

(1993) 06 KL CK 0063

In the High Court Of Kerala

Case No : O.P. No's. 4070, 4118, 4341, 4354, 4560 etc. of 1993 and W.A. No's. 535, 539, 540, 541, 542 etc. of 1993

G. Anandarajan

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 25-06-1993

Acts Referred:

Constitution of India, 1950 — Article 133, 134, 134A, 19, 19(1)

Foreign Liquor Rules — Rule 13

Kerala Abkari Act, 1077 — Section 12, 17, 18, 18A, 29

Kerala Abkari Shops (Disposal in Auction) Rules, 1974 — Rule 4, 6, 6(2)

Citation : (1993) 2 KLJ 165

Hon'ble Judges : M. Jagannadha Rao, C.J;K. Sreedharan, J

Bench : Division Bench

Advocate : K. Sudhakaran and A.N. Rajan Babu, for the Appellant; V.K. Beeran, A.A.G. II, for the Respondent

Final Decision : Dismissed

Judgement

K. Sreedharan, J.—Issue raised in these original petitions and writ appeals are the same. Therefore we propose to deal with all of them in this common judgment. We treat O.P. 4070/1993 as the main petition and refer to the documents as they are marked in that petition. The main prayer made therein is to quash the amendment brought to Rule 6(2) of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974, hereinafter referred to as "the Rules". Petitioners have also prayed for striking down Section 18A of the Abkari Act as ultra vires of the Constitution.

2. Petitioners in the various writ petitions moved interlocutory applications to direct Respondents, namely the State Government and the Officers of the Excise Department to refrain from enforcing the amendment brought to Rule 6(2) of the Rules. In those applications, interim orders were passed staying the operation of the amendment to Rule 6 of the Rules. Accordingly Respondents, namely State and the excise authorities, were directed to consider the applications put in by

the Petitioners for issue of licence to the various liquor shops without taking note of the amendment. These interim orders were challenged by the State in Writ Appeal 535/1993 and connected appeals. A Division Bench of this Court stayed the operation of the interim order till the final disposal of the writ appeals. Pending those appeals, all original petitions were referred to Division Bench. Thus the entire matter is now before us.

3. Short facts necessary for understanding the controversy in these matters are as follows (The allegations made by the Petitioner in O.P. 4070/1993 virtually represents all the contentions raised by other Petitioners as well. So, we refer to the facts narrated by the Petitioner in O.P. 4070/1993). Petitioner was conducting foreign liquor wholesale shop under foreign liquor 1 licence in T.C. No. 25/X/73 at Thampanoor in Thiruvananthapuram from 1974 onwards. First Respondent, the State amended the rules with effect from 1st April 1986. The amendment prohibited location of foreign liquor wholesale shops within certain distances from educational institution, temple, church, mosque, and burial ground. As far as the wholesale shops were concerned, the restriction regarding the location was introduced for the first time by the said amendment. Petitioner challenged the validity of that amendment before this Court in an original petition. By interim order, this Court directed Respondents to permit him to conduct the foreign liquor wholesale shop in the place where it was housed. During the currency of that order, Government amended the Rule adding a proviso to the effect that foreign liquor (retail) and foreign liquor (wholesale) shops shall be permitted to be located and licensed in the places where they were located in the previous abkari year. By this amendment, Government recognised the necessity to permit the existing shops to continue in their respective places irrespective of the provision contained in Rule 6(2) of the Rules. The amendment so brought out was being extended year after year till the Government deleted the proviso by G.O. (P) 29/93/TD, dated 4th March 1993. Consequently, no shop whether existed prior to 4th March 1993 or not, will be allowed to be located and licensed within the prohibited distance. Petitioners challenge this amendment of the Rules.

4. A detailed counter affidavit has been filed by a Joint Secretary to Government, Taxes Department. Averments made therein are as follows: Rule 6(2) was amended on grounds of public interest and expediency. It is not permissible to locate liquor shops around public places like temples, mosques, churches, educational institutions, burial grounds etc. Temples, churches, mosques etc. are places where people assemble. When people assemble, there are chances of increased consumption of liquor. Such consumption even by a small percentage of the total congregation, can lead to large scale consumption which can give rise to law and order problems. If shops are removed to a place away from these public places, it can result in reduction in consumption of liquor. This may be a step towards attainment of the broad mandate of Article 47 of the Constitution of India. When easy availability of liquor is avoided near a public place where large number of people collect, it will certainly lead to reduction in the consumption of liquor. Educational institutions are places where persons of the

younger generation of impressionable age assemble regularly. If liquor is available easily within a hand's reach, the chances of the young falling prey to the evil of addiction will be greater. If shops are removed to a reasonable distance away from educational institutions, the number of youngsters who will be tempted and drawn to consumption of liquor will be drastically reduced. If children are not exposed to liquor at the early ages chances of their becoming interested in consuming liquor will be reduced in geometric proportion. If the youngsters have to walk a considerable distance to reach liquor shop, disincentive will be larger. This is also a small step in the direction of implementation of the policy contained in Article 47 of the Constitution. The privilege of vending liquor in toddy, arrack and foreign liquor retail shops are sold in auction. The right of the auction purchaser to conduct shop, for 1993-94 crystallised only on 1st April 1993. Their rights must depend on the rules as it stood on 1st April 1993. After 1986 no new shop was allowed to be established within the prohibited distance. But the shops which existed earlier were allowed to function in the same premises, even though within the prohibited distance, by virtue of the policy decisions taken from time to time. The present policy decision was taken way back on 2nd September 1992, which was made known to the public by G.O. (Ms.) No. 152/92/TD, dated 28th September 1992. That policy was given wide publicity by the Public Relations Department. Before translating the policy decision into rules, Government appointed an Expert Committee, chaired by Sri C. Thomas. That Committee opined "it will not therefore be proper on our part to suggest any change in the present distance limits". The policy change and the Rules were announced in the auction hall before the commencement of the auction. Hence all those who took part in the auction sale were fully aware that they will not have the right to conduct shops within the prohibited distances. The distance requirement is a pure question of fact, decided by Government and it is not open to challenge under Article 226 of the Constitution.

5. Learned Counsel representing the Petitioners argued that State Government are not having any privilege to control the trade in liquor or intoxicants. Consequently Section 18A of the Abkari Act, which deals with grant of privilege on payment of rental, is illegal and has to be struck down. It is their further argument that even if Section 18A is valid, it does not lay down guidelines for the rule making authorities in framing, Rules for giving effect to the provisions of the section. Consequently the rules framed u/s 18A of the Act are to be struck down. Lastly it was contended that the amendment brought out by G.O. (P) 29/93/TD, dated 4th March 1993 to Rule 6(2)(b) should not in any way affect the continuance of the provisos as far as Rule 6(2)(a) is concerned. The Petitioners' further case is that there is no justification for directing foreign liquor 2 licences to be located beyond 400 metres from the educational institutions, temples, mosques, etc. while foreign liquor 1 and foreign liquor 3 licences are allowed to be located outside 200 metres from those institutions.

Whether Section 18A is invalid.

6. Section 18A of the Abkari Act is in the following terms:

18A. Grant of exclusive or other privilege of manufacture, etc., on payment of rentals: (1) It shall be lawful for the Government to grant to any person or persons, on such conditions and for such period as they deem fit the exclusive or other privilege-

(i) of manufacturing or supplying by wholesale; or

(ii) of selling by retail; or

(iii) of manufacturing or supplying by wholesale and selling by retail, any liquor or intoxicating drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other method as may be determined by the Government, from time to time, and may be collected to the exclusion of, or in addition, to the duty or tax leviable under Sections 17 and 18.

(2) No grantee of any privilege under Sub-section (1) shall exercise the same until he has received a licence in that behalf from the Commissioner.

(3) In such cases, if the Government shall by notification so direct, the provisions of Section 12 relating to toddy and toddy producing trees shall not apply.

This section proceeds as if the Government were parting with the privilege of manufacturing, supplying and selling of liquor or intoxicating drugs to various persons. According to counsel, Government are having no such privilege or exclusive right to deal in manufacture, supply or sale of liquor or intoxicating drugs. If that be the case, it is argued, the section cannot be sustained. In support of this argument, learned Counsel relied on the observations made by Oza, J. in the concurring judgment in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, . The Bench which dealt with the said case consists of seven Judges. Sabyasachi Mukharji, J. (as His Lordship then was) delivered the main judgment for himself and the other five Judges. In the judgment rendered by Mukharji, J. it was observed:

We are clearly of the opinion that in respect of industrial alcohol the states are not authorised to impose the impost they have purported to do.

Oza, J. in the concurring judgment observed:

There is nothing like privilege vested in any one of the functionaries of the State and in the background of this basic feature of our Constitution the doctrine of privilege is difficult to reconcile with, then if we examine this, privilege of trading in commodities injurious to health and dangerous to life in the context of Article 21 and Article 47 of the Constitution.

His Lordship went on to state:

In view of Articles 21 and 47 with all respects to the learned Judges who so far

accepted the privilege doctrine, it is not possible to accept any privilege of the State having the right to trade in goods obnoxious to health.

These observations made by Oza, J. was not dissented to by Mukharji, J. in the judgment rendered on behalf of himself and the other five Judges. Therefore, according to counsel, the statement of law made by Oza, J. in the concurring judgment must be treated as the decision of the Bench consisting of seven Judges. If this be the position, the State had no privilege in dealing with liquor or intoxicating drugs and consequently Section 18A has no legal or Constitutional support.

7. In *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, the only question that was considered by the Bench was whether intoxicating liquor in Entry 8 in List II is confined to potable liquor or includes all liquors. While dealing with this issue, Mukharji, J. referred to the decision of the Constitution Bench in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, and quoted with approval the following observation made therein:

There is no fundamental right to do trade or business in intoxicants. The State under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants its manufacture, storage, export, import, sale and possession.

His Lordship also quoted, with approval, the following passage from *Har Shankar's* case:

These unanimous decisions of five Constitutional Benches uniformly emphasised after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to the health and welfare of the public is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by themselves by all civilised communities.

Towards the close of the judgment, Mukharji, J. came to the following conclusion:

On an analysis of the aforesaid decisions and practice, we are clearly of the opinion that in respect of industrial alcohol the States are not authorised to impose the impost they have purported to do. In that view of the matter, the contentions of the Petitioners must succeed and such impositions and imposts must go as being invalid in law so far as industrial alcohol is concerned. We make it clear that this will not affect any impost so far as potable alcohol as commonly understood is concerned. It will also not affect any imposition of levy on industrial alcohol fee where there are circumstances to establish that there was quid pro quo for the fee sought to be imposed. This will not affect any regulating measure as such.

(emphasis added)

Thus it is abundantly clear that the majority judgment dealt with the State's power to impose restrictions on industrial alcohol. Their Lordships were not dealing With potable alcohol with which we are concerned in these matters. It was under these circumstances that Oza, J. made the observations quoted earlier. What can be the effect of those observations?

8. Article 21 of the Constitution cast a duty on the State to protect the life of every citizen except as is provided thereunder. According to Oza, J. if one compares this duty of the State with the theory of privilege to deal in intoxicating liquor, it may mean that the State has got a privilege to endanger human life by giving the right to manufacture, store and sell liquor to private persons in auction. The State, which has got a duty to raise the level of nutrition and the standard of living and to improve public health should, according to the learned Judge, not resort to the practice of selling this privilege to the public. If such a procedure is allowed to be continued by the State, it is stated that it will certainly go against the mandate of Articles 21 and 47 of the Constitution. It was in this perspective, the learned Judge made the earlier quoted observations. This is clear from His Lordship's observation:

It sounds contradictory for a State which is duty bound to protect human life, which is duty bound to improve public health and for that purpose is expected to move towards prohibition claims that it has the privilege of manufacture and sale of alcoholic beverages which are expected to be dangerous to human life and injurious to human health, transferring this privilege of selling this privilege on consideration to earn huge revenue without thinking that this trade in liquor ultimately results in degradation of human life even endangering human life and is nothing but moving contrary to the duty cast under Articles 21 and 47 and ideal of prohibition enshrined in Article 47.

According to us, the learned Judge was criticising the action of the Government which was duty bound to bring about prohibition in auctioning out the right to manufacture, store and sell liquor to the public, under the cover of its absolute privilege. Viewed in this light, we do not find anything in the concurring judgment of Oza, J. which goes to dilute the principle of the "State privilege" in relation to liquor and intoxicating drugs.

9. Since lengthy arguments spread over days were advanced on the effect of the earlier quoted observations made by Oza, J, in the concurring judgment, we shall deal with the same herein below. According to the learned Counsel, the statement made by Oza, J. that it is not possible to accept any privilege of the State having the right to trade in goods obnoxious to health, must be treated as the law laid down by Bench of seven Judges in Synthetics and Chemicals Ltd. Consequently, the earlier decisions of Constitution Benches and Division Benches taking the view that the State has the right to prohibit absolutely every form of activity in relation to intoxicant must be deemed to have been overruled. The argument proceeded on the basis that the said observation made by Oza, J. in the concurring judgment must be deemed to have been concurred to by the

other six learned Judges. In support of this argument, counsel relied on the following observation from *Guardians of Poor v. Guardians of Poors* 1889 (24) Q.B.D. 117.

We know that each of them (Judges constituting the Bench) considers the matter separately, and then they consider the matter jointly, interchanging their judgment, so that everyone of them has seen the judgments of Ors. . If they mean to differ in their view, they say so openly when they come to deliver their judgments and if they do not do this, it must be taken that each of them agrees with the judgments of the Ors. .

The following passage from *Overseers of Manchester v. Guardians of Ormskirk Union* 1890 (24) Q.B.D. 678 was also pressed into service:

Where in the House of Lords one of the learned Lords gives an elaborate explanation of the meaning of a statute, and some of the other learned Lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it.

On the basis of these pronouncements, it was argued that the seven Judge Bench while rendering the judgment in *Synthetic and Chemicals Limited* must be deemed to have exploded the theory of the privilege of the State to trade in goods obnoxious to health. We are not impressed with this argument. In support of this, we rely on the decision in *John Martin Vs. State of West Bengal*, In *John Martin's* case a Bench of three Judges had to consider whether a representation made by the detenu detained under the Maintenance of Internal Security Act is to be dealt with by the State Government or by an independent body. In the decision in *A.K. Gopalan Vs. The State of Madras*, two learned Judges, out of the six constituting the Bench, in their separate judgments took the view that the detenu's representation must be considered by an impartial person or persons. *Fazl Ali, J.* in the separate judgment observed:

The right to make a representation which has been granted under the Constitution must carry with it the right to the representation being properly considered by an impartial person or persons.

Mahajan, J. in the separate judgment rendered by His Lordship also stated:

The right has been conferred to enable the detained person to prove his innocence and to secure justice, and no justice can be said to be secured unless the representation is considered by some impartial person.

Based on these observations of the two learned Judges, who rendered separate judgments in *A.K. Gopalan's* case decided by the Constitution Bench consisting of six Judges, it was argued before the three Judge Bench that the representation should have been considered by an independent person or persons. If the observations made by *Fazl Ali, J.* and *Mahajan, J.* were taken as the decision rendered by the Constitution Bench, the three Judge Bench in *John Martin Vs. State of West Bengal*, could not have taken a different view in But the

three Judge Bench took the view that these observations made by two out of six learned Judges can never be regarded as law laid down by the Constitution Bench in A.K. Gopalan's case. In view of this legal position, we do not think that learned Counsel are justified in making the submission that the observation made by Oza, J. in his concurring judgment should be treated as decision rendered by the seven Judge Bench in Synthetics and Chemicals Ltd's. case having the effect of unsettling the law laid down by earlier Constitution Benches. One or two sentences from the judgment of Oza, J. are not to be culled out, out of context, and to be read to attribute meanings which the learned Judge did not intend.

10. Another argument advanced by the learned Counsel representing the Petitioners was that there are two conflicting decisions rendered by Constitution Bench, each consisting of five Judges, concerning the right to deal in liquor. In the decision in Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others, Subba Rao, C.J. speaking on behalf of a Constitution Bench of five Judges stated that "dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make law imposing reasonable restriction on the said right, in public interest." A contrary view was taken by Anr. Constitution Bench of five Judges in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, where it was observed that there is no fundamental right to do trade or business in intoxicants and that the State has the right to prohibit absolutely every form of activity in relation to intoxicants. In view of this conflicting decisions rendered by Benches of co-equal jurisdiction, it was contended that the issue must be taken as *res integra* and this Court is entitled to examine, which view is reasonable or more reasonable to be preferred and followed. In support of this contention, reliance was placed on Indo Swiss Time Limited Vs. Umrao and Others, , Amar Singh Yadav and Another Vs. Shanti Devi and Others, and Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others, Special Bench. This argument of counsel, we are afraid is not germane for this case. Constitution Bench in Har Shankar's case dealt with all earlier decisions rendered by the Supreme Court on intoxicants, including those of five Constitution Benches. Thereupon Their Lordships came to the conclusion that the citizen has no fundamental right to do trade or business in intoxicants. The conclusion arrived at by the Bench is:

The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants-its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants.

Thereafter the decision in Krishan Kumar Narula's case was considered by the Constitution Bench in Har Shankar's case and observed:

It is significant that the judgment in Krishan Kumar Narula's case does not negate the right of the State to prohibit absolutely all forms of activities in

relation to intoxicants. The wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants on such terms of general application as the State deems expedient.

Thus it is abundantly clear that the Constitution Bench in *Har Shankar's* case recognised the absolute privilege of the Government in regard to intoxicants and held that it was open to the State to part with those rights for consideration. The privilege theory has been followed in subsequent decisions of the Supreme Court, like *Lakhanlal and Others Vs. The State of Orissa and Others*, , *P.N. Kaushal and Others Vs. Union of India (UOI) and Others*, , *Government of Andhra Pradesh Vs. Anabeshahi Wine and Distilleries Pvt. Ltd.*, and *Doongaji and Co. Vs. State of Madhya Pradesh and others*, The majority decision of six Judges in *Synthetics and Chemicals* also support the State's privilege over potable alcohol. In the light of these decisions of the Supreme Court, it is too late in the day for the Petitioners to contend that the State has no privilege in the manufacture, storage or sale of liquor and intoxicating drugs. Section 18A of the Abkari Act is based on the privilege theory. This theory has been judicially recognised. Consequently we find no vice in the said section.

11. Section 17(3) of the East Bengal and Assam Excise Act is in the following terms:

Notwithstanding anything contained in Sub-section (1) and (2), the State Government may, by notification prohibit the possession by any person or class of persons either throughout the whole of the territories to which this Act applies or in any local area comprised therein, of any intoxicant, either, absolutely or subject to such conditions, as it may prescribe.

The validity of this provision was challenged on the ground that it gives uncontrolled, naked and arbitrary powers to the State Government. It was also contended that the power under the section is capable of being used in a discriminatory manner, and that it lays down no principle for the guidance of the Government in issuing the notification. A bench of the Assam High Court in *Balbir Singh v. The State* AIR 1958 Gau 177 negatived all these contentions on the ground that any restriction on the use and possession of liquor can be considered to be reasonable. Pernicious nature of the subject dealt with by the Act justifies conferment of wide powers on the Government. The Court took the view:

If the Government in exercise of that discretion selects some persons or places for application of the statute, it cannot be said that the power of the Government is naked and uncontrolled.

We are in respectful agreement with this view taken by the Assam High Court. The guiding principles which control the powers of the Government are discernible from the object and purpose of the Abkari Act and the duties cast on the State under Articles 21 and 47 of the Constitution. So, by no means can it be held that the Government are given uncontrolled or naked power to make Rules and that legislature has delegated essential legislative functions to Government.

12. Provision similar to Section 18A is contained in almost all Acts in the other States in India. Such provisions came up for consideration before the Supreme Court in many cases. No attempt was ever made before the Supreme Court to challenge the validity of such provisions. The fact that constitutionality of those provisions were not challenged before the Supreme Court was a factor which was noted by a Division Bench of the Orissa High Court in *Shiva Prasad Saha v. State of Orissa* ILR 1971 Cutt 171, for negating the attack against that provision. In that case Section 22 of the Orissa Act was under challenge. Their Lordships upheld its validity and constitutionality.

13. Only by virtue of the provision contained in Section 18A can the State part with its privilege of manufacture, supply or sale of liquor and intoxicating drugs to any person. If such power is not in the State, no person could claim the right to traffic in liquor. So, dehors Section 18A, no one can claim any privilege. Similarly without the legislative sanction of Section 18A the State cannot part with its privilege either. The attack made by the Petitioners against Section 18A will lead to a situation like cutting the branch of the tree on which they are sitting.

Whether Section 18A is bad for excessive delegation of legislative power.

14. Yet Anr. argument advanced by the learned Counsel representing the Petitioners was that Section 18A has not laid, down any guideline for the rule making authority to frame rules thereunder. The rules are made by the Government invoking the powers conferred by Section 18A and Section 29 of the Abkari Act. Since no guidelines are laid down by the legislature, rules framed thereunder should, according to counsel, be struck down.

15. A reading of Section 18A shows that the Government may grant privileges to any person or persons on such conditions as they deem fit. This grant can be within any local area. The local area within which the privilege is to be exercised by the grantee can also be fixed by the Government. The legislature has thus given permission to the rule making authority to fix the local area in which the grantee has to exercise the privilege acquired by him. In this view, it cannot be held that the rule making authority has not been authorised to fix the local area where the licensee is to carry out his business. The location of the shop can also be prescribed by the State. Under the Act, the rules are to be made by the Government. It means that the cabinet has to approve the rules. The cabinet is the head of the executive of the State. The rule making power is thus given to the highest executive authority. That authority should be presumed to act in the interest of the public. It is not possible for a legislature to envisage in detail every possibility and make provisions for them. So, the legislature is forced to leave the rule making authorities ample discretions; of course the guidelines being provided in the Act itself. So long as the legislature indicates the subjects on which the delegate authority can frame rules, we find no vice in such delegation. Delegation of legislative power has been upheld by the Supreme Court on several varied and diversified grounds because Their Lordships have realised the incapacity of the legislature to foresee all future events. The nature

of the subject matter of legislation also plays a vital role in examining whether the legislature has delegated excessive power to the authorities. In the instant case, the subject matter of legislation is liquor and intoxicating drug, over which the State is having absolute privilege. On a subject of this nature, it cannot be held that the rules made u/s 18A are invalid on account of excessive delegation. In these circumstances, we do not find any vice in Section 18A of the Abkari Act or in the rules framed thereunder.

What are the effects of the amendment brought out to Rule 6(2) of the rules.

16. By G.O. (P) 29/93/TD, dated 4th March 1993 the second and third provisos to Rule 6(2) have been deleted. The amendment brought about by the said G.O., which was published in S.R.O. 353/93 reads:

In Rule 6,-

- (a) in Sub-rule (2)(b), the second and third provisos shall be omitted;
- (b) to the note under the fourth proviso, the following words "and the same will be measured from gate to gate" shall be added.

According to counsel, the deletion of the second and third provisos can affect only to Sub-rule (2)(b) of Rule 6 and not to Sub-rule (2)(a) of Rule 6. For understanding this argument we read. the unamended Rule 6(2):

(2)(a) No toddy, arrack or foreign liquor shop, shall be located outside the limits notified in the gazette under Rule 4, but with the previous sanction of Assistant Excise Commissioner it may be removed from one place to Anr. within such limits. But no toddy, arrack or foreign liquor retail shop shall be located in, or removed to, a place-

- (i) within an area declared as a project area; or
- (ii) within 400 meters from an educational institution, temple, church, mosque or burial ground, or
- (iii) within harijan colonies and tribal colonies.

(b) No foreign liquor 1 shop shall be located in, or removed to, a place within 200 metres from an educational institution, temple, church, mosque or burial ground:

Provided that the Excise Commissioner may, for sufficient reasons to be recorded and subject to such conditions as he may deem necessary, to impose order to remove from any place, any toddy shop, arrack shop retail fpreign liquor shop or any toddy parlour to a place outside the limits specified in Sub-clauses (i), (ii) or (iii) of Clause (a) and (b):

Provided further that the toddy shop, arrack shop and foreign liquor retail shop shall be permitted to be located and licensed in such places where they were located and licensed in the abkari year 1991-92 as a toddy shop, an arrack shop or foreign liquor retail shop respectively. In the event of complaints, the Excise

Commissioner shall cause due enquiries and for sufficient reasons to be recorded, order the shifting or closure of such shops:

Provided further that such wholesale shops which were in existence in 1987-88 and converted into retail shops during 1989-90 shall be given licence to continue as retail shops in the same premises as in 1987-88, if such premises comes within the notified area of that shop:

Provided further that if any educational institution, temple, church, mosque or burial ground comes into existence subsequent to the grant of licence, it shall not disentitle such shops for continuance;

Note: In calculating distance the basis will be shortest pathway/ lane/street/road generally used by the public.

According to counsel, notification dated 4th March 1993 can have effect only on Sub-rule (2)(b) of Rule 6 and not to Sub-rule (2)(a). The above quoted four provisos are to Rule 6(2). Those provisos cannot be treated as provisos to Rule 6(2)(b). It is common case that the second proviso has reference only to Rule 6(2)(a). It has nothing to do with Rule 6(2)(b). So also it is the case of parties that the third proviso has application only to Rule 6(2)(b) and has no relevance as far as Rule 6(2)(a) is concerned. In such a situation, when it is said that second and third provisos are deleted, it cannot be in relation to Section 6(2)(b) only. Viewed in this light, there is a mistake in the notification. This mistake, according to counsel, is not to be rectified by the Court. Unless the Government makes a proper rule, it is argued that second and third provisos must be deemed to be in force in so far as Rule 6(2)(a) is concerned. We are not impressed with this argument. As stated earlier, the four provisos are not provisos to Rule 6(2)(b). They are the provisos to Rule 6(2). When the second and third provisos are deleted, that must affect both Rule 6(2)(a) and Rule 6(2)(b); otherwise it will lead to absurdity. As a result of this amendment, no toddy, arrack or foreign liquor retail shop shall be located in a project area or within 400 meters from an educational institution, temple, church, mosque or burial ground or within harijan and tribal colonies.

17. An argument advanced by the learned Counsel representing the Petitioners is that foreign liquor 2 licence, as per the amended rule, can be located only beyond 400 meters from educational institutions, temples, churches, etc. In the case of foreign liquor 1 and foreign liquor 3 licences are concerned, they are allowed to be located beyond 200 meters from those institutions. This differentiation is unwarranted and has no justification. Foreign liquor 1 licences are in relation to foreign liquor wholesale depots. Foreign liquor 2 are foreign liquor, retail depots. Foreign liquor 3 relates to hotel (restaurant) licences known as "Bar Licence." While foreign liquor 1 and 3 are allowed to be located beyond 200 meters from the abovementioned institutions, foreign liquor 2 are to be located beyond 400 meters. According to counsel, there is no justification for this differential treatment.

18. Foreign liquor 2 retail licences are of two categories. The privilege of vending foreign liquor under this licence may be with or without the privilege of consumption on the premises. On payment of a sum of Rs. 50,000 in a lump in an year, a foreign liquor 2 licensee will get the privilege of vending liquor with privilege of consumption on the premises. Those who do not pay the additional rental of Rs. 50,000 will have to sell it in sealed bottles. Such licensees carry on business similar to foreign liquor 1 licensee. Those who have got the privilege of consumption on the premises is transacting business, it is alleged, similar to the foreign liquor 3 licensee who run the restaurant or bar. So it is argued that if foreign liquor 1 and foreign liquor 3 can be located beyond 200 metres, foreign liquor 2 licensees should also be allowed to be located beyond 200 meters. This argument cannot be countenanced. Foreign liquor 1 licence is granted only to Kerala Beverages Corporation. The outlets of the corporation are manned by the employees of the corporation. They are selling the foreign liquor in sealed bottles. The bottles are not opened there for loose sale for consumption on the premises. Since those shops are manned by employees of the corporation, they are not interested in resorting to underhand dealing for augmenting the sales. Foreign liquor 2 licences are given in auction to the highest bidders. They are interested in making profits. So, even those who have not paid additional rental of Rs. 50,000 may be resorting to methods to increase their turnover. It may be a Herculean task for the excise officials to prevent such dealings. In the case of those foreign liquor 2 licensees, who have paid the additional rental of Rs. 50,000, they are not to invest much for allowing customers to consume liquor on the premises. A hotel (restaurant) licensee, who gets foreign liquor 3 licence, has not only to pay a rental of rupees four lakhs per year, but must conform to the standard, of a two star hotel and the provisions contained in Clause (3) of Rule 13 of Foreign Liquor Rules. Such a licensee must incur a huge investment to have such a hotel for getting foreign liquor 3 licence. It is therefore clear that a foreign liquor 2 licensee, who has not paid the additional rental of Rs. 50,000, cannot be treated on the same footing as a foreign liquor 1 licensee. So also a foreign liquor 2 licensee who has purchased the additional privilege on payment of Rs. 50,000 with the privilege of consumption on the premises cannot be treated on a par with a foreign liquor 3 licensee. Government in its wisdom has treated them on different footing. This Court, in exercise of its jurisdiction under Article 226 of the Constitution, is not to substitute its views for that of the Government. At this juncture, it is worthwhile to quote the following observation made by the Supreme Court in *Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others*, .

The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and

the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution.

19. It was then contended that the premises in which foreign liquor 2 licensees carried on their business prior to the amendment of 4th March 1993 should have been allowed to exist as liquor shops even thereafter. This argument is based on the ground that when the distance rule was introduced in 1986 the shops then existed were allowed to continue in the same premises. That privilege was being recognised till the abkari year 1992-93. Therefore that privilege should not have been interfered with. The Government have now taken a policy decision to locate foreign liquor 2 shops, toddy shops and arrack shops beyond 400 metres from the educational institutions, temples, churches etc. According to them, if they are so removed, it will prevent the students from having easy access to those liquor shops and the people who gather the places of worship will be, away from liquor. This, according to the Government, is a small step towards the attainment of goal envisaged by Article 47 of the Constitution. When such a decision is taken by the Government should this Court step in and say that the decision of Government is arbitrary and liquor shops are to be located near the educational institutions and the places of worship? The answer, we are clear in our mind, can only be in the negative. On the ground that during the previous year Petitioners were allowed to carry on their business within the area prohibited by the rules as it now stand, they cannot have any right to compel the licensing authorities to grant licence to conduct the trade in the same premises. Petitioners cannot be allowed to contend that what was previously permitted should be permitted to continue in future also in spite of the change in the policy.

20. Lastly it was contended that in spite of the amendment brought out to Rule 6(2) of the Rules Government by letter No. 8892/A2/93/TD., dated 30th March 1993 informed the Excise Commissioner that the rule will not apply to beer parlours and pub beer parlours conducted by the Tourism Development Corporation. This, according to the Petitioners, shows that the State Government are not having a firm policy regarding the location of the shops. Learned Additional Advocate General has placed before us letter No. 14634/A2/93/TD., dated 15th June 1993 by which the earlier letter dated 30th March 1993 has been cancelled. Since the earlier letter stands cancelled, we do not find any ground to interfere with the decision of the Government to prevent establishment of liquor outlets near the educational and religious institutions as provided in Rule 6(2) of the rules as amended by G.O. (P) 29/93/TD., dated 4th March 1993.

21. Original Petitions fail. They are accordingly dismissed. Consequently the Writ Appeals are also dismissed.

Jagannadha Rao, C.J. (Concurring):

22. I am in entire agreement with the reasoning and conclusions arrived at by my learned brother. However, I wish to add a few words in regard to the contention based on the separate judgment of Oza, J. in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, .

23. In my opinion, the observations of Oza, J. in the above case are not on the same lines as those of Subba Rao, C.J. in *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, . Nor do the observations of Oza, J. run contrary to what the majority stated in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, or that the Constitution Bench said in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, .

24. Subba Rao, C.J. in *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, , observed that there is a right to do business in potable alcohol and could be subject of reasonable restrictions by the State. In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , it was held that (i) the said observations fell short of describing the right as a fundamental right under Article 19 of the Constitution of India; (ii) the said observations, if intended to lay down that there was a fundamental right, were contrary to five judgments of the Constitution Benches of the Supreme Court; and (iii) the observations were not necessary for the purpose of the decision in *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*,

25. In *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, , the majority held that the decisions in earlier cases regarding the privilege of the State in regard to liquor trade did not come in the way of industrial alcohol. When we come to the judgment of Oza, J. His Lordship nowhere expressed that he was accepting the view of Subba Rao, C.J. in *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, Far from it, I would say that His Lordship has taken the view that in the context of Article 47 of the directive principles of the Constitution requiring prohibition to be imposed and also in the context of Article 21 which requires the State to protect life and liberty, the State cannot be given any absolute privilege which, at some stage may even allow the State to make liquor business free of licensing and controls. Obviously, His Lordship, Oza, J. wants the State to go ahead with Article 47 and ultimately impose prohibition and then the privilege of the State in regard to liquor trade, would come to a natural end.

26. Therefore, it cannot be said that after Subba Rao, C.J.'s views in *Krishna Kumar Narula*'s case in 1967, Oza, J. expressed a similar view. On the other hand, in my view, Oza, J. wants the total annihilation of the privilege of the State for the purpose of Article 47 leading ultimately to total prohibition. Therefore, there is no substance in the contention that Oza, J.'s view is similar to that of

Subba Rao, C.J., that Subba Rao, C.J. laid down that the right to trade in liquor is a fundamental right and that all the other Judges in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, must be "deemed" by a fiction to agree with Oza, J. purporting to lay down that the right to trade in liquor is a fundamental right. The whole submission is based on a wrong reading of the judgment of Oza, J. and a wrong understanding of *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, if I may say so, With great respect to the elaborate submissions based on the judgment of Oza, J.

I agree with the reasoning and conclusions of Sreedharan, J.

M. Jagannadha Rao, C.J.—In these writ petitions and writ appeals an oral application has been made by the learned Counsel under Article 133A(b) of the Constitution of India seeking certificate for leave to file appeal before the Supreme Court and for stay. The same parties have also filed independent C.M.Ps. seeking time to shift the shops beyond 400 metres from educational institutions etc. This order which we are now passing is in the oral applications and also the other petitions filed by the parties.

2. The issue in the case is whether, when the Government has introduced a policy with effect from 1st April 1993 that certain kinds of liquor shops should not be located within 400 metres from educational institutions, religious institutions, etc., under the relevant rules, this Court should interdict the same and quash the said policy and permit these shops to be run within the prohibited distance from the schools, religious institutions etc.

3. In the elaborate judgment delivered by us today, we have held that this Court cannot strike down the said policy of the Government as reflected in the rules not only in the context of the provisions in the Act as to privilege of Government contained in Section 18A of the Kerala Abkari Act, but also in the context of Article 47 of the Constitution of India. We have held that there is no fundamental right to carry on business in liquor. Even otherwise, the restriction as to 400 metres distance from schools, religious institutions etc., would be reasonable.

4. It is contended by the learned Counsel for the parties that the question involved is as to the existence of a fundamental right to carry on business in liquor, that the said question is an important matter of public importance and therefore certificate must be granted under Article 134A. Learned Counsel placed reliance on an order of reference dated 9th January 1992 made by the Supreme Court of India in C.A. 4708-12/89 *Mis Khoday Distilleries Ltd. v. State of Karnataka*. It is pointed out that the question whether right to carry on business in liquor is a fundamental right or not is yet to be resolved by a Constitution Bench of five judges and that, the said question is not decided authoritatively. It is also argued that if the parties have to search for new location for their shops beyond 400 metres from the schools and religious institutions, etc., the Court should grant time.

5. We are unable to accept any of these submissions. We have pointed out in our

judgment delivered today that the Constitution Bench of the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, considered the matter elaborately and stated that earlier five Constitution Benches had clearly taken the same view. It was there held that there is no fundamental right in regard to business in potable liquor. The decision in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , would be the sixth decision of the Constitution Bench on the same point. Further, *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , has been consistently followed by the Supreme Court again in atleast five cases till recently, namely, *Lakhanlal and Others Vs. The State of Orissa and Others*, , *P.N. Kaushal and Others Vs. Union of India (UOI) and Others*, , *Government of Andhra Pradesh Vs. Anabeshahi Wine and Distilleries Pvt. Ltd.*, , *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, and *Doongaji and Co. Vs. State of Madhya Pradesh and others*, . In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , above cited, the Constitution Bench pointed out that the observations of Subba Rao, C.J. in *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, cannot amount to holding that there is a fundamental right in regard to potable liquor business under Article 19(1) of the Constitution of India. The Constitution Bench also observed that if Subba Rao, C.J. was to be understood as laying down that there was a fundamental right, then the same would be contrary to atleast five earlier judgments of Constitution Bench of the Supreme Court. It was also clearly observed that the observations of Subba Rao, C.J. were not necessary for the purpose of this case.

6. In view of the overwhelming authoritative decisions of the six Constitution Benches of the Supreme Court upto 1975 and five later decisions of the Supreme Court between 1975 and 1991, we are clearly of the view that no substantial question of law of general importance which, in our opinion, is to be decided by the Supreme Court, arises in this case. It is true that the Supreme Court appears to have referred the question to Anr. Constitution Bench in its order in C.A. No. 4708-12/89 dated 9th January 1992. But that being only a referring order, it will not result in overruling the view taken by the large number of cases above mentioned.

7. Coming to the question of granting time for locating the shops at places beyond 400 metres from the educational institutions and religious institutions, etc., we are of the view that the same cannot be granted by this Court having regard to our decision rendered in this batch of cases. We have already stated that granting of any further time will amount to interference by the Court, of the Government policy not to permit location of any liquor shops within 400 metres of educational institutions and religious institutions etc. If we intervene and grant stay, that Would indirectly amount to permitting the violation of the above said policy till the shops are, shifted. This may indeed adversely affect educational institutions etc., which the government policy precisely wants to avoid. Even otherwise, the parties had ample time from 1st April 1993 till this day and they

could have easily made arrangements to locate these shops elsewhere.

In the result, we reject the oral applications for leave, applications for time as well as petitions filed today for granting certificate under Article 134A. The oral applications, applications for stay as well as applications for time are all dismissed.