
(2011) 09 PAT CK 0095

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2291 of 1998

Arun Kumar

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 02-09-2011

Acts Referred:

Citation : (2011) 09 PAT CK 0095

Judgement

Shiva Kirti Singh, J.—Since all the five writ petitions involve common issues of facts and law as they seek to challenge the vires of the Bihar Excise (Amendment and Validating) Ordinance, 1998 which was subsequently replaced by the Bihar Excise (Amendment and Validating) Act, 1998 (6 of 1998) (hereinafter referred to as "the Validating Act"), hence, they have been heard together and are being disposed of by a common judgment. CWJC No. 2291 of 1998 was argued as a leading case by Mr Y.V. Giri, Senior Advocate and therefore, unless otherwise indicated, facts have been taken from the records of said writ petition.

2. The facts are not in dispute and can be easily gathered from an earlier judgment rendered by a Division bench of this Court on 28.5.1996 in the case of M/s Sheo Narain Jaiswal v. The State of Bihar, reported in 1996 BBCJ 469. However, for the sake of ready reference and convenience, some essential facts may be noticed. In exercise of powers u/s 22 of the Bihar Excise Act, 1915, the State of Bihar decided to grant exclusive privilege for manufacture and wholesale supply of country liquor. The whole State of Bihar had been divided into nine zones for this purpose. The Board of Revenue, Bihar issued tender notice dated 3.6.1995 (Annexure-1) inviting tenders from interested parties for grant of the aforesaid privilege in different nine zones for the period 1st July, 1995 to 31st March, 1999. The terms of tender notice permit grant of exclusive privilege for manufacture and wholesale supply of country liquor to more than one licensee in a particular zone and it also provided that the licence fee had to be paid in equal proportion by the licensees in a particular zone. For each zone an annual guaranteed quantity was worked out on the basis of the gross sale of country liquor in different zones during the year 1994-95 and the licence fee was

determined at the rate of Re.1 per L.P. litre of the guaranteed quantity. The successful tenderers such as the Petitioners were informed of the grant of licence through different communications which contain a condition inconformity with the terms of the tender notice, noticed above. One such communication dated 23rd June, 1995 (Annexure-2) shows that the Petitioner- Arun Kumar and another licensee for the Muzaffarpur zone were informed about annual minimum guarantee on the basis whereof licence fee was to be realized. In Clause 6 of that communication for grant of the exclusive privilege it was indicated that for each licensee of a particular zone, the licence fee would be at the rate of Re.1 L.P. Litre on the minimum guaranteed quantity payable proportionately in advance. It was clarified that the licence fee would be payable only for each financial year in advance and in case the quantity supplied exceeds the guaranteed quantity, further licence fee would be payable by each licensee over such excess quantity.

3. When the Petitioners who had been granted licence for exclusive privilege for manufacture and wholesale supply of country liquor along with some other licensees in same zone were coerced to pay the entire licence fee for the zone and not proportionately along with other co- licensee of the zone, two licensees- Sheo Narain Jaiswal and M/s Ellen Breweries & Distilleries Pvt. Ltd. preferred writ petitions which were allowed by the judgment in the case of M/s Sheo Narain Jaiswal (supra). The Division Bench of this Court considered the meaning of Clause 2 (kha) and 3 (ga) of the notice inviting tenders as well as Clause 6 of the conditions of grant to come to a conclusion that the terms of the grant provide that the licence fee calculated in the manner prescribed shall be paid by each of the grantee in equal proportion and no other meaning could be given to the said clause. The Division Bench after giving the aforesaid finding in paragraph 13 of the judgment went on to consider the results that would accrue if the case of the State was accepted and in paragraph 14 of the judgment it held that it would result in clear unfairness between sole grantee of any zone vis-?-vis co-grantees in another zone. For the sake of convenience paragraph 13 and 14 of the judgment are reproduced herein below:

13. It was submitted by the counsel for the State that in the earlier year when the licence was granted with effect from 1st of July, a proportionate reduction had been granted in the licence fee having regard to the fact that the grantees could not carry on their business for three months. He, therefore, submitted that use of the word "SAMANUPATIC? has relevance only for reduction in the licence fee in case a grantee is not granted the licence for the whole year. In our view, neither Clause 2 (kha) and 3 (Ga) of the notice inviting tenders, nor Clause (6) of the licence referred to, conceive of a situation where the lease is granted for a shorter term. The reduction in the licence fee on account of the term of the licence being curtailed may be the logical consequence in law. Clause (6) of the grant appears to us to be clearly applicable to a case where more than one grantee is granted special privilege by the State in a particular zone. In such a situation, the term provides that the licence fee calculated in the manner prescribed shall be paid by each of the grantee in equal proportion. We are not

able to give to the said clause any other meaning.

14. Counsel for the Petitioners submitted that even if it is possible to give more than one meaning to the terms and conditions of the grant, that meaning should be given which is in consonance with fairness and justice and is also consistent with commonsense. An interpretation which results in absurd or unfair results must be avoided. He submitted that if the clauses in the notice inviting tenders and Clause (6) of the grant is construed in the manner sought to be construed by the Respondents, it would result in an absurdity, and in any event an unfair result. If the licence fee is the price for parting with the exclusive privilege of the State which is parted with in favour of a private person or persons, the State can only insist upon the payment of price. If within a zone more than one grantee is granted exclusive privilege, the benefit derived by the grantee is reduced in as much as has to compete with other grantees within the same zone. What the state parts with in favour of a grantee is more when there is a single grantee and less when there are several grantees. If each grantee is held liable to pay the licence fee determined for the zone individually, the State would greatly benefit by charging the price many times over, but the grantee would get a lesser benefit than what he would have got had he been a single grantee in whose favour the exclusive privilege was granted. The unfair consequence that may result can also be demonstrated by taking another illustration. If in respect of zones A and B the licence fee is determined at rupees one lac each, and if there is only one grantee in zone A and four grantees in zone B, the State will get a sum of rupees one lac only in zone A but would get rupees four lacs in Zone B by way of price of the privilege which is otherwise equally valued. On the other hand, the grantee of Zone A would be in a much more advantageous position by paying less than the grantees of Zone B who shall have to pay the same amount for getting lesser benefit. Such would be the resultant unfairness if Clause (6) is construed in the manner commended by counsel for the State.

4. Clearly, the licence fee realized or demanded by the State was found to be against law on two counts- (1) it was contrary to plain meaning of relevant clauses in the notice inviting tenders as well as the terms of the grant and (2) it was based upon a view which was clearly unfair and unjust. By now it is well settled in law that unfairness in State action would negate the mandate of Article 14 of the Constitution of India.

5. While allowing writ petitions the Division Bench noticed the interim order dated 13th March, 1996 which required deposit of the licence fee but with an interim protection that in case the writ petitions was allowed, the Petitioners would be entitled to refund of excess amount deposited by them together with interest calculated at the rate of 16% per annum within one month of the date of judgment. In terms of the interim order, final direction was issued to refund to the Petitioners the excess amount of licence fee deposited by them with interest at the rate of 16% per annum calculated from the date of deposit till the date of payment. The refund was to be made within a period of one month.

6. Against the judgment of this Court noticed above, the State of Bihar preferred Special Leave Petitions before the Supreme Court which were dismissed by judgment and order dated 24.10.1997 in the case of State of Bihar v. M/s Sheo Narain Jaiswal Pvt. Ltd, reported in AIR 1998 SC 233. The Apex Court noticed the arbitrariness in State's stand in paragraph 6 of the judgment in the following words:

Petitioner 1 has charged from each of the contractors in one zone the full licence fee calculated at the rate of Re 1 per L.P. litre based on consumption for the year 1994-95 in that zone. But according to the Respondents, the licence fee so calculated is for each zone.

7. It was further held that the High Court judgment was correct in holding that in the light of provisions in the tender notice and under the licence, the total licence fee for the zone was to be realized from the contractors of that zone in equal proportion. The plea of the State of Bihar that since the licence fee related to manufacture and sale of liquor and, therefore, it was open for the State to charge full licence fee from each contractor in a zone was negated by the Apex Court on the ground that "if the tender conditions and the conditions of the licence do not so provide, the State will not be able to collect the full licence fee from each of the licensees/contractors."

8. After the Division Bench judgment of this Court stood confirmed by the Supreme Court, the State Government apparently chose to nullify the said judgments requiring refund of the excess licence fee with interest, by promulgating the Validating Ordinance dated 21.2.1998. The ordinance is Annexure-4 and the Act replacing the same is Annexure-7 in CWJC No. 2291 of 1998. Since the Validating Act is paramateria same as the Ordinance, it will be useful to refer to the provisions in the Validating Act for deciding the issue of vires. In the objects and reasons there are four clauses. In the first clause, it has been reiterated that in the State of Bihar, the grant of exclusive privilege of wholesale supply of country liquor is governed u/s 22 of the Bihar Excise Act, 1915. In Clause (2), the provision in Clause 2 (kha) of the tender notice for proportionate licence fee at the rate of Re.1 per L.P. litre on the minimum guaranteed quota specified for the zone has been mentioned. In Clause (3), the judgments of this Court and of the Supreme Court in the writ petitions filed by two grantees have been mentioned. Clause (4) runs as follows:

(4) Under the above circumstances, the existing system of realization of licence fee at the rate of Re.1 per L.P. litre from each grantee of a specified zone and to legitimate the realized licence fee, it has become necessary to validate the said provisions of the Act. Therefore, necessary provisions have been made in the Act, enactment of which is the object of this Act.

9. The objects and reasons noticed above no doubt mention the necessity to validate provisions of the Bihar Excise Act, 1915 but they ignore an important fact that the High Court or the Supreme Court did not declare the demand for

licence fee as made by the State, illegal on account of any lacuna or shortcomings in that Act or on account of invalidation of any provisions of that Act. That explains vagueness in the expression- "said provisions of the Act". There is no clear indication as to which provision of the Act required validation and why?

10.. The preamble of the Act contains eight clauses. The preamble runs as follows:

Preamble.- WHEREAS, the Cabinet had approved the proposal of the Excise & Prohibition Department for imposing licence fee on every licensee of the zone at the rate of Rupee 1 per L.P. litre on the M.G.Q. of the zone and the tender notice was to be issued accordingly;

AND, WHEREAS, the tender notice was issued for the period 1st July 1995 to 31st March 1999 and the period of supply of country liquor during the first year being only 9 months the Excise & Prohibition Department intended to grant a proportionate reduction of licence fee for the shorter period and with this intention had used the expression on "Samanupatik" in the tender notice and licence;

AND, WHEREAS, at the time of negotiations of rates and its determination all the tenderers were fully aware of the number of tenderers in each zone and the rate was fixed and agreed upon after including Rs. 2 per L.P. litre for covering the licence fee burden which was intended to be passed on to the retailer/consumer;

AND, WHEREAS, The tenderers had accepted the rate fixed in writing and 13 out of 15 tenderers paid the licence fee at the rate of Rupee 1 per L.P. litre on M.G.Q. for the years 1995-96, 1996-97 and 1997-98 and did not challenge the imposition of the said licence fee;

AND, WHEREAS, only two tenderers filed writ petitions in the Patna High Court, after depositing licence fee at the above rate for the period 1995-96 and all the tenderers supplied monthly liquor at the fixed agreed rate and passed on the licence fee burden to the retailer/consumer; AND, WHEREAS, the Hon?ble Supreme Court and the High Court held that the expression "samanupatik?", in the context, meant that the total licence fee for the zone was to be paid by the licensees of the zone in equal proportion;

AND, WHEREAS, the Hon?ble Supreme Court had held that the State will not be able to charge from each contractor in a zone the full licence fee unless it is so provided clearly in the tender conditions and the conditions of licence;

AND WHEREAS, it has become necessary to validate and impose licence fee in accordance with the intent of the policy approved by the Cabinet on 13th June 1995, by rectifying the unintended error in the tender notice dated 3rd June 1995 and the licences issued in pursuance thereof, and also to validate the collection of licence fee already made from each licensee;

Be it enacted by the Legislature of the State of Bihar in the forty-ninth year of the Republic of India as follows:

11. As is usual with the Validating Acts, Sub-section (3) of Section 1 makes the Act retrospective by providing that the Validating Act shall be deemed to come into force with effect from 1st June, 1995. Vide Section 2 of the Validating Act three new sections, namely, Sections 22D, 22E and 22F have been inserted in the Bihar Excise Act, 1915 after Section 22. For the sake of convenience they are extracted herein below:

22D- Grant of exclusive/special privilege for bottling/sacheting and wholesale supply of country liquor- 1. The State government may grant to any person/ persons on such conditions and for such terms and conditions and for such period as it may think fit, the exclusive/special privilege for supplying country liquor on wholesale basis, after sacheting/bottling. There may be more than one grantee in a zone of supply.

2. No Grantee of any privilege under Sub-section (1) shall exercise the same unless he has received a licence in that behalf from the Board of Revenue/Excise Commissioner/Collector.

3. A licence fee shall be paid in advance in one lump sum by each licensee of the zone determined by the member, Board of Revenue/Excise Commissioner at the rate of Rupee 1 per L.P. litre calculated on the basis of the annual M.G.Q. Additional licence fee shall be paid by each licensee of the zone if the total wholesale supply of the country liquor in the zone exceeds the annual M.G.Q. which would also be calculated at the rate of Rupee 1 per L.P. litre on the excess quantity.

4. The condition regarding payment of advance licence fee and additional licence fee as per Sub-section (3) would be deemed to be included in the tender notice dated 3rd June, 1995 issued by the Excise & Prohibition Department for wholesale supply of country liquor during the period 1st July, 1995 to 31st March, 1999 and would also be deemed to be included in all the licenses issued in pursuance thereof and any expression, term or condition to the contrary contained in the tender notice and licenses would be deemed to be deleted and substituted accordingly.

22E. Validating of Licence Fee. - 1. Notwithstanding anything contrary contained in a judgment/decreed or order of any court, Tribunal or Authority, advance licence fee in the lump sum on each licence for wholesale supply of country liquor after sacheting/bottling granted pursuant to tender notice dated 3rd June, 1995 issued by the Bihar Excise & Prohibition Department shall be deemed to have been imposed on every licence at the rate of Rupee 1 per L.P. litre calculated on the annual .M.G.Q. and additional licence fee at the same rate on excess supply shall also be deemed to have been imposed on every licence of the zone where the total wholesale supply in the zone exceeds in the annual M.G.Q.

2. The amount of licence fee collected from the various licensees at the above rate shall be deemed to have been validly collected, irrespective of any term or condition contained in the tender notice dated 3rd June, 1995 and the licence issued in pursuance thereof and the licence fee so collected shall not be refundable and no Court, Tribunal or Authority shall order for refund of such licence fee:

Provided that if any licensee has not paid licence fee as specified in subs-section (3) of Section 22D under the order of any Court, Tribunal or Authority the State Government shall realize the same as arrears of revenue.

22F. Overriding effect of the Ordinance.- Notwithstanding anything to the contrary contained in any judgment, decree or order passed by any court and in any law for the time being enforce, the provision of this Ordinance shall prevail and have effect.

12. Section 3 of the Validating Act provides for repeal of the Bihar Excise (Amending and Validating) Ordinance, 1998 but saves actions taken under the same as one under the Validating Act.

13. On behalf of the Petitioners it has been submitted that the challenge to the action of the State in seeking to realize entire licence fee of a zone from each of the grantees of that zone ignoring the proportionate clause was not on the ground of invalidity or inadequacy of any provision in the Bihar Excise Act, 1915 and in fact, the judgments rendered by this Court and the Supreme Court in the matter, which have attained finality, have found and held the decision of the State Government bad only on account of explicit provisions in the notice inviting tender and the conditions of grant and on account of lack of fairness, hence, there is no scope to undo such judgments against the State of Bihar by resorting to legislative powers. In other words, according to Petitioners there can be no valid ground or justification for enactment of a Validating Act unless a tax or fee is declared by a court to be illegally collected under an ineffective or invalid law and only in such a case, the cause for ineffectiveness or invalidity may be removed under powers available to the legislature before validation can be effective. Hence, according to the Petitioners there can be no valid or effective validation in the present case where the illegality as found by the court emanates from terms of the tender notice and the grant and on account of unfairness and injustice inherent in the decision and stand of the State.

14. On behalf of the Respondent State a heavy reliance has been placed upon objects and preamble of the Validating Act to justify the provisions therein which are supposed to provide lawful basis for the fee demanded and realized by the State. The stand of the Respondent is that in the business of liquor, the State has absolute monopoly to grant or not to grant a privilege and to determine the terms and conditions for such grant, including fees. Therefore, there could be no issue of fairness or arbitrariness in such matters and Article 14 of the Constitution has no application in a case of the present nature. It has further

been submitted that the Validating Act contains provisions which remove the basis on which the judgments were rendered by the High Court and the Supreme Court against the State and such provisions are within the legislative competence of State legislature. Hence, there is no constitutional infirmity in the Validating Act.

15. The law relating to validating statutes in general is to be found in a catena of judgments. We can do no better than to quote paragraph 4 from the judgment of the Supreme Court in the case of *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, rendered by a Constitution Bench of five Judges:

4. Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the reenacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiats makes the new meaning binding upon Courts. The legislature may follow any one method or all of them and while it does so it may neutralize the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of

the tax.

(Emphasis by me)

16. From the aforesaid paragraph it follows that the present case is not one belonging to the ordinary category which invites validating statutes because in the present case the court has not held the fee in question to be invalid because of want of power or because the statutes or the rules or both are invalid or because they do not sufficiently create jurisdiction. The judgments proceed on the basis that power to levy the fee is available and there is no lack of jurisdiction. The judgments do not hold the statute or the rules to be invalid. In such a situation, the primal issue is to decide whether Validating Act could have been enacted by the legislature of the State so as to nullify the basis of the judgment of this Court affirmed by the Supreme Court. The other issue would be whether the contents of newly added Sections 22D, 22E and 22F are within the legislative competence of the State legislature for rectifying the illegalities which form the basis of the judgments of this Court and the Supreme Court. And lastly, whether such provisions in the Validating Act could be given retrospective effect.

17. Learned Counsel for the Petitioners has placed reliance upon several judgments of the Supreme Court in support of his stand noticed earlier. The judgment in the case of Shri P.C. Mills (supra) has already been noticed earlier in respect of general features of validating statutes. The next judgment is in the case of The Municipal Corporation of The City of Ahmedabad and Another, Vs. The New Shrock Spg. and Wvg. Co. Ltd. etc. etc., Paragraph 7 of that judgment reiterates the views expressed in the case of Shri P.C. Mills. It emphasizes further that the legislatures under the Indian constitution, within the prescribed limits, have the powers to make laws prospectively as well as retrospectively. By exercise of such powers the legislature can remove the basis of a decision rendered by a competent court so as to render the decision ineffective. But no legislature in our country has power to ask the State or its instrumentalities to disobey or disregard the decisions given by the courts. In paragraph 9 reliance was placed upon judgment of the Supreme Court in the case Janapada Sabha Chhindwara Vs. The Central Provinces Syndicate Ltd. and Another, . Part of the said judgment has been extracted and it reads thus-

On the words used in the Act, it is plain that the legislature attempted to overrule or set aside the decision of this Court. That in our judgment, is not open to the Legislature to do under our constitutional scheme. It is open to the Legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that a judgment of a court properly constituted and rendered in exercise of its power in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court.

(emphasis is mine)

18. In the case of Madan Mohan Pathak and Another Vs. Union of India (UOI) and Others, a Constitution Bench of 7 Judges declared as void the Life Insurance Corporation (Modification and Settlement) Act, 1976 on the ground that it offended Article 31(2) of the Constitution of India. As a consequence, the Life Insurance Corporation was declared bound to obey the Writ of Mandamus issued by the Calcutta High Court to pay annual cash bonus for the year 1975-76 to class III and class IV employees.

19. In the case of D. Cawasji and Co., Mysore Vs. State of Mysore and Another, the issue related to constitutionality of Mysore Sales Tax Amendment Act, 1969 which provided for levy of higher rate of tax with retrospective effect to nullify the judgment and order of the High Court for refund of excess amount of tax illegally collected. On the basis of Articles 14 and 19, the Act was held to be unconstitutional being unreasonable and arbitrary. The Court further held that the Act in question could not be considered to be a validating Act because in words of the Court -

A validating Act seeks to validate earlier Acts declared illegal and unconstitutional by courts by removing the defect or lacunae which led to invalidation of the law. With the removal of the defect or lacunae resulting in the validation of any Act held invalid by a competent court, the Act may become valid, if the validating Act is lawfully enacted. The retrospective operation of a validating Act properly passed curing the defects and lacunae which might have led to invalidity of any act done may be upheld, if considered reasonable and legitimate.

20. In the case of S.R. Bhagwat and others, Vs. State of Mysore, the Supreme Court was called upon to test the validity of certain provisions in the Karnataka State Civil Services (Regulation of Promotion, Pay and Pension) Act, 1973. The Court held that the provisions disentitling deemed promotees to the arrears for the period prior to actual promotion had to be read down as they were contrary to judgments of competent courts which had attained finality against the State. It also held that the State legislature could not simply review and nullify judgments and orders of court which have become final. In paragraph 13 of the judgment, reliance was placed upon a Constitution Bench judgment of the Apex Court in the case of Belgaum Gardeners Cooperative Production Supply and Sale Society Ltd. Vs. State of Karnataka, and the following passage was extracted:

The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal." In paragraph 15, the Court held as follows:

We may note at the very outset that in the present case the High Court had not struck down any legislation which was sought to be re-enacted after removing

any defect retrospectively by the impugned provisions. This is a case where on interpretation of existing law, the High Court had given certain benefits to the Petitioners. That order of mandamus was sought to be nullified by the enactment of the impugned provisions in a new statute. This in our view would be clearly impermissible legislative exercise.

(Emphasis is mine)

21. In the case of Delhi Cloth and General Mills Co. Ltd. and Another Vs. State of Rajasthan and Others, the issue was legal effect of a Validating Act. In paragraph 17, the Court found that some provisions existing on the statute book unamended were mandatory and had not been followed and hence, the defect was not cured by the Validating Act. On that account the Validating Act was held to be bad in law and was struck down.

22. In the case of Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, in paragraphs 22 to 24 the Apex Court held that Article 14 of the Constitution would be attracted even in the matter of trade in liquor. In paragraph 24, a passage from another judgment of the Apex Court in the case of Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, was extracted to highlight that -

when the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

23. On the other hand, learned AAG 1 appearing for the State has placed reliance upon the following judgments of the Apex Court-

- (1) I.N. Saksena Vs. State of Madhya Pradesh,
- (2) Comorin Match Industries (P) Ltd. Vs. State of T.N.,
- (3) State of Bihar and Others Vs. Bihar Pensioners Samaj,

24. In the case of I. N. Saxena (supra), a government servant was compulsorily retired after the attainment of 55 years of age. The challenge to order of compulsory retirement succeeded in the Supreme Court on account of a lacuna in the fundamental rules. The said lacuna was removed by promulgation of rules under Article 309 of the Constitution with retrospective effect. This was done prior to judgment of the Supreme Court but the rules were not brought to the notice of the Court. Thereafter, the State promulgated an Ordinance validating the retirement of certain government servants including Mr I. N. Saxena. The Apex Court held that all the three tests for determining validity of a validating law were made and hence, no relief was granted to Mr Saxena. The three tests noticed in the judgment are as follows: Firstly, whether the legislature possesses competence over the subject matter, secondly, whether by validation the legislature has removed the defect which the courts had found in the previous

law and thirdly whether the validation is consistent with the provisions of Part III of the Constitution. It was further noticed in paragraph 20 that the earlier judgment of the Court was not a money decree and did not raise a judgment-debt. Since the judgment was merely a declaratory decree, it was held that it did not create an indefeasible right of property and hence, there was no merit in the argument that the validating Act sought to acquire property vested in the Appellant without payment of compensation and, therefore, the impugned Act could not be treated as unconstitutional. Clearly, in that case the validating Act removed the lacuna in the earlier law and the Act was found to be within the competence of the concerned legislature.

25. In the case of Comorin Match Industries (Pvt.) Ltd. (supra), the Supreme Court set aside assessments under the Central Sales Tax Act on the ground that excise duty would not be included in computing turnover. By retrospective amendment the definition of turnover was amended and assessment was validated by a validating Act. In such circumstances, the Apex Court held that the impugned amendment Act cannot be challenged on the ground that it nullified judgment of a court. In this case large number of judgments of the Supreme Court were discussed but, as appears from paragraph 6, the court found that the result of the provisions in the amending Act and in particular, a validating provision was to change the law with retrospective effect and to impart validity to all assessments, made under the previous law, which had been struck down by the court.

26. Strong reliance was placed on behalf of the State on the judgment of the Supreme Court in the case of State of Bihar v. Bihar Pensioners Samaj (supra). In that case the Government of Bihar issued a notification in the year 1990 revising the provisions regulating pension, family pension and death- cum- retirement gratuity of its employees. The notification was made effective from 1st of January, 1986 but the revision of pension thereunder was stipulated to be merely notional and the financial benefits were to accrue only with effect from 1.3.1989. Another notification issued in the year 1990 also sought to rationalize pensionary principles of pre 1.1.1986 pensioners/family pensioners. This was also made effective in similar terms. A Division Bench of this Court upheld the right to fix the cut off date but set aside the notifications at the instance of Bihar Pensioners Samaj and directed the Government to reconsider as to whether there was any justification for the date from which the notification was made effective. The Supreme Court dismissed the SLP filed by the State. The reconsideration resulted into enactment of an Act of 2001 passed by the legislature of Bihar, reiterating cut off dates fixed by the notifications. The High Court struck down the validation Act on the ground that it was enacted to nullify the earlier decisions. In appeal, the Supreme Court considered the only contention raised on behalf of the Respondent- Pensioners Samaj that the fixation of the cut off date for payment of the revised benefits violated Article 14 of the Constitution because of being arbitrary. The Supreme Court held the legislation to be valid because the stand of the State was found justified and not

arbitrary so as to violate Article 14 of the Constitution.

27. Learned Counsel for the State highlighted that although in the earlier round of litigation no lacuna or defect in the law was found by the courts but yet the provisions and the validating Act were upheld although the effect was to nullify the earlier judgments. This submission is not based upon correct appreciation of the facts and the issues decided in that case. The High Court judgment which was upheld by the Supreme Court by dismissal of SLP directed the State to reconsider the matter and that was the occasion for enactment of the validating Act which was in substance reiteration of the earlier decision but through a statute of State legislature. The only issue was whether the provisions were arbitrary and, therefore, violative of Article 14 of the Constitution. On the basis of reasons supplied by the State, the Apex Court upheld the provisions of the validating Act.

28. Having noticed the various judgments relied upon by the parties, it is now to be seen as to what is the effect of the validating Act upon the two grounds on which the demand or realization of licence fee in question was held illegal by this Court and the Supreme Court, with a view to find out whether the basis of those judgments have been so fundamentally altered as to render them ineffective or not. The first basis was plain meaning of relevant clauses in the notice inviting tenders as well as the terms of the grant. The second basis was that the State's action was clearly unfair and unjust. This, in other words, would mean that the view of the State now sought to be validated through the Validation Act suffered from unfairness, arbitrariness and must, therefore, be treated as violative of Article 14 of the Constitution of India.

29. So far as the second ground is concerned, it is almost unconceivable as to how such determination by a competent court can be denuded of its base by statutory provisions by way of Validating Act when the findings given by the High Court and not disturbed by the Apex Court, were on the basis of relevant facts and documents and not on account of any legal infirmity or lacuna in the earlier law. The effect of the demand of licence fee without any regard to provision for proportionate payment by the licensees in a given zone will still create the same discrimination between sole licensee of a zone and more than one licensee in another zone. Such arbitrariness and unfairness as noticed in paragraphs 13 and 14 of the judgment of the High Court extracted earlier will continue to exist even if the provisions of Validating Act are given full force. Hence, it must be held that one of the important grounds which led to the judgment of the High Court, still remains valid. The Validating Act cannot cure and has not cured this defect or lacuna. As a necessary corollary, it must be held that the judgments of this Court and of the Supreme Court in the case of two licensees- M/s Sheo Narain Jaiswal and M/s Ellen Breweries & Distilleries Pvt. Ltd. do not stand nullified because the Validating Act does not succeed in changing the law so fundamentally so as to take away the entire basis on which the judgments are founded.

30. So far as the first ground as a basis of the judgments sought to be nullified is

concerned, the Validating Act has inserted Sub-section (4) of Section 22D to create a fiction so as to delete the stipulation of proportionate payment of licence fee by the grantees in a zone from the tender notice dated 3rd June, 1995 as well as from the licenses issued pursuant to that notice. Such a provision is unusual because generally validating statutes amend earlier law which suffered from lacuna or shortcomings and the amendments may include even creation of a fiction in general as was done in the case of Camorin Match Industries (Pvt.) Ltd. (supra) by amending the definition of "Turnover". Such change of law in general would be permissible as observed in the case of Cauvery Water Disputes Tribunal, Re (supra). But change of facts of a particular case by creating deeming fiction through a validating Act to nullify an individual final decision inter- partes by a competent court would amount to usurpation of judicial functions by a legislature. That would run counter to well accepted constitutional scheme of separation of powers between Judiciary and other organs of State in our country and is clearly impermissible.

31. In the present case the deeming fiction created by impugned provisions of the Validating Act is in respect of documents such as tender notice and licence already issued which determined the course of action for the grantees who relied upon those documents for entering into business for stipulated gains. The fiction, if allowed to stand, would result in loss of monetary benefits to which the grantees became entitled in view of the judgments sought to be avoided. Instead they would be exposed to fresh liabilities which could not have been foreseen on the basis of actual tender notice and the licenses issued to the grantees. Such clear disregard of the rights and liabilities on the basis of validly issued tender notice and validly issued licenses, clearly amount to unfairness and arbitrariness on part of the State. Hence, the Validating Act and particularly, the provision of the same noticed above which is meant to fundamentally remove the other ground or basis in the judgments sought to be nullified are found to be unconstitutional being violative of Article 14 of the Constitution of India.

32. No doubt, on behalf of the State it was contended that Article 14 will have no play in the present case because it relates to demand of fees in relation to business in intoxicants. This contention, however, stands no chance of success in view of law laid down by the Apex Court in the case of Kerala Samsthana Chethu Thozhilali Union (supra) which has already been noticed. Nobody can claim a right to carry on trade or business in potable liquor or intoxicants but once that stage is crossed and grantees are issued with licenses, the State must be fair and equal to all the grantees. In identical situation, the State action, in the present matter of demand of licence fee, would place a sole licensee of a zone in much more advantageous and privileged position compared to more than one licenses allowed to operate in another zone. This aspect has been elaborately dealt with in paragraph 14 of the judgment of the High Court already extracted.

33. Although the fate of the writ petitions stands determined on account of findings given above against the fairness and validity of Validating Act for the

purpose of nullifying the concerned judgments of this Court and the Supreme Court, it is deemed necessary to indicate that the Validating Act does not meet the requirements of a Validating Act in the light of judgments of the Supreme Court in the case of *D. Cawasji and Co.* (supra). Parts of those judgments extracted earlier show that an Act cannot be considered to be a Validating Act if it does not seek to validate earlier Acts or rules declared illegal and unconstitutional by courts. The retrospective operation of a Validating Act may be upheld if it is considered reasonable and legitimate. In the case of *S. R. Bhagwat* (supra) it was emphasized that for changing the basis of a decision given by the court, the legislature can change the law in general so as to affect a class of persons and events at large but it cannot set aside an individual decision inter partes and affect their rights and liabilities alone. On the touchstone of the aforesaid principles, the Validating Act in the facts and circumstances of the case lacks the essential attributes of a Validating Act. Creation of fiction with regard to a particular individual tender notice and licenses issued pursuant thereto, indicates an attempt only to set aside an individual decision inter partes. Even if it is argued and accepted that the change in the law is to affect a class of persons i.e. all the grantees of licenses pursuant to the tender notice in question, still the substance and effect of the deeming provision in the Validating Act is not to bring about change in the law in general but to nullify the judgments and orders of the Courts in question by asking to look at the existing facts in a different manner which is function of an appellate court or tribunal and cannot be exercised by the legislature. If such power is acceded in favour of legislature, then in a case where State has lost a property dispute on account of evidence and deeds of title in favour of the other party, it may by legislative fiction force the courts to re-read the evidence and deeds of title in a manner different than how they were read and interpreted by the court. The legislature in India is subject to Part III of the Constitution. Any statute, including a Validating Act must pass the test of reasonableness and fairness if it is made retrospective so as to affect vested rights and interests. Applying the aforesaid principles, the deeming provision in the Validating Act in question is found to be beyond legislative competence because of arbitrariness as well as on account of looking at particular facts of a case differently for indirect usurpation of judicial function with a view to nullify judgments and orders of competent courts of law.

34. For all the aforesaid reasons, it is held that the deeming part of the Validating Act is ultra vires and unconstitutional. Hence, it cannot nullify the concerned judgments. Since the judgments of this Court and of the Supreme Court in the case of two licensees- *M/s Sheo Narain Jaiswal* and *M/s Ellen Breweries & Distilleries Pvt. Ltd.* remain to be good, they have to be followed as binding precedents in these cases also. Hence, it is ordered that only proportionate licence fee shall be retained by the State of Bihar for the periods in question and the excess licence fee realized from the Petitioners shall be refunded to them within a period of three months from the date of this judgment. We are aware that 16% interest on the refundable amount was

awarded under the earlier judgments but that was on account of an interim order to that effect. In these writ petitions we have not been shown any such interim order, hence while allowing the prayer for refund of excess licence fee deposited by the Petitioners during the year 1995-96, 1996-97 and 1997-98, we are not inclined to allow any interest. However, in case the required refunds are not made within a period of three months indicated above, the due amount shall become payable along with interest at the rate of 16% per annum from the date of this judgment till the date of actual payment. There shall be no order as to costs.

Shivaji Pandey, J.

35. I agree