
(2002) 07 AHC CK 0025

In the Allahabad High Court

Case No : Writ Petition (Tax) No"s. 504, 509 and 610 of 2002

Brij Bhushan Chaudhari and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 05-07-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 226
General Clauses Act, 1897 — Section 22, 4(42B)
Municipalities Act, 1916 — Section 131(3), 135, 94(3)
Uttar Pradesh Excise Act, 1910 — Section 10, 21, 24, 24(A), 24(B)
Uttar Pradesh Excise Rules, 2001 — Rule 18, 331, 332, 338, 357
Uttar Pradesh Licensing under the Surcharge Fee System Rules, 1968 — Rule 1

Citation : (2002) 3 AWC 2549

Hon'ble Judges : S.K. Sen, C.J.;V.M. Sahai, J;S. Rafat Alam, J

Bench : Full Bench

Advocate : Hemant Kumar, P.P. Srivastava, Bharatji Agarwal, Mukesh Prasad, H.P. Srivastava and Arun Tandon, for the Appellant; Ashok Mehta and Rakesh Dwivedi, S.C., for the Respondent

Final Decision : Dismissed

Judgement

S.K. Sen, C.J.—The writ Petitioners in these writ petitions are licensees for country liquor/foreign liquor and beers. Since common issues, namely, claiming renewal of their licences granted to them till 31.3.2002 for another period of one year from 1.4.2002 and for quashing the notice dated 18.3.2002 published in daily newspaper (Dainik Jagran, Gorakhpur) are involved in these writ petitions, they are being disposed of by this common judgment. That apart, a large number of writ petitions involving the same questions of facts and law have been instituted in this Court and they have been connected with these petitions. Therefore, all those connected writ petitions will be governed by the decision in these writ petitions and they are also disposed of by this common judgment.

2. The case of the Petitioners is that some of the licensees were granted licences in the year 2000 and some of them in the year 2001 for a period of one year or

part thereof, renewable on the conditions to be decided by the State Government. According to relevant Rules governing the grant of licence in respect of country made liquor, foreign liquor, and beer, to be discussed hereinafter, the licence granted to the writ Petitioners may be renewed for such period and on such terms and conditions as to be decided by the State Government, from time to time. The State Government, however, had already issued advertisement on 18th March, 2002, in several newspapers inviting applications for grant of licence for retail outlet for sale of beer, country made liquor and foreign liquor. Some of the writ Petitioners applied for renewal of their licences. Their case has not been considered. However, advertisement has been issued for issuance of fresh licence.

3. When the writ petitions came up for admission on 21.3.2002 before a Division Bench, they were admitted and an interim order to the following effect was passed :

Be that as it may, we are not inclined to enter into the controversy. We are of the view that the interest of justice shall be best served if those Petitioners who have already applied for renewal and those whose applications were not entertained apply within 23rd March, 2002, their cases for renewal is considered by the State Government in accordance with law and appropriate decision is taken by State Government by 25th March, 2002. In the event of refusal to grant renewal the State Government to record reasons for the same.

Pursuant to advertisement the draw of lots shall take place as fixed and the result shall be declared, but no contract shall be executed till 5.4.2002. It is made clear that this order is restricted to the case of writ Petitioners only. The question of renewal shall be decided by the Secretary, Excise Department, U. P. Government, Lucknow.

The case shall be taken up on 1.4.2002 at 3 p.m. as specially fixed part heard matter.

4. On 1st April, 2002, when the matter again came up for hearing, the following interim order was passed :

Learned Advocate General submits that by way of interim measure, it should be provided that the Petitioners who moved applications by 23.3.2002, are not required to deposit any money at the moment.

The order passed by Secretary, Department of Excise, State of U. P. on 25.3.2002 has not been communicated to the Petitioners. It shall be supplied to the learned Counsel for the Petitioners by 2.4.2002.

Status quo as on 31.3.2002 shall continue till 5.4.2002 so far as the aforesaid Petitioners are concerned.

The matter will be taken up on 3.4.2002 at 2 p.m. as part heard.

Let certified copy of this order be supplied to learned Counsel for the parties on

payment of usual charges today.

5. Again, the matter came up for hearing on 4th April, 2002, before a Division Bench consisting two of us, and it had passed the following orders :

Shri S. C. Sinha, Joint Director, Government Printing Press, Allahabad, is present in the Court in pursuance of our order passed today before recess.

He submits that Director, Government Printing Press has left for Lucknow today early morning for attending the meeting at Secretariat, Lucknow. He has produced the record and submits that the Gazette, which is produced today, was printed yesterday night, i.e., on 3.4.2002.

He further submits that Shri G. S. Sethi, Director, Government Printing Press has instructed him to print the Gazette by any means by 3rd April night since the publication is very important.

He further submits it was received on 14.3.2002 and was in the process of publication but it could not be printed.

He further submits that no copy has been sold out to any member of the public as yet.

Shri S. C. Sinha, Joint Director, Government Printing Press, voluntarily submits that he had received instruction that it must be published in view of the urgency by night of 3.4.2002 from Director, Government Printing Press. He further voluntarily says that the Director has instructed him specifically to publish the Gazette by 3.4.2002 from his office at Allahabad.

Considering the statements made by Shri S. C. Sinha, Joint Director, Government Printing Press, it appears to us that the matter has taken a very serious turn.

Shri P. P. Srivastava, learned Counsel for the Petitioners in the presence of the Chief Standing Counsel made a comment on 3.4.2002, that he apprehends that such printing of Gazette shall take place by night as the printing of Gazette has not taken place as yet and as such, the repealing Rules 2002 has not really come into force. It appears that to circumvent and to stifle the course of justice, such a process has been taken, so that the submission of the learned Counsel for the Petitioners cannot have any effect when the Court is seized of the entire matter. It shall not be in the interest of the justice to take the matter lightly. Considering the gravity of the situation, we direct the Director, Government Printing Press, Shri G. S. Sethi, who instructed Shri S. C. Sinha, Joint Director, Government Printing Press to print the Gazette by any means by the night of 3.4.2002, to be present in the Court tomorrow, i.e, on 5.4.2002 at 2 p.m. The Secretary, Department of Excise and the Commissioner of Excise, Uttar Pradesh, Allahabad, shall also be present on 5.4.2002 at 2 p.m. and explain on what basis the printing could be made only in the night of 3.4.2002. In the meantime no sale to public of this Gazette in question shall take place.

6. It may be noted that by order dated 21.3.2002 and 23.3.2002, the Division

Bench, inter alia, directed as follows :

Be that as it may, we are not inclined to enter into the controversy. We are of the view that the interest of justice shall be best served if those Petitioners who have already applied for renewal and those whose applications were not entertained apply within 23rd March, 2002, their cases for renewal is considered by the State Government in accordance with law and appropriate decision is taken by State Government by 24th March, 2002. In the event of refusal to grant renewal the State Government to record reasons for the same.

Pursuant to the advertisement the draw of lots shall take place as fixed and the result shall be declared, but no contract shall be executed till 5.4.2002. It is made clear that this order is restricted to the case of writ Petitioners, only. The question of renewal shall be decided by the Secretary, Excise Department, U. P. Government, Lucknow.

7. On 1.4.2002, the Division Bench passed an order directing the status quo as on 31.3.2002 to continue till 5.4.2002 in Writ Petition No. 504 of 2002 and Writ Petition No. 509 of 2002 and in large number of petitions which came up for hearing :

We are prima facie satisfied that the said order was not followed in its true spirit. By one general order, the applications of the applicants were rejected referring to Section 36A of the U. P. Excise Act. It is well-settled that no body has a specific right to renewal, but each case has to be decided in its own perspective in view of Rules 5 for country and foreign liquor and 6 for Beer of U. P. Excise Rules, 2001. The said Rules provide for renewal and the State Government has exclusive power to decide the terms and conditions of such renewal. The Rules of 2002 however provided that the consent of the licensee has to be obtained for the purposes of renewal, Prima facie it appears to us that the said order rejecting the case for renewal was passed mechanically and without application of mind. The Chief Standing Counsel however pointed out on the last occasion, i.e., on 3.4.2002, that Rules for the year 2001 have been repealed with regard to country liquor and, therefore, the Petitioners cannot get the benefit. We have already noted that the repealing Act has not been published as required u/s 77 of the U. P. Excise Act, 1910 and as such the same has not come into force. In fact, the Secretary, Excise Department, Government of U. P. in his order dated 25th March, 2002, has not mentioned the said Rules of 2001 have been repealed and repealing Rules have come into force by publication in the Official Gazette. Accordingly, we are prima facie of the view that the interim order of status quo, which had continued upto 31.3.2002, shall continue upto 10.4.2002 subject to further order that may be passed tomorrow. Since we have heard the case of all the Petitioners today, all the Petitioners shall be entitled to this interim relief.

This interim order shall, however, continue subject to the condition that there is no arrears due against the Petitioners. In the event, there is any arrear against any of the Petitioners, they will not be permitted to run their shops. Since we are

passing this order, by way of interim measure, the Petitioners shall be granted licence on day-to-day basis. As an interim measure, the Petitioners may be permitted to run the shop on day-to-day basis on the terms and conditions as may be fixed by the State Government. It is expected that the supply of liquor shall be ensured provided the Petitioners make payment of the amount due and payable upto 10.4.2002 at a time.

The matter shall be listed on 5.4.2002 along with all connected matters, as part-heard at 2 p.m. for hearing.

The office is directed to supply copy of this order to learned Chief Standing Counsel today for compliance of the order.

8. The matter was thereafter taken up on 7th April, 2002, as part, heard when it was directed that the matter shall appear as part-heard on 8th April, 2002 and interim order shall continue upto that date. Thereafter, the matter was heard on several dates, i.e., on 8.4.2002, 10.4.2002 and 11.4.2002. On 11.4.2002, the following orders, by the Division Bench consisting of two of us, were passed :

Sri S. C. Budhwar, learned senior advocate assisted by Sri Neeraj Sharma, learned advocate, intervener in Writ Petition No. 595 of 2002 argued the case at length and placed before us the various provisions of the Uttar Pradesh Excise (Settlement of Licences for Retail Sale of Beer) Rules, 2001 (hereinafter referred to as the Rules), other relevant Rules, country liquor, foreign liquor and all the three Rules of 2002 particularly Rules 7, 8, 9, 10 and 11 of the Rules which relate to the procedure and settlement of shops on the basis of new applications received. The State Government in spite of our granting repeated time has declined to file counter-affidavit in the matters. Therefore, the State Government is directed to produce records relating to the procedure for grant of licence and settlement of shops adopted by it by 15th April, 2002. The matter shall be taken up as part-heard at 2 p.m. on 15.4.2002. On 10.4.2002, in Writ Petition Nos. 504 and 509 of 2002 this Court has passed the following order :

Put up tomorrow as part- heard at 2 p.m. along with all connected matters. The interim order shall continue till tomorrow.

This order shall also apply in all other connected matters where the interim order is already operating.

Till 15.4.2002 status quo as of today be maintained. This order shall apply in all other connected matters where the interim order had been passed by this Court. The office is directed to issue certified copy of this order in all connected matters where said order is already operating.

The Chief Standing Counsel shall communicate this order to the State Government and the Excise Commissioner. The office is directed to handover a copy of this order today to the learned Chief Standing Counsel.

9. The matter was finally heard and concluded on 15th April, 2002, when the

interim order of status quo was directed to continue till 19th April, 2002. It was also provided that the said interim order was to continue in all other connected matters in which the interim order was already operating. Ultimately, on 1.5.2002, the Division Bench consisting of two of us passed the following orders :

...it may be noted that during the course of hearing on 15.4.2002, learned Advocate General pointed out to us that similar writ petitions were being heard by a Division Bench of the Lucknow Bench and the Bench had reserved the orders. We had also concluded the hearing and reserved the judgment and the interim order was directed to continue till 19.4.2002. In the meantime, however, we were informed on 17.4.2002 that on 16.4.2002 that the Division Bench comprising Hon''ble Mr. Justice Pradeep Kant and Hon''ble Mr. Justice M. A. Khan, dismissed the Writ Petition No. 1543 (MB) of 2002, Kiran Jaiswal v. State of U. P. and others and connected writ petitions.

Records of the said writ petitions were called for and it appears from the records of the said writ petitions that the said writ petitions were assigned to the Bench comprising Hon''ble Mr. Justice J. Bhalla and Hon''ble Mr. Justice R. D. Shukla and on 25.3.2002, the said Division Bench passed the following order :

..To maintain judicial property and law of certainty, we find it to be appropriate to direct the Secretary, Excise Department, U. P. Government, Lucknow to dispose of Petitioners'' renewal applications if they have been received by 23rd March, 2002 upto 11 p.m., in accordance with law and the remaining order of the two benches (supra) would also be available to the Petitioners.

List on 1st of April, 2002.

We are further of the view that let these matters be communicated/placed before the Hon''ble Chief Justice during Holi vacation for considering as to where all the matters can be heard and disposed of together, i.e., the matters filed at Allahabad and at Lucknow by the same Division Bench....

10. On the reopening of the Court on 1.4.2002, the said matters were taken up by Hon''ble Mr. Justice Pradeep Kant and Hon''ble Mr. Justice M. A. Khan. On 3.4.2002, the said Division Bench referred to the order passed by Hon''ble Mr. Justice J. Bhalla and Hon''ble Mr. Justice R. D. Shukla, passed on 25.3.2002 and proceeded with the hearing of the matter, in view of the fact that there was no specific order of the Hon''ble the Chief Justice on the observation made by the Division Bench on 25.3.2002. The Bench on 3.4.2002, passed the following order :

A Division Bench of this Court while entertaining the writ petitions noted the fact that similar writ petitions have been filed both at Allahabad as well as at Lucknow and observed that these matters be communicated/placed before Hon''ble the Chief Justice for considering as to where all the matters can be heard and disposed of together, that is, the matters filed at Allahabad and at Lucknow by the same Division Bench. These matters were listed on 1.4.2002 and we were

informed by the Joint Registrar (Listing) that because of the ignorance, the aforesaid observations made in the order, could not be communicated to Hon''ble the Chief Justice, therefore, we postponed hearing for today and required the Joint Registrar (Listing) to place these matters before Hon''ble the Chief Justice, in the meantime.

Sri P. K. Chaturvedi, Joint Registrar (Listing) is present. He informs that the order has been sent and placed before Hon''ble the Chief Justice on 1st April, 2002 itself but no written orders have been sent or communicated till this time. He has been informed telephonically by Sri D. N. Agarwal, Joint Registrar (Listing), Allahabad, that the Hon''ble Chief Justice has observed that he could not pass any order for transferring the petitions otherwise than under Clause 14 of the amalgamation order which can only be passed when he sits at Lucknow.

Learned Counsel for the Petitioners argued that since the jurisdiction to entertain the petitions at Lucknow has already been upheld by the Division Bench while entertaining the writ petitions and there being no prayer for transferring the matters under Clause 14 of the amalgamation order nor there is any such order till date and Hon''ble the Chief Justice having been duly communicated the observation made by the Division Bench, there is no impediment for the Court to proceed with the matters.

We are also of the view that in view of the information given by the Joint Registrar (Listing) and the fact that the order has been communicated to Hon''ble the Chief Justice and the writ petitions have been entertained at the Lucknow, there appears to be no legal impediment in hearing the matters and, therefore, we proceed with the hearing.

Put up tomorrow, i.e., on 4.4.2002 for hearing along with other connected matters.

11. The question, however, still remains that if the matter was assigned to another Bench, whether the matter could be taken up by the other Division Bench. However, we are not willing to go into the said controversy being a Bench of coordinate jurisdiction. We feel that the question should be decided by a larger Bench or higher forum with several other questions which have been raised on behalf of the Petitioners, by representing counsel for the Petitioners, Mr. Arun Tandon, Mr. Mukesh Prasad and Mr. K. D. Mishra.

12. It has been strongly contended by Mr. Arun Tandon that the judgment of the Division Bench of Lucknow is not binding, being contrary to the settled law that the matter was assigned to another Bench could not be decided. That apart, it was also argued that the judgment and decision of Division Bench of Lucknow Bench in Kiran Jaiswal's case is per incuriam.

Mr. Mukesh Prasad, learned Counsel on behalf of another Bench of the writ Petitioners states that the judgment and the order passed by the Division Bench at Lucknow should be treated as per incuriam. He argued that matter should be

referred to the larger Bench.

Mr. K. D. Mishra, learned Counsel for the Petitioner in Writ Petition No. 610 of 2002 has argued vehemently that the Rules of 2002 are ultra vires U. P. Excise Act, 1910 since the Commissioner under the statute has not been authorised for the purpose of grant of licence as has been done by the Rules 2002. He also placed before us the necessary averments in the writ petition and he has prayed in the writ petition also, which are as follows :

(i) Issue a writ, order or direction in the nature of certiorari to quash the U. P. Excise (Settlement of Licences for retail sale of country liquor) Rules, 2002, notified by the Notification No. 27091/X-Licence-59, Dated March, 14, 2002 (Annexure-1 to the writ petition).

(ii) Issue a writ, order or direction in the nature of mandamus directing the Respondents to consider for the extension of renewal of the Petitioners' licences for further period or till the New Rules are framed by the State Government.

The Petitioners have challenged the lottery system in Mr. K. D. Mishra's Writ Petition No. 610 of 2002 and also prayed for the relief of quashing of the Rules of 2002, What was the effect of the said Rules on the advertisement as also on the notification on the basis of which the lottery was held pursuant to the Rules, 2002 and on the basis of letter of 14.3.2002 from Joint Secretary, U. P. Government to Excise Commissioner, U. P. which is stated to be the policy of the State Government. We called upon to Chief Standing Counsel who has very fairly submitted that the said letter which is treated as Government policy is the basis of the Rules, 2002. The said policy is reflected in the said Rules.

It may be noted that on the same day, the policy and rules came to light. Admittedly, the said Rules, 2002 were not taken into consideration by this Division Bench.

The Division Bench, felt that it was not necessary to consider the Rules. It has also been argued before us by the counsel for the Petitioners that if the Rules 2001 and 2002 is declared to be not valid and binding, then the U. P. Licensing under the Surcharge Fee System Rules, 1968, shall hold the field. Naturally, the procedure mentioned therein has to be complied with and procedure under the 2002 Rules cannot have any effect. It is the specific case of the State Government that both the administrative policy and the advertisement are in consonance with the 2002 Rules. This aspect of the matter has been totally ignored by the Division Bench at Lucknow, perhaps due to inadvertence or due to the fact that learned Counsel appearing therein did not make out this case.

Be that as it may, the matter involves substantial question of law of very great importance as argued before us. Accordingly, we are framing the following questions :

(1) If the judgment and order passed by Division Bench comprising of Hon"ble Mr. Justice Pradeep Kant and Hon"ble Mr. Justice M. A. Khan at Lucknow,

dismissing the writ petition on 16.4.2002, is valid and has any binding effect in view of the fact that the said writ petitions were assigned to another Bench comprising of Hon''ble Mr. Justice J. Bhalla and Hon''ble Mr. Justice R. D. Shukla?

(2) If the principles of per incuriam and sub-silentio are applicable to the said judgment and decision rendered by the Division Bench of Lucknow on 16.4.2002?

(3) (a) If the rules framed by the Excise Commissioner being Rules of 2000, 2001 and 2002 for country liquor, foreign liquor and beer on the basis of which, it has been contended by the Respondents that grant of excise licence for the period 2000-2001, 2001-2002 and 2002-2003 was made, are valid in the eye of law?

(3) (b) If so, when the said Rules came into force?

(4) Are the Petitioners entitled to the renewal of licence or for grant of new licence since they filled up the forms and paid the deposits as asked for by the Respondent authorities?

We refer the entire bunch of writ petitions to be heard and decided by the larger Bench, on the aforesaid questions amongst other questions, which may be examined by it, for the determination by said Bench to be constituted by the Chief Justice.

This order shall be applicable to Civil Misc. Writ Petition No. 504 of 2002, Writ Petition No. 509 of 2002, Writ Petition No. 610 of 2002 and all other connected writ petitions.

13. It may be noted that pursuant to the interim order dated 21.3.2002, the application for renewal of the licences were considered by the Secretary, Excise Department who passed an order on 25.3.2002 declining to grant renewal of excise licences issued for 2001-02. The main reason disclosed for issuance of such order was that the State Government had taken a policy decision not to grant renewal of excise licence and to hold public lottery for the purpose.

14. Mr. Bharatji Agrawal, learned Senior Advocate assisted by Mr. Mukesh Prasad, Mr. H. P. Srivastava and Mr. Arun Tandon, learned advocates argued on behalf of most of the writ Petitioners and other learned Counsel, appearing on behalf of rest of the writ Petitioners, adopted their submissions. The contention of Mr. Bharatji Agrawal, learned senior advocate is that the writ Petitioners did not commit any breach of the terms and conditions of the licence and they have complied with all the necessary formalities. As such, they moved an application for renewal of the licences. On the one hand, applications of some of the Petitioners were rejected by the State Government by means of an order dated 25.3.2002 and renewal applications of other Petitioners were not, at all, entertained whereas, on the other hand, the applications of other Petitioners have been accepted but could not be decided by the Respondents on the ground that there did not exist any direction of this Court. Mr. Agrawal also urged that the licence of the Petitioners is to be renewed for such period and on such terms

and conditions, as may be decided by the State Government in accordance with Rules of 2001 and 2002, as amended by U. P. Excise (Second) Amendment Rules, 2002 and U P Excise (Third) Amendment Rules, as well as, terms and conditions and the period is the discretion of the State Government subject to which the existing licences are to be renewed.

15. Mr. Agrawal further urged that the writ Petitioners have already expressed consent for renewal prior to 31.3.2002. Thus, the advertisement issued by the State Government on 18.3.2002, for grant of licence for retail sale of beer, foreign liquor and country liquor is contrary to law and provisions of the existing Rules of 2002 as well as amended Rules of 2001 which came into force with effect from 3.4.2002. Therefore, the Petitioners who were licence holders upto 21.3.2002, are certainly entitled to get their applications for renewal considered, on merits, as per rules and amended Rules, issued on 14.3.2002 and published in the Official Gazette on 3.4.2002.

16. Mr. Agrawal very specifically pointed out that on the own showing of Mr. G. S. Sethi, the Joint Director, Government Printing Press, Allahabad, the amended Rules of 2002 were printed/published in the Official Gazette in the night of 3.4.2002 and, thus, by virtue of Section 77 of U. P. Excise Act, new Rules shall be deemed to have come into force from the date of publication in the Official Gazette. It was next argued by Mr. Bharatji Agrawal that any action taken under the new Rules of 2002 for drawing the lottery prior to 3.4.2002 shall be invalid and illegal. In support of his contention, Mr. Agrawal placed reliance in State of U. P. v. Kishori Lal Minocha, AIR 1980 SC 680, wherein the Hon''ble Apex Court, at page 682 of the Report has held as follows :

Section 77 of the U. P. Excise Act, 1910 states.-All rules made and notification issued under the Act shall be published in the Official Gazette and shall have effect as if enacted in this Act from the date of such publication or from such other date as may be specified in that behalf. The High Court found that the conditions mentioned in Rule 357 had never been published as required and they did not, therefore, have the force of law. The High Court held that Part II of the Excise Manual which includes Rule 357 contained provisions which were commonly referred to as rules but were not really Statutory Rules and that it was a sort of books of guidance. Before us, it was claimed on behalf of the Appellant that some of the conditions contained in Rule 358 had been published in the Official Gazette, but the learned Counsel for the Appellant, State of Uttar Pradesh, was not in a position to dispute that at least the last part of the 5th condition providing that in case of default if the price fetched at the resale was less than the bid at the first sale, the difference would be recovered from the defaulter, had not been published. That being so, it must be held that there was no law under which the Respondent could be asked to make amends for the shortfall.

The learned senior counsel Mr. Agrawal further submitted that similar view was taken by a Division Bench of this Court in Vijay Prakash Jaiswal and Ors. v. State

of U. P. and others, 1984 UPTC 178(Para 17). According to Mr. Agrawal, the aforesaid decision has been upheld by the Apex Court in State of U. P. v. National Industrial Corporation, decided on 17.9.1976. The Apex Court has approved the view of this Court to the effect that the additional license fee of Rs. 25,000 cannot be recovered from the excise licences under the U. P. Excise Act even though such a condition was in existence in the excise licence but the rules made were not printed in the Gazette. Hence, the Statutory Rules will prevail.

17. Mr. Agrawal vehemently urged that the action of drawing lotteries on the basis of Rules of 2002 is ab initio invalid and no license can be granted on the basis of such lottery drawn in pursuance of the Rules of 2002 as no action under the Rules of 2002 could be permissible in the eye of law, prior to 3.4.2002 (the date, when the Rules of 2002 came into force). According to Mr. Agrawal, renewal applications are to be considered as per existing Rules of 2001, as amended by U. P. Excise Rules of 2002, (U. P. Excise Rule No. 6 of 2002 for beer and U. P. Excise Rule No. 5 of 2002 for foreign liquor) and similarly for country liquor as these Rules of 2002 have also come into force with effect from 3.4.2002. According to Mr. Agrawal, learned senior counsel, the administrative instructions of 14.3.2002 contained in the letter of Secretary to Excise Commissioner, relied upon by the State, being contrary to rules, is invalid and, therefore, the State cannot get any advantage of the said instructions for the purpose of renewal of licence by way of lottery. In support of this contention, he placed reliance on the decision in Aditya Chemicals v. State of U. P., 1988 UPTC 1348 ; Km. M. Chikka Puttaswamy v. State of Andhra Pradesh, AIR 1985 SC 956 and Collector of Central Excise, Bombay v. Kores (India) Ltd., Thane, 1997 (10) SCC 338(para 4). The argument of Mr. Agrawal is that the executive instructions and the circulars, if they are favourable to the Assessee can be relied upon by the Assessee as binding on the Department, but the administrative instructions, which are contrary to law can have no binding effect either on the Assessee or on the Court as has been held by the Apex Court in Collector of Central Excise, Bombay's case (para 4) (supra). According to Mr. Bharatji Agrawal, Rules 5 and 6 of the existing rules are binding upon the Government and the Government is estopped from asserting the same to be contrary to Section 36A of U. P. Excise Act (hereinafter referred to as "the Act" I).

18. Mr. Agrawal, learned senior counsel strenuously urged that Section 36A of the Act is an enabling provision. It enables the State Government and the Excise Commissioner to frame rules in exercise of powers under Sections 40 and 41 of the Act in respect of renewal of a licence. In exercise of powers u/s 41 of the Act, the Excise Commissioner has framed the Beer, Country Liquor and Foreign Liquor Rules, which provide for renewal of licence. Thus, the Petitioners are entitled for their application to be considered on merits for renewal on the basis of the existing rules for the year 2001 amended by Rules of 2002, which has now come into force with effect from 3.4.2002.

19. The further argument of Mr. Agrawal is that Rules 5 and 6 are not contrary to

Section 36A of the Act and it is not open to the State Government to argue that the Rules are contrary to Section 36A of the Act. To fortify his submission, Mr. Agrawal placed reliance on paragraph 11 of the decision of Hon''ble the Supreme Court in Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, , wherein, the Apex Court has held that if there are circulars issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue regardless of interpretation placed by the Supreme Court.

20. With regard to question No. 1 for consideration by the Full Bench, citing Paragraph 59 (4) of the decision of Apex Court in State of Rajasthan v. Prakash Chand and others, 1998 (1) AWC 246 : 1998 SCC 1, it has been submitted by Mr. Agrawal, learned senior advocate assisted by Mr. Mukesh Prasad, learned advocate, that a Bench can only take up judicial business assigned to it by or under the direction of Hon''ble the Chief Justice. In the instant case, since the matter was specifically assigned to the Bench presided over by Hon''ble Jagdish Bhalla, J., by the Chief Justice, Mr. Agrawal contended that the Division Bench presided over by Hon''ble Mr. Pradeep Kant, J., had no jurisdiction to decide the matter and as such, the said decision is no decision, in the eye of law, and the same is not binding.

21. So far as question No. 2 is concerned, it has been contended by Mr. Agrawal that the conclusion of law by the Lucknow Bench of this Court, dated 16.4.2002 to the effect that the writ Petitioners have failed to establish any enforceable right for consideration of renewal of licence for excise year 2002-03, falls within the rule of sub-silentio and is per incuriam, since the Lucknow Bench of this Court has not considered all the relevant provisions of the Act and the Rules framed thereunder and several issues have been left open. They were not adjudicated upon by the Lucknow Bench. To fortify his contention, Mr. Agrawal took us through paragraphs 40 to 42 of the decision of Apex Court in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , Mr. Agrawal, however, submitted that the order passed by the Lucknow Bench of this Court, in any event, cannot and will not prevent the Full Bench of this Court to pass an order and to take an appropriate decision, irrespective of the findings recorded by the Division Bench, since this Bench is a larger Bench and, therefore, the question of validity of the order passed by the Division Bench as on the question of jurisdiction or on the question of sub-silentio and per incuriam has become immaterial.

22. So far as question No. 3 is concerned, Mr. Agrawal has submitted that there is no infirmity in the Rules framed by the Excise Commissioner. The Rules of 2000, 2001 and 2002 have been validly framed by the Excise Commissioner in exercise of powers u/s 41 of the Act. By framing Rule 5 of the Uttar Pradesh Excise (Settlement of Licenses for Retail of Country Liquor) Rules, 2001, Foreign Liquor Rules, 2001 and Beer Rules, in exercise of power u/s 41 (a), the Excise Commissioner has imposed two specific conditions, firstly, that the licences will

be for an excise year, and, secondly, that the licence will be renewable. The Excise Commissioner has not usurped the powers of the State Government and had not made fresh Rules prescribing the period of licence. Period of licence has been prescribed under Rule 332, framed by the State Government, way back in the year 1910. The provisions of Rule 332 govern the period of all excise licences.

23. As regard the question of renewal, it has been submitted that renewal is to be done, in respect of all licences granted under the surcharge fee system under Rule 4 of the Uttar Pradesh Licensing Under the Surcharge Fee System Rules, 1968, framed by the State Government.

24. Mr. Arun Tandon, learned Counsel appearing on behalf of many of the writ Petitioners in several writ petitions draws our attention to page 25 of the Division Bench judgment rendered by Lucknow Bench of this Court in Civil Misc. Writ Petition No. 1543 of 2002, *Kiran Jaiswal and 40 others v. State of U. P. and others*. According to Mr. Tandon, it has been clearly recorded by the Division Bench in the aforesaid judgment that the policy decision of State Government for the grant of licence for the year 2002-03 has not been challenged in the said writ petition. It also records that the policy decision which has been communicated to the Excise Commissioner U. P., Allahabad, by the State Government on 14th March, 2002, discloses that the State Government has duly considered the policy which was to be adopted for the excise year 2002-03 and thereafter a decision was taken to make the settlement under public lottery system. It also lays down the conditions of fee etc., which would be applicable in the case of such licences. The decision thus taken by the State Government cannot be faulted with. As a matter of fact, the aforesaid policy decision has not been challenged in any of the writ petitions. It has not at all been stated that how the policy decision is bad and contrary to any statutory provision or fundamental rights or any other constitutional provision or rules. The Division Bench has further, *inter alia*, recorded that the only ground of attack, during the course of argument, raised was that Rule 5 of the Rules of Country Liquor and Indian Made Foreign Liquor Rules, 2001 and Rule 6 of Beer Rules, 2001, denote the policy of the State to renew the licenses and, therefore, the subsequent decision doing away with the aforesaid alleged policy enunciated in Rules 5 and 6 respectively, was arbitrary and illegal. It appears that the Division Bench only took into consideration Rules 5 and 6 of the Rules of 2001 and so far as Rules of 2002 are concerned, the same were not considered by the Division Bench perhaps because of the fact that they were not brought to the notice of the Division Bench as appears from a bare perusal of the said judgment. According to Mr. Tandon, in view of the fact that the Division Bench overlooked the Rules of 2002 and thereby failed to take note of the relevant statutory provisions, renders it to be ineffective and the same cannot have any binding effect and has to be treated as *per incuriam*. The said judgment is also distinguishable on account of the fact that it has been clearly mentioned at page 28 of the same that there was no pleading with regard to legitimate expectation and promissory estoppel. In the instant case, however, the writ Petitioners have specifically pleaded the same. Mr. Tandon strenuously

argued on U. P. Excise Licensing Surcharge Rules and contended that under surcharge fee system, the writ Petitioners have been granted licence. He also referred to Sections 24, 24A, 31 (d) and 10 (2) (f) of the Act. He submitted that the State Government has power to delegate the authority to make rules to the Excise Commissioner except u/s 40 (e) of the Act regarding period, locality and persons to whom licence is to be granted. For that purpose, rules can be framed by the State Government only. In the instant case, such power cannot be delegated to the Excise Commissioner. Excise Commissioner has power to frame Rules with regard to fixation of fee. Fee, however, can be determined u/s 41 (c) of the Act by (i) auction, (ii) invitation of tender and (iii) assessment on the basis of sales to be governed by Auction-cum-Tender Rules, 1991. To the extent of fixation of these fee on the basis of the aforesaid provision, the Commissioner is certainly empowered to frame Rules. The aforesaid provision, however, does not contemplate any mode of determination of fee on the basis of lottery.

25. Mr. Tandon further contended that Section 24A read with Section 24B of the Act provides that the State Government has exclusive privilege to manufacture by wholesale or retail any foreign liquor, in any locality, and that the Excise Commissioner while determining or realizing the fee for grant of such exclusive privilege acts on behalf of the State Government. According to Mr. Tandon, the provisions of Section 24A of the Act, are, however, subject to the provisions of Section 31 of the Act. Section 31 of the Act provides that every licence, permit or pass granted under the Act shall be granted :

(a) on payment of such fees (if any), (b) subject to such restrictions and on such conditions, (c) shall be in such form and contain such particulars, as the (Excise Commissioner) may direct either generally or in any particular instance in this behalf, and (d) shall be granted for such period as the State Government may in like manner, direct.

He also referred to (i) Section 40 (2) (e) of the Act which provides that the rule making power of the State Government cannot be delegated, (ii) Section 10 (2) (f) of the Act which provides that the State Government may delegate all or any of its power under the Act to the Excise Commissioner except the power conferred by Rule 40 to make rules (iii) Section 40 (1) of the Act which empowers the State Government to make rules for the purpose of Government carrying out the provisions of the Act or other law for the time being in force relating to excise revenue and submitted that the Legislature has adopted by incorporating the U. P. Licensing under the Surcharge Fees, Stamp Rules, 1968, made by the Excise Commissioner to be deemed as valid and effective as if the said Rules were duly framed by the State Government Under this Section, Mr. Tandon also referred to Surcharge Fee System Rules and submitted that the same are applicable to grant of licences of excisable articles settled under graduated surcharge fee system or under uniform surcharge fee system. Under the said Rules, the licences granted are liable to be renewed compulsorily under Rule 4. Mr. Tandon, therefore, urged that in view of the aforesaid statutory

provisions, the Excise Commissioner, U. P. at Allahabad has absolutely no authority to frame any Rule, whatsoever, with regard to the period of licence and the power in that regard vests with the State Government only. The writ Petitioners having been granted licences are entitled for renewal of the same on year to year basis and fresh applications in respect of the shops of the writ Petitioners cannot be entertained because Rule 5 of the Rules of 2000 provides for renewal of licences for succeeding year and Rule 6 of 2000 provides for renewal of the licences granted under the Rules of 2000. According to Mr. Tandon, under Rule 7 of the Rules of 2001, fresh applications could only be invited in respect of the new licences proposed to be granted in an area or locality. A joint reading of Rule 5 read with Rule 7 established beyond doubt that so far as existing licences were concerned, there was no occasion for any new licences to be treated, consequently, Rule 7 has no application in respect of the licences, which were granted in the year 2000-01.

26. Mr. Tandon contended that admittedly the said Rules have remained unchanged till 31.3.2002, when the right of renewal has accrued in favour of the writ Petitioners. It is only on 3rd April, 2002, when the Rules of 2002 were published in the Official Gazette in view of Section 77 of the Act. The said Rules of 2002 shall have application only on the date of publication in the Official Gazette. In support of this contention Mr. Tandon placed reliance on two decisions, one rendered by the Apex Court-State of Uttar Pradesh v. Kishori Lal Minocha, AIR 1980 SC 680 and the other by a Division Bench of this Court in Vijay Prakash Jaiswal and Ors. v. State of Uttar Pradesh and others, 1984 UPTC 178.

Mr. Tandon specifically pointed out that the amendments made by Amendment Rules of 2002 have not altered the position of the writ Petitioners to their detriment in any manner, whatsoever. As a matter of fact, the right of the writ Petitioners for renewal has further been accrued by deletion of the words "granted under these rules" from Rule 6 as well as the addition of the words "with the condition of the licence". Mr. Tandon also referred to Rule 7A of the Rules of 2001 and submitted that the said rules have not been amended by the Rules of 2002, meaning thereby, that in respect of existing licensed shops of the writ Petitioners, no fresh application could be entertained as it was not grant of new licence contemplated by Rule 7A of the Rules of 2001. According to Mr. Tandon, Section 36A provides that no licensee shall have a claim for renewal. This Section has to be read along with other Rules framed by the State Government and the Excise Commissioner, whereunder renewal of the licence has been statutorily contemplated, meaning thereby-the State Government may, by rules, provide for renewal of licences and on such a prescription by the State Government, the State Government cannot refuse to act arbitrarily and no act contrary to its own Rules. The legal position in this regard has been firmly settled by a Division Bench of this Court in Writ Petition No. 385 of 1995, decided on 26.5.1995. In the said decision, it has been specifically held that although the State has exclusive authority to deal with intoxicating liquor, the State

Government cannot act contrary to its own conditions and it is bound by the rules by which it wants its action to be adjudged. To fortify his submission, the learned Counsel drew our attention to the decision of Apex Court in *Ramanna v. I. A. Authority*, AIR 1979 SC 1629 , wherein the principles of natural justice and fair play have also been made applicable in regard to the claim of the licences dealing in liquor, when the grant of licence is refused in breach of the conditions of the tender notice and Statutory Rules. Mr. Tandon urged that in view of the principle of legislation by incorporation which is to be applied to proviso Rule 41 as the Rules framed by the State Government, as already contained, it cannot be disputed that the State Government, irrespective of Section 36A, can renew licence on year to year basis. According to him, rigours of Section 36A have no application, at all, insofar as the right and power of the State Government are concerned as guaranteed by Section 31 (d) of the Act read with Section 40 (2) (e) of the Act for the purposes of determining the period of licence which necessarily includes the renewal on year to year basis and it is always open to the State Government to frame statutory conditions or rules providing for renewal of licence and such conditions or rules framed by the State Government would not be hit by Section 36A of the Act. The learned Counsel further submitted that such a rule being framed by the State Government, it is always open to the licensee to insist that the State Government must act in accordance with the Statutory Rules framed by it, failing which the action of the State Government would be per se arbitrary and violative of Article 14 of the Constitution of India. He supported this argument by citing the decision of Apex Court in *M/s. Khoday Distilleries Ltd. etc. Vs. State of Karnataka and others*, . In this decision, the Apex Court has very specifically held that even in respect of grant of excise contract, Article 14 would be attracted. Mr. Tandon painstakingly raised his arguments, at great length, on the different questions which have come up before this Full Bench for consideration.

27. So far as question No. 1 is concerned, Mr. Tandon vehemently urged that (i) Rule 1 of Chapter v. of the Allahabad High Court Rules provides that the Judges shall sit alone or in Division Benches, as may be constituted from time to time and do such work, as may be allocated to them by the order of the Chief Justice or in accordance with his directions. Under Rule 10 of Chapter V, under the orders of the Chief Justice, writ jurisdiction can be exercised by such Judges, as may be appointed for the purpose. Rule 10 (2) clarifies that arrangement of Benches shall be subject to the general or special order of the Chief Justice: (ii) once the Chief Justice has allocated a particular case to a particular Bench to sit, that Bench alone has the jurisdiction to deal with the matter in view of the aforesaid rules. It will not be out of place to clarify that under Rule 6 of Chapter VI, publication of the Cause List by the Registrar is also subject to such direction as the Chief Justice may give, from time to time, meaning thereby, that once the Chief Justice has constituted a particular Bench and has allocated a case to the said Bench, the matter can be heard and decided by the said Bench alone ; (iii) from the record of the Writ Petition No. 1543 (MB) of 2002, *Kiran Jaiswal v. State*

of U. P., it is apparently clear that the Bench which was nominated by the Chief Justice during Holi vacations passed specific order that the matter may be placed before the Chief Justice during summer vacation for considering whether all the matter can be heard and disposed of together, i.e., matter filed before Allahabad and Lucknow by the same Division Bench ; and lastly, (iv) in view of the aforesaid judicial order of the Division Bench which was nominated by the Chief Justice ; the matters could not have been heard by any other Bench unless and until (a) the matter was placed before the Chief Justice and the Chief Justice had passed an order for hearing of the case at Lucknow and (b) in the event of any orders being not passed by the Chief Justice on the matter being placed before him, the same Division Bench to which the aforesaid writ petitions were allotted by the Chief Justice alone should have heard the matter. In view of the above, Bench comprising of Hon"ble Mr. Pradeep Kant, J. and Hon"ble Mr. M. A. Khan, J. could not have heard the matter. Consequently, the order passed by the said Bench on 16.4.2002, has no binding effect.

28. On question No. 2, Mr. Tandon submitted that the principles of sub-silentio and per incuriam are attracted in respect of the judgment of the Lucknow Bench for the reasons (i) that there was no petition in respect of Beer licences which were granted in the year 2000-01 and were renewed for the year 2001-02. Consequently, the impact of the Rules of 2000 read with the Clauses 6 and 7 of the Rules of 2001 have not been noticed and were not subject-matter of consideration ; (ii) Rules 6 and 7 of the Rules of 2001 have not been taken into consideration, nor the effect of words "new licences" under Rule 7, so far as invitation of fresh applications is concerned, has been considered. From the records of the present writ petitions and the proceedings which have taken place before this Court, it is now well established, beyond reasonable doubt, that the Rules of 2002 had come into force only with effect from 3.4.2002, i.e., subsequent to the right of renewal having been accrued in favour of the writ Petitioners and as such, had no application, at all ; (iii) that in the present writ petition the writ Petitioners have challenged the advertisement itself inviting fresh applications, as also order of the State Government rejecting their renewal applications. The writ petitions were instituted prior to the settlement of the licenses and there is an interim order in favour of the writ Petitioners whereby final settlement of the shops of the writ Petitioners was stayed. Lucknow Bench has noticed that there is no challenge to the settlement of the licenses for the year 2002-03. The finding with regard to the publication of Rules of 2002 is based on non-consideration of Section 77 of the U. P. Excise Act. The letter dated 14.3.2002, written by the Under Secretary to the Excise Commissioner has been taken as the policy decision of the State Government on the basis of mere allegations made by the standing counsel in the counter-affidavit in another writ petition. From the records, which have been produced before this Court in the present proceedings, it is crystal clear that there is no such policy decision. The document dated 14.3.2002 is only an internal letter ; (v) a bare reading of Rules 5 and 6 with reference to Rule 7 clearly indicates that these provisions have

material bearing upon the right of the sitting licensees to get their licences renewed. That being so, the finding that the licensees have no right under the Statute for renewal of licence is incorrect and is based on non-consideration of Rules 5 to 7 as well as the Surcharge Fee System Rules. The incorporation of Section 36A is based on non-consideration of proviso to Rule 40 (1) as well as the power of the State Government to determine the period of licence, which includes renewal thereof as provided for u/s 31 of the Excise Act ; and (v) the Lucknow Bench has specifically left open the issue about grant of licences to the new licensees which is prominently under consideration in the present proceedings.

29. Mr. Tandon urged that in the connected Writ Petition No. 410 of 2002, the vires of Rules of 2002 have specifically been challenged before this Court (at Allahabad) which was not the case before the Lucknow Bench of this Court. The Division Bench judgment in the case of National Industrial Corporation and Sirshadi Lal Industries, has not been noticed by the Lucknow Bench which specifically provides that the action of the State Government is to be judged in accordance with the rules framed by it and any action to the contrary would be violative of Article 14 of the Constitution of India.

30. Next submission of Mr. Tandon is that the grant of licences for the Excise Year 2001-02, has been done in accordance with the Rules of 2002 which were not in force in the eyes of law on the date of lottery when the licensees were selected. The impact of notification of the Rules of 2002 in the Gazette dated 4.5.2002 read with Section 77 has been completely ignored by the Lucknow Bench.

31. On question No. 3 (a), Mr. Tandon contended that the licences granted in favour of the writ Petitioners are in conformity with the Surcharge Fee System Rules which are para materia to the Beer Rules of 2000. Consequently, the grant of licence in favour of the writ Petitioners is legal and valid and the said licences are liable to be renewed.

32. So far as question No. 3 (b) is concerned, Mr. Tandon contended that in view of Section 77, the Rules shall come into force only on the date of publication in the Official Gazette which in the facts and circumstances of the case is admittedly 3.4.2002 and the said Rules will have no application so far as the right of renewal of the writ Petitioners is concerned, which had accrued on 1.4.2002, i.e., prior to the coming into force of the new Rules. He lastly submitted that the State Government having obtained option for renewal of the licences from the writ Petitioners and other such persons in the month of February, 2002, it cannot now be permitted to refuse renewal of the licences on the basis of its letter dated 14.3.2002 as well as under the impugned order dated 25.3.2002.

33. Mr. K. D. Misra assisted by Mr. Santosh Misra appeared in Writ Petition No. 610 of 2002 for the writ Petitioners and submitted that the writ Petitioners were under the impression that the licence will be renewed for the year 2002-03 under

the existing rules for the year 2001-02. But the State Government and the Excise Commissioner decided to settle the licences afresh by lottery system and the general public was invited to submit applications in the prescribed proforma under the provisions of U. P. Excise (Settlement of Licences for Retail Sale of Country Liquor) Rules, 2002 (hereinafter referred to as "the Rules"). It is claimed that the new Rules were notified vide Notification No. 27091/K-Licence-59, dated 14th March, 2002. He also urged that the said rules, however, were not printed and published in the Gazette till 3.4.2002 and, therefore, did not come into existence prior to that date. Mr. K. D. Misra, learned Counsel also referred to the provisions of Section 77 of the Act and contended that the rules made and the notification issued under the Act can be made applicable from the date mentioned or specified therein. The new rules had been made applicable from the date of their publication in the Official Gazette. Thus, the new Rules can be made applicable with effect from 3.4.2002 and not from 14.3.2002, when the said notification was issued. In this connection he placed reliance on a decision of the Apex Court in *The State of Madhya Pradesh and Others Vs. Tikamdas*, . It is the contention of Mr. Misra that the State Government and Excise Department invited applications all over the State for settlement of licences for country liquor from 18th March and the lottery was drawn on 25.3.2001, under the new Rules. In the meantime, writ Petitioners challenged the re-settlement of their licences under the new Rules, on the ground that the new Rules were ultra vires and prayed for extension or renewal of their licences till the new Rules were framed by the State Government.

34. Mr. Mishra further contended that the new Rules superseded the Rules of 2001 and 2002 with effect from 2.4.2002, and, therefore, every action taken by the Department for settlement of licences of the writ Petitioners beginning from 14.3.2002 to 26.3.2002, were without the authority of law and the persons who were successful in the lottery held on 26.3.2002 were not, at all, entitled to be granted the licences for retail sale of country made liquor for the year 2002-03 with effect from 1.4.2002. It is also submitted by Mr. Mishra that pursuant to the interim orders dated 23.3.2002, permitting the writ Petitioners to apply for renewal of their licences till 23 hours on 23.3.2002, before the Excise Secretary, the applications for renewal of the licences were made. However, the same were considered and rejected by the Excise Secretary-Respondent No. 1, Mr. Misra referred to Section 24B of the Act and urged that in terms of the said Section the State Government has an exclusive privilege of sale of country made liquor and foreign liquor. He also urged that u/s 36A of the Act no person to whom licence has been granted under the Act shall have any claim to the renewal of licence. But the Petitioners claim for renewal of or extension of the period of their licence on the basis of Rule 5 of the Rules of 2001, though there is no fundamental right for trade in liquor. It is contended that the Petitioners are certainly entitled to get the benefit of renewal or extension of the period of their licence by virtue of rules framed by the Excise Commissioner. Mr. Mishra vehemently urged that in accordance with the provisions of new rules, i.e., the Rules, 2002, the period of

licence shall be for an excise year or part thereof, for which the licence has been granted and that the licence may be renewed or extended with the consent of the licensee for another excise year or part thereof on such terms and conditions, as may be decided by the State Government. It has been contended that while the relevant rules for the year 2001-02, provide that the period of licence shall be for an excise year or part thereof for which the licence has been granted, the licence may be renewed on such terms and conditions as may be prescribed by the State Government. But before the lapse of the rules for the year 2001-02, the term of the licences granted under these rules stood expired on 31.3.2002. However, according to the old rules, if the Government so decides, the term of the licences, of the Petitioners could be renewed for the year 2002-03 but that possibility extinguished with effect from 3.4.2002, on account of the fact that the old rules stood suspended on coming into force of the new rules. The learned Counsel vehemently challenged the validity of the new rules on the ground that the rules contained in paragraphs 8 to 12, 18 and 21 of the new rules are totally beyond jurisdiction of the rule making power of the Excise Commissioner. According to him, the State Government is obliged to make rules under the provisions of the Act on the subjects: (a) the period of licence ; (b) the locality of licence ; (c) the person to whom licence can be granted ; (d) the procedure of grant of licence ; (e) the prescribing of restrictions under which any licence, permit or pass may be cancelled u/s 34 of the Act and (f) taking away property of the Petitioners under the Rule 18 without paying the price for which the commodity was purchased. Mr. Misra, learned Counsel pointed out that the State Government has already made rules u/s 40 of the Act fixing the period and duration of the licences as mentioned in Rule 332 of the Excise Manual, Volume I. In Rule 338, the State Government has prescribed the eligibility conditions of the licensees for grant of licences. Under Rule 331, the State Government has deemed to have made U. P. Licensing under the Surcharge Fee System Rules, 1968, prescribing the procedure as well as eligibility conditions for licences to be granted under the Surcharge Fee System Rules, 1968. These eligibility conditions have been given in Rules 381 (3) of the Excise Manual Volume I. Rule 381 (4) of the Excise Manual, which is relevant for the purpose of renewal of the licence, runs as follows :

... The Collector shall decide whether a licence for sale of any excisable article should be renewed or not. For this purpose, he shall examine the list of existing licences in consultation with the Assistant Excise Commissioner every year. If he considers that the conduct of any licensee has been suitable, he shall order the renewal of the licence. If the conduct of an existing licensee is reported to be unsuitable, the Collector shall call upon such licensee to show cause within a specified period why his licence should not be terminated and in doing so, shall inform him the reasons for believing him to be unsuitable. The show cause notice shall be served by registered post on the licensee. If after considering the explanation, the Collector find the licensee to be unsuitable he shall refuse to renew the licence and invite applications and select a new licensee in accordance

with these rules.

35. Learned Counsel has relied upon a Division Bench decision of this Court in *Anant Ram v. State of U. P. and others*, 1985 EFR 325, wherein the Division Bench quashed the amendment made by the Excise Commissioner to the eligibility conditions of licensees for retail sale of Tari, declaring the amendment to be ultra vires the powers of the Excise Commissioner u/s 41 of the Act. It has been submitted by Mr. Misra, learned Counsel that the Respondent No. 2 with the approval of the State Government has fixed the licence fee of country made liquor licences on the basis of minimum guaranteed quota for the shops. Thus, the licences granted to the Petitioners are on the condition of payment of licence fee imposed upon the licensees under the Surcharge Fee System. The surcharge increases with the increase in quota. Thus, the rules made under the U. P. Licensing under the Surcharge Fee System Rules, 1968, have to be applied in the present case, if this Court finds the new Rules to be ultra vires the powers of the Excise Commissioner u/s 41 of the Act. The further contention of the learned Counsel is that the State Government is deemed to have made U. P. Licensing under the Surcharge Fee System Rules, 1968, under its powers u/s 40 of the Act and the U. P. Licensing under the Surcharge Fee System Rules cannot be superseded by any rules made by the sub-delegated authority, i.e., the Excise Commissioner, u/s 41 of the Act. According to Sri Misra, there is specific prohibition of delegation of rule making powers u/s 40 of the Act in favour of the Excise Commissioner as provided in Section 10 (2) of the Act.

36. Mr. Misra next contended that if the new rules are held to be ultra vires the powers of the Excise Commissioner, the Rules of 2001 are revived. As the Rules of 2001 also suffer from defect as pointed out in the new Rules and if this Court is inclined to declare them to be ultra vires, they can fall upon the U. P. Licensing under the Surcharge Fee System Rules, 1968, containing a provision for renewal of licences for retail sale of excisable articles, suo motu, by the Collector every year. In the event it is held that Rules of 2001 are not applicable, the U. P. Licensing under the Surcharge Fee System Rules, 1968, which provides for renewal of licence for retail sale of excisable articles-suo motu, shall automatically be applicable. In terms of the said provision, if the Collector decided that the conduct of the licensee has been suitable, he shall order renewal of the licence. If it is held by the Collector that the conduct of the existing licensee is unsuitable, he shall call upon such licensee to show cause within a specified period as to why his licence be not terminated and in doing so, shall inform him the reasons for believing the licensee to be unsuitable. Mr. Misra, therefore, urged that the Government has been fully empowered under Article 298(b) of the Constitution of India to carry on a trade or business by virtue of its executive power, subject to legislation by Parliament in the case of a trade or business with regard to which the State Legislature has no power to Legislate. It, therefore, follows that in the absence of law made by the Parliament, relating to Government organised lottery, any State may organize and conduct a lottery by virtue of its executive power to carry on a trade or

business. To fortify his submission, the learned Counsel drew our attention to a decision of the Apex Court in *H. Anraj and Others Vs. State of Maharashtra*, . According to Sri Misra, holding of lottery to settle the licences for retail sale of liquor is not illegal but the grant of licence to a person selected by lottery will be illegal unless the State Government by its executive power or rule making power lays down that selection of a person by lottery makes him the most eligible person for grant of an excise licence. Thus, submission of Mr. Misra, in the forefront, is that since there does not exist any such rule, the grant of licence on the basis of lottery is out and out illegal and arbitrary and it is not vouched by law.

37. On the question of *per incuriam* and *sub-silentio*, Mr. Misra contended that such principle shall not apply in the instant cases in view of the fact that Lucknow Bench has specifically recorded a finding that there is no challenge to the rule on the said question. The judgment rendered by the Lucknow Bench of this Court does not apply to the case of the writ Petitioners of Writ Petition No. 610 of 2002. In the said writ petition, direct challenge has been made to the U. P. Excise (Settlement of Licences for Retail Sale of Country Liquor) Rules, 2002 and prayer has been made for declaring the same to be *ultra vires* the powers of the Excise Commissioner u/s 41 of the Act. Mr. Misra, therefore, submitted that the Rules of 2002, have been framed on the lines of Rules of 2001. Thus, by implication, the Rules of 2001, are also bad on the same grounds. According to Mr. Misra, U. P. Excise (Settlement of Licences for Retail Sale of Foreign Liquor Excluding Beer and Wine) Rules, 2001, together with amended version for 2002 as well as the U. P. Excise (Settlement of Licences for Retail Sale of Beer), Rules, 2001, along with their amended version for 2002 fall on the same lines and, thus, all these rules are *ultra vires* the powers of the Excise Commissioner u/s 41 of the Act. Therefore, they have no sanctity in the eyes of law and, they have to be ignored. The Beer Rules of 2000, are also bad on the same grounds, though they are slightly different from the Rules of 2001. He referred to Section 36A of the Act as also the Rules providing for renewal. According to Mr. Misra, it is permissible to renew the licence on the basis of the said rules for which power has been expressly conferred on the State Government. A licence or permit for carrying on any trade or business is not a bounty but a specific right subject to reasonable restrictions under the Act. A licence holder has an ordinary right of renewal unless there are outweighing reasons of public interest leading to a contrary result as held by the Apex Court in *D. Nataraja Mudaliar Vs. The State Transport Authority, Madras*, (Para 8) and *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, . Sri Misra urged that even if the year of licence expired and the writ petition is pending, the writ petition does not become infructuous and right to renew continues as has been held in *Balbir Singh Kripal Singh v. State of U. P.* (1979) UPTC 120.

38. Mr. Misra, in the light of aforesaid submissions, vehemently urged that the Respondents have utterly failed to show that there was an outweighing reason of public interest to refuse renewal of the licenses of the writ Petitioners. According

to him, the laudable objects of ousting the liquor mafia by settling licences by lottery were not as successful as is being claimed. Persons with limited finances at their disposal suffered great disadvantage. The State exchequer has also suffered a tremendous loss. Most of the Petitioners have acquired experience of running excise shops and now they can compete with liquor mafias. Refusal to renew their licenses shall only strengthen the hands of liquor mafias who possess heavy finances at their disposal and are capable of managing to acquire as many licences as possible. With the network of licences in the neighbouring States, the liquor mafias are capable of ousting the new licensees who are raw hands in the field. In this behalf, the learned Counsel quoted the decisions in *Ahad Shah and Ors. v. The District Excise Officer, Gorakhpur and others*, 1982 EFR 3418 and *Raj Restaurant and Another Vs. Municipal Corporation of Delhi*, .

39. The Rules for the year 2000 to 2002 make provision for renewal of licences for the sale of beer, foreign liquor except beer and wine as well as country made liquor. As such, there is no reasonable basis for making the policy that the licences should not be renewed. Mr. Misra frankly admitted that there is no scope to claim renewal of licences, as a matter of right, under the U. P. Licensing under the Surcharge Fee System Rules, 1968.

40. To sum up the submissions of Mr. Misra, it appears that his main argument is that the Rules framed by the Excise Commissioner are inconsistent with the Rules framed by the State Government on the subject of period and duration, locality, the persons to whom licences may be granted and the procedure for grant of licence, and, in that view of the matter, the Rules framed by the Excise Commissioner cannot survive. His further submission is that the eligibility of a person to be granted licence as laid down by the State Government in Rule 381 (3) of Excise Manual, Volume I based on the U. P. Licence under the Surcharge Fee System Rules, 1968, does not include a person who is selected by lottery system and, therefore, the licences proposed to be granted under the new rules by the lottery system cannot be upheld. Thus, according to Mr. Misra, under these conditions, either the State Government may be directed to make new rules consistent with the provisions of the Act or fall upon the U. P. Licenses under the Surcharge Fee System Rules, 1968, to settle the licences afresh and, in the meantime, this Court may also direct to extend the period of licences for the period deemed reasonable during which the new rules may be framed by the State Government subject to the condition that the Petitioners have given their consent for extension of the period of licences or renewal thereof for the year 2002-03 on the terms and conditions prescribed by the State Government. Mr. Misra has also contended that the assignment made during vacation remains valid for the period of vacation only. The decision regarding assignment becomes final and jurisdiction on that ground cannot be challenged.

41. Mr. Rakesh Dwivedi, learned senior advocate, on behalf of the Respondent-State of U. P., urged that it is not necessary to answer the first question since Full Bench can adjudicate all the questions of law involved in the instant cases

and, therefore, the decision on question No. 1 would be academic. He, however, did not dispute that the Chief Justice has the sole prerogative to assign or determine the cases to be taken by the Hon'ble Judges and the assignment, if made, remains valid. According to Mr. Rakesh Dwivedi, since none of the parties have raised any dispute with regard to reference made to the larger Bench and the issues involved are of great importance, it is not, at all, necessary to go into the question as the Full Bench is competent to determine all the questions including the question that has been decided by the Division Bench. He urged that the question of per incuriam does not arise since many of the questions have been left open for determination. Since the question raised was not argued before the Division Bench, the Division Bench at Lucknow was absolutely right in leaving the matter open. According to Mr. Dwivedi, since there was neither any issue raised nor any argument made, yet there is abrupt observation about the aspect having not been raised, the observation is said to be sub-silentio. The judgment of the Lucknow Bench takes care not to decide the issue which has not been raised or with regard to which no arguments were advanced and, therefore, there is no observation, which can be said to be sub-silentio. Before the Lucknow Bench of this Court, no arguments were advanced to challenge the vires of Rules of 2002. It is also noted that the Rules of 2002, are not challenged on the ground that they remained unpublished on the date the licences were granted. It is also noted that the writ Petitioners do not challenge the grant of new licences and the new licensees have not been impleaded as parties. The only point argued before the Division Bench is that since the renewal of licence has not been considered, the action for fresh grant of licence would be invalid. Since the Petitioners only sought for renewal of licences which were granted under the Rules of 2002, the Bench only considered the said question, issue of validity of the new licence was left open. Mr. Dwivedi, urged that it is settled law that the Court should decide only that question which is pleaded and argued otherwise, the observation will be obiter. The matter for consideration before the Division Bench was with regard to Rule 5 of Country Liquor Rules of 2001 and Rule 5 of Foreign Liquor Rules of 2001 as well as Rule 6 of Beer Rules of 2001 pertaining to renewal of licences. Court also noted Section 36A of the Act. It rejected any right to renewal in view of the policy decision of the State. The Court proceeded to consider the question of renewal and rejected the same on the basis of the policy decision of the State to settle the liquor shops by fresh grant of licence. Mr. Dwivedi has submitted that the Lucknow Bench of this Court, in fact, applied its mind to all the relevant rules and was not oblivious of any rules and it held that any renewal claim under Rules of 2002, would be relevant for the licence granted under the said Rules. In such circumstances, Mr. Dwivedi urged that the judgment cannot be said to be per incuriam since there was no scope for consideration of the validity of the rules by the Division Bench. Mr. Dwivedi also urged that the aforesaid Division Bench judgment may be right or wrong, may be upheld or over-ruled by the larger Bench, but the same cannot be declared to be per incuriam. He supported this contention by placing implicit reliance on the decisions in *Municipal Corporation of Delhi Vs. Gurnam Kaur*, and *Union Carbide Corporation, etc., etc.*

Vs. Union of India, etc. etc., .

42. Mr. Dwivedi has further argued that the grievance, if at all, would be available to the writ Petitioners of those writ petitions who were before Lucknow Bench only and they can make or agitate their grievance before Hon''ble the Supreme Court in SLP under Article 136 of the Constitution of India and other Bench of this Court-be it a larger Bench cannot sit in judgment/appeal on the judgment dated 16.4.2002 passed by the Lucknow Bench on any ground, whatsoever, including proper assignment.

43. On the question 3 (a), Mr. Dwivedi, learned senior advocate contended that Section 41 of the Act empowers the Excise Commissioner to make Rules. The Rules have been made with previous sanction of the State Government. The procedures prescribed in Section 41 of the Act have been fully complied with and, therefore, the rules are perfectly valid. All the provisions of the rules are well within the scope of Section 41. According to Mr. Dwivedi, the question of breach of any fundamental right does not arise as trade in liquor is rest extra commercium and there is no fundamental right to trade in liquor. He fortified this submission by the decisions in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, ; State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., ; M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration and Others, and Panna Lal and Ors. v. State of Rajasthan and Ors. (1974) 2 SCC 633.

44. Mr. Dwivedi further contended that the publication of the rules in the Official Gazette of the State is sine qua non for giving effect to the Rules only and not for making of the Rule. According to him, "making of Rule" and "effect of Rule" are two different concepts. The rule is made and becomes valid when the sanction of State Government is obtained and the rule is finalized by the Excise Commissioner u/s 41 of the Act. But for having effect, it is to be published as per Section 77 of the Act. To fortify this submission, Mr. Rakesh Dwivedi, learned senior advocate placed implicit reliance on the decisions of Hon''ble Supreme Court in Y. Narayana Chetty and Anr. v. Income Tax Officer, Nellore and others, AIR 1959 SC 213 ; I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, ; Makeswar Nath v. Union of India and Ors. (Para 14), : 1971 (1) SCC 662; D. C. T. O. v. Sri Sukraj, AIR 1968 SC 67 ; University of Poona and Others Vs. Shankar Narhar Ageshe and Others, and State of Uttar Pradesh v. Kishori Lal Minocha, (1980) 3 SCC 8 . The learned senior advocate also drew our attention to pages 136 and 137 of the book-Francis Bennion "Statutory Interpretation" by Butterworths. Placing reliance on the decisions of Apex Court in Major G.S. Sodhi Vs. Union of India (UOI), (paragraph 24) and Union of India and Others Vs. M/s. Ganesh Das Bhojraj, (paragraphs 11, 16 and 18) he strenuously urged that there is a presumption of proper publication of Rules.

45. Mr. Dwivedi, learned senior advocate next contended that assuming that the Government orders publication of Notification dated 14.2.2002 on the said date

itself but the same was actually published on 3.4.2002, that would have no effect on the validity of the rules. The only question would be as to from which date the rules would take effect. While Rule 1 (ii) of the Rules of 2002 for country liquor expressly mentions that they shall come into force from the date of their publication in the Official Gazette, Rule (ii) of the Foreign Liquor (Third) Amendment Rules of 2002 and Beer (Second) Amendment Rules of 2002, clearly states that they shall come into force at once, meaning thereby, with immediate effect, i.e., with effect from 14th March 2002. Thus, in view of Section 77 of the Act, there can be no doubt that the Foreign Liquor and Beer Rules came into force with effect from 14.3.2002. In support of this contention, the learned senior advocate referred to the decisions in *The State of Madhya Pradesh and Others Vs. Tikamdas*, and *V. Balasubramaniam and Others Vs. Tamil Nadu Housing Board and Others*, (Vol. I, paragraphs 10 and 11) as also pages 154 to 158 of the book-Crawford on "Construction of Statutes (Reprint (1981) and Page 176 of the book-Francis Bennion "Statutory Interpretation" by Butterworths.

46. Mr. Rakesh Dwivedi painstakingly continued his argument and urged that there is vast distinction between "publication of Rules" and "operation of the Rules". It was suggested that once the notification itself mentions the said date to be the date of publication in the Official Gazette, as per order of the Governor, the actual publication by the Government Press on a later date would not be relevant. The Government Press is simply an executing agency and it cannot subvert the legislative exercise of framing of Rules under the legislative mandate by Section 41. Under Rule 55 of the Publication Rules, the publication in Extraordinary Gazette must take place on the same day. According to Mr. Dwivedi, some snag at the level of Government Press causing delay in issuance of the Notification shall not amount to any fraud on Rule Making Power. The pleasure of the Governor had been communicated to the Government Press well in time and, therefore, the legislative intent must prevail. The purpose of publication in the Official Gazette should also be kept in view. The purpose obviously is to inform the concerned persons about the legal position so that they may take notice of law and take such steps as they may deem fit to protect their interest. In the instant case, the Rules dated 14.3.2002, were published in several newspapers and all the writ Petitioners admittedly came to know of the said Rules. In fact, this Court, by order dated 21.3.2002, permitted the Excise Department to conduct draw of lots and declare result but execution of contract was restrained till 5.4.2002. It was pointed out that the advertisement is not in conflict with the Rules at all. It gives limited information and requires the applicants to collect detailed information from the office. It also refers to the communication of the Excise Commissioner. It is important that the writ Petitioners are all holders of existing licences and the averments made in the writ petitions itself show that they were fully conversant with the Rules of 2001 and 2002. All the writ petitions were instituted well before the lottery was drawn. Mr. Dwivedi urged that the advertisement must be read along with the communication of the Excise Commissioner and the Rules of 2002. They are

meant to compliment each other. The new rules that find mention in the order is also in the order dated 22.3.2002 and, therefore, not only the writ Petitioners were well aware of the rules but the draw of lots were conducted as per orders of this Court. The writ Petitioners cannot have any grievance for such non-publication of the Rules. Mr. Dwivedi dubbed the challenge based on delay in publication of Rules in the Official Gazette, on the facts and in the circumstances of the case, as hyper technical. He contended that the new licenses were issued on 2.4.2002 and they would, in any case, operate with effect from 3.4.2002 even if the said date is taken as the date of operation of Rules.

47. Mr. Dwivedi next contended that the actions taken on the basis of valid Rules before publication would remain valid once the Rules are notified in the Official Gazette, which is evident from Section 22 read with Section 4 (42B) General Classes Act, 1897). In support of this contention, he placed implicit reliance on the decision in University of Poona's case (supra) ; Bangalore Woollen Cotton and Bangalore Woollen, Cotton and Silk Mills Co. Ltd., Bangalore Vs. Corporation of the City of Bangalore, by its Commissioner, Bangalore City, (paragraph 4) ; The State of Rajasthan Vs. The Mewar Sugar Mills Ltd., Bhopalsagar, (paragraph 8) ; Jiyajirao Cotton Mills Ltd. Vs. Employees State Insurance Corporation, (paragraphs 8 and 9) and The Gram Panchayat and Others Vs. Government of Andhra Pradesh and Another, (paragraphs 7, 21, 29 and 30).

48. The further argument of Mr. Rakesh Dwivedi, learned senior advocate is that the State has exclusive privilege and right to manufacture and sell liquor. It has also exclusive privilege and right to sell the said right in order to augment its revenue. It is a normal incident of trading or business transaction to charge a price for this. In view of Sections 21, 24, 24A and 31 of the U. P. Excise Manual, 1910, the exclusive privilege is granted by means of a licence and this would guide and regulate the executive power of the State to carry on trade or business in liquor and to make contracts in that behalf. The learned senior advocate referred to Section 31 of the Act which provides for the form and conditions of licences. The fee restrictions, conditions, the form and particulars of licences are to be fixed by the Excise Commissioner and the period of licence is to be such as the State Government may direct. Section 31 of the Act does not necessarily envisage upon framing a rule under Sections 40 and 41 of the Act and it can be given effect to or be implemented by directions contained in the executive orders. Thus, even if there is delay in publication of the rules in the Official Gazette, the grant of licence and consequential execution of contracts in accordance with the Act and unpublished Rules would be valid and effective. According to Sri Dwivedi, grant of licence and contracts would be protected by Section 31 and Article 298 of the Constitution of India. He fortified this contention by relying on the decisions in M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another, ; Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, (paragraphs 15 and 18) ; State of Orissa and Others Vs. Harinarayan Jaiswal and Others, ; Lakhanlal and Others Vs. The State of Orissa and Others, ; Har Shankar and Others Vs. The Dy. Excise

and Taxation Commr. and Others, (Vol. IV) paragraphs 38, 54 to 59 and 63 to 65) and Doongaji and Co. Vs. State of Madhya Pradesh and others, .

49. Mr. Dwivedi, thereafter referred to Sections 24, 24A and 31 of the Act, containing the provisions for grant of exclusive privilege of manufacture etc. ; grant of exclusive or other privilege in respect of foreign liquor ; form and conditions of licences etc. Thus, prescription of conditions of licence has to be done by framing Rules u/s 41 of the Act. The framing of rules would be a proceeding taken before grant of licence. The crux of his submission, therefore, is that even if there is some irregularity or omission in such proceedings pertaining to enforcement of Rules, the same would not make the grant of licence invalid in view of Section 37 of the Act. The publication, at any rate, is only a procedural matter. In support of this submission, the learned senior advocate placed implicit reliance on the decisions rendered in I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, ; Bangalore Woollen Cotton and Silk Mills case (supra) (paragraphs 2, 3 and 4) ; R. V. Sheer Metalcraft Ltd. and Anr. 1954 (1) All ER 542 ; Bejgam Veeranna Venkata Narasimloo and Others Vs. State of A.P. and Others, (paragraphs 14 and 15) ; as well as on Page 370 of the book-"Maxwell on the Interpretation of Statutes".

50. On question No. 3, Mr. Dwivedi submitted that even if the previous rules are considered to be operative till 3.4.2002, there would be no material difference with regard to the entitlement of the writ Petitioners either to renewal of licences or grant of new licences. It would still be open to the State to grant its exclusive right or privilege of sale of liquor in such manner as it decides and as per policy adopted. It is open to the State to adopt a policy of granting fresh licences instead of granting renewal of licences to the existing licensees.

51. Regarding question No. 4, the argument advanced by Mr. Dwivedi is that on the factual premise, the writ Petitioners were not, at all, asked by the Excise Commissioner to fill up renewal forms or application for renewal or to make deposits. The writ Petitioners sought the renewal on their own. So far as the claim of renewal of licence is concerned, there is no basis or justification for the reasons: (i) Section 36A of the Act makes it clear that no licensee shall have any claim of renewal and, therefore, irrespective of operation of the Rules of 2002, the writ Petitioners have no right to renewal ; (ii) in the trade of liquor, the State has exclusive privileges as has been held in various decisions of Apex Court as well as this Court. For removal of doubts, Section 24B of the Act makes this position crystal clear ; and lastly, the writ Petitioners have no fundamental right to trade in liquor and so they cannot claim, as a matter of right, renewal of licence. Since there is no right to renewal of liquor licence and the State is not duty bound to renew the licence, under the provisions of law, no mandamus can be issued directing the Excise Commissioner to renew the licences. The learned senior advocate, supported this contention by the decisions of Apex Court in Chingleput Bottlers Vs. Majestic Bottling Company, (paragraphs 13 and 41) ;

State of U. P. and Anr. v. Raja Ram Jaiswal and another, (1983) 3 SCC 131 (paragraph 16) ; Mohd. Fida Karim and another Vs. State of Bihar and others, and Gajraj Singh etc. Vs. The State Transport Appellate Tribunal and others etc., .

52. According to Mr. Dwivedi, the only right of the writ Petitioners with regard to renewal of licence is fair treatment based on Article 14 of the Constitution of India. In this behalf, he referred to the decisions of Hon''ble Supreme Court in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, ; State of M.P. and Others Vs. Nandlal Jaiswal and Others, . The learned senior advocate also drew our attention to the law laid down by Apex Court in R. Vijayakumar and Others Vs. Commissioner of Excise and Others, , to the effect that the State has to follow a uniform and consistent policy. In the present case, in view of new excise policy, the State decided not to renew any licence and to seek applications for fresh grant of licence. Thus, there is no question of any discrimination and every existing licensee has been treated at par. The State Government has followed uniform and consistent policy and the writ Petitioners cannot assail the same on any ground whatsoever.

53. Mr. Dwivedi, assisted by Mr. Ashok Mehta, Chief Standing Counsel next submitted that all the applications have been made under the new Rules and have been given due consideration. Thus, it cannot be subject-matter of judicial proceeding. Though the new excise policy is going to fetch more revenue, in matters of liquor regulation, the increase or decrease of revenue is only one aspect to be kept in mind. More dominant factors are health of general public, elimination of mafias, supply of good liquor and ending decentralization of supply. It is for the Government to attach weight as it deems fit to the various factors and it must be given enough play to experiment. Both judicial deference and judicial restraint are relevant in this behalf. It is also to be presumed that the Government knows the interest of people and has acted constitutionally in framing and adopting its policy. The approach of skepticism is not sanctified by law of judicial review. According to Mr. Dwivedi, it is not the case of the writ Petitioners that there is infringement of Article 14 of the Constitution, in any manner, whatsoever. Moreover, in view of various decisions, such as, Ugar Sugar Works (supra) ; Punjab Communications Ltd. Vs. Union of India and Others, ; Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others, (paragraphs 14-16) ; State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., ; Premium Granites and Another Vs. State of Tamil Nadu and Others, (paragraphs 53, 54 and 56) ; Delhi Science Forum and others Vs. Union of India and another, ; M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, (paragraphs 52 and 59) ; Krishnan Kakkanth Vs. Government of Kerala and others, (paragraphs 32 and 36) ; Surjit Singh Vs. State of Punjab and Others, ; Bhavesh D. Parish and Others Vs. Union of India and Another, (paragraphs 23 and 26) ; BALCO Employees Union (Regd.) Vs. Union of India and Others, ; Ashok Kumar Vs. Union Territory, Chandigarh and another, ; Narmada Bachao Andolan Vs. Union of India and Others, , public policy adopted by the State is

beyond the judicial scrutiny.

54. According to Mr. Dwivedi, learned senior advocate, the State Government has duly considered the applications of renewal submitted by the various licensees pursuant to the direction, dated 23.3.2002, of this Court. Since the material aspects have been culled out and dealt with properly, there is no infirmity in passing a common order dated 25.3.2002. This is without prejudice to the submission that in view of the policy decision to invite applications for fresh grant of licence, it was not necessary for the State Government to consider the applications for renewal. To the submission made on behalf of the Petitioners to the effect that the State Government while disposing of the application for renewal in terms of the interim order of this Court has not applied its mind in deciding the applications for renewal of licence since the applications for renewal have been disposed of by common order, Mr. Dwivedi contended that the objection to passing of common order by itself does not reflect any non-application of mind on the part of the State Government. Where large number of representations for renewal were presented for consideration before the State Government, it is most natural and permissible to the State Government to decide those representations/applications by a common order as the grounds mentioned in the representations were common and they can be disposed of by a common order. The new excise year was to start with effect from 1.4.2002 and draw of lots was to take place on 23.6.2002. Dates were fixed for the hearing of the matters both at Allahabad and Lucknow Bench of this Court and as such, it was convenient and proper for the Government to decide the representations by a common order. In support of this contention, the learned senior advocate placed reliance on the decisions of the Apex Court in *Shivaji Atmaji Sawant Vs. State of Maharashtra and Others*, (paragraphs 3 and 7) ; *The Bihar School Examination Board Vs. Subhas Chandra Sinha and Others*, (paragraphs 11 and 13) and *Ashwani Kumar and others Vs. State of Bihar and others*, etc. etc., (paragraphs 28 to 32, 72 and 73). It was also urged that though the order was common in nature, it is recorded therein that all the applications were carefully examined and the different goods in the applications were collated. It is not the contention that any ground taken by the Petitioners has not been included and has been left out of consideration. It would, thus, follow that all the grounds taken in the various representations were noted and considered by the Government. Each point has been considered separately and no prejudice has been caused to any of the writ Petitioners. In fact, the representations were rejected in view of the new excise policy of 2002-03, wherein it was decided to settle the shops for retail sale of liquor by public lottery. The other ground for rejection of the renewal of licence is in view of Section 36A of the Act since the Rules do not provide that renewal must be done compulsorily. The other reason is that the arrangements and investments made by the licensee was for running the business under the licence for 2001-02 and that cannot be a basis for continuance of the licence by renewal. Another reason is that the plea of assurances was incorrect as neither the advertisement gives any assurance nor

the Government issued any order or notification extending any assurance of renewal of licence for 2002-03. Next reason is that the public lottery is inconsistent with the constitutional provisions and the mere submission of applications for renewal would not create any right of renewal and renewal would be subject to Excise Policy of the Government which has exclusive privilege. The grant of renewal on new condition is the exclusive privilege of the State. It is noted that new Excise Policy has introduced several changes in Excise Duty, Licence Fee and Licensing System. Therefore, the Excise shops are to be settled afresh. Since all the questions have been duly considered, it cannot be said that any action on the part of State Government suffers from any infirmity in disposing of the representations of the writ Petitioners by a common order. Mr. Dwivedi, therefore, submitted with all vehemence at his command that there is no scope to claim renewal on the basis of old terms as the rates of Excise Duty and License Fee would be wholly inconsistent with the new Excise Policy. It would also be detrimental to public interest and there remains no doubt about the well-settled position of law that sale of liquor is the exclusive privilege of the State. At the same time, if the old licensees desire renewal on the basis of the new terms and conditions and new rates of Excise Duty and Licence Fee, then it is actually a case of fresh grant of licence on fresh terms and conditions and the very concept of renewal would be inapplicable.

55. Mr. Dwivedi next contended that the right of renewal is dependent upon the decision of the State Government. Unless the State Government decides to go for renewal of licences and determines the terms and conditions for renewal, these Rules do not come into play at all. He further contended that in regard to three-fourth of the shops, the licences have already been granted afresh under the new Excise Policy and in regard to rest of the shops, new allottees are operating the shops on day to day basis in view of the order of this Court. Under the new Excise Policy, the revenue target is Rupees. 2696.33 crores. Three-fourth of the licensees have already deposited their basic licence fee and are continuing to deposit the monthly instalments of licence fee. Even if the Rules of 2002, are assumed to be operative on 3.4.2002, the issuance of mandamus, quashing fresh grant of licence would not nullify the new Rules of 2002 and the question of consideration of renewal applications under the old rules would not arise. The Excise Department will have to act under the new Rules of 2002, in any case. On the other hand, the quashing of the fresh grant of licenses would seriously hurt the revenue of the State with no gain to the writ Petitioners. The excise revenue is an important source of fund for the State and loss of excise revenue would aggravate the financial crisis. The settled law is that the Court would not issue a futile writ under Article 226 of the Constitution of India as held in *S. L. Kapoor v. Jagmohan and Ors.* (1980) 4 SCC 379 (paragraphs 24-26) and *Ashish Sharma and Others Vs. University of Delhi and Others*, (paragraph 3).

56. We have seriously considered the arguments advanced and the decisions cited before us by the learned Counsel for the parties. So far as the question No. 1 is concerned, it has not been actually disputed that the Chief Justice is master

of the roaster and all assignments and determinations made by the Chief Justice are binding. The Judges cannot suo motu take up matters in the absence of proper order of determination and once a matter is assigned before a single Bench or a Division Bench, the same is binding and there is no scope to override the determination to that effect. In this connection, reference may be had to paragraph 11 of a decision of the Apex Court in *State of Rajasthan Vs. Prakash Chand and Others*, and also Division Bench judgment of this Court in *Prof. Y. C. Simhadri, v. C. B. H. U. V. Deenbandhu Pathak*, 2001 (4) AWC 2698. In both the decisions, it was held that while on the judicial side, the Chief Justice of the High Court is only the first amongst the equals, the administrative control of the High Court vests in the Chief Justice of the High Court alone and it is the prerogative to distribute business of the High Court-both judicial and administrative. However, Mr. Dwivedi tried to raise a question to the effect that if the assignment made during vacation remains valid after vacation? He urged that such assignment was made in the instant case and was limited for the purpose of vacation and the said assignment automatically ceased after vacation. Thus, it was rightly placed before the Division Bench entrusted to take up such matters. Considering the facts and circumstances, it, however, appears to us that the Division Bench to which the matter was assigned, never released it from the list but only wanted some directions from the Chief Justice in view of the fact that the matter was pending adjudication before the Division Bench at Allahabad. In these circumstances, there was absolutely no scope for taking up such matters by the other Division Bench. Learned Counsel for the Respondent-State Government, however, appreciated the above view although he urged that the same really relates to matter of propriety and it is not a question of jurisdiction. According to learned Counsel, even assuming that the Division Bench at Lucknow, which has dismissed the writ petition, had no jurisdiction with regard to the matters assigned to the other Division Bench, there are large number of other writ petitions which were not assigned to other Division Bench presided over by Jagdish Bhalla, J., and as such, the decision in regard to those writ petitions which were not assigned and dismissed by a Division Bench presided over by Pradeep Kant, J., has the binding effect and there was no irregularity, at all, therein. Be that as it may, since it has also been submitted by the learned Counsel that all these matters which were decided by the Division Bench cannot have any binding effect on the Full Bench and it is open to the Full Bench to decide all the questions irrespective of any decision or finding recorded by the said Division Bench, any question in that context is mere academic. Although the learned Counsel for the parties have advanced their submissions at great length, they have also argued that since no dispute has been raised with regard to the validity of the order of reference dated 1.5.2002, the question No. 1 has become academic, in nature, and it is not necessary to decide the same.

57. Question No. 2 is, if the principles of per incuriam and sub-silentio have become applicable to the judgment rendered by the Division Bench of Lucknow Bench of this Court. The same is also not required to be considered at this stage

since this matter has already been referred to the larger Bench. However, we are of the view that the questions of per incuriam and sub-silentio do not at all apply to the questions involved in the instant case in view of the fact that the Division Bench of Lucknow Bench of this Court specifically left the various questions open and it is open to any other Division Bench to consider and decide the same.

58. A decision or judgment becomes per incuriam and sub-silentio when the Court due to oversight or inadvertence or ignorance fails to take into consideration any well-settled proposition of law, any decision or authority which is clearly applicable in that particular case. In this behalf, learned Counsel for the parties drew our attention to a number of decisions and we have given our anxious consideration to them. So far as the case on hand is concerned, suffice it so say that the Division Bench at Lucknow did not at all, overlook or fail to consider any principle of law or any decision which is applicable in the present case. On the contrary, the Division Bench at Lucknow was well aware of the well-settled principle. The Division Bench, however, considered it not necessary to decide in the light of the fact urged before the Bench and facts pleaded in the said writ petition. Therefore, the judgment of the Division Bench of the Lucknow Bench does not suffer from the vice of per incuriam and sub-silentio. We answer question No. 2 accordingly.

59. Now we come to question Nos. 3 (a) and 3 (b). It appears to us that the formulation of the Government policy and framing of rules took place after holding discussions and meetings. The last meeting took place on 11.3.2002. On that day, the Governor of Uttar Pradesh held a meeting with the Chief Secretary, Principal Secretary (Finance), Principal Secretary, Law, Principal Secretary, Excise and the Excise Commissioner with regard to excise policy for the year 2002-03. Matters were discussed in great detail. It may be noted that on 11.3.2002, under the President Rule, the Governor was Head of the State as there was no Council of Ministers at that time. On perusal of record, it appears that after such discussions, the Governor directed the senior officials to prepare a proposal and place the same for approval. On the same date, i.e., on 11.3.2002, the aforesaid officials again met in the office of the Chief Secretary and finalized the proposal for excise policy and placed it for Governor's approval. On the basis of such discussion, the option of granting renewal to the existing licensees for whole of the year was eliminated. Three options were considered. The first two alternatives were for renewal of existing licences for a period of one month either on new terms or on existing terms and the third one was for granting licence on the basis of new rules or public lottery. Having considered these three options, an unanimous decision was taken to settle the liquor shops by granting fresh licences on the basis of public lottery. This is recorded in the Minutes of Meeting dated 12.3.2002, prepared by the Principal Secretary, Finance. The file was then sent to the Principal Secretary, Finance and signified his approval on 13.3.2002. After fixing the target of rupees 2,696 crores on the same day, the file went to the Chief Secretary. In his note, the Chief Secretary recommended approval of third option for grant of fresh licences for settling liquor shops on the basis of

public lottery. The proposal so submitted by the Chief Secretary was approved by the Governor of Uttar Pradesh being the Head of the State. The above settlement of shops by granting fresh licence through public lottery has been marked by the Governor in the margin by horizontal line by letter "Ka" and the same has been approved by the Governor. After approval of the Governor, the Chief Secretary, U. P., again signed the office note on 14.3.2002 and the Principal Secretary, Excise put his signatures on 14.3.2002. The Joint Director not only communicated the approval of the new excise policy to the Excise Commissioner by letter dated 14.3.2002 but had also communicated the information of sanction of the Rules on 14.3.2002. On receiving such information, the Excise Commissioner forwarded two copies of each of the rules dealing with the Country Liquor, Beer and Foreign Liquor to the Director, Government Press, U. P. Allahabad. The Joint Director of Excise Department has also sent the letter to the Director, Government Press for publishing the Rules-both in Hindi and English. It is also submitted that since the draft Rules have also been sent by the Excise Commissioner to the Principal Secretary, Excise on 7.3.2002 and 9.3.2002, and the same having already been translated into Hindi and vetted by the Principal Secretary (Litigation), therefore, the sanction of the Rules has been approved on 14.3.2002 itself by the Principal Secretary, Excise immediately after receiving the approval of the Governor of the new excise policy. In these circumstances, it cannot be said that the Rules were not made by the State Government. In fact, pursuant to the policy of the State Government, Rules were prepared and sent to the Government Press for publication after having complied with all the formalities. Arguments advanced on behalf of some of the writ Petitioners by Mr. K. D. Misra and also by Mr. Arun Tandon that the Commissioner had no power to make such Rules do not apply to the instant case particularly, in view of the facts, as stated above, as regards the procedures followed for framing the Rules. It appears that the Rules were framed at the instance of the State Government and the Excise Commissioner having been directed by the State Government to frame Rules, after approval of the Governor to issue and publish such Rules, no question of lack of authority to frame the Rules does, at all, arise. The Rules, in our considered opinion, are legal and valid and there is no illegality at all.

60. In the case of Bangalore Woollen, Cotton and Silk Mills Co. Ltd., Bangalore Vs. Corporation of the City of Bangalore, by its Commissioner, Bangalore City, , the Supreme Court held that resolution imposing tax by Municipal Corporation since published in news papers and communicated to parties affected, mere failure to notify the final resolution of the imposition of the tax in the Government Gazette is not fatal to the legality of the imposition of tax as required by Section 98 (2) of the Act and is cured by Section 38 (1) (b) of the Act. The Supreme Court in the said case also observed that the resolution was published in news papers and was also communicated to those affected by it and thus it was well known. The failure to publish in the Government Gazette did not affect the merits of its imposition. The answer to question No. 2 referred therefore, is that the mere failure to notify the final resolution of the imposition

of the tax in the Government Gazette is not fatal to the legality of the imposition.

61. In the case of *Municipal Board, Sitapur Vs. Prayag Narain Saigal and Firm Moosaram Bhagwan Das*, , which was the case of levy of water tax, the Supreme Court held that since the local inhabitants did have the notice of the proposal and did indeed submit their objections, no prejudice is caused by not inviting fresh objections to the modified proposals. The Supreme Court also pointed out that the modified proposals raised the exemption limit and reduced the rate of tax and was thus in no way prejudicial to the inhabitants. With regard to other objections the Supreme Court observed that the special resolution did not require to be published in accordance with Section 94. Even if it is assumed that it required to be so published, the Court held, that the non-publication was a mere irregularity for the reason that the inhabitants had no right to file any objection to the special resolution. The Court also observed that the inhabitants had clear notice of the imposition of the tax from the notification published in the Official Gazette on 3.8.1957 and the defect of non-publication of special resolution in the manner prescribed by Section 94 was cured by Sub-section (3) of Section 135. It would be noticed immediately that the objection of non-publication pertained to the proposals and modified proposals to levy taxes and that requirement was held to be not mandatory. So far as the special resolution is concerned the Court held that it did not require to be published in the manner prescribed by Section 94. Even if it is required to be published, the Court held, the said defect of non-publication was cured by Sub-section (3) of Section 135 which provided that :

A notification of the imposition of a tax under Sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act.

62. In *Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur*, , which was a case of levy of water tax by Rampur Municipal Board under the provisions of the United Provinces Municipalities Act, 1916, the Supreme Court observed that in the manner required by Section 131 (3) read with Section 94 (3) of the Act the draft proposals were not published in the Hindi newspaper but were published in a local newspaper published in Urdu though the notification as published was in Hindi. The complaint did not pertain to the non-publication of the final notification levying taxes but only to the publication of draft proposals. The majority (Gajendragadkar, C.J., Wanchoo and Reghubar Dayal, JJ), held that Section 131 (3) read with Section 94 (3) consists of two parts, the first one providing that the proposals and the draft rules for a tax intended to be imposed should be published for the objections of the public, if any, and the second laying down that the publication must be in the manner prescribed in Section 94 (3). The majority held that having regard to the objection underlying the provision for publication, it must be held that while the first part is mandatory, the second part is not. In that case, it was held, the first part was complied with but that there was an irregularity in complying with the second part inasmuch as instead of publishing in a local newspaper published in Hindi, the proposals were published

in a local paper published in Urdu, though the publication itself was in Hindi language. It was also found that there was no regularly published local Hindi newspaper in Rampur. It was held that there was substantial compliance with Section 94 (3) in the circumstances of the case and further that Section 135 (3) which created a conclusive presumption that the tax had been imposed in accordance with the provisions of the Act, excludes any complaint of defect in procedure.

63. It may not be out of place to mention that in the instant case, sanction of the Governor was obtained on 14th March, 2002. For giving effect to the same, there is a presumption of proper publication of Rules. In this connection, we may take note of the decisions in *Major G.S. Sodhi Vs. Union of India (UOI)*, and *Union of India and Others Vs. M/s. Ganesh Das Bhojraj*, .

64. In the instant case, assuming that Governor ordered publication of Notification dated 14.3.2002 on the said date itself but the same was actually published on 3.4.2002, that would have no effect on the validity of the Rules. The only question would be from which date the Rules would take effect. While *Country Liquor Rules, 2002*, expressly mention in Rule 1 (ii) that they shall come into force from the date of their publication in the Gazette, the *Foreign Liquor 3rd Amendment Rules, 2002* and *Beer 2nd Amendment Rules, 2002*, clearly state in Rule 1 (ii) that they shall come into force at once. At once would mean immediately on the date, March 14, 2002. In view of Section 77, there can be no doubt that the *Foreign Liquor & Beer Rules* would come into force on 14.3.2002. In the case of *Major G. S. Sodhi (supra)*, it was held that the publication in the Official Gazette is presumed when a printed copy of the Gazette is produced. However, in the instant case, there is no dispute that the publication took place on 3rd April, 2002. No licence was granted prior to the publication in the Gazette. Only an advertisement was published. Advertisement being step towards grant of licence and being in conformity with the rules, therefore, there is no scope for challenge only on the ground of its non-publication. The decisions rendered in *State of U. P. v. Kishori Lal Minocha*, AIR 1980 SC 680 ; *Vijay Prakash Jaiswal v. State of U. P. and others*, 1984 UPTC 178 and *State of U. P. v. National Industrial Corporation (of the Supreme Court)* decided on 17.9.1996 cited by Mr. Bharatji Agrawal, learned senior advocate for the writ Petitioners do not apply to the facts of the instant case. That apart, taking into consideration the fact that the said Rules were notified in the Official Gazette of 3.4.2002 and as such, came into force on that date, the same cannot have any effect in view of the fact that no licence was, in fact, granted on the basis of advertisement for holding the lottery except that direction made in the interim order was carried out and licence was granted by way of interim arrangement. The fact that the State Government proceeded to hold lottery on 26.3.2002, is only step towards grant of licence but no licence was, in fact, issued on that basis and as such, there was no illegality even assuming that the Rules did not come into existence with effect from 26.3.2002. Both the questions 3 (a) and 3 (b) are answered accordingly.

65. So far as question No. 4 is concerned, that is, if the Petitioners are entitled to the renewal of licence, it is not disputed that the Petitioners do not have any fundamental right to trade or business in liquor, which is, in fact, the exclusive privilege of the State. In this behalf, Section 36A of the U. P. Excise Act is also very clear in that respect. Section 36A provides as follows :

36A. Bar to right of renewal and compensation.-No person to whom a licence has been granted under this Act shall have any claim to the renewal of such licence or any claim for compensation on the determination or non-renewal thereof.

66. The grant of licence being an exclusive privilege of the State, under the Rules, the State Government has been conferred power to renew the licence on such terms and conditions, as it deems fit and proper. A bare perusal of the provisions contained in the Rules makes it clear that the State Government has the privilege to deal with cases of licences. The Rules, in effect, have to be read in consonance with Section 36A. In our view, the Rules do not provide for any right on the Petitioners to claim renewal as a matter of right or course. If the State Government decides to renew the licences, in that event, it has to follow the Rules. The same, however, does not take away the power of the State Government to take a decision that no renewal of licences be granted for a particular year. That apart, irrespective of the fact as to from when the Rules of 2002, come into force, the same shall apply prospectively in regard to the applications for renewal, i.e., to say, for those who will obtain licence under the said Rules for this year and they shall be entitled to renewal in accordance with the Rules but those who have been granted licence under the earlier Rules and those who have already been granted renewal, (as is the case of most of the writ Petitioners), they cannot claim the benefit of renewal under the Rules of 2002, once the earlier Rules ceased to be operative. In the instant case, assuming that the Rules have come into force with effect from 3.4.2002, that does not confer any right on the Petitioners or others who are continuing on the basis of Rules of 2000 and 2001, to have further renewal on the basis of Rules of 2002. In that view of the matter, in our view, the writ Petitioners cannot claim any specific right of renewal and the writ petitions, on that ground alone, cannot succeed.

67. However, only in case of arbitrary action on the part of the State, while exercising its power to grant licence or refusal to renew in terms of the Rules by making discrimination under Article 14 of the Constitution of India, there is scope for interference against the State action. In the case on hand, it is fully established that the State Government has adopted uniform policy not to renew the licence. It has also not been alleged in the writ petitions that any person has been discriminated in the sense that there is renewal of one and non-renewal of another. In such circumstances, there is absolutely no scope for interference.

68. So far as the argument to the effect that the Petitioners are entitled to grant of renewal of licences on the basis of legitimate expectation as they had deposited the necessary amount, etc., is concerned, in view of the findings recorded by us, as contained in the body of this judgment, there is no scope of

applying the principle of legitimate expectation in the facts and circumstances of the instant case on account of the view we have taken on the question, it is not necessary to refer to and consider other contentions and decisions raised and cited by the parties. Many of the writ Petitioners participated in the lottery already held and as such, lottery held pursuant to order of this Court, need not be disturbed. However, in respect of further allotments, it will be open to the writ Petitioners also to participate and the selections should be made in accordance with the Rules of 2002.

69. In the result, the questions having been referred to us for consideration by the Division Bench, are answered in terms of the observations and answers contained in the foregoing paragraphs of this judgment. Accordingly, the writ petitions including the bunch of connected writ petitions stand dismissed with the aforesaid observations.

S. Rafat Alam, J.

I agree.

V. M. Sahai, J.

I agree.