect is not sustainable.

23. Mr. Lalit Kishore, learned Principal Additional Advocate General, has then, relied upon Clause 3 (vi) of the NIT and Clause 4 of the Grant and has submitted that the differential amount was to be paid in four equal installments without any variation or difference. Since the petitioners deposited the first installment calculated on the applicable rates of 200 ml, they could not subsequently take a different plea. He has further submitted that as is manifest from Clause 3(vi) of the NIT read with Clause 4 of the Grant, consideration for a grant of exclusive privilege is the difference between the base rate of 200 ml and rate quoted by the tenderer for 200 ml multiplied by *MGQ*. In terms of Clause 3(vi) of the NIT and Clause 4 of the Grant, if the supply was more than *MGQ,* then, a guarantee would be required to deposit differential amount towards supply in excess of *MGQ,* but if it is less

than *MGQ*, the differential will be on the *MGQ*. He has submitted that there is no provision in the NIT or the Grant for reconciliation by adjustment or refund except reconciliation in case of supply in excess of *MGQ*. He has, accordingly, submitted that the petitioners, having accepted the grant, which stipulates payment of differential amount between the base rate of 200 ml and the rate quoted by the petitioners for 200 ml, followed by deposit of first installment, cannot question the demand made accordingly and take a plea that difference is to be calculated on the basis of base rate of 400 ml. He has placed reliance on Full Court's decision of this Court in case of ***M/s Ajanta Traders vs. State of Bihar & ors, 1996 (2) PLJR 281***. He has next submitted that the petitioners entered into a contractual obligation with their eyes open and they cannot be allowed to turn around and question the validity of those obligations.

24. Evidently thus, the sole question, which is required to be answered in the present proceedings, is as to whether the differential amount is essentially to be calculated on the basis of applicable base rate of 200 ml *PET* bottles and the rates quoted by the tenderers for their supply to BSBCL.

25. We have given our anxious consideration to the submissions advanced on behalf of the parties and the pleadings and other materials available on record.

26. In paragraph 16 of the respective applications of the present batch of cases, there is specific averment that the demand, in

their respective Zones, was only for 400 ml *PET* bottles and they manufactured and supplied country liquor in their integrated plant in 400 ml *PET* bottles alone. This specific averment, made in the writ application, has not been denied in the counter affidavits filed on behalf of the respondents-State of Bihar. This fact, thus, stands unconverted.

27. Upon perusal of the policy of the State Government as contained in its Resolution, dated 24.10.2013, we notice that it does not stipulate that the differential amount shall be calculated on the applicable rates for 200 ml bottles only despite the supplies being made of 400 ml bottled country liquor. Nor is there any such stipulation in the NIT.

28. Heavy reliance has been placed on the terms of the grant of exclusive privilege in favour of these petitioners issued by Registration, Excise and Prohibition Department for manufacture of country liquor in *PET* bottles and supply to BSBCL. English translation of the said Clause 4 has been supplied to us by learned counsel representing the petitioners, without any objection having been said from the respondents, which reads thus:-

> "4. For each of the privilege holder, granted exclusive privilege for a zone the differential amount for the entire year shall be determined on the basis of the difference between the Base Rate determined by the Department for (200 ml @ Rs. 5.78 & 400 ml @ Rs. 9.76) and the rate given by the tenderer for (200 ml @ Rs. 3.86 per bottle) on the determined MGQ specified for the zone (as per column 3 above). This amount has to be deposited in 3-3 equal

> installments in advance to the State Government. The first installment has to be deposited within 7 days of the finalization of tender and thereafter it has to be deposited after every three months i.e. on 15th June, 15th September and 15th March. On failure to deposit the installment in time, the privilege shall be cancelled. If the tenderer supplies liquor more than the MGQ, then the differential amount has to be deposited on the consumption. If the supply is less than the MGQ, the differential amount has to be deposited on the MGQ. This reconciliation would be done after every three months and recovery of the differential amount will be done in a month."

29. Learned Principal Additional Advocate General has extended two reasons seeking to justify the action of the respondents of calculating differential amount on applicable rates of 200 ml. Firstly, according to him, the tenderers were required to quote their rates for 200 ml only and, therefore, the differential amount was also to be calculated on the basis of applicable rates for 200 ml packed size. His second contention is that based on applicable rates of 200 ml, calculation for payment of differential amount was made and the tenderers were asked to pay the differential amount, on that basis, within seven days from the date of finalization of the tender, which they did. After having accepted the calculation of differential amount on applicable rates of 200 ml packed size, it is not permissible for them to take a different plea.

30. We do not find any force in the submissions advanced on behalf of the State of Bihar that there was no base rate for 400 ml

packed size nor tendered rate on the reasoning that the tenderers were required to quote their rates for 200 ml packed size only. There was base rate for 400 ml bottled country liquor quoted in the NIT itself, which was not twice the base rate fixed for 200 ml. It cannot be said that there was no tendered rate for 400 ml, packed size on the ground that the tenderers were required to quote rates for 200ml. The rate stood quoted by the tenderers for 400 ml also, by multiplying the rate quoted for 200 ml, by 1.688 as per the policy and the NIT both.

31. Evidently thus, there was base rate and tendered rate for 400 ml available. Making it mandatory to quote rate for 200 ml packed size might have been for administrative convenience in finalization of bids and other incidental matters. For the purpose of selecting the lowest bidder, it would have certainly been convenient for the Department to have asked the tenderers to quote rates for 200 ml packed size only because that rate could have automatically given the quoted rate of 400 ml by multiplying it by 1.688.

32. This is to be noted that under the scheme of the things, a successful tenderer is entitled to receive payment for supply on the base rate. Since the successful tenderers offered to supply on a rate lower than the base rate, he is required to reimburse the excess amount received by him on total supplies to the State Government. This is the basic premise on which the levy of differential amount works. We find substance, in the submissions advanced on behalf of

the petitioners, that there is no reason why the State would raise demand of differential amount on the basis of applicable rates for 200 ml, when the petitioners have, admittedly, supplied 400 ml bottled country liquors only, in their respective Zones.

33. We do not find much substance in the submissions that the petitioners should be denied relief in the present proceedings as they failed to seek these reliefs in the earlier proceedings. There is no dispute that the issues, involved in the earlier proceedings, were entirely different relating to arbitrary fixation of *MGQ;* whereas, in the present proceedings, the grievance of the petitioners is of calculation of differential amount on the basis of applicable rates for 200 ml irrespective of *MGQ*. The Supreme Court's decision, in case of ***Alka Gupta Vs. Narender Kumar Gupta*** (supra), relied upon by Mr. Lalit Kishore, cannot be applied in the present proceedings under Article 226 of the Constitution of India. The said decision of the Supreme Court arose out of a suit and applying Order 2 Rule 2 of the Code of Civil Procedure, the Supreme Court held that the said provisions put a bar on a plaintiff, who had earlier claimed certain remedies with regard to cause of action, from filing a second suit with regard to other reliefs based on same cause of action. The Supreme Court held that a second suit, based on a different and distinct cause of action, is not barred under Order 2 Rule2 of the Code of Civil Procedure. The provisions of the Code of Civil Procedure cannot be strictly applied in a writ proceeding. Secondly, the cause of action, in

the present proceedings, arise out of determination of difference between the applicable base rate and the tendered rate. The Supreme Court's decision, in case of ***Inacio Martins*** (supra), relied on by Mr. Lalit Kishore, is also distinguishable for the same reason.

34. The Full Bench decision, in the case of ***M/s Ajanta Traders*** (supra), which has been relied upon by Mr. Lalit Kishore, is also not applicable in the present facts and circumstances of the case. The Full Bench of this Court held that liability of a licensee to make payment of licence emanates primarily from the terms and conditions of the grant of licence. In the present cases, nothing has been shown to us in the grant making a provision that differential amount shall be calculated on the basis of applicable base rate and tendered rates for 200 ml packed size.

35. In view of the discussions as above, we are of the considered view that the petitioners are entitled for the relief sought for in the present proceedings. Since there is no denial of the specific assertion of the petitioners that they had supplied 400 ml bottled country liquor only to BSBCL, the differential amount will be required to be calculated on the basis of the applicable rates for *MGQ* applicable for 400 ml *PET* bottles in the concerned Zones.

36. We, accordingly, direct respondent No.2, namely, the Secretary, Excise & Prohibition Department, Bihar, Patna, to reconcile the differential amount in the terms of what we have held above and if it is found that the petitioners have paid more amount

than what they were required to pay on the basis of applicable rates for 400 ml *PET* bottles against differential amount, refund the excess amount so realized to the petitioners. The exercise of reconciliation and refund, if any, must be completed within a period of three months from the date of receipt/production of a copy of this order.

37. These applications are, accordingly, allowed.

38. In the facts and circumstances of the case, there shall be no order as to costs.

(Chakradhari Sharan Singh, J)

I.A. Ansari, ACJ:- I agree.

(I.A. Ansari, ACJ)

ArunKumar/-

AFR/NAFR	
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