not by revision under section 115 of the Code of Civil Procedure but the party can make it a ground of appeal if such an appeal becomes necessary against the final decree itself. The order refusing a commission is just an interlocutory one and cannot be said to be a case within the meaning of section 115 of the Code of Civil Procedure.

For the foregoing reasons, the revision petitions are dismissed but there is no order as to costs.

B.S.G.

CIVIL MISCELLANEOUS

Before R. S. Narula and C. G. Suri, JJ.

SIRI RAM,—*Petitioner.*

versus.

THE DEPUTY EXCISE & TAXATION COMMISSIONER, PATIALA ETC.,—*Respondents.*

Civil Writ No. 170 of 1965.

September 29, 1970.

Punjab Excise Act (I of 1914)—Sections 36 and 65—Punjab Liquor License Rules (1956)—Rule 37(33)(ii)—License becoming liable to cancellation under section 36—Licensee allowed to retain the license on payment of additional fee—Fixation of the quantum of such additional fee—Whether dependant on the acceptance of the licensee—Rule 37(33)(ii)—Whether ultra vires section 65.

Held, that when the stage for cancelling a liquor license on any of the grounds set out in section 36 of the Punjab Excise Act 1914, arrives, the competent authority has two roads open to him, either to cancel the license or not to cancel the license in spite of liability for cancellation having been incurred and to adopt the course of allowing the licensee to retain the license on payment of additional fee. The licensee having rendered his license liable to cancellation is then not given any voice by any part of Punjab Liquor License Rules (1956) to have a say in the matter of choice of the competent authority about the alternative which he would adopt, nor about the fixing of the quantum of the additional fee in a case where he decides to adopt the course open to him under clause (ii) of rule 37(33) of the Rules. The acceptance mentioned in the clause relates to the fixing of

the quantum of the additional fee and though there is nothing to bar the licensee being heard at the very same time at which the inquiry is being made about the fixing of the quantum, in the particular circumstances of a case, there is no question of the fixation of the quantum of the additional fee being made dependent upon his acceptance. (Paras 4 and 5).

Held, that it is clear from the phrascology of section 65 of the Act that it deals with imposition of penalties by the competent criminal Court for the commission of the offences mentioned therein. Section 75 of the Act lays down that cognizance of the offences under section 65 can be taken only by a Judicial Magistrate on the complaint or report of the Collector or an Excise Officer authorised by him in that behalf. Section 65 has, therefore, nothing at all to do with the levy of additional fee under rule 37(33)(ii). In fact the said rule authorises the authorities to waive their right to straightway cancel a license in a particular case by resorting to levy of additional fee. Additional fee levied under the rule is not necessarily in the nature of a penalty. In any event, section 65 of the Act does not in any manner control or restrict the exercise of jurisdiction under rule 37(33)(ii) and is not *ultra vires* section 65. (Para 7).

Petition under Articles 226 and 227 of the Constitution of India praying that a writ in the nature of certiorari, or any other appropriate writ, order or direction be issued quashing the orders dated 21st February, 1962 and 20th October, 1964 passed by the Respondents No. 1 and 2 respectively.

NARINDER SINGH, ADVOCATE, for the petitioner.

M. R. SHARMA, SENIOR DEPUTY ADVOCATE-GENERAL (PUNJAB), for the respondents.

JUDGMENT

R. S. NARULA, J.—(1) This judgment will dispose of two writ petitions, namely, Civil Writs 170 and 477 of 1965. In *Siri Ram's case* (Civil Writ 170 of 1965) liquor of less than the prescribed strength was found to be on sale at the petitioner's vend at the time of the surprise check on December 7, 1961. In reply to the notice served on the licensee to show cause why his license should not be cancelled for selling adulterated liquor, Des Raj *Karinda* of the licensee appeared and admitted that the liquor in question was adulterated. Siri Ram, the licensee, himself in his statement, dated December 22, 1961, stated that he did not know of the adulteration and that either defective liquor might have been supplied by the distillery, or the *Karinda* might have bungled. Before us it is not disputed that on those findings, the license of the petitioner had become liable to

cancellation. On February 21, 1962, the Deputy Excise and Taxation Commissioner, Patiala, passed the impugned order (Annexure 'B'), wherein he held that the retail country liquor license of Siri Ram petitioner was liable to cancellation under clause (c) of section 36 of the Punjab Excise Act, 1914 (hereinafter called the Act), but allowed the licensee to retain his license on payment of additional fee of Rs. 1,000 under clause (ii) of sub-rule (33) of rule 37 of the Punjab Liquor License Rules, 1956 (hereinafter called the Rules). Petitioner's appeal against that order was dismissed by the Excise and Taxation Commissioner on October 20, 1964. Since the license was for the financial year 1961-62, and it was still current when the original order (Annexure 'A') was passed, the petitioner paid out the additional fee of Rs. 1,000 to avoid his license being cancelled under section 36(b) of the Act on account of non-payment of the additional fee, and admittedly operated the vend till the end of the year. It was after the dismissal of his appeal in October, 1964, that he filed Civil Writ 170 of 1965, in this Court on January 18, 1965. Since reliance was placed by the petitioner at the time of the motion hearing on an earlier judgment of Shamsher Bahadur, J., to which reference will be made a little later, the petition was admitted and notice of the same was issued to the respondents.

(2) The country liquor vend of Shiv Sharan Dass, petitioner in Civil Writ 477 of 1965, was checked on February 1, 1964, during the currency of his license for 1963-64, and it was found that 50 spiced spirit bottles bore fictitious labels and capsules of the Karnal Distillery Company, whereas the liquor contained therein was not of that distillery. In reply to the show-cause notice served on the licensee, he made a statement on February 4, 1964, admitting the default and tried to justify the same on the ground that the consumers wanted liquor of Karnal Distillery, and since that was not available, the licensee had resorted to the above-mentioned subterfuge. Thereupon, the Deputy Excise and Taxation Commissioner passed the impugned order (Annexure 'A') on February 18, 1964, holding that the license of Shiv Sharan Dass had become liable to cancellation under section 36(c) of the Act for violation of rules 37(21) and 37(25) of the Rules, but he allowed Shiv Sharan Dass to retain his license on payment of an additional fee of Rs. 1,500 under rule 37(33)(ii) of the Rules. In pursuance of that

order, the petitioner paid out the additional fee of Rs. 1,500 on February 26, 1964, and operated the vend till the end of the financial year in question. Petitioner's appeal against the order of the Deputy Excise and Taxation Commissioner having dismissed by the order of the Excise and Taxation Commissioner, dated October 20, 1964 (Annexure 'B'), Civil Writ 477 of 1965, was filed by him on February 20, 1965. In view of the earlier admission of Civil Writ 170 of 1965, this petition was also admitted by the order of the Motion Bench, dated February 22, 1965.

(3) Returns have been filed in both the cases supporting the impugned orders.

(4) Mr. Narinder Singh, who represents the petitioners in both the cases, firstly contended that in exercise of his powers under rule 37(33)(ii), the Deputy Excise and Taxation Commissioner could not have levied the additional fee, or in any case, fixed its quantum without obtaining in advance consent of the licensee. Inasmuch as it is the common case of both sides that no such advance consent was obtained, it is argued that the impugned orders should be quashed on that short ground. Rule 37(33) reads as follows :—

> "If a license becomes liable to cancellation under any Act for the time being in force, or these rules the competent authority may either (i) cancel the license and make such arrangements as he may think fit for carrying on the business for which the license was granted, and any fee paid or deposit made in respect thereof shall be forfeited to Government, but if any loss has to be made good, the deposit shall be taken into account in calculating the amount of that loss; or (ii) permit the licensee to retain the license on payment of such further fee as he may see fit to accept."

Reliance is placed by Mr. Narinder Singh on the judgment of Shamsher Bahadur, J. in *Shri Siri Ram* v. *The Deputy Excise and Taxation Commissioner, Patiala and another* (1). Siri Ram licensee in that case held the country liquor license for the year 1961-62. In a raid conducted on his vend on August 22, 1961,

(1) C.W. No. 671 of 1963 decided on 15th Dec., 1964.

irregularities rendering his license liable to cancellation were detected. A show-cause notice was given to the petitioner. He submitted a reply disowning the irregularities. An inquiry was held, and it was found that the licensee had committed the irregularities which rendered his license liable to cancellation. By order, dated September 18, 1961, the competent excise authority held that Siri Ram's license was liable to cancellation, but instead of cancelling the same, permitted him to retain the license on payment of an additional fee of Rs. 2,000. (The facts not disclosed in the judgment of the learned Single Judge have been gathered by us from the record of the original writ petition which was called for by us for that purpose). At the hearing of that petition an attempt was first made to impugn the finding of the Excise Authorities on the merits of the controversy. That attempt was rightly not permitted to succeed. After quoting sub-rule (33) of rule 37 of the Rules, the learned Judge proceeded to hold as follows :—

> "What the authority did was to impose the penalty of Rs. 2,000 straightway without enquiring whether the licensee was prepared to accept this levy. As I read the rule, the authority may either cancel the license or permit the licensee to retain his license on payment of a further fee which is acceptable to him. The sum of Rs. 2,000 as further fee apparently is not acceptable to the licensee and it was open to the authority in such an eventuality to cancel the license. The procedure adopted by the authority is not strictly in accordance with the rule and I would accordingly set aside the order and direct the Deputy Excise and Taxation Commissioner, Patiala Division, to re-determine the matter in the light of the observations made by me and in accordance with the statutory rules. In the circumstances, I would make no order as to costs."

The operative part of the order of the Deputy Excise and Taxation Commissioner, Patiala, that had been passed in Siri Ram's case was in the following terms:—

> "In the circumstances the retail country liquor license, Sangrur, is liable to cancellation under section 36(c) of the Punjab Excise Act, 1914. But he is allowed to retain his license on

payment of an additional fee of Rs. 2,000 (Rupees two thousand only) under rule 37(33)(ii) *ibid.*"

The ratio of the judgment of the learned Single Judge as interpreted by Mr. Narinder Singh is that additional fee of Rs. 2,000 (which the learned Judge has described as "penalty" in his judgment) could not be imposed without inquiring from the licensee whether he was prepared to accept the levy or not. Simply because after the expiry of the financial year for which Siri Ram held the license, he represented to this Court that the sum of Rs. 2,000 as further fee was not acceptable to him, the learned Judge held that it was open to the licensing authority only to have cancelled his license and not to have directed payment of the additional fee. With the greatest respect to the learned Judge, we are wholly unable to agree with that view. Mr. Narinder Singh does not contest the proposition, nor could he indeed have so done, that the words "such further fee as he may see fit to accept" in clause (ii) of rule 37(33) refer to the authority competent to cancel the license. In other words, it is not disputed that "he" in the above-quoted part of the rule refers to the competent Excise Authority and not to the licensee. The only manner in which we have been able to read the relevant rule is to imply that when the stage for cancelling the license or any of the grounds set out in section 36 of the Act arrives, the competent authority has two roads open to him, either to cancel the license, or not to cancel the license in spite of liability for cancellation having been incurred, and to adopt the course which has been adopted in the present cases.

(5) The licensee having rendered his license liable to cancellation is then not given any voice by any part of the Rules to have a say in the matter of choice of the competent authority about the alternative which he would adopt, nor about the fixing of the quantum of the additional fee in a case where he decides to adopt the course open to him under clause (ii) of the rule in question. Mr. Narinder Singh contends that no question of the competent authority accepting anything could arise, unless the licensee had first made an offer which could be accepted. We are unable to find any force even in this submission. The acceptance relates to the fixing of the quantum of the additional fee and though there is nothing to bar the licensee being heard at the very same time at which the inquiry is being made about the fixing of the quantum, in the particular circumstances of a case, there is no question of the fixation of the quantum of the additional fee being made dependent upon his acceptance. The competent

authority can permit the licensee to retain the license on payment of any amount of additional fee which it may deem fit to fix, and the licensee is not prejudice because he can straightway say that he does not want to pay any additional fee, and in that case the authority can either adopt the alternative procedure, or proceed to cancel the license for non-payment of the additional fee under section 36(b) of the Act.

(6) We have disposed of this argument of the learned counsel because it may possibly arise in some other cases. So far as the facts of the present cases are concerned, really no argument is available to the petitioners who voluntarily paid out the additional fee without any complaint, and availed of the opportunity allowed to them under the impugned orders and actually exploited their vends till the very last day of the financial year in question.

(7) The second argument of the learned counsel is that clause (ii) of rule 37(33) is *ultra vires* section 65 of the Act, inasmuch as it authorises the competent authority to impose a penalty exceeding Rs. 500 which is the maximum amount that can be imposed as penalty under section 65. That section reads as below:—

> "Whoever, being the holder of a license, permit or pass granted under this Act, or being in the employ of such holder or acting on his behalf:—
>
> (a) fails wilfully to produce such license, permit or pass on the demand of any excise officer or of any other officer duly empowered to make such demand; or
>
> (b) in any case not provided for in section 61 wilfully contravenes any rule made under section 58 or section 59; or
>
> (c) wilfully does or omits to do anything in breach of any of the conditions of the license, permit or pass not otherwise provided for in this Act;
>
> shall be punishable in case (a) with fine which may extend to two hundred rupees, and in case (b) or case (c) with fine which may extend to five hundred rupees."

The above-quoted provision forms part of Chapter IX of the Act which is headed as "offences and penalties". Even otherwise, it is clear from the phraseology of section 65 that it deals with imposition of penalties by the competent criminal Court for the commission of the offences mentioned therein. Section 75 of the Act makes it clear that cognizance of the offence under section 65 can be taken only by a Judicial Magistrate on the complaint or report of the Collector or an Excise Officer authorised by him in that behalf. Section 65 has, therefore, nothing at all to do with the levy of additional fee under rule 37(33)(ii). In fact the above-mentioned rule authorises the authorities to waive their right to straightaway cancel a license in a particular case by resorting to levy of additional fee. Additional fee is levied under rule 37(33)(ii) and is not necessarily in the nature of a penalty. In any event, section 65 of the Act does not in any manner control or restrict the exercise of jurisdiction under rule 37(33)(ii).

(8) It was then contended that the impugned rule is invalid because it bestows unlimited power on the competent excise authority to levy any amount of additional fee. Inasmuch as it is not possible to contend that the impugned additional fee fixed in the two cases before us was in any way unreasonable in the circumstances of the case, we cannot say that the power vested in the competent authority under the relevant provision has in any manner been abused. In the nature of things it is impossible to fix the maximum amount of additional fee which may be levied under the relevant provision. The quantum of additional fee must depend on the facts and circumstances of each case including the question of the nature of default the quantum of the license-fee for the whole year, the remaining period of the license year, and several other factors, which have to be taken into consideration by the competent authority and with which we cannot interfere in writ proceedings, so long as the order has been passed in a *bona fide* manner. The *bona fides* of the authority have neither been nor could be questioned in these cases.

(9) The last submission of the learned counsel is that if the quantum of ordinary obscuration is taken into account, the liquor found with the petitioners could not be held to have been sub-standard. This question does not arise in the case of Shiv Sharan Dass as default for which that licensee was punished was not of selling sub-standard liquor, but of fictitious labels and capsules having been

used in connection with the liquor in dispute. Nor does this matter call for any decision in Siri Ram's case as adulteration had been admitted by the *Karinda* of the licensee, and even the licensee himself had placed the responsibility, at least in the alternative, on the *Karinda*, and had not categorically denied the allegation made against him.

(10) No other argument was advanced in either of these cases. Both these petitions, therefore, fail, and are accordingly dismissed. In view of the fact, however, that the petitioners were led to file these petitions on account of the earlier Single Bench decision, we leave the parties to bear their own costs in each of these two cases.

C. G. SURI, J.—I agree.

N.K.S.

LETTERS PATENT APPEAL

Before Harbans Singh, C. J. and Prem Chand Jain, J.

THE EXCISE AND TAXATION COMMISSIONER ETC.,—*Appellants.*

versus.

M/s. GURANDITTA MALL SHADI PARKASH,—*Respondents.*

Letters Patent Appeal No. 247 of 1970.

October 5, 1970.

The Punjab General Sales Tax Act (XLVI of 1948)—Section 20(5)—Appellate Authority—Whether has power to grant stay of recovery of tax during the pendency of appeal.

Held, that under section 20(5) of the Punjab General Sales Tax Act, 1948, the Appellate Authority entertains an appeal only when it is satisfactorily proved that the tax or the penalty or both have been paid. Thus the payment of the amount of tax or both, as the case may be, is a prerequisite to the entertainment of the appeal by the appellate authority. However, it is clear from a plain reading of the proviso to section 20(5) that in case of non-payment of the tax before entertaining an appeal, the Appellate Authority has been empowered to determine as to whether the assessee is unable to pay the tax in full or partly and to pass an appropriate