

(1993) 10 KAR CK 0024

In the Karnataka High Court

Case No : Writ Petition No"s. 26581, 28237, 28414 and 28415 of 1993

Gowri Industries

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 12-10-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1) (g), 246, 47
Industries (Development and Regulation) Act, 1951 — Section 18 G

Citation : (1993) ILR (Kar) 3153 : (1993) 4 KarLJ 604

Hon'ble Judges : Shivashankar Bhat, J

Bench : Single Bench

Advocate : N. Santosh Hegde, M.R. Naik, Jayakumar S. Patil and Javaji Srinivasalu, for the Appellant; B.V. Acharya, General, B.J. Somayaji, Government Advocate, T.M. Venkata Reddy, Central Govt. Stdg. Counsel, for the Respondent

Final Decision : Allowed

Judgement

Shivashankar Bhat, J.—In these Writ Petitions the basic question pertains to the power of the State Government to fix the price of rectified spirit to be sold to the manufacturers of arrack. This question is sought to be projected by reference to several Rules made under the provisions of the Karnataka Excise Act, 1965 ("the Act" for short).

Petitioners primarily rely on the Decision of the Supreme Court in SYNTHETICS & CHEMICALS LTD. ETC. v. STATE OF UP. AND ORS., (hereinafter referred as the "Second Synthetics case"). Rectified spirit is manufactured out of molasses by a process of fermentation. It is not fit for human consumption and it is not potable alcohol. Therefore, according to the petitioner it is not an "intoxicant" or "liquor" in the ordinary sense of the term. Rectified spirit is also called, industrial alcohol which is the raw material for the use in many chemical and drug industries. It is also a raw material in the manufacture of potable alcohol including arrack and other liquor such as whisky, brandy, etc. commonly referred as Indian Made Foreign Liquors ("IMFL" for short). In view of the insistence on the part of the

respondents, petitioners have obtained licences in respect of the distillery units under Sections 13 to 15 of the Act and the Rules framed thereunder. Thus the licences according to the petitioners are limited to regulate the activities of the distilleries to prevent diversion and misuse of rectified spirit for the purpose of illicit manufacture of potable alcohol. It is stated that Ethyl alcohol Grade-I is the raw material used in the pharmaceutical industries, IMFL and arrack manufacturers as well as in chemical industries. This is 66° OP (over proof). Ethyl alcohol below the said degree cannot be used as a raw material in the manufacture of the articles referred just now. When this Grade-I Ethyl alcohol is treated with certain chemicals it is converted into "de-natured spirit," used for chemical purposes, it cannot be used for the manufacture of the arrack, IMFL, etc. A small quantity of Ethyl alcohol manufactured by the petitioners is permitted to be converted into de-natured spirit. Earlier, industry engaged in the manufacture or production of alcohol and other products of fermentation industries were brought under the First Schedule to the Industries (Development and Regulation) Act, 1951 (hereinafter referred as "IDR Act"). In the exercise of the powers vested in the Central Government under this Act, Ethyl Alcohol Price Control Order, 1971, as well as Molasses Control Order, 1961, were issued which regulated and controlled the supply and sale of Ethyl alcohol and molasses. According to the petitioners, the price of rectified spirit produced by them were, all along regulated under the Price Control Orders referred above. But these Price Control Orders were withdrawn on 10.6.1993 by two Notifications (Annexure-A and B). Therefore the Central Government has clearly permitted free formulation of prices. This is also clear, says the petitioners, by the Circular dated 11.6.1993 addressed to all State Governments, by the Secretary to the Department of Chemicals and Petro Chemicals, Government of India, New Delhi (Annexure-C). The said Circular states that the earlier Price Control Orders outlived their utility and that the regime of controls is inhibiting the free movement of molasses and alcohol and causing unnecessary delays which are having adverse effect on the down stream industries. The relevant sentences read thus:

"... However, now it is felt that these Orders have outlived their utility and in fact the regime of controls is inhibiting the free movement of molasses and alcohol, and causing unnecessary delays which are having an adverse effect on the downstream industries. In line with the economic liberalisation programme of the Government, market forces need to be allowed to operate and controls minimised for allowing the realisation of full potential of the growth of industries and proper utilisation of molasses. The price control on molasses has inhibited the creation of modern storage facilities for them. A similar situation is found to exist for Ethyl alcohol. In fact, estimates indicate that the ethyl alcohol distilleries are utilising only 60% to 70% of their capacity. As against this, about 6 to 7 lakh tonnes of molasses is allowed to rot for want of allocation. Molasses are being exported when the alcohol industry with spare capacity is not being able to expand production. The withdrawal of the control orders is expected to provide a better opportunity for all the sectors dependent on molasses to function

optimally in a free market economy.

While making the decision to decontrol molasses and alcohol, the government has emphasised the need to ensure that there is no undue diversion of molasses to the potable alcohol sector. Fears have been expressed that molasses in a decontrolled situation may be diverted for potable alcohol production. It has also been alleged that the potable alcohol sector, with its ability to pay higher prices for molasses, may corner a major part of the molasses in the country and this would have a serious impact on the availability of molasses for industrial alcohol. It is, therefore, particularly important that strict vigilance is exercised in this regard. It hardly needs to be emphasised that even after the decontrol of molasses and alcohol, the powers of the State Governments/Union Territories Administration to regulate the potable alcohol sector under their excise regulations and other laws would remain intact."

Thereafter the Circular refers to the Decision of the Supreme Court in Second Synthetics case and it is stated that:

"The same judgment also emphasises that the State Governments have a responsibility towards controlling potable alcohol. Since potable alcohol is a major source of revenue to the States and State Excise Department Officers constantly monitor the production, storage and sale of potable alcohol, it should not be difficult for the States to ensure that new capacity for potable alcohol does not universally followed. The State Governments further need to take steps to check the flow of molasses for illicit distillation. For this they have adequate powers under various laws. In the changed situation, as a result of decontrol of molasses, particular attention would need to be given to this aspect. In fact, State Government would need to work out a comprehensive schemes for preventing flow of molasses for illicit distillation and checking their diversion to the potable alcohol sector. The success of the efforts of the State Governments in this regard would also go to ensure adequate availability of molasses for production of industrial alcohol which is required for a large number of alcohol based chemicals industries. Government is particularly concerned that even after decontrol of molasses, their availability for production of industrial alcohol should not be affected adversely."

The Circular refers to Article 47 of the Constitution to point out the responsibility of the State. It is not necessary to refer to other statements in this Circular. The petitioners further point out that this liberalised policy of decontrol has been accepted by a few States by not prescribing any selling price for rectified spirit, and in this regard a press note issued by the Government of Maharashtra on 21.6.93 is produced. The earlier Rules under the State Act were made to be in consonance with the control orders issued by the Central Government. Now that the State Government has lost its competence over rectified spirit; petitioners contend that the State Government cannot fix any price and the limited power of the State Government is to see that the rectified spirit is not diverted elsewhere and is misused. However, the petitioners particularly referred to the Karnataka

Excise (Distillery and Warehouse) Rules 1967 (hereinafter referred as Distillery Rules") which provided for licensing of distillery. Rule 31 states that the spirits intended for issue as denatured spirit or rectified spirit shall not be distilled at a strength lower than 52° over proof. It further states that the distiller shall sell at the distillery to the Distillery Officer such quantities of country made spirits, rectified spirits and denatured spirits as may be indented for by him, for the supply. Sub-rule (3) of Rule 31:

"(3) In case of 2(a) after the issues are made payment shall be made by the Distillery Officer on the instructions of the Commissioner to the Distiller, at such intervals as the Commissioner may prescribe, the value of spirits supplied.

In case of 2(b) the distiller shall himself, recover the value of spirits supplied from the person concerned."

Another Rule relied upon is called the Karnataka Excise (Manufacture & Bottling of Arrack) Rules, 1987 (hereinafter referred to as "the Arrack Rules" or the "Rules"). Rule 17 of the Arrack Rules reads as follows:

"17. Fixation of price:- The price to be paid by Government to the distillery for the rectified spirit supplied by the distillery to the Warehouse, the price to be paid by the Government to the Warehouse for manufacture and bottling of arrack and the price to be paid by the lessees for the right of retail vend of arrack to the Government for the supply of bottled arrack shall be fixed by the Commissioner from time to time with prior approval of the Government and same shall be communicated to the persons concerned."

The petitioners contended that these Rules are inapplicable after the decontrol of molasses and ethyl alcohol by the Central Government.

During the pendency of these Writ Petitions the State Government fixed the price of the rectified spirit at Rs. 8.50ps. per litre. However, earlier, by an interim order this Court had permitted the petitioners to charge Rs. 9/- per litre when the rectified spirit is to be supplied to the arrack manufacturers. It is also not in dispute that the price fixed by the State Government governs the supply of rectified spirit for the manufacture of arrack only and does not limit the price of rectified spirit when sold for other purposes. The State Government has asserted that the price fixed by the Excise Commissioner even during the earlier years was not under Ethyl Alcohol Price Control Order; on the other hand the Commissioner was passing the order of allotment and fixing price by virtue of his powers under the Act and the Rules framed thereunder. The assent of the President of India was received earlier on 3.8.1986 before the Act was brought into force. Again when the Act was amended by the Karnataka Act 36 of 1987 President's assent was obtained on 10.11.1987. It is also asserted in the statement of objections that the price fixation in question is an exercise of power for regulating, distribution and supply of the article and that rectified spirit is the raw material for the manufacture of arrack and arrack is manufactured by adding specified quantity of water to rectified spirit. Under Rule 17 of the Arrack Rules

price of rectified spirit is fixed by the Commissioner after obtaining the approval of the Government. It is further pointed out by the respondents that the Association of petitioners and others had requested to fix the price of rectified spirit at the rate of Rs. 12.50ps. per litre. The following statement in the pleadings of the respondents also is relevant;

".... Since the Central Government has rescinded the Molasses Control Order by its Order dated 10.6.93, the price of molasses has increased. The several distillers have also requested to increase the price of rectified spirit. The Association had also given representation dated 9.7.1993. A majority of the Sugar Factories in the State are yet to commence their cane-crushing operations for the current season, on account of which there is practically no production of molasses at present. The present price of molasses will fall substantially by about the end of October, by which time almost all the sugar factories in the State would have commenced their crushing operations. Thereafter, the price of molasses may again increase towards the end of April 1993-94 when the crushing operation of the sugar factory comes to a close. Therefore, till the current excise year, it may be assumed that the molasses price will be at the present level for a period of 4 to 5 months and at a substantially lower level for a period of about 5 to 6 months. It is therefore proposed that the price of rectified spirit is fixed for the current excise year taking into account the average cost of molasses throughout the period of the remaining about 10 1/2 months. There is also proposal before Government to reduce the sales tax of molasses from 40% to 10%. The Government by its letter dated 24.8.1993 accorded prior approval for fixation of the price of rectified spirit at the rate of Rs. 8.50 per litre. The Excise Commissioner by his Order No. ECS 22 ABG 91 dated 24.8.1993 has fixed the price of Rectified Spirit under Rule 17 of the Karnataka Rules 1987 for the excise year 1993-94. It is respectfully submitted that before fixing the price at Rs. 8.50 per liter, the Authorities have taken into consideration all the relevant factors."

Before parting from reference to the pleadings I may also point out that the petitioners have produced sufficient materials to show that at present the price of molasses per metric ton is Rs. 2,500/- and at this rate the cost of rectified spirit would be Rs. 22.63ps. per litre.

2. Petitioners advanced the following contentions:-

(1) State has no legislative competence to issue the impugned orders in view of the fact that the subject pertaining to non-potable alcohol has been specifically included in the Schedule to IDRA.

(2) After Judgment of Constitution Bench in Synthetics & Chemicals case the area left to legislate by the State is only restricted to those areas which are specified in para 85 of the said Judgment (AIR 1990 SC 1927).

(3) There is no requirement under the Constitution that after the Parliamentary declaration there should be either a ban or a notification to establish that the

subject has fallen within the legislative jurisdiction of the Centre; mere intention to occupy the field is sufficient to establish that the subject is occupied by the Centre.

(4) The withdrawal of the Central Orders does not leave the field vacant for the State to make laws or issue orders since by the very object of withdrawal of the orders, the Centre still occupied the field. Even if we assume for a moment that the power vests back in the State, the State cannot use the provisions of the Excise Act as they were rendered void by the doctrine of implied repeal.

(5) The State cannot trace its powers to issue the impugned orders either to the Karnataka Excise Act or to various rules framed under the said Act and Rule 17 of the Karnataka (Manufacture and Bottling of Arrack) Rules is ultra vires; the said Rule also suffers from excessive delegation of legislative power.

(6) At any rate, price fixation is wholly arbitrary and without basis, hence violative of Article 14 of the Constitution.

Above contentions could be broadly formulated as follows:-

I. Whether the State has any competence to make a law affecting the industrial alcohol/rectified spirit?

II. Whether Rule 17 of the aforesaid Rule is ultravires the Act in so far as it empowers, the State Government to fix the price of rectified spirit sold to arrack manufacturers and whether the Rule to that extent suffers from excessive delegation of legislative power?

III. Whether fixation of price, as a fact, is arbitrary, unreasonable and without any basis?

RE. CONTENTION NO. 1.

3. The petitioners elaborated their contention as follows:

The regulation of ethyl alcohol comes solely within the power of the Centre as per the provisions of the IDR Act. The field has been totally occupied by the Centre and has been held to be so by the Supreme Court in Second Synthetics case at para-84 . The Court has further pointed out in para 85 that under the only power that remains with the State it may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol. The Central power has been assumed under the heading "Fermentation industry" as found in Entry 2 of Schedule I of the IDR Act and evidenced by the Ethyl Alcohol (Price Control) Order, 1971 as well as the Molasses (Control) Order, 1971.

By the Notification dated 11.1.1993 which decontrolled molasses (vide Circular No. 15021/24/91) the Centre has decided that price of the molasses and ethyl alcohol are not to be controlled. This does not have the effect of reviving the State's power to regulate. This submission has three aspects,-

(i) The Notification dated 11.6.1993 is an act in the exercise of an exclusive power and does not amount to the Centre abdicating the power to regulate non-potable alcohol. This is evidenced from the fact that a plain reading of the Notification shows that its purpose is to improve production and distribution and does not contemplate fetters being imposed on the industry by the State. It is, therefore, clear that the decontrol Order is also in the nature of the exercise of power and therefore such power has not been abdicated and does not revert back to the State.

(ii) It has been explained by the Supreme Court in Second Decision that, to determine the question of occupied field, no law or notification is required and mere intention to occupy is sufficient. Therefore, the non-existence of a regulation does not result in the power being reverted back to the State. In *State of Orissa Vs. M.A. Tulloch and Co.*, the Court held that the test of two legislations containing contradictory provisions is not the only criterion of repugnancy, for if a competent Legislature with a superior efficacy expressly or impliedly evinces by its legislation, an intention to cover the whole field, the enactments of the other Legislature would be over-borne on the ground of repugnance and this view has been reiterated by the Supreme Court in the Decisions in (a) *Baijnath Kadio Vs. State of Bihar and Others*, and (B) *State of Haryana and Another Vs. Chanan Mal and Others*, .

(iii) Alternatively, if we assume for a moment that the power to regulate reverts back to the State, even then the Karnataka Excise Rules cannot be invoked, because, once the Central enactment came into force, the earlier State law became void and stand repealed on the basis of the doctrine of implied repeal. The Supreme Court explained this doctrine in *TULLOCH & CO.'s case* - paras 20/21. The Parliamentary enactment superseded the State law and this results in its repeal. As the legislative intent to supersede the earlier law is the basis on which this doctrine is founded there can be no incongruity in attributing to the later legislation, the same intent which Section 6 of General Clauses Act has and that such implied repeal has the effect of rendering the State legislation void:- *T. Barai Vs. Henry Ah Hoe and Another*, Earlier in *Zaverbhai Amaldas Vs. The State of Bombay*, also, the Supreme Court, in para-7 held that, even where the Central law does not expressly repeal the State law, even then the State law will be void, if the State law conflicts with the Central law with respect to the same matter. Also to the same effect is the Decision in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, .

A repeal of the repealing law does not revive what was repealed except as provided for u/s 7 of the General Clauses Act is the contention.

4. It is necessary to refer to three Decisions, which dealt with the subject of industrial alcohol/rectified spirit. The first one is *State of Uttar Pradesh and Others Vs. Synthetics and Chemicals Ltd. and Others*, - referred hereinafter as the First Synthetics case"). However, it is unnecessary to refer to it separately, since it was overruled in *Synthetics & Chemicals Ltd., etc. v. State of UP. &*

Others¹ - (referred as the Second Synthetics case"). The third one referred to as the "Third Synthetics case" is reported in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, . The Second Synthetics case is the sheet anchor of the petitioners. Para-2 of the Judgment of the Supreme Court states that the main question for consideration in the case was whether the vend fee in respect of industrial alcohol levied by different States was valid; this involved three questions, stated at page 1932, as follows:-

(i) Whether the power to levy excise duty in case of industrial alcohol was with the State Legislature or the Central Legislature?

(ii) What is the scope and ambit of Entry 8 of List II of the Seventh Schedule of the Constitution?

(iii) Whether, the State Government has exclusive right or privilege of manufacturing, selling, distributing, etc., of alcohols including industrial alcohol. In this connection, the extent, scope and ambit of such right or privilege has also to be examined."

In this regard Court held that the term "alcohol" and "intoxicating liquor" are to be understood in the sense they are capable of being taken by human beings as such beverage of drinks. Therefore, rectified spirit which is incapable of being consumed as a drink was outside the scope of the terms and if so not covered by Entries 8 or 51 of List II of Schedule VII to the Constitution. State's power to legislate under these Entries would not enable the State to legislate on the topic of rectified spirit. However, the Supreme Court held at page 1949:

"We must accept the position that the States have the power to regulate the use of alcohol and that power must include power to make a provision to prevent arid/or check industrial alcohol often being used as intoxicating or drinkable alcohol. The question is whether in the garb of regulations a legislation which is in pith and substance, as we look upon the instant legislation, fee or expenses administering the regulation, can be imposed purely as regulatory measure. Judged by the pith and substance of the impugned legislation, we are definitely of the opinion that these levies cannot be treated as part of regulatory measures."

As to the scope of Entry 52 of List I under which Parliament may legislate on the topic of "industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest" and comparing with this, Entry 33 of List III and the effect of inclusion of "alcohol" and "other products of fermentation industries" in Item 26 of the First Schedule to IDR Act, Court observed at page 1955;

"After 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as item 26 of the First Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non-potable alcohol is vested in the Central

Government. Distilleries are manufacturing alcohol under the Central Licences under IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which these do not possess. Nor can the States claim exclusive right to produce and manufacture industrial alcohol which are manufactured under the grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under such grant be amenable to State's claim of exclusive possession of privilege. The State can neither rely on entry 8 of List II nor entry 33 of List III as a basis for such a claim". The State cannot claim that under entry 33 of List III, it can regulate industrial alcohol as a product of the schedule industry, because, the Union, u/s 18G of the IDR Act, has evinced clear intention to occupy the whole field. Even otherwise sections like Section 24A and 24B of the U.P. Act do not constitute any regulation in respect of the industrial alcohol as product of the scheduled industry. On the contrary, these purport to deal with the so-called transfer of privilege regarding manufacturing and sale. This power admittedly, has been exercised by the State purporting to act under entry 8 of List II and not under entry 33 of list III.

The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol;

- a) it may pass any legislation in the nature of prohibition of potable liquor referable to entry 6 of list II and regulating powers.
- b) it may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.
- c) the State may charge excise duty on potable alcohol and-sales tax under entry 52 of list II. However, safes tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.
- d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of Indian Mica Micanite Industries Vs. The State of Bihar and Others,

5. From the above observations of the Supreme Court, Allahabad High Court inferred that the State lacked competence, even to levy sales tax on the sale or purchase of industrial alcohol. This Decision of the Allahabad High Court came up before the Supreme Court in the Third Synthetic case. The Allahabad High Court's view was reversed by the Supreme Court, after holding that the observation found in the Second Synthetics case to the extent of State's power to levy sales tax, was per incuriam. In the Third Synthetics case, the scope of the Decision in Second Synthetics case was stated thus, at page 151:

"We have extensively quoted from the judgment of the Constitution Bench in *Synthetics & Chemicals Ltd. v. State of U.P.* with a view to showing that the Court was concerned with only one question, and that was whether the States could levy excise duty or vend fee or transport fee and the like by recourse to Entry 51 or 8 in List II in respect of industrial alcohol. This Court held, as seen above, that the States had no such power under either entry in respect of non-potable or industrial alcohol."

Thereafter the Court referred to the First Synthetic case wherein a wider meaning was attributed to the term "alcohol" to include "industrial alcohol" and proceeded to say that "this wider understanding of "intoxicating liquor" so as to comprehend not only potable alcohol, but also industrial alcohol, was disapproved in *Synthetics*" ("*Synthetics*" here was a reference to the Second *Synthetics* case).

With regard to the scope of legislative competence, Court said:

"Unlike mines and minerals, alcohol stands on a different footing, and is dealt with differently, dependent on whether it is potable or not. What is significant is that legislation falling in pith and substance under Entry 8 or Entry 51 of List II in relation to alcoholic liquor for human consumption (as distinguished from industrial alcohol) whether for the purpose of levying vend fee or transport fee or excise duty, strictly confined to such articles, is not subject to challenge on the ground of legislative incompetence or repugnancy by reason of the power vested in Parliament under Entry 52 or Entry 84 of List I or Entry 33 of List III. Incompetence or repugnancy arises only when the impact of the legislation falls, not incidentally, but substantially on industrial alcohol so as to transgress on a field occupied by Parliament."

Again, at p.155:

"Industry as a subject of legislation falls under Entry 24 of List II. But the provision is subject to Entries 7 and 52 of List I dealing respectively with "Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of the war" and "Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest". It is Entry 52 of List I that is relevant for the present purpose for it is in respect of that entry that Parliament enacted the IDR Act, 1951 to provide for the development and regulation of certain industries. This Act contains a declaration by Parliament that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule." "Fermentation Industries" (i.e., alcohol and other products of fermentation industries) is Item 26 of the First Schedule. Section 18G of the IDR Act confers upon the Central Government the power of control of supply, distribution, price etc., of the articles mentioned in the First Schedule of the Act. All powers vested in the Central Government u/s 18G of the IDR Act are referable to Entry 52 of List I dealing with "controlled" industries, read with Entry 33 of List III which

pertains to "Trade and commerce in, and production, supply and distribution of the products of controlled industries".

None of the entries in the Concurrent List deals with tax but general subjects of legislation. No conflict can, therefore, arise between the taxing powers of the Union and the States. Parliament has the power to legislate in respect of a "controlled" industry falling under Entry 52 of List I and both Parliament and the States have the power to legislate in respect of the trade and commerce in, and the production, supply and distribution of, the products of a "controlled" industry (Entry 33 of List III). These are not taxing entries and no doubt, therefore, relate to taxes, but powers of regulation and control. The power to control industry being thus vested in Parliament (Entry 52 of List I) and the legislative power in respect of trade and commerce in such industry being concurrently vested in the Union and the States (Entry 33 of List III) any exercise of control by the State must be subject to the legislative power of Parliament and the power conferred on the Central Government by such legislation (Article 246). Any exercise of power by the State which transgresses -upon the power of Parliament or of the Central Government, as its delegate, is to the extent of such transgression null and void."

Court pointed out that the pith and substance of the law levying sales tax falls within the scope of Entry 54 of List II and the power under the said Entry is not affected by the declaration by the Parliament under Entry 52 of List I. In that connection, Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, was referred thus:

"A like question arose in a different form in Ch. Tika Ramji v. State of U.P. This Court rejected the challenge in that case against the constitutional validity of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and the notifications issued thereunder. It was held that the impugned Act and the notifications were ultra vires the State legislature as they were concerned with the regulation of the supply and purchase of sugarcane which in no way trench upon the exclusive jurisdiction of the Centre with regard to sugar. No question of repugnancy under Article 254 of the Constitution could arise because Parliament and the State legislated in different fields and dealt with separate and distinct matters even though of a cognate and allied character. There is no inconsistency between the two enactments. The provisions of Section 18G of the IDR Act 1951 did not cover sugarcane or indicate any intention on the part of Parliament to cover the entire field of such legislation. Raw material did not come within the ambit of "any article or class of articles relatable to any scheduled industry within the meaning of that Act". The court further pointed out that even if sugarcane was an article which fell within the purview of Section 18G of the Act, no order having been issued by the Central Government under that provision, no repugnancy could arise, for repugnancy had to exist as a fact and not as a mere possibility. The existence of an order covering the entire field was an essential prerequisite to give rise to repugnancy.

Thereafter, Court held that Price Control Orders made by the Central Government in exercise of its power under IDR Act cannot fetter the State's power to levy sales tax. The Price Control Orders were for the purpose of preventing the seller from pricing his goods beyond the limit prescribed by those Orders.

"That is a fetter on the free play of demand and supply. When supply is scarce, the prices are bound to rise and it is that vice which is controlled by fixing the maximum price. But that does not in any manner curtail the power of the State to levy taxes on the sale or purchase of goods. It is no doubt true that the consumer of the article must in addition to the price, pay purchase tax due in respect of them. But, that is by reason of a valid levy which is within the constitutional power of every State, and is de hors the price, though often referable to it." (vide para-35).

In the concurring Judgment, Sahai, J., referred to doctrine of "per incuriam"; thereafter, as to the scope of Entry 33 of Part III and Entry 24 of List II it was held;

"Ethyl alcohol is not fit for human consumption. It is principally used as raw material for manufacture of rubber etc. Since it was of all India importance the activities of which affected the country as a whole, it was declared as of public importance by adding it as Item (1) under Entry 26 of the First Schedule appended to the Industries (Development and Regulation) Act, 1951 (hereinafter referred as IDRA). The effect of this declaration was that it stood removed from Entry 24 of List II and allocated to the Central Legislature. The Control thus vested in the Parliament. But Entry 33 in Concurrent List permits, both the Parliament and the State Legislature to deal with trade and commerce in it and also regulate production, supply and distribution of goods declared to be public importance. The State could, therefore, enact law under Entry 33 subject to it that the State legislation could not be repugnant to Central legislation. That is if the field is already occupied by a Central enactment then the State legislation to that extent shall be invalid (see Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, and Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others,

As to power of fixing the price, it was held at para-45;

"Price fixation of ethyl alcohol is an exercise of power for regulating distribution and supply of it. The general entry for regulating distribution and supply is different from exercise of taxing power. The two do not even remotely touch each other. Therefore, if the price goes up in exercise of taxing power then subject to its being arbitrary or confiscatory it could not be struck down as intruding in forbidden field."

Again, -

"In fact as stated earlier the entire theory of occupied field or State legislation being repugnant to Central legislation is available when the two legislatures

exercise their power under Concurrent List."

6. The learned Counsel for the petitioners contended that the Decision in Third Synthetics case was confined to the power of the State to levy sales tax under Entry 54 of List II with regard to the industrial alcohol (sic) the said Decision in no way dilutes or contradicts, the Decision in Second Synthetics case in other respects. In the Second Synthetics case it was clearly held that State's powers under Entry 8 of List II and Entry 33 of List III are not available to legislate on the topic of industrial alcohol, except to the extent of legislating to prevent the misuse of industrial alcohol and its diversion to forbidden areas.

This argument certainly requires serious consideration. In the cases before me, Court is concerned with the fixation of price of rectified spirit when it is to be sold to the State or its agencies for the manufacture of arrack.

7. Power to fix price of an industrial product (that is, of a controlled industry by virtue of the declaration referred to in Entry 52 of List I) is traceable to Entry 33 of List III. A Concurrent power vests, both in the Parliament and State Legislatures. It is also clear that if the law made by the Parliament occupies the field of legislation, law enacted by the State which is repugnant to the former cannot be valid. In Second Synthetics case there is an observation that,-

"the Union, u/s 18G of the IDR Act, has evinced clear intention to occupy the whole field".

The real question before me is, whether this observation is conclusive of the inference to be drawn from the said observation, that the State has lost its competence to fix the price of industrial alcohol under all circumstances.

8. The concept of "occupied field" has been discussed in several Decisions, some of which I have already referred to and my understanding of these cases leads to the conclusion that observations made in Tika Ramji's case are still good law and the general observation found in Tulloch's case does not whittle down the earlier observations in Tika Ramji's case. For the purpose of Second Synthetics case, a discussion on the scope of Entry 33 of List III was not absolutely necessary. As held in the Third Synthetics case the scope of the Second Synthetics case was limited to the concept of "industrial alcohol" and State's power to levy excise duty thereon; (by whatever name the duty is imposed). In fact, when the Supreme Court held that the State's power to levy sales tax on industrial alcohol is an independent power and the IDR Act and Orders made thereunder prescribing the price have nothing to do with the levy of taxes, it necessarily follows that the reference to Entry 33 of List III in Second Synthetics case was purely obiter. The relevant observation in para-84 of Second Synthetics case is not the sole basis for the conclusion reached therein. After stating that Union u/s 18-G of IDR Act has evinced clear intention to occupy the whole field", the next sentence proceeds to say that "even otherwise, Sections like Sections 24A and 24B of the U.P. Act do not constitute any regulation.... these purport to deal with the so-called transfer of privilege regarding manufacture and sale. This

power admittedly, has been exercised by the State purporting to act under Entry 8 of List II and not under Entry 33 of List III." In other words, Court examined the pith and sub stamp of the State law and held it purported to be law under Entry 8 of List II. Earlier, Court had held that "the State cannot itself manufacture industrial alcohol without the permission of the Central Government."

Therefore, the privilege theory is inapplicable to industrial alcohol. State has no exclusive privilege at all unlike the case of intoxicating liquors. If so, Entry 8 of List II is inapplicable.

9. The starting point has, necessarily to be CH.TIKA RAMJI AND ORS. v. THE STATE OF UTTAR PRADESH AND ORS. The State of U.P. enacted a law regulating the supply of sugarcane to the sugar factories; the object of the Act was to provide for a rational distribution of sugarcane to factories, for its development on organised scientific lines, to protect the interests of the sugarcane growers and of the industry. State Government issued certain orders specifying the agency of supply of sugarcane to the factories and creation of Zones for particular factories. Central Government promulgated Sugar Control Order in the exercise of its powers under the Essential Commodities Act; this Order empowered the Central Government to fix the price of sugarcane and to regulate the movement of sugarcane. The "Sugar industry" was brought under the control of the Union by a declaration made under Entry 52 of List I. In these circumstances, petitioner questioned the competence of the State to make the impugned law. The Supreme Court held that each Entry in the legislative Lists which is category or head of the subject-matter of legislation must not be construed in a narrow or restricted sense but as widely as possible so as to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it; a harmonious reading of all the Entries is necessary to give due effect to all the Entries. The Court further pointed out that each subject of legislation has several aspects and one of the aspects of a subject matter may fall within one Entry while another be covered by some other Entry. Term "industry" is a word comprising three aspects. At page 695 the Court observed:

"Industry in the wide sense of the term would be capable of comprising three different aspects: (1) raw materials which are an integral part of the industrial process, (2) the process of manufacture or production, and (3) the distribution of the products of the industry. The raw materials would be goods which would be comprised in Entry 27 of List 2. The process of manufacture of or production would be comprised in Entry 24 of List 2 except where the industry was a controlled industry when it would fall within Entry 52 of List I and the products of the industry would also be comprised in Entry 27 of List 2 except where they were the products of the controlled industries when they would fall within Entry 33 of List 3.

This being the position, it cannot be said that the legislation which was enacted

by the Centre in regard to sugar and sugarcane could fall within Entry 52 of List I. Before sugar industry became a controlled industry, both sugar and sugarcane fell within Entry 27 of List 2 but, after a declaration was made by Parliament in 1951 by Act 65 of 1951, sugar industry became a controlled industry and the product of that industry, viz., sugar was comprised in Entry 33 of List 3, taking it out of entry 27 of List 2. Even so, the Centre, as well as the Provincial Legislatures had concurrent jurisdiction in regard to the same."

Therefore, the State had not trenched upon the jurisdiction of the Centre, while enacting the law regulating sugarcane as a raw material. The second contention raised the question of repugnancy between the law enacted by the Union and the State law. On this, the relevant principle was stated at page 697:

"Repugnancy falls to be considered when the law made by Parliament and the law made by the State Legislature occupy the same field because, if both these pieces of legislation deal with separate and distinct matters though of a cognate and allied character, repugnancy does not arise."

With obvious approval, the Supreme Court quoted the observations of B.N. Rau, J., speaking for a Bench of Calcutta High Court. At page 699, the Supreme Court observed, along with the observations of B.N. Rau J. thus:

"The Calcutta High Court in *G.P. Stewart Vs. Brojendra Kishore Roy Chaudhury*, had occasion to consider the meaning of repugnancy and B.N. Rau, J., who delivered the judgment of the Court observed at page 632:

"It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says "do" and the other "don't", there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test; there may well be cases of repugnancy where both laws say "don't" but in different ways.

For example, one law may say, "No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time" and another law may say, "No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time". Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other though not actually disobeyed, is nullified,"

The learned Judge then discussed the various authorities which laid down the test of repugnancy in Australia, Canada and England and concluded at page 634;

The principle deducible from the English cases, as from the Canadian cases, seems therefore to be the same as that enunciated by Isaac, J in the Australian 44 hour case [37 CLR 466 (M)] if the dominant law has expressly or impliedly evinced its intention to cover the whole field; then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a

given case, the dominant law evince such an intention must necessarily depend on the language of the particular law."

Sulaiman, J. in AIR 1939 74 (Federal Court) thus laid down the principle of construction in regard to repugnancy;

"When the question is whether a provisional legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility. Their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not may never be in force": (Attorney General for Ontario v. Attorney General for the Dominion (1896) AC 348 at pp. 369-70 (T))."

Petitioners relied on Section 18-G of the IDR Act to contend that power to fix the price was with the Central Government and Parliament had evinced an intention to occupy the field of price fixation. This contention which is identical to the present contention before me, was rejected by the Supreme Court. At page 703, the Court held:

"Even assuming that sugarcane was an article or class of articles relatable to the sugar industry within the meaning of Section 18-G of Act, 65 of 1951, it is to be noted that no order was issued by the Central Government in exercise of the powers vested in it under that section and no question of repugnancy could be ever arise, because, as has been noted above, repugnancy must exist in fact and not depend merely on a possibility. The possibility of an order u/s 18-G being issued by the Central Government could not be enough. The existence of such an order would be the essential pre-requisite before any repugnancy could ever arise."

10. In BAIJNATH KEDIA ETC. v. THE STATE OF BIHAR AND ORS., appellant was the purchaser of the lessee's interest to quarry stone ballast boulders and chips. By virtue of the Land Reforms Act, landlord's interest vested in the State; the Act provided for the continuation of the mining leases. However, the State contended that the terms of the lease were substituted statutorily and the new conditions are prescribed by the Bihar Mineral Concessional Rules. Appellant challenged the validity of the relevant provisions of the Land Reforms Act and of the Rules. The Parliament had enacted a law declaring it to be necessary to take under the control of the Union the regulation of mines and development of minerals to the extent stated in the Act. This was under Entry 54 of List I. To that extent State's power under Entry 23 List II was taken away to make a law. In view of this, appellant contended that amendments to the Land Reforms Act

made thereafter, affecting the mining leases were made without competence. While considering this contention of the appellant, the Supreme Court held at page 1443:

"Entry 54 of the Union List speaks both of Regulation of mines and minerals development and Entry 23 is subject to Entry 54. It is open to Parliament to declare that it is expedient in the public interest that the control should rest in Central Government. To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State legislature. This proposition is also self evident that no attempt was rightly made to contradict it."

Thereafter, Tulloch's case was referred in this context. An earlier Decision rendered in Hinqir Rampur Coal Company's case was also referred and the Court observed at page 1444:

"Where a superior legislature evinced an intention to cover the whole field, the enactments of the other legislature whether passed before or after must be held to be overborne. It was laid down that inconsistency could be proved not by a detailed comparison of the provisions of the conflicting Acts but by the mere existence of two pieces of legislation. As Section 18(1) covered the entire field there was no scope for the argument that till Rules were framed under that section, room was available."

Again at page 1445 -

"Therefore, whether Rules are made or not the topic is covered by Parliamentary legislation and to that extent the powers of State legislature are wanting. Therefore, there is no room for State legislation."

(underlining is made by me)

This Decision has nothing to do with the doctrine of occupied field applicable to the cases of a single entry in List III under which both Parliament and State Legislature, are given the competence to enact a law.

11. Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others, involved the validity of certain provisions of Kerala Abkari Act and its Rules, to the extent those provisions related to medicinal and toilet preparations containing alcohol. Question was whether those provisions are traceable to Entry 8 List II of the Constitution, conferring legislative power on the State. Under the relevant Central law, petitioners obtained licence and were manufacturing certain drugs they sought supply of alcohol free of duty. Mainly, under the impugned provisions of the Abkari Act and the Rules, the maximum quantify to be manufactured was prescribed, even though the manufactured

article was covered by the Central Law; the maximum quantity of intoxicants or liquor that could be used in the manufacture of those drugs was also prescribed by the State, it was contended inter alia that (i) field was occupied by the Central law; (ii) "Drugs and Pharmaceutical" was a declared industry u/s 7 of IDR Act and therefore State had no competence to legislate in respect of this subject matter. Both these contentions failed. Supreme Court held that the impugned law was covered by Entries 8 and 51 List II ("Intoxicating liquors" etc. and "duties of Excise"). The Supreme Court held that the real test is to find out the pith and substance of the impugned law or its true nature and character to determine whether it is a legislation with respect to matters in the relevant List. At page 1869, the Court held:

"In determining whether an enactment is a legislation "with respect to" a given power, what is relevant is not the consequences of the enactment on this subject matter or whether it affects it, but whether, in its pith and substance, it is law upon the subject matter in question. The Central and the State legislations operate on two different and distinct fields. The Central Rules, to some extent, trench upon the field reserved to the State legislature, but that is merely incidental to the main purpose, that is, to levy duties of excise on medicinal and toilet preparations containing alcohol. Similarly, some of the impugned provisions may be almost similar to some of the provisions of the Central Rules, but that does not imply that the State legislature had no competence to enact the provisions.

It is sufficient to say upon the first ground that the impugned legislation is confined to "intoxicating liquor", that is, to ensure proper utilisation of rectified spirit in the manufacture of medicinal and toilet preparations and therefore, within the powers granted to the State legislature under Entry 8 List II. It further seeks to regulate the manufacture of bona fide medicinal preparations and prevent misuse of rectified spirit in the manufacture of spurious medicinal and toilet preparations containing alcohol capable of being used as ordinary alcoholic brewerages. It was suggested that the provisions are identical with the provisions contained in the Central Rules, and, in particular to Rule 45(1), therefore, the legislation is in the occupied field. The answer is that the enumeration of "intoxicating liquor" in Entry 8 List II, confers exclusive power to the State to legislate in respect of medicinal and toilet preparations "containing alcohol."

(Underlining is done here)

An incidental encroachment is no encroachment at all. The trespass should be a direct and substantial trespass into the field belonging to another law making authority.

In the context of the argument that law offended Article 19(1)(g) of the Constitution, while negating it, the Court held at page 1872:

"The power to legislate with regard to intoxicating liquor carries with it the power

to regulate the manufacture, sale and possession of medicinal and toilet preparations containing alcohol, not for the purpose of interfering with the right of citizens in the matter of consumption or use for bona fide medicinal and toilet preparations, but for preventing intoxicating liquors from being passed on under the guise of medicinal and toilet preparations. It was within the competence of the State Legislature to prevent the noxious use of such preparations, that is, their use as a substitute for alcoholic brewerages."

12. The above observation also leads to the principle that State can prevent misuse of any article from being diverted to or used as an intoxicant liquor and this preventive measure is traceable to Entry 8 of List II.

13. As to the second contention that State's legislative power was eroded by the declaration of the Parliament made under Entry 52 List I, it was held, that the State is not entirely denuded of its power, and only partially to the extent of the declaration, the State's power under Entry 24 of List II ("Industries....") was taken away. Since the impugned law in pith and substance was not a law under Entry 24 of List II, question of occupied field did not arise. It follows from the above that the Doctrine of occupied field is to be considered only when Parliament and State legislatures have competence to enact a law and in such a situation, Court has to examine whether the field of legislation is already occupied by one or the other. If the field is occupied by the Parliamentary legislation, State law enacted under the very same field would be operative only when the said State law is reserved for the consideration of the President and received his assent, as provided for in Article 254(2) of the Constitution. There is no inherent lack of competence in the State to enact a law relating to a subject stated in any of the Entries in List III of the Seventh Schedule; but the law so enacted cannot be operative if it is repugnant to a law made by the Parliament in relation to the same subject matter, subject to the provisions of Article 254(2). Observations found in STATE OF ORISSA AND ANR. v. M.A. TULLOCH & COMPANY AND ANR. are the main base for the petitioners' contention, that the very creation of a power in the Central Government u/s 18-G of IDR Act to fix the price of the commodity is equivalent to evincing an interest in the subject matter to occupy the field and therefore, State law on the same subject is unenforceable.

14. Enforceability of an Orissa Act under which fees were demanded was the subject matter of the Decision, in Tulloch's case, Tulloch was the lessee of a mining lease; the Orissa Act empowered the levy of fees. The State Act was enacted under Entry 23 of List II (Regulation of Mines, etc... subject to the provisions of List I with reference to Regulation and Development of Mines). The Central law was traced to Entry 54 of List I (Regulation of Mines, etc., where "Control of the Union is declared..... to be expedient...."). The High Court held that on coming into force of the Central law, State law ceased to be operative. In the words of Supreme Court at page 1287, the effect of the law made under Entry 54 of List I was;

"It does not need much argument to realise that to the extent to which the Union

government had taken under "its control" "the regulation and development of minerals" so much was withdrawn from the ambit of the power of the State legislature under Entry 23 and legislation of the State which had rested on the existence of power under that Entry would to the extent of that "control" be superseded or be rendered ineffective, for here we have a case not of mere repugnancy between the provisions of the two enactments but of a denudation of deprivation of State legislative power by the declaration which Parliament is empowered to make and has made,"

Above observation is a clear indication of the difference that exists between a total lack of competence to enact a law and a repugnancy between the Central and State legislations. The legislative competence has to be found out by reference to the "extent to which regulations and development under the control of the Union has been declared by Parliament to be expedient in the public interest" (as stated in Entry 54 of List I. in the said case); this is to be found out by reference to the purpose, width the scope and the area of the operation of the State law and then consider to what "extent" the Central Act cuts into it or trenches on it."

Tika Ramji's case was referred at page 1291 while considering the argument that the Central Act provided for the Rules to be on the lines of the State Act and therefore, subject was occupied by the Central law; the State contended that until the Rules were made under the Central Act there was no repugnancy and in support of this proposition Tika Ramji's case was relied to point out that repugnancy must exist in fact and not depend merely on a possibility. This contention of the State was not accepted, at page 1291, thus:

"We consider that this submission in relation to the Act before us is without force, besides being based on a misapprehension of the true legal position. In the first place the point is concluded by the earlier decision of this Court in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, where this Court said:

"In order that the declaration should be effective it is not necessary that Rules should be made or enforced. All that this required is a declaration by Parliament that it is expedient in the public interest to take the regulation and development of mines under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not."

But even if the matter was *res integra*, the argument cannot be accepted, Repugnancy arises when two enactments both within the competence of the two legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of

repugnancy, for, if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of the provisions of the two statutes but by the mere existence of the two pieces of legislation. In the present case, having regard to the terms of Section 18(1) it appears clear to us that the intention of Parliament was to cover the entire field and thus to leave no scope for the argument that until Rules were framed there was no inconsistency and no suppression, of the State act."

15. It is clear that the above observations were founded on the particular facts of the case, viz.,

(i) The identical question was covered by an earlier Decision of the Supreme Court reported in the *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, and,

(ii) Section 18G of the Central Act is so extensive that no field was left to the State to operate its law on the subject matter covered by the Central law.

Actually, it was not a case for the application of the Doctrine of occupied field. Therefore, any observation made touching the said Doctrine, cannot override the observations made by the Supreme Court in other Decisions, wherein directly the question was considered. With full awareness of my limitations, I venture to observe that Tulloch's case is not an authority reversing or overruling the observations found in Tika Ramji's case; in Tulloch's case the fact situation did not attract a consideration of the Entries in List III of Schedule VII to the Constitution at all. The extent of the control envisaged by the IDR Act is not exhaustive of all the fields of legislation relatable to industrial alcohol. This is quite clear from *SH. BILESHWAR KHAND UDYOG KHEDUT SAHKARI MANDALI LTD. v. STATE OF GUJARAT AND ANR.* AIR 1992 SC 872. Bombay Prohibition Act provided for the levy of supervision charges to meet the supervision cost by the State officials over the manufacture, input, export, transport, sale, etc., of any intoxicant, denatured spirituous preparations and other articles. Petitioners relied on the Second Synthetics case to contend that State had no competence to enact a law under Entries 51 or 8 of List II, touching the manufacture of industrial alcohol; this contention was negated, Supreme Court held:

"According to learned Counsel since the entire judgment of the High Court proceeded on privilege theory it cannot withstand the principle laid down in Synthetics and Chemicals case levy as a fee under Entry 8 of List II of VII Schedule or Excise Duty under Entry 51 are different than cost of supervision charged u/s 58A. The former has to stand the test of a levy being in accordance with law on power derived from one of the constitutional entries. Since Synthetics & Chemicals case finally brought down the curtain in respect of industrial alcohol by taking it out of the purview of either Entry 8 or 51 of List II

of VII Schedule the competency of the State to frame any legislation to levy any tax or duty is excluded. But by that a provision enacted by the State or Supervision which is squarely covered under entry 33 of the Concurrent List which deals with production, supply and distribution which includes regulation cannot be assailed. The Bench in Synthetics and Chemicals Case made it clear that even though the power to levy tax or duty on industrial alcohol vested in the Central Government the State was still left with power to lay down regulations to ensure that non-potable alcohol, that is, industrial alcohol, was not diverted and misused as substitute for potable alcohol. This is enough to justify a provision like Section 58A. In paragraph 88 of the decision it was observed that in respect of industrial alcohol the states were not authorised to impose the impost as they have purported to do in that case but that did not effect any imposition of fee where there were circumstances to establish that there was quid pro quo for the fee nor it will affect any regulatory measure. This completely demolishes the argument on behalf of the appellant.

Principle of occupied field precluded State from trenching on any power which was already covered by Central legislation. But in the absence of any provision in Industries (Development and Regulation) Act touching upon regulation or ensuring that industrial alcohol was not diverted the State was competent to legislate on it under Entry 33 of List III of VII schedule which is extracted below:

"33. Trade and commerce in and the production supply and distribution of, --

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) to (e)

Trade and Commerce and supply and distribution of goods are exclusive State subjects under Entries 26 and 27 of List II of VII Schedule. But both are subject of Entry 33 of List III. That is what is covered in Entry 33 is excluded from List II. And the power to legislate in respect of what is covered by List III is enjoyed both by Central and State subject to Article 246 of the Constitution. Since Section 58A can be traced to regulatory power of the State exercisable under Entry 33 the challenge to its validity is liable to fail."

Court relied on Second Synthetics case and reiterated that the State may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol; State also had other two powers left (as stated in para-85 of Second Synthetics case). Entry 33 of List III is still available to the State regarding many of the aspects of the subject referred to in the said Entry. IDR Act has not occupied the entire field of legislation.

16. I think that, when it is said that a law occupied a field, the occupation should be a de facto occupation, Intention to occupy is evinced by the law detailing the mode of occupation. It is not an act of occupation, by enabling a delegate to

occupy a part of the field as and when the delegate thinks it necessary to do so. Either the law should declare that the said delegate is the only authority which could occupy the field to the exclusion of others or provide for the only mode of occupying the field in a particular manner.

17. In the instant case, Section 18-G provides for fixation of price, in the sense it vests a power in the Central Government to fix the price. It does not say that none else shall fix the price; it does not say as to under what circumstances only, the price could be fixed. It is an enabling provision, but not a disabling provision. No exclusive power is created and vested by Section 18-G. The intention evinced by the Parliament is an intention permitting the Central Government to fix the price if circumstances require such fixation by it.

18. In *Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others*, Tika Ramji's case was followed by a Bench of five Judges. The Court also referred to, with obvious acceptance of the observations of Sulaiman, J., speaking for the Privy Council in AIR 1939 74 (Federal Court) wherein it was held that, "...repugnancy must exist in fact and not depend merely on a possibility."

19. Evincing an intention to occupy a field in its entirety should be expressed clearly by declaring that the field of legislation is taken over by the Union. If the declaration made by the Parliament does not vest an exclusive power in the Centre over the field, but enables the Centre to occupy the field as and when it chooses to do so, can it be said the field is occupied? If the law enables the Centre to fix the price and in the exercise of the enabling power, the Centre fixes the price, State cannot fix a price which is repugnant to the former.

20. The valuable and classical doctrines governing the interpretation of legislative powers evolved in the context of other Constitutions shall have to be applied in India, to suit Indian conditions. The problems of this Country are as manifold as the diversities of its people; the needs of this Country are peculiar. Indian Constitution is the result of a serious exercise to meet its peculiar needs. Granville Austin in his "The Indian Constitution, Cornerstone of a Nation" (1972 Edition) said, at page 186:

"The political structure of the Indian Constitution is so unusual that it is impossible to describe it briefly. Characterization such as "quasi-federal" and "statutory decentralization" are interesting, but not particularly illuminating. The members of the Assembly themselves refused to adhere to any theory or dogma about federalism. India had unique problems, they believed, problems that had not "confronted other federations in history". These could not be solved by recourse to theory because federalism was "not a definite concept" and lacked "stable meaning". Therefore, Assembly members, drawing on the experience of the great federations like the United States, Canada, Switzerland and Australia pursued "the policy of pick and choose to see (what) would suit (them) best, (what) would suit the genius of the nation best...." This process produced new modifications of established ideas about the construction of federal governments

and their relations with the governments of their constituent units. The Assembly in fact, produced a new kind of federalism to meet India's peculiar needs."

Though the Federalism envisaged by the Indian Constitution is compared to "co-operative federalism" the mechanics of interpretation of the Constitution should mould itself to make it a workable organ and prevent a possible friction between the Centre and the States. Each State has its own problems.

Suppose pricing of a product of a controlled industry is required in a State say "X" and the Centre fails to exercise its power u/s 18-G of the IDR Act, can it be said that State "X" should be helpless in solving the problem in the State in respect of that industrial product? I am of the view that so long as the Centre is not given an exclusive power to fix the price u/s 18-G or the Centre has not fixed the price of the industrial product u/s 18-G, State should be allowed to fix the price to meet their respective needs. This interpretation of the phrase "evinces an intention to occupy the field" would keep alive the structure of co-operative federalism of the vast Country. Tika Ramji's case shall have to be respected as a binding precedent.

21. I may also refer to one more Decision of the Supreme Court in Indian Aluminium Company Limited and another Vs. Karnataka Electricity Board and others, . The Supreme Court affirmed the Decision of this Court. Supreme Court, while summarising the case, referred to the finding of this court and in one of the findings this Court had referred to Tika Ramji's case and quoted its observation that - "repugnancy must exist in fact and not depend merely on a possibility". In the Decision rendered by the High Court electricity was considered as a raw material for the smelter plant. Since price of electricity was not fixed u/s 18-G of the IDR Act, it was held that State had competence to do so. Supreme Court upheld all the reasonings of this Court as could be seen from the following observations in para 23:

"We have given our anxious consideration to the contentions raised for challenging the vires of the amending Act but we are unable to accept the contentions that the Act suffers from any infirmity affecting its vires either on the score of legislative competence or for offending Articles 19(1)(g) or Article 14 of the Constitution. It appears that the High Court has given cogent reason for upholding the vires of the amending Act and for dispelling the contentions raised by the Writ Petitioners and we endorse the view taken by the High Court. We may only indicate here that in deciding the question of legislative competence one must bear in mind that the Constitution is not to be construed with a narrow or pedantic approach and it is not to be construed as a mere law but as a machinery by which laws are made. Such interpretation should be made broadly and liberally. The entries in the Constitution only demarcate the legislative fields of the respective legislature and do not confer legislative power as such."

22. The relevant principles are again found in B. Viswanathiah and Company and Others Vs. State of Karnataka and Others, certain amendments made in the year

1979, to the Mysore Silkworm Seed & Cocoon (Regulation of Production, Supply & Distribution) Act 1959 were challenged in the said case. These amendments "imposed on the production, supply distribution and sale of silk, restrictions in a manner more or less analogous to those that earlier existed in respect of silk worm seeds & cocoons". In view of the Central Silk Board Act, the "Silk industry" came under the control of the Centre and State had no competence to legislate in that regard, was the petitioner's contention. Central Act was enacted with a declaration under Entry 52 of List I. Supreme Court rejected the challenge to the State law. Tika Ramji's case was referred and quoted and then Court proceeded to say at page 460:

"It is clear from the above observations that it is not all aspects of the industry (that) fall within the scope of Entry 52 of List I. It is only one aspect of the industry, that is, the process of manufacture or production that falls under Entry 52 of List I. It does not include raw materials used in the industry or the distribution of the products of the industry."

The Court pointed out that legislation in regard to raw materials would be permissible under Entry 27 of List II, notwithstanding a declaration of the industry under Entry 52. When the industry is a controlled industry (under Entry 52 of List I), legislation in regard to the products of the industry would be permissible by both the Central and State Legislatures by virtue of Entry 33 of List III. The impugned provisions of the State Act in the said case were traced to the power of controlling the supply and distribution of goods produced by the industry.

23. Rectified spirit is a raw material necessary for the manufacture of arrack; in that sense legislation on rectified spirit as a raw material would be within the legislative competence of the State. Sale of rectified spirit (as a finished product of an industry) for the purpose of its utilisation for the manufacture of arrack, is a subject that would fall within the topic of "Trade and commerce in and the production, supply and distribution" of the products of the industry encompassed in the field earmarked by Entry 33 of List III. Sale to the arrack manufacturers of the rectified spirit is incidental to the trade in and supply of rectified spirit; fixation of price to be charged at such a sale or for such supply, is a regulatory power flowing out of the power under this Entry 33.

24. From the above, I draw the following conclusions:

(1) State has power to regulate manufacture and dealing in rectified spirit to prevent its diversion or misuse.

(2) The observation of the Supreme Court in para 84 of the II Synthetics case that State cannot exercise its power to regulate under Entry 33 of List III, because the said field of regulation is occupied by Section 18-G of IDR Act was purely obiter and cannot be followed as a binding precedent in view of Third Synthetics case. The principle of occupied field enunciated in Tika Ramji's case is still good law governing the scope of Entry 33 of List III.

(3) Under Entry 33 List MI, the State has the requisite power to fix the price of rectified spirit so long as the Centre has not fixed the price by recourse to Section 18-G of IDR Act.

(4) The State has no exclusive right to produce and manufacture industrial alcohol which are manufactured under the grant of licence from the Central Government.

25. It is unnecessary to go into the contention that consequent of earlier Molasses Control order and Ethyl Alcohol (Price Control) Order 1971, State's power if any stood abrogated, because, impugned order under which the State fixed the price is after the aforesaid orders were withdrawn and the field was left unoccupied by the Centre. The question whether there was a repeal earlier and whether the withdrawing of the two orders by Central Government revives the State's power, therefore, does not arise.

26. The contention has another aspect as to whether Rule 17 of the Rules empowering the State to fix the price of rectified spirit, was repugnant and ceased to be operative.

Under Section 18-G of the IDR Act, power is given to the Central Government to fix the price; but that is not exclusive power; it is for the Central Government to make it exclusive by exercising it in a particular manner; it is certainly open to Central Government to convert it into an exclusive power and declare or order, that none shall charge a different price than the price fixed by the Central Government; so long such an order is not made, field of legislation remains unoccupied. Hence I am of the view that on enactment of Section 18-G read with Entry 26 of the Schedule to IDR Act, Rule 17 of the State Rules did not become unenforceable. It became unenforceable to the extent of ethyl alcohol, the moment, the Central Government fixed the price of ethyl alcohol. In the instant case, on the issuance of Ethyl Alcohol (Price Control) Order 1971, (for short, referred to as "Ethyl Order"), State lost its independent power to act under Rule 17 to fix the price of ethyl alcohol, because the price to be charged for ethyl alcohol has to be only according to the said Order in respect of three categories mentioned in the Table" attached to Clause (2) of the said Order. However, the said order permitted the State to vary the price under certain circumstances referred to in Clause (3) of the Ethyl Order."

27. Therefore, I am of the view, that the power of the State to regulate the price of Ethyl Alcohol under Entry 33 of List III is not taken away by Section 18-G of IDR Act, read by itself. The power may be taken away as and when the Central Government makes an order u/s 18-G as held in Tika Ramji's case.

Quite obviously, so far, while fixing the price of rectified spirit purporting to act under Rule 17 of the State Rules, State actually acted in accordance with the Ethyl Order or it may have acted on the ground that State had the exclusive privilege to deal in rectified spirit under Entry 8 of List II which was never questioned.

28. The next question is whether the Karnataka Excise Act and the relevant Rules were in the purported exercise of the power under Entry 33 of List III, or whether the power to fix the price under Rule 17 of the State Rules was traceable to the exclusive privilege the State allegedly had in dealing in "intoxicating liquors". If the pith and substance of the law takes it to any of the Entries in List II, can Rule 17 be now justified by tracing the source to Entry 33 of List III?

The normal principle is that when the Legislature delegates its power, it must lay down policy, principle or standard for the Rule making authority. Vast latitude is recognised in the matter of delegation because of the complex nature of administration and imponderables that may have to be overcome while administering the law. So long as the law enacted by the Legislature spells out a clear purpose to be achieved or policy to be implemented, manner of realising it is left to the Rule making authority. Guidance may be found anywhere in the Act such as, an express provision empowering a delegation, or the preamble, the scheme or even the very subject matter of the statute.

But the liberal and generous power recognised as vested in the Legislature to delegate its power is not unlimited. Essential legislative functions are to be discharged by enacting the law, since the power of making the law is given to the Legislature by the Constitution. Many a times, the fact that the Rule is placed before the Legislature for disapproving or modifying it, is considered as a strong factor in upholding the delegation because, the Legislature has retained control over the Rule.

Under the State Act, Section 71 (4) requires the laying of the Rules before the Legislature within the prescribed time and if the Legislature modifies it, then, the modified Rule is enforceable; if not original Rule continues to operate. As per Section 71(3) every Rule under the Act shall have the effect as if enacted in the Act. However the Rule operates immediately on its being notified for its operation and it need not await the approval of the Legislature. No doubt, this is an aspect to be considered in favour of the validity of the delegation. However, the clause dealing the Rule as if enacted in the Act cannot give the Rule an absolute immunity. In the State of Kerala Vs. K.M. Charia Abdullah and Co., , the Court observed:

"... if in making a rule, the State transcends its authority, the rule will be invalid, for statutory rules made in exercise of delegated authority are valid and binding only if made within the limits of authority conferred. Validity of a rule whether it is declared to have effect as if enacted in the Act or otherwise is always open to challenge on the ground that it is unauthorised."

The liberal approach to the permissiveness of delegation is found in M.K. Papiiah and Sons Vs. The Excise Commissioner and Another, . Section 22 of the State Act empowers the Government to levy excise duty on any excisable article manufactured in the State and the duty may be at such rate or rates as the State Government may prescribe. No doubt this is a wide delegation regarding a levy

of tax. Supreme Court upheld its validity. The Supreme Court referred to Section 71 (4) requiring the laying of the Rule before the Legislature and the prescribing of the duty under the Act has to be only by making Rules. After pointing out that the laying of the Rules before the Houses has several virtues and "they bring legislative into close and constant contact with the administrative", the Court also held that the Legislature may retain its control over its delegate by exercising its power of repeal.

A point of distinction between the facts of Papaiah's case and the present case may straightaway be noted. The excise duty is leviable and rates etc. are prescribed by making Rule or Rules. But the price to be fixed under Rule 17 is by an executive order of the Excise Commissioner. Rule 17 by itself does not lay down the mode of fixing the price; therefore even if the Rule 17 had the blessing of the Legislature, it cannot be assumed that the price fixed thereunder had the benefit of legislative scrutiny. The only control over the price fixation is the requirement, as stated in Rule 17, that it should get the prior approval of the State Government.

29. While examining the scope, scheme and purpose of Karnataka Excise Act, the understanding as to the legislative competence of the State in respect of the subject matter during the relevant time is not irrelevant. States believed that they had the exclusive privilege to deal in respect of all aspects of rectified spirit and this belief stood Judicial scrutiny in the year 1980 when first Synthetics case was decided; levy of vend tee on denatured spirit by the State was upheld in that Decision, Court rejected the contention that alcohol manufactured for the purpose of industries such as industrial alcohol, is not covered by the term "intoxicant" or "liquor"; it was held that term "liquor" would not only cover alcoholic liquor which is generally used for beverage purposes and produces intoxication but would also include liquid containing alcohol"- (Para 12 of the Decision). At para 18, Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, was referred to say that power to legislate under List II, Entry 8 relating to intoxicating liquor comprises of liquor which contains alcohol whether it is potable or not and that the State has exclusive right of manufacture or sale of intoxicating liquor which includes liquid containing alcohol was recognised in that Decision in Harshankar's case. In the First Synthetic's case the further argument that after passing of IDR Act, the claim by the State for monopoly with regard to production and manufacture and the sale of denatured spirit or industrial alcohol, was held as unsustainable. It was held that the Ethyl Order made by the Central Government u/s 18-G of IDR Act in no way affected the State's power "to regulate the distribution of intoxicating liquor by collecting a levy for parting away with its exclusive right". At para 28 the principle stated in Tika Ramji's case that to bring about the repugnancy, it should be a de facto repugnancy, which would arise only if Central Government had fixed the price u/s 18G of the IDR Act

30. The basic theme of First Synthetic Decision was that "liquor" includes all kinds

of liquids containing alcohol and rectified spirit is a liquor with respect to which State had monopolistic power or privilege. It is this idea that pervaded the States' excise Legislations, such as the Karnataka Excise Act. The idea that rectified spirit is an intoxicant over which the State has the exclusive privilege, is now clearly overruled in Second Synthetic case (para 84): to this extent the Third Synthetic's case also accepted the Decision in Second Synthetic's case.

31. Therefore, when the State Act was enacted, it was legislated on the assumption that the State had the exclusive privilege in the matter of manufacture, dealing or licensing of rectified spirit. This is also clear from the several provisions of the Act. The several definitions in Section 2, clearly brought in rectified spirit within the terms "liquor", "intoxicating liquor" and "excisable article". Vast and absolute powers are shown as vesting in the State with regard to every aspect of these articles in Chapter IV (Sections 13 to 21) of the Act. Excise duty was levied on rectified spirit under Chapter V (Section 22 etc.). Not a direct, specific, clear provision is found in the Act guiding the exercise of power to fix the price of these articles, obviously, on the assumption that since the State had an exclusive privilege, specific guidance on this aspect is unnecessary, and no person has a fundamental right to manufacture, process or sell intoxicating liquors (including rectified spirit). Even Section 71 does not refer to price fixation in specific terms. The scheme of the Act is to lay down broadly, the manner of exercising the State's privilege. Even, under Rule 17, no guidance is prescribed to fix the price, unlike the Ethyl Order, where, clear guidelines were prescribed to fix the price of ethyl alcohol.

A comparison with Essential Commodities Act and several statutory orders issued thereunder also show that, either the Act or the relevant order prescribed guidance to fix the price of the commodity in question. This apart, the very purpose of the Essential Commodities Act indicates that a fair price has to be fixed with a view to "control" the price of the commodity which is essential to the community.

32. Since Rule 17, to the extent it covers rectified spirit, treating it as a privileged commodity of the State, is now realised to be based on a mistake, necessarily it follows that Rule 17 cannot be accepted as a valid Rule in so far as it empowers the Excise Commissioner to fix the price of the rectified spirit when sold to manufacture arrack.

33. As the purpose of the Act purported to be implemented through its several provisions cannot cover the rectified spirit under Entry 8 of List II and the relevant provisions were never intended to be under Entry 33 of List III, it is impossible to infer any guidance to guide the fixation of price. Price fixation is generally considered as a legislative function, when, price is fixed for the goods in general or to govern the price in a specified class of transactions. Sometimes price fixation is attributed with quasi-judicial function; but this is restricted to the cases of price fixation in individual cases; Court does not venture into the area of price fixation, because it is essentially, an area covered by the economic activity

of the State. Further, mechanisms involved in price fixation are not easy to formulate in clear and specific terms.

34. The Oil and Natural Gas Commission and another Vs. The Association of Natural Gas Consuming Industries of Gujarat and others, etc. etc., was concerned with the price charged by the Oil and Natural Gas Commission ("ONGC" for short) (an instrumentality of the State) in respect of the natural gas supplied to the private industrial undertakings. In respect of the natural gas supplied to a few others, lower prices were charged. It was not disputed that price to be charged by ONGC should have some basis and not to be arbitrary or unconscionable. ONGC contended that it based the price on the "alternative fuel cost" which the consumers may have to incur had they not been in receipt of gas supply. The question was whether this was a valid basis or whether ONGC should have followed "cost plus" basis, a basis similar or analogous to the basis formulated in Sugar Price Control Order or the Drug Price Control Order or other Orders issued under the Essential Commodities Act. Supreme Court held, at page 1869, that:

"While the cost plus basis is a recognised basis for fixation of prices of essential commodities or for the service rendered by a public utility undertaking, it would not, in our view, be correct to treat it as the only permissible basis in all situations. On behalf of the ONGC it has been pointed out that even in the fixation of prices of essential commodities like levy sugar, the concept of cost plus is not necessarily the only method of fixing the price for the commodity."

An earlier Decision rendered in connection with the challenge to the price fixed, governing sugar under the provisions of Section 3(3C) of the Essential Commodities Act, 1955 in Anakapalle Co-op. Agrl. and Industrial Society Ltd., Vs. Union of India (UOI) and Others, was referred to in this connection. Thereafter, again it is pointed out at page 1870:

"These passages indicate that cost plus is not a satisfactory basis in all situations. The basis may need to be more stringent in some situations and more broad based in others. May be the cost plus is an ideal basis where the commodity supplied is the product of a monopoly vital to human needs. In that context the price fixed should be a minimum possible as the customer or consumer must have the commodity for his survival and cannot afford more than the minimum. The producer should not, therefore, be allowed to get back more than a minimum profit. Indeed, in certain situations it may even be inequitable to fix varying prices on the basis of the cost of each individual manufacturer and thus encourage inefficiency; it may be necessary to base it uniformly for a whole industry on the cost of the most efficient manufacturer as has been done in the case of drugs (vide: Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., . It was so vital that the goods should be available to the common man that the prices were statutorily fixed so low as to drive away inefficient producers and so as to make it possible only for the most efficient manufactures to survive. Per contra, there can be situations where the need of

the consumer is not so vital and the requirements of the economic scene are such that the needs of the producer should be given greater consideration. In such situations, the "plus" element in the cost plus basis (namely, the allowable profit margin should not be confined to "a reasonable return on the capital") but should be allowed to have a much larger content depending on the circumstances."

The nature of the commodity and the community's needs also could be taken into consideration while fixing the price. The problem, in the background of need to fix a fair and reasonable price for goods, was referred, with the following observation at page 1872:

"Price fixation it is common ground, is generally a legislative function. But Parliament generally provides for interference only at a stage where in pursuance of social and economic objectives or to discharge duties under the Directive Principles of State Policy, control has to be exercised over the distribution and consumption of the material resources of the community. Thus while Parliament has enacted the Essential Commodities Act, it has left it to the discretion of the Executive to take concrete steps for fixing the prices of essential commodities as and when necessity arises, by promulgating Control Orders in exercise of the powers vested in the Act. Various types of foodgrains, sugarcane and drugs have come under the purview of such control orders and the modalities of fixation of fair prices thereunder have also come up for consideration of the Courts. There has also been such fixation of price under the industries (Development & Regulation) Act, 1951, vide: Premier Automobiles Ltd. and Others Vs. Union of India (UOI), . In all these cases, the primary concern of the Government and Parliament has been that the articles in question should be available to the members of the consumer public at the minimum prices possible and, in that context, these legislations no doubt adopt the "cost plus reasonable return on investment" test in the fixation of prices. That, even in respect of such commodities, the "cost plus" method is not the only reasonable method has been recognised in judicial decisions. The cases on this topic have been reviewed and the limitations on judicial review of price fixations fully discussed recently by a Constitution Bench of this Court in M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, , it is, however, not necessary here to enter into a discussion of this and the earlier cases because those cases were primarily concerned with the question whether the price fixation had been made in consonance with the requires of the relevant legislation fixing prices of essential commodities in the interests of the general public and also because ONGC does not deny that, as a State instrumentality, its price fixation should be based on relevant material and should be fair and reasonable."

35. In M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, Supreme Court was considering the validity of the price fixed for "levy sugar" u/s 3(3C) of the Essential Commodities Act, 1955. Here the price fixation was held to be in the sphere of State's economic policy and Court cannot

substitute its Judgment for that of the Legislature or its agents. The principles to be borne in mind are indicated in Section 3(3C), because, price had to be fixed "having regard" to the factors stated in Section 3(3C), though, the said factors are not exhaustive and conclusive. However, the scope of the power to be exercised by the delegate, is to be, as pointed out at page 1296:

"Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterised as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be "reasonably related to the purpose of the enabling legislation". See *Leila Mourning v. Family Publications Service* (1973) 411 US 356, 36 Law Ed. 2d 318. if they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, courts might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires"; per Lord Russel of Killowen, C.J. in *Kruse v. Johnson* (1898) 2 QB 91."

The impugned order, in the said case, was held based on an exhaustive study by experts. At page 1299, the Bench held:

"Price fixation is not within the province of the courts, Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority."

Again-

"It is a matter of policy and planning for the Central Government to decide whether it would be, an adoption of a system of partial control, in the best economic interest of the sugar industry and the general public that the sugar factories are grouped together with reference to geographical-cum-agro-economic factors for the purpose of determining the price of levy sugar. Sufficient power has been delegated to the Central Government to formulate and implement its policy decision by means of statutory instruments and executive orders."

36. The two Decisions of the Supreme Court reflect two different sets of fact-situations. In *ONGC* case, *ONGC* fixed the price for the supply of its goods on the basis of "alternative fuel cost", while in the case of sugar, price Taxation was guided by Section 3(3C) of the Essential Commodities Act. *ONGC* case was not concerned with any legislative policy, while, in the second case statutory power of fixing the price, which was a matter of legislative policy, was involved. *ONGC* was the "owner" of the goods to be sold; as an instrumentality of the State, it has to price its commodity by applying a fair principle. In the latter case (*Sitaram Sugar Co. Ltd.*) State was exercising a regulatory function, as the repository of the power delegated to it by the Parliament and, therefore, guidance was forthcoming in the relevant statute.

37. Object behind the fixation of price under the Essential Commodities Act is the "maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices or for securing any essential commodity for the Defence of India etc..." (vide Section 3)

38. The purpose of Section 18-G of IDR Act is also similar; it is "for securing the equitable distribution and availability at fair prices of any article or class of articles relatable to any Scheduled industry etc...". Therefore, a notified order u/s 18-G "may provide for controlling the prices at which any such article or class thereof may be bought or sold". Even without a further enunciation of the principles or any further guidance, to arrive at the price, this object itself can be considered as an exposition of the legislative policy to guide the exercise of the power.

39. But the State Act with which I am concerned here, nowhere, indicates any similar policy; the State Act purports to wield and exert a monopolistic power with regard to commodities over which the State has an exclusive privilege. Therefore, it is not possible to imply any guidance to guide the exercise or the power of fixing the price of such a commodity.

40. Though Court cannot examine the correctness of the price fixed, Court can examine whether the power is vested in the authority as envisaged by the Constitution and whether the repository of the power exercised it reasonably, taking into consideration all relevant factors and whether there has been a failure to consider any important relevant factors, having an impact on the process of price fixation, as otherwise, the price fixed would be unreasonable and arbitrary.

41. Union of India (UOI) and Others and State of Delhi (Now Delhi Administration) and Others Vs. BhanaMal GulzariMal Ltd. and Others, was referred by the learned Advocate General in support of his contention that when the repository of the power is the Government to fix the price, it has to be upheld, because, Government is always expected to be guided by reason and fairness while fixing the price and that the Act need not specifically lay down the guide lines. Fixation of price under Clause (11B) of Iron and Steel (Control of Production and Distribution) Order 1941 read with Section 7 of Essential Supplies (Temporary Powers) Act 1946 was the subject matter in issue in the said case. Guidance was found in the very Act which created the power. The Statutory order also indicated the principle to be considered while fixing the price. There was no unguided, absolute power given to the Central Government in the said case. The case is similar to other cases under the provisions of the Essential Commodities Act.

42. Rule 17 of the Rules, invoked in the present case, nowhere lays down nor indicates the principles or factors to be considered while the Excise Commissioner fixes the price with the prior approval of the State Government. The cases of other liquors may be different, because, in those cases, the State has exclusive privilege to deal with those liquors/intoxicants; unlike the case of

rectified spirit.

43. The permissible limits of delegation of legislative function cannot be stretched so as to make it notional. It cannot be said that the limitation on the delegation of legislative function has reached a vanishing point. Limitation is needed to prevent any possible dictatorial power being vested in the executive by the Legislature.

Courts are not expected to somehow find a purpose behind a legislation and then apply the said purpose to guide the exercise of the delegated power. If an absolute power is created in the executive, and the circumstances and factors guiding the exercise of such a power cannot be reasonably deciphered, and the Court still has to uphold such a law, it will be a case of abdication of its responsibility by the Court and the vice of unconstitutionality will be left unremedied.

Rule 17 in so far as it empowers of the fixation of price of rectified spirit, is therefore, declared as unconstitutional, and ultra vires the provisions of the State Act.

44. The State Government has fixed the price at Rs. 8.50 per litre under Rule 17. Assertion of the State is that it has taken all relevant factors into consideration.

It is undisputed that the raw material for rectified spirit is molasses. It is also not disputed that on the basis of the price of molasses at Rs. 1700/- per metric tonne, the cost of rectified spirit, per litre would be Rs. 18,84. Price of molasses has gone up further and even the Mysore Sugar Company (an undertaking of the State Government) "has been selling molasses for over Rs. 2,000/- per metric tonne, resulting in the cost of rectified spirit of about Rs. 21/-per litre. State explains the situation by pointing out that this is only seasonal and the price of molasses would drastically come down after October.

The fact remains that for nearly five months in a year, molasses is in short supply. During the other seven months, to what extent its price is likely to come down is not forthcoming. State's objection statement is silent as to the anticipated downfall in the price of molasses and the average price of molasses for the year. It is not established that the price fixed now at Rs. 8.50 per litre would offset the present loss by the likely profit that would be earned later by the manufacturers of rectified spirit.

It is true that price fixed under Rule 17 governs the sale of rectified spirit for manufacture of arrack; in other respects its price is not controlled. But, that cannot help the State. Rectified spirit required as a raw material in industries (including pharmaceuticals) is expected not to be costly. In fact the policy of the Central Government is to have more rectified spirit available to these industries. Having regard to the need to curb consumption of alcohol/arrack, attempt should be to have its cost increased. Therefore, it cannot be said that, by the low price for the rectified spirit when sold for arrack manufacture, loss caused, if any, can

be compensated by charging a higher price elsewhere. Such an approach would be opposed to the very basis on which the Central Government withdrew the Price Control Orders; such an approach, I am of the view is not in the public interest.

In the circumstances, I am constrained to hold that the price fixed at Rs. 8.50 per litre of rectified spirit under Rule 17 of the Rules is unreasonable, unfair and arbitrary.

45. For the reasons stated above, these Writ Petitions are allowed. It is declared that Rule 17 of the Karnataka Excise (Manufacture and Bottling of Arrack) Rules 1987, in so far as it governs the rectified spirit, is unconstitutional and consequently to that extent it is unenforceable. It is also declared that the price fixed by the State Government for the sale of rectified spirit for the manufacture of arrack, at Rs. 8.50 per litre is arbitrary, unreasonable and unfair and consequently it is void as offending Articles 14 and 19(1)(g) of the Constitution of India.

The Writ Petitions are allowed accordingly. Rule made absolute. No costs.