

(2003) 09 AP CK 0047

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 11319 and 11320 of 2000

Grag Martin Distillery Private Limited

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 12-09-2003

Acts Referred:

Andhr Pradesh Distillery Rules, 1970 — Rule 9
Andhra Pradesh Excise Act, 1968 — Section 13
Constitution of India, 1950 — Article 14, 19, 47

Citation : (2003) 6 ALD 261 : (2003) 5 ALT 613

Hon'ble Judges : Goda Raghuram, J; Bilal Nazki, J

Bench : Division Bench

Advocate : H. Prahalada Reddy, for the Appellant; Government Pleader for Prohibition and Excise, for the Respondent

Final Decision : Allowed

Judgement

Goda Raghuram, J.—These writ petitions involve similar questions of fact and law. As the respective petitioners seek identical relief the writ petitions are considered together and disposed of by this common judgment.

2. M/s. Crag Martin Distillery Private Limited, Pilamol, Goa and M/s. Swan Distillery Private Limited, Curtorim, Goa, respectively, have filed the above writ petitions. They seek identical reliefs as under:

(a) A writ of certiorari calling for the records of the first respondent in Memo. Nos. 4478/Ex.II (2)/99-1, impugned in W.P. No. 1 1319/2000 and 44781/Excise-II (2)799-2, impugned in W.P. No. 11320/2000, both dated 4-8-1999 and quash the same;

(b) A direction calling for the records of the first respondent in G.O. Ms. No. 168, Revenue (Excise-II) Department, dated 31-3-2000 and declaring Clause 4 of the said policy prohibiting grant of licences for new ML distillery as unconstitutional and null and void;

(c) Consequently directing the respondents to issue the licence to the petitioner for establishing the distillery in the State of A.P. and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

3. As the facts and questions of law involved in these writ petitions are substantially similar, the facts as pleaded in and leading to W.P.No. 11319 of 2000 are recorded:

W.P. No. 11319 of 2000:

(a) The petitioner is a Company incorporated under the Companies Act, 1956. It manufactures Indian Liquor viz., Brandy, Whisky, Gin, Rum and Vodka at its plant in Goa for sale, in the State of Goa and in the neighbouring State of Kerala. The manufacturing capacity of the petitioner's plant is 50,000 cases per month.

(b) The State of Andhra Pradesh under the provisions of the A.P. Excise Act granted the A.P. Beverages Corporation Limited (Beverages Corporation) the exclusive privilege of wholesale procurement and supply of liquor for eventual consumption in the State of A.P. The Beverages Corporation is accordingly procuring Indian Liquor by floating tenders. In G.O. Ms. No. 166 Revenue (Excise-II) Department, dated 18-3-1998, the 1st respondent (the State) set out the excise policy for the year 1998-99. In Clause-7 of this policy, liquor was classified into four categories A, B, C and D, based on the basic price per case. By Clause 8 the Beverages Corporation was directed to procure A, B and C categories of liquor from distilleries located within the State while permitting it to continue to import premium brands i.e., D category. The reasons set out in the clause for restricting procurement of A, B and C categories of liquor from distilleries located within the State, is set out in Clause 8. The reason as set out is that sufficient production capacity for these categories exists within the State. Clause 8 further states that a period of three months should be given for those who would like to establish production facility within any existing distillery or tie up with any local distillery regarding A, B and C categories, not manufactured or produced within the State.

(c) Pursuant to the excise policy for the year 1998-99 set out in G.O.166, the Beverages Corporation issued a tender notification dated 20-3-1998 calling for sealed tenders from local distilleries situated in A.P., who possess a valid excise licence issued by the 2nd respondent and are willing to enter into an agreement with the Beverages Corporation for supply of Indian Liquor and Wine, in categories A, B and C, for the financial year 1998-99.

(d) Though the petitioner has a valid excise licence issued by the Government of Goa, it was disabled from participating in the tender dated 20-3-1998 issued by the Beverages Corporation in view of the terms of the tender notification and the order of the Government in G.O.Ms.No. 166, as it did not have a distillery within the State of A.P.

(e) Aggrieved the petitioner filed W.P.7996/98 in this Court challenging G.O.166 and the consequent tender notification issued by the Beverages Corporation. After the institution of the writ petition, the petitioner, with the leave of this Court, raised additional grounds for enabling it to . establish a distillery.

(f) By an interim order dated 27-7-1998 in the above writ petition, the petitioner was permitted to apply to the 1st respondent for establishing a new distillery while directing the 1st respondent to dispose of the application to be made by the petitioner, within four weeks from the date of receipt of the application. Directions were also issued to the MCH and the Chief Inspector of Factories to dispose of the relevant applications of the petitioner to these authorities so as to enable the establishment of a distillery by the petitioner.

(g) Against the interim directions above, the respondents therein filed writ appeals, which were disposed of by a common judgment dated 30-10-1998. A Division Bench of this Court, affirmed the directions of the learned Single Judge.

(h) On 24-8-1998 the petitioner applied to the 1st respondent for grant of a Letter of Intent to establish a distillery in the State of A.P. In the application the petitioner pleaded that the condition in the new excise policy issued by the State Government in G.O.Ms.No. 166, facilitated the formation of a cartel and exploitation of both the Beverages Corporation and the consuming public of Andhra Pradesh. The petitioner further stated in his application that it was offering substantial quantities of liquor to the Kerala State Beverages Corporation @ Rs. 230/- per case, after incurring export fee and transportation charges for having to move liquor from Goa to Kerala as well as the extra cost of operating in a State like Goa where basic raw materials are not available. As all the raw material is available in abundance in A.P., the petitioner's cost of production per case will be as low as Rs. 142.51. Therefore, the petitioner offered to supply to the Beverages Corporation at a price lower than Rs. 200/- per case in comparison to Rs. 300/- per case being charged by the existing distilleries of A.P., who allegedly formed a cartel.

(i) The 1st respondent herein by its order in a memo dated 30-12-1998 rejected the application of the petitioner for permission to grant a LOI to establish distillery. In para 5 of the order, the 1st respondent denied the formation of a cartel and stated that the Cabinet Sub-committee decided to ban import of A, B and C categories of liquor in order to curb the menace of non-duty paid liquor and has also not granted any LOI to anybody to establish a new distillery in the State during 1998-99 as the production capacity of the existing distilleries is more than adequate to meet the demand. This order of rejection was also challenged in W.P. No. 7996/98 by way of amendment of the reliefs sought. The writ petition was eventually heard along with a connected writ petition filed by M/s. Swan Distillery Pvt. Ltd., and allowed by a learned Single Judge by the common judgment dated 15-3-1999. The order of the Government in the memo dated 30-12-1998 rejecting the petitioner's application for a LOI to establish a distillery, was set aside and the matter remitted to the Government for fresh

consideration in the light of the observations recorded in the judgment. The learned Single Judge in allowing the writ petition held that the State by permitting tie-ups between the local distilleries and manufacturers outside the State while refusing permission to establish distilleries in the State, had acted arbitrarily and in violation of Article 14 of the Constitution. He further held that the Government was not competent to insist that out of State distilleries must enter into a contract with local distilleries and characterised this requirement by the State as an unreasonable restriction and further that the classification between local and outside distilleries was irrational, having no nexus with the alleged object viz., regulation of illegal entry of non-duty paid liquor into the State. The learned Single Judge also held that the rejection of the petitioner's application was on extraneous grounds. Against the above common judgment in the two writ petitions the State filed W.A. Nos. 769 and 775 of 1999 and the Division Bench of this Court granted status quo while directing the State to reconsider the application of the petitioner.

(J) By the impugned order in the memo dated 4-8-1999 the petitioner's application for a licence for establishing a distillery in the State was again rejected. The impugned memo recorded the following factors as underlying its decision to reject:

(i) The main intention of the State is to procure A,B and C categories of liquor from local distilleries to avoid smuggling of non-duty paid liquor.

(ii) There are 31 distilleries in the State of which 30 are functioning. The total production of these distilleries is 15.81 lakhs cases per month, whereas the consumption is only 10 lakhs cases per month. There is thus sufficient production capacity to meet the demand of the State.

(iii) The State has not granted LOI to any new distillery within the State during the Excise years 1998-99 and 1999-2000.

(iv) The contention of the applicant (petitioner) that consumers are adversely affected is not borne out by facts. In the neighbouring State of Tamil Nadu the number of cases procured and supplied to the Tamil Nadu State Beverages Corporation Ltd., is comparatively small. It is therefore evident that the State of A.P. has taken more than adequate care to meet the needs of the consuming public.

(v) Issue of licences for establishment of distilleries in the State is governed by the principles laid down by the State. Licences cannot be issued freely to every person who applies since the Government does not intend to promote consumption of liquor. Several regulatory measures are in operation not only for issue of licences to distilleries but also to regulate the number of retail licences granted. Licences to Bars are also restricted and ban on arrack continues to be in force. The State does not accept free licensing to distilleries without restrictions. The Government desires to regulate both production and sale of IMFL and Beer in the State. The guiding principle is the overall interests of the general public.

Another reason recorded is that 13 applications for establishment of distilleries have been rejected in May, 1998 and the Government should be consistent in its decisions.

(k) After the above order of the State Government dated 4-8-1999 rejecting the petitioner's application, Writ Appeal Nos. 769 and 775 of 1999 filed by the State against the common judgment dated 15-3-1999 of the learned Single Judge, came up for hearing. During the course of hearing of the writ appeals and after conclusion of the arguments, the State Government in G.O. Ms. No. 168 Revenue (Excise II) Department, dated 31-3-2000, issued the Excise Policy for the year 2000-2001. Clauses (4), (5), (6) and (8) of the said Excise Policy are relevant and read as under:

"(4) Modernisation and expansion of distilleries will be permitted to the extent of improving operational hygiene and efficiency. No licence will be issued to set up a new IML Distillery, as existing distilleries after modernisation and expansion can meet demand within the State.

(5) To meet the uncovered demand in the State, expansion and establishment of new breweries will be permitted.

(6) To encourage healthy competition, introduction of new brands and labels and agreements for fresh tie-ups will be permitted.

(7).....

(8) Category "C" liquor will be procured from all over the country, in addition to category "D" and beer. Category "A" and "B" liquor will continue to be procured from within the State."

(l) A Division Bench of this Court by its judgment reported in State of A.P. and another Vs. Crag Martin Distillery Pvt. Ltd., Goa and another, , allowed the appeals filed by the State of A.P.

(m) As the petitioner is aggrieved by the order of the 1st respondent dated 4-8-1999 rejecting its application for establishing of a distillery in the State of A.P. and is also aggrieved by the clauses in G.O. Ms. No. 168 dated 31-3-2000 (Excise Policy for the year 2000-2001), permitting expansion and modernisation of the existing distilleries and thereby increased production while disabling new entrants like the petitioner to compete for the largesse of the State in the matter of supply of liquor, it has instituted the present writ petition.

4. The order of the 1st respondent dated 4-8-1999 and the Excise Policy for the year 2000-2001 announced by the 1st respondent in G.O. Ms. No. 168 dated 31-3-2000 are challenged on the following broad grounds:

(i) While it is open to a State to either prohibit the manufacture, distribution or supply of liquor within its territory or regulate these areas, as trade and business in liquor is held to be *res extra commercium*, once the State permits the manufacture of liquor, by private agencies, within its territory, the equality

injunctions of Article 14 are implicated and every person has a right to pursue the trade and business of manufacture of liquor and to apply to the State for permission to set up a manufacturing unit. The State cannot under the guise of regulating the manufacture of liquor set out to create a monopoly in favour of existing manufacturers and to the detriment of others intending to enter the field. Such regulation by the State would violate Article 14 of the Constitution.

(ii) The rejection of the petitioner's application by the 1st respondent by its order dated 4-8-1989 on the ground that the production capacity is sufficient to meet the demand within the State, is based on an irrelevant and discernably incorrect ground as is demonstrated by the Excise Policy set out in G.O. Ms. No. 168 dated 31-3-2000 wherein the State has permitted as a policy "modernisation and expansion" of the existing distilleries.

(iii) The other ground of rejection recorded in the order of the 1st respondent namely that the State does not want to permit increase in consumption of liquor is also incorrect and misconceived being inconsistent and contrary to its Excise Policy for the year 2000-2001 which affirmatively permits expansion of the production capacities in existing distilleries.

(iv) The other ground of rejection is that procurement of liquor only from local distilleries will curb smuggling of non-duty paid liquor and that no licence to establish a new distillery had been given by the State in the Excise Years 1998-99 and 1999-2000. This ground is irrelevant besides having no nexus with the petitioner's application which is for establishment of a new distillery in the State.

(v) The statement in the impugned order of the 1st respondent dated 4-8-1999 rejecting the petitioner's allegation of formation of a cartel by the local distilleries, is misconceived. The local distilleries had uniformly quoted Rs. 245/- per case in the current year which warrants the inference that all the manufacturers had agreed upon a minimum rate which is far in excess of the price at which sales are effected in neighbouring States. The petitioner's offer was for supply of good quality liquor for less than Rs. 200/- per case. In these circumstances it is reasonable to infer that the State in rejecting the petitioner's application was not acting in furtherance of public interest but was actuated by extraneous considerations and to benefit existing distilleries, to the detriment of the State Exchequer and the consuming public of the State.

(vi) The policy of the State as contained in G.O. Ms. No. 168 dated 31-3-2000 permitting "modernisation and expansion" of the existing distilleries while prohibiting entry of new distilleries is a policy that leads to hostile discrimination violating the petitioner's rights under Article 14 of the Constitution. The policy has no rational nexus with the avowed object of the State either to curb or regulate the consumption of liquor, or any object of the State Excise Act.

(vii) The impugned policy is also illegal and unconstitutional as it permits tie-ups between the local and outside manufactures while prohibiting grant of new

licences and establishment of new distilleries. This policy obligates manufacturers of liquor who intend to participate in the largesse of the State of A.P. to enter into a contractual relationship with the existing private distilleries. This coercive obligation to a business/commercial association has no nexus whatsoever with any rational governmental objective.

5. After the institution and admission of these writ petitions for consideration, the State Government issued G.O. Ms. No. 525, Revenue (Ex.III) Department, dated 31-7-2000, purporting to be under Rule 37(1) of the A.P. Distilleries Rules, 1970 for conversion of manual bottling lines into semi automatic/ automatic bottling lines and sanction of one separate bottling line for manufacture of 90 ml bottles. This order was issued in respect of 28 distilleries set out in the table, in G.O. Ms. No. 525.

Counter-affidavit of the 1st and 2nd respondents:

6. An Officer on Special Duty of the 1st respondent has filed a counter-affidavit on behalf of Respondents 1 and 2. The salient and relevant statements in this affidavit are as under:

(A) There are 32 distilleries in the State, which manufacture liquor. Under the provisions of the Andhra Pradesh (Regulation of Wholesale Trade and Distribution of Retail Trade in Indian Liquor, Foreign Liquor, Wine and Beer) Act, 1993 [Act 15 of 1993] (for short "1993 Act"), the State Government took over the wholesale trade and distribution of Indian Liquor, Foreign Liquor, Wine and Beer. For the purpose of trading operations which were thus taken over, the Government conferred on the Beverages Corporation the exclusive privilege of importing, exporting and carrying on wholesale trade and distribution in Indian Liquor, Foreign Liquor, Wine and Beer on behalf of the State. The validity of this Act was assailed but upheld by the Supreme Court in *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, .

(B) The Beverages Corporation was originally purchasing potable liquor from sources within the State of A.P. as well as from outside through the procedure of calling for tenders. Out of State suppliers were provided import permits. No persons other than such suppliers were granted permits for import of liquor. It came to the notice of the State that a large quantity of non-duty paid liquor (NDPL) was being smuggled into the State. After the issue was raised in the Legislative Assembly a Cabinet Sub-Committee was constituted in G.O. Ms. No. 99, Revenue (Excise IT), dated 24-2-1998, to advise on the proper implementation of prohibition in particular the steps to be taken to control flow of NDPL into the State. The Committee in its report noted that a liquor smuggling net-work gradually evolved in the State with the support of producers of Indian Liquor outside the State, powerful middlemen and also some local distilleries. The Committee also noticed that the total ban imposed on imports introduced in Tamil Nadu was working satisfactorily. On a study the Committee recommended.

(i) That imports be banned in A, B and C grade liquor while for the premium D

grade liquor import may be permitted as consumption of this grade of liquor is of the order of 3%.

(ii) That a reasonable time and opportunity of a couple of months be given to those who want production facility or tie-up with local distilleries to supply their liquor which was hitherto imported.

(C) The State having taken into account the production capacity of local distilleries of A,B and C categories and having considered it sufficient to meet the demand in the State, in its Excise Policy set out in G.O. Ms. No. 166, dated 18-3-1998, directed the Beverages Corporation to procure the above category of liquor from distilleries located within the State. In its current policy the Beverages Corporation was permitted to procure A and B category liquor only from local distilleries while imposing no such restriction in respect of category C and D which could be procured from outside the State as well. As the petitioners have no fundamental right to business in liquor, no rights of theirs are affected. It is settled law that the policy decision of the State relating to grant of licence for trade in liquor could not normally be interfered with. As there is a basis for the classification by the State, no illegality is involved.

(D) The Andhra Pradesh (Regulation of Wholesale Trade and Distribution of Indian Liquor, Foreign Liquor, Wine and Beer) Rules, 1993 (for short "1993 Rules") were framed pursuant to the available power u/s 4 of the 1993 Act. Rule 19 of the 1993 Rules obligates the Beverages Corporation to conform to the provisions of the A.P. Excise Act, 1968, A.P. Foreign Liquor and Indian Liquor Rules, 1970, any other Rules relating to the procurement of Indian Liquor and Foreign Liquor as well as to abide by the orders and directions issued by the State Government and the Commissioner of Excise. The Excise Policy of the State from time to time is therefore binding on the Beverages Corporation.

(E) As a matter of policy the State rejected the application of the petitioner for establishment of a distillery and its order dated 4-8-1999 was passed after all relevant facts were considered.

(F) The contention of the petitioner that the rejection of its application for establishment of a new distillery while permitting "modernisation and extension" of existing distilleries violates Article 14, is misconceived. In respect of this contention of the petitioner, the assertions in the counter-affidavit of respondents 1 and 2 at Paras 10 to 16 being relevant require to be extracted. The contentions are as under:

"(10) it is submitted that the Government have reviewed the implementation of Excise Policy for the year 1999-2000 taking into consideration the experience gathered in the past and the suggestions and feedback received from various quarters. The existing capacity of distilleries works out to 266.40 lakh cases per annum. The actual production was 163.44 lakh cases i.e., the capacity utilisation was 61%. The consumption of IML during the year 1999-2000 has worked out at 163.37 lakh cases including imports (2.03 lakh cases). The estimated demand

for IML for the coming years (i.e., 2000-2001; 2001-2002 and 2002-2003) assuming a 20% growth rate per year, on average works out to 196,235 and 282 respectively (volume growth during the last year was 24%), the existing capacity of the local distilleries will be sufficient to meet the demand requirement for 2000-2001 at about 66% capacity utilisation. However, for the year 2001-2002 the present capacity would be sufficient only at an utilisation percentage of 80% of capacity, which is considered high. Apart from this, during the current year, Government introduced the supply IML in 90 ml bottles with strength of 35 degress UP under "A" category liquor.

Government felt that there is imperative need for permitting separate Automatic/ Semi Automatic line for production of IML of 90 ml. bottles. Accordingly orders were issued vide G.O. Ms. No. 525, Revenue (Excise. III) Department, dated 31-7-2000.

Further, as a matter of policy the Government had not permitted to set up any new distillery so far in the State. Even after partial lifting of prohibition in the year 1997 Government renewed the LOIs to the distilleries, which were existing prior to imposition of prohibition.

Even in the Excise Policy for the year 2000-2001 issued vide G.O. Ms. No. 168, Revenue (Excise.II) Department, dated 31-3-2000, no new licences are sought to be given to set up distillery in the State. As on date the Government had permitted modernisation of existing distilleries, but not permitted any expansion proposal. The Government have permitted conversion of manual lines into Automatic/Semi Automatic as a hygienic measure. A new line for the manufacturing of 90 ml bottles exclusively was permitted to each Distillery keeping in view the Excise Policy.

(12) I submit that the legal grounds based upon Article 14, are untenable and unsustainable inasmuch as the Government had rejected all the requests for issue of Letter of Intent for setting up Distilleries/Breweries in the State vide Government Memo No. 30129/EX.III-1/ 97-3, dated 25-5-1998. The petitioner is treated on par with its equals and there is no discrimination.

(13) In reply to grounds (a) and (b), I submit that there is no factual inconsistency in view of what is stated above. The object in permitting modernisation and expansion is to improve operational hygiene and efficiency.

(14) The contention urged in ground No. (c) is untenable. The decision to restrict procurement from local distilleries was based upon the recommendations of Cabinet Sub-Committee and is a policy decision. The rejection order is based upon the Excise Policy of the Government and the relevant facts on the subject. The allegation that irrelevant and extraneous factors were taken into consideration is untenable and incorrect, I deny the same categorically.

(15) In reply to ground Nos. (d), (h) and (i), it is submitted that there are 32 distilleries in the State owned by different individuals and groups, there is

sufficient competition which ensures that the price charged by them is not on the higher side. The rate contracts with the suppliers have been entered into through open tender system and the corporation is procuring liquor from local distilleries in respect of A and B category and C and D category liquor from all over the country. The prices prevail in neighbour State are taken into consideration and rate tenders entered into without any loss to the individual and the State Exchequer. The distilleries are requested to print recommended maximum retail price on each bottle for creating consumer awareness. I deny the allegation that any cartels have been formed. The petitioner is put to strict proof of the same.

(16) In reply to grounds (e) and (j), it is submitted that there is no discrimination to the petitioner and the State action has not violated Article 14 of the Constitution of India. The local manufacturers constitute a class and since the classification has reasonable nexus to the object sought to be achieved i.e., to prevent smuggling liquor trade in accordance with the underlying legislative policy of Act 5 of 1997 and the Regulation Act, 1993. As submitted above, the Government through Memo No. 30129/ Ex.III.1/ 97-3, dated 25-5-1998 rejected all the applications for grant of letter of intent to establish new distilleries. The petitioner has not been subjected to unequal treatment."

7. During the course of hearing, on 18-9-2001, it was noticed that there were thirty one (31) existing distilleries holding licences to manufacture liquor in the State of Andhra Pradesh. As it was not known how these licence holders were permitted to manufacture liquor, how these distilleries licences were issued or whether any applications were called for and opportunity given to all interested parties to apply for licences, this Court felt it appropriate to permit the petitioner to implead the thirty one (31) existing distillery licensees and afford them an opportunity in the writ petition. Learned Counsel for the petitioners was accordingly permitted to implead the distilleries as party respondents in the writ petition. Substituted service by publication in local newspapers, of summons to the newly added respondents-distilleries, was permitted by this Court on 16-4-2002.

8. Only M/s. Omar Khayyam Wineries (since re-designated as Khoday Industries Ltd., in 2001) - an existing distillery, has filed a counter-affidavit. This respondent contends, briefly, as under:

(a) That on 25-1-1995 the State prohibited the manufacture and sale of liquor within Andhra Pradesh. During the period of prohibition, the answering respondent did not manufacture liquor, though it's licence was not cancelled during the period.

(b) Prohibition was lifted on 15-6-1997, on manufacture and sale of liquor. The State Government issued notification through G.O. Ms. No. 384 (Ex.II) Department dated 13-5-1997 for renewal of manufacturing licences. The answering respondent applied for renewal of licence for manufacture and sale of liquor in the State. It's licence was renewed by the State and since then it is in

the business of manufacture and sale of liquor.

(c) G.O. Ms. No. 168 Revenue (Excise.I) Department dated 31-3-2000, being the Excise Policy for the year 2000-2001 was issued by the State. One of the clauses of the policy permits "modernisation and expansion of the existing distilleries to the extent of improving operational hygiene and efficiency and decided not to issue licence to set up new IML distilleries as existing distilleries after modernisation and expansion can meet demand within the State." Pursuant to the above excise policy, managements of existing distilleries requested the State for permission for alteration and conversion of manual lines into Semi-Automatic/Automatic lines and also for expansion of the capacity in view of the demand for their products in the market. The Government, having examined the request of the existing distilleries; and in view of it's excise policy for the year 2000-2001; and pursuant to the recommendations of the Commissioner of Prohibition and Excise, granted permission in G.O. Ms. No. 525 Revenue (Excise-III), Department dated 31-7-2000 for conversion of manual lines, permitting use of Semi-Automatic/Automatic bottling lines and also a separate Semi-Automatic/Automatic bottling line exclusively for manufacture of 90 ml bottles, to the various distilleries. In the said Government Order, the answering respondent was also accorded permission for conversion and for a separate bottling line for 90 ml bottles. "Respondent company had started the extra bottling line (3 belt) from 20-4-2001 and since then, the manufacturing capacity had been increased from 27,647 cases per month (Approx) to 47,711 cases per month (Approx) and the company is now paying an amount of Rs. 1,28,46,540 (Approx) per month towards, excise duty. Previous to expansion the respondent company was paying excise duty nearly to a tune of Rs. 69,16,880/- per month." (emphasis)

9. It needs be noticed that after issuance of G.O. Ms. No. 525 dated 31-7-2000, the petitioner filed a additional affidavit dated 3-12-2000. In this affidavit, the petitioner asserts that the State is bent upon encouraging existing distilleries, while discriminating against new entrants by prohibiting establishment of new distilleries in the State, even to meet the additional demand for liquor in the market. It is alleged by the petitioner that as evident from G.O. Ms. No. 525 dated 31-7-2000, the State Government, under the guise of permitting modernisation and expansion of existing distilleries, is out to encourage a monopoly by existing distilleries, in the State. The additional affidavit further asserts that the expansion of production capacity permitted to the existing distilleries belies the contention of the State that as a policy, it does not intend to encourage increased consumption of liquor.

10. A "further additional affidavit" dated 4-9-2001 was filed by the petitioner. In this affidavit, it is stated that not only has the State by the order in G.O. Ms. No. 525 dated 31-7-2000 permitted expansion in existing distilleries, but has also allowed establishment of an additional line for bottling liquor in 90 ml. bottles. State has also, by another order, permitted this additional line to be utilised for bottling liquor, in all sizes, while removing the restrictions on bottling liquor in 90

ml. bottles alone. These Government Orders have resulted in substantial expansion of the existing distilleries. Petitioner further pleaded that the Excise Department of the State maintains month-wise statistics and year-wise production figures of the liquor manufactured by various distilleries in the State. An analysis of these figures would disclose that the production by distilleries prior to expansion is far less than the production during the period subsequent to the permission granted for expansion. It is further contended that the State Government has not fixed the licensed capacity for any distillery in the State. The licence granted to them does not specify any licensed capacity. According to the proviso to Rule 5(1) of the Andhra Pradesh Distillery Rules, 1970, as amended, the maximum production of the distillery for the previous year or the actual production in the current year, whichever is higher, is to be taken as the licensed capacity of production. The petitioner also pleaded that the State in its counter-affidavit has admitted that from the current excise year, the production from the distilleries would not be adequate to meet the increased demand in the State. The policy of the State in permitting expansion of the existing distilleries, while prohibiting new entrants to the field, constitutes an unconstitutional governmental conduct and in abuse of its privilege, is the contention.

11. 1st respondent has filed an "additional common counter-affidavit" dated 17-9-2001. Paragraph No. 2 of the counter-affidavit states that the affidavit has been filed to clarify certain issues that had arisen during the course of arguments and for providing further information that was required to be furnished to the Court. This counter-affidavit states that in the State, at present, there are 31 (thirty one) manufacturers of different types of liquor. Each manufacturer has a plant of different capacity. The total plant capacity of each manufacturer represents, in actual practice, the theoretical level to which he can manufacture liquor. Usually, the peak capacity is never reached. Every year, the manufacturer applies for a licence and in that application, he seeks a licence to manufacture a particular quantity of liquor. The proportionate licence fee will be paid. The Form prescribed "as application" is Form D-1; and the Form prescribed for grant of licence is Form D.2. Both these forms contain a column "quantity permitted for manufacture per annum". When an application is filed, the manufacturer pays licence fee corresponding to his estimate of the quantity he proposes to manufacture during the year. When he exceeds this quantity, at that appropriate time, he will have to pay the excess licence fee as per the table mentioned in Rule 5. Though there is no prohibition, as such, against a manufacturer exceeding the quantity for which he initially paid the licence fee, in actual practice, as this licence fee is paid on the maximum quantity manufactured during the previous year, normally a situation does not arise where he will exceed the estimate and be required to pay the excess licence fee. In the previous year, there were only five cases where additional licence fee was paid because the total liquor manufactured exceeded the estimate on the basis of which licence fee was initially paid. In any case, the total quantity of liquor, which would be manufactured, is exclusively dependent upon the plant and machinery

installed. As at present, judging from the statistics of 1999-2000 only two (2) distilleries touched their maximum production. The production average of the remaining distilleries was only 52.10% of their total productive capacity. The recent permissions given were motivated by two factors. One was to ensure more hygienic procedures in production. The second factor was the introduction of 90 ml. These smaller packages entail less production cost for the container and for packing and are consequently cheaper. It was therefore, thought that such a system would help the consumer to buy liquor at lesser cost. An incidental benefit would be that the consumer of liquor might content himself with consumption of smaller quantities. The nonavailability of smaller containers would result in purchase of larger containers and having regard to the addictive quality of liquor, result in consumption of larger quantities. For these various reasons, as a matter of policy, the existing manufacturers were permitted to convert their lines to Automatic and Semi-automatic lines from manual lines and one additional line was permitted on 31-7-2000 for exclusive purpose of the smaller packages of 90 ml. for which the original equipment was not designed. It may be that incidentally there would be some overall increase in the manufactured quantity. This is not inevitable because it is dependent upon other variable factors. Statistics show that many of the manufacturers are not manufacturing up to the limit of their capacity. This factor may probably vary according to the popularity of the brand they manufacture. A year later, by G.O. Ms. No. 509 Revenue (Ex.III) Department, dated 21-7-2001 permission was issued for these lines to be utilised for bottling of other sizes subject to the condition that the existing authorised installed capacity shall not be exceeded.

12. In the above additional counter-affidavit, the rejection of the petitioner's application for setting up a distillery was justified by contending as under:

"In considering the propriety of the order rejecting the request of the writ petitioners for installing their distilleries in Andhra Pradesh, the following aspects have to be borne in mind.

- (a) The Constitution has prescribed a directive principle to introduce prohibition.
- (b) Practical considerations including the known unsatisfactory financial position of the different States including A.P. has forced the Andhra Pradesh State to content itself with partial prohibition.
- (c) The constitutional policy is sought to be at least partially ensured by banning the production of arrack, which is mostly consumed by the poor and is most injurious to health.
- (d) Balancing of these different constitutional objectives against the background of practical administration involves some degree of compromise and this has been sought to be achieved by not encouraging new distilleries.

3. If the Excise policy is to permit new distilleries to be set up it would entail calling for applications from all over the country fixing the number of distilleries

which can be permitted and making a choice. In the present case, such a policy has been regarded as totally detrimental to the principal objective of discouraging this habit to the extent practically possible. It is permissible to refer to other licensing provisions like for example the number of auto-rickshaws, which can ply in the city or the number of buses, which can be allowed, nobody can question the propriety of the concerned authority fixing a ceiling for the number of such vehicles which can ply. On the same logic, if the State decides that the existing number of manufacturers should not be increased, such a decision cannot be challenged on the ground of Article 14 because the policy is uniform. Merely because there has been a sanction of a bottling line for the manufacture of small bottles and some modernisation intended to secure hygienic conditions by eliminating manual work, it cannot be reasonably contended that the State is encouraging any monopoly or otherwise offending the doctrine of equality. Out of all the permitted manufacturers, up to now, only 12 have availed of this facility. There is no appreciable overall increase, in the total quantity of manufactured liquor when compared to capacity. As already submitted, the different brands vary in popularity and different manufacturers tailor their production according to the market demand. These variable factors are impossible to predict or tabulate. Against this background the contention that the State is encouraging a monopoly is uncharitable and unjust,

4. The writ petitioners have filed an additional affidavit repeating the contention already advanced. The material allegations in the said affidavit are denied. The correct factual position in regard to the additional line permitted is set out above. There is no admission in the counter-affidavit as alleged by the petitioner in the additional affidavit. The Government is not enabling the existing distilleries to maintain their stranglehold on production as alleged.

5. It is settled law that Courts do not interfere in policy matters unless those policies violate constitutional provisions. In the present case, the trade in question is *res extra commercium*. The petitioners have no fundamental right to carry on this business. The narrow area in which they can complain is that they are being subjected to discrimination. The applicants constitute part of a class of persons who desire to set up new distilleries in Andhra Pradesh, Amongst that class there is no discrimination because nobody has been granted such permission. So there is no warrant, it is respectfully submitted, for judicial interference."

13. Along with the "additional common counter-affidavit" dated 17-9-2001 some documents were filed on behalf of the 1st respondent-State, by the learned Advocate General. These are:

- (a) Capacities of utilisation of existing distilleries before conversion into automatic and semi-automatic lines and an additional line for packaging of the 90 ml. bottles (permitted in G.O. Ms. No. 525, dated 31-7-2000);
- (b) Capacities of utilisation of the existing distilleries after the conversion and

addition of line i.e., subsequent to G.O. Ms. No. 525; and

(c) Details of the existing distilleries who exceeded the production slab during the year 2000-2001.

14. These documents disclose that except 5 of the existing distilleries the other distilleries had a capacity utilisation percentage ranging between 11.19% to 90.71% (prior to conversion) and 1% to 75.89% (after the conversion to manual and semi-automatic lines and addition of separate line for production of 90 ml packages). Five of the distilleries viz., M/s. Sri Krishna Enterprises, M/s. Komal Wineries, M/s. Aroma Distilleries, M/s. Anab-e-Shahi Distillery and M/s. Durga Wine Industries, exceeded the production slab during the year 2000-2001. Prior to the Excise year 2000-2001 the maximum production of these 5 distilleries, was 3,959,659.890; 1,529,962.020; 1,724,196.348; 1,847,844.900; and 1,950,750,000 proof litres, while after the conversion the actual production during the year 2000-2001 rose up to 7,719,770.232; 6,225,567.434; 3,227,288.430; 2,597,598.258 and 2,392,363.030 proof litres. In view of the increase in production, these five distilleries had to pay additional licence fees during the Excise Year 2000-2001, which was double the licence fees they had initially to pay at the commencement of the year.

15. Along with the "further additional affidavit" filed by the petitioner on 4-9-2001 certain documents were filed including a statement setting out the comparative production figures of the existing distilleries during the year 1999-2000 and the year 2000-2001, the figures for the later year being up to February, 2001. This table discloses that apart from the 5 distilleries mentioned above, 14 other distilleries also had an increased production during the year 2000-2001 as compared to their production during the year 1999-2000. The distilleries who produced larger quantity during the year 2000-2001 (apart from the 5 distilleries admitted in the statement filed on behalf of the 1st respondent), as per the statement filed by the petitioner, are M/s. Mc.Dowel & Co; M/s. Gowtami Agro Industries; M/s. A.P. Met Engineering Ltd.; M/s. Mohan Beverages Pvt Ltd.; M/s. Continental Wines; M/s. Rizome Distilleries; M/s. Hyderabad Distilleries; M/s. Kapiton Distilleries; M/s. Omar Khayyam Wineries; M/s. Esveear Distilleries; M/s. MLR Drinks; M/s. Eagle Distilleries; M/s. Paras Collins; M/s. Andhra Liquors and M/s. Praag Distilleries. Of the above distilleries the increase in production in some of the companies such as M/s. Gowtami Agro Industries, M/s. Continental Wines, M/s. Paras Collins and M/s. Praag Distilleries, has been very steep. In fact as per the statement the maximum production during the year 1999-2000 of M/s. Praag Distilleries was 1509.94 proof litres which shot up to 48,9825.95 proof litres in the year 2000-2001, up to February of the year itself.

Governing Legal Structure:

16. The constitutional parameters and statutory prescriptions governing the core and penumbra of the rights and obligations of the petitioners and the State are

informed by the provisions of Articles 14, 19 and 47 of the Constitution of India and the provisions of the A.P. Excise Act, 1968 (for short the "Excise Act"); The A.P. (Regulation of Wholesale Trade and Distribution and Retail Trade in Indian Liquor, Foreign Liquor, Wine and Beer) Act, 1993 (for short "the 1993 Act"); The A.P. (Regulation of Wholesale Trade and Distribution and Indian Liquor, Foreign Liquor, Wine and Beer) Rules, 1993 (for short "the 1993 Rules"); The A.P. Brewery Rules, 1970 (for short "the Brewery Rules") and The A.P. Distilleries Rules, 1970 (for short "the Distilleries Rules").

Status of the Trade and Business in Alcoholic Beverages under the Constitution of India:

17. Article 47 occurring in Part IV -The Directive Principles of State Policy enjoins that the State shall, inter alia, endeavour to bring about the prohibition of the consumption of intoxicating drinks. In view of provision of Article 37 however, the provisions of the Directive Principles are not enforceable, though the principles enunciated therein are nevertheless fundamental in the governance of this nation and the State is obligated to apply these principles in making the laws.

18. Article 14 enjoins the State not to deny any person equality before law or equal protection of the laws within the territory of India.

19. Article 19(1)(g) guarantees to all citizens the right inter alia to carry on any occupation, trade or business, subject however, to reasonable restrictions enumerated in Article 19(6). This guaranteed right to carry on any occupation, trade or business is subject to reasonable restrictions in the interests of the general public and enables the creation of a monopoly in favour of a State or Corporation owned or controlled by the State, including to the extent of partial or complete exclusion of citizens.

20. A large number of nations across the globe have recognised the pejorative impact of human consumption of alcohol and have characterised trade and business in this sphere as *res extra commercium*. The Indian law in this area is to the same effect.

21. This area and the precedential enunciation of the constitutional principles governing the respective rights of the individuals and the State in the area of trade and business in alcoholic beverages had been considered on an analysis of extant precedents in *Mc. Dowell and Co., Ltd., Hyd. and others Vs. Government of A.P. and others*, . The relevant ration of *Mac. Dowel* may be summarised thus:

22. Ever since *State of Bombay v. F.N. Balsara*, AIR 1951 SC 218, and up-to date the consistent principle laid down by a uniform catena of binding authority is that the State has power to prohibit trades that are illegal, immoral and injurious to the health and welfare of the public, that citizens cannot have a fundamental right to trade or carry on business of liquor, that the State has the exclusive right or privilege in the matter of manufacture, trade or business in liquor and that it is within the discretion of the State to devise the manner in which it may farm out such rights to licensees vide *Cooverjee B. Bharucha Vs. The Excise*

Commissioner and the Chief Commissioner, Ajmer and Others, ; Assam State v. Sristikar, AIR 1957 SC 414; R.M.D. Chamarbaugwalla Vs. The Union of India (UOI), ; Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, ; Nashirwar and Others Vs. State of Madhya Pradesh and Others, ; State of M.P. and Others Vs. Nandlal Jaiswal and Others, ; Government of Andhra Pradesh Vs. Anabeshahi Wine and Distilleries Pvt. Ltd., ; Doongaji and Co. Vs. State of Madhya Pradesh and others, ; M/s. Khoday Distilleries Ltd. etc. Vs. State of Karnataka and others, .

23. It is thus, the settled law that no fundamental right inheres in a citizen to carry on trade or business in liquor and that the State is, under its regulatory power, entitled to totally prohibit any form of activity in relation to intoxicants whether in relation to its manufacture, possession, import or export.

Liquor and Article 14:

24. Where, however, the State has decided to part with its exclusive right and privilege in favour of others, it could still regulate such farmed out right and privilege, but consistent with the principles of equality enjoined upon it under Article 14 of the Constitution. That the aura and splendorous reach of Article 14 is not eclipsed when the State is operating in the area of liquor trade, in particular when it operates the trade through private persons or organisations, is clear from the dicta enunciated in the following decision of the Supreme Court.

25. In Doonagaji & Co. (supra), the Supreme Court has stated--

"..... when the State has decided to part with such right or privilege to the others, then State can regulate consistent with the principles of equality enshrined under Article 14 and any infraction in this behalf at its pleasure is arbitrary violating Article 14. Therefore, the exclusive right or privilege of manufacture, storage, sale, import and export of the liquor through any agency other than the State would be subject to rigour of Article 14."

26. The principle to the same effect, laid down in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , and State of Madhya Pradesh v. Nandlal Jaiswal (supra), has been reiterated in the above decision.

27. In Khoday Distilleries Ltd. and Ors. v. State of Karnataka and others case (supra) the Supreme Court has summarised the law on the subject of trade and business in liquor. The decision has reiterated the law that when the State permits trade or business in potable liquor with or without limitations, the citizens have the right to carry on trade or business subject to the limitations, if any, and the State cannot discriminate between the citizens who are qualified to carry on the trade or business. In the 2nd Khoday Distilleries Limited v. State of Karnataka case (supra) the Supreme Court reiterated the principle that when the State decides to grant the right or privilege inter alia to the trade in liquor, to others, the State cannot escape the rigour of Article 14. Responding to the apprehensions voiced by the appellants therein that in the absence of a

concomitant obligation cast on the State instrumentality, to which alone the manufacturers are obliged to sell their liquor, to buy the liquor, the State instrumentality may arbitrarily or capriciously purchase or decline to purchase from particular manufacturers at its sweet will, the Supreme Court held that this apprehension is misconceived. The Supreme Court held that the Government Company is expected to act bona fide and with responsibility; a Governmental agency cannot be interested only in a particular manufacturer. The Court also held "Once the rules oblige the manufacturer to supply product only to the Government holding distributory licences, a corresponding duty is cast on the distributor to place orders with the suppliers concerned whenever demand of a particular product is received by it....."

Looking to the channelling role of MSIL the fear of discrimination between different suppliers expressed by the appellants does not appear to be justified, ruled the Court.

28. In *State of Madhya Pradesh v. Nandlal Jaiswal* (supra) while declaring the applicability of Article 14 to situations where the State farms out its exclusive privilege to trade in liquor, a note of caution was however entered to declare that having regard to the nature of trade and business the Court should be slow to interfere with the policy laid down by the State Government and that in view of the inherently pernicious nature of the commodity, would allow a large measure of latitude to the State Government in determining its policy of regulating manufacture and trade in liquor. Government policy in this area, declared the Court, would be upheld unless it appears to be plainly arbitrary, irrational or mala fide. This principle has been reiterated in later cases including in the *2nd Khoday Distilleries Ltd v. State of Karnataka* (supra).

29. The above decision categorically declares the principle that the State or its instrumentality has a large measure of latitude, in recognition of the complexity of regulating the trade or business in liquor, even when it farms out its exclusive privilege in this area. The Governmental policy in this area ought not to be subjected to the strict scrutiny test and so long as the State policy or a State activity is not vitiated by wholly irrelevant and extraneous factors, which clearly tend to bring about discriminatory results, the Court would exercise restraint.

The Dynamic Contours of Article 14:

30. The Constitution Bench of the Supreme Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, , felicitously defined the scope of the equality injunctions underlying Article 14 of the Constitution. The Court held that any attempt to truncate the all embracing scope and meaning of this great principle ought not to be countenanced. Where the operative reason for State action, as distinguished from the motive inducing from the ante-chamber of the mind is not legitimate and relevant but is extraneous and outside the area of permissible considerations it would amount to mala fide exercise of power hit by Article 14; mala fide exercise of power and arbitrariness are different lethal variations

emanating from the same vice; the later comprehending the former, declared the Court.

31. Chief Justice A.N. Ray in *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, , applied the above principles to a case challenging the black-listing of a contractor and declared that the Government being a Government of law and not of men, is obligated to deal with citizens with whom it enter into contracts in compliance with the equality injunctions of the Constitution and without arbitrariness and discrimination in such transactions. When a State enters into a contract, it must do so fairly and without discrimination and without unfair procedure. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders but an individual is entitled to fair and equal treatment with others while trading with the Government.

The Vitarelli Doctrine:

32. That an executive authority is rigorously held to the standards by which it professes its actions to be judged and must scrupulously observe those standards or otherwise the consequent action would be invalidated, has been enunciated as an integral component of administrative law and the principle placed on a firm footing in the opinion of Justice Frankfurter in *Vitarelli v. Seaton* 359 US 535. This principle has been integrated into our administrative law heuristic by the approval accorded to it in *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation*, . This principle has been reiterated to be an emanation of the equality injunctions of Article 14, in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, .

33. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, , the Supreme Court declared that the concept of unfettered discretion is inappropriate to a public authority which possess powers exercisable only in public interest.

34. The State when entering into a contract does not stand on the same footing as a private person. It is not at liberty to enter into a contract with whosoever it likes. Article 14 of the Constitution prohibits arbitrariness in State action and requires the State to act fairly and reasonably including in the matter of entering into contracts. In exercising the discretion in the matter of selection of persons for entering into such contracts it is required to evolve rational and fair principles to effectuate even a valid policy while entering into such contracts and relationships. Its action in this area must clearly be in conformity with standards or norms that are not arbitrary, irrational or irrelevant. While Courts do allow a measure of latitude in recognition of the complexities of modern Government, such liberty cannot extend to conversion as a licence, to act at whim or caprice - vide *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, .

35. Even in the matter of entering into contracts the exercise of power is

required to be structured by rational, relevant and non-discriminatory standards and norms. State instruments are not exonerated from the need to have constitutional conscience. Rational considerations and factors cannot be eschewed from consideration nor irrelevant, irrational or arbitrary factors inputted into the decision making process. This is the necessary concomitant of the duty to act under a fair procedure. Actions of State instrumentalities must be informed by reason - vide *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, ; *LIC of India and Another Vs. Consumer Education and Research center and Others*, ; *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, .

36. Where the State enunciates a policy and the policy is declared in terms of rules or instructions the respondents are bound to follow such policy as an obligation founded upon fair, rational and non-discriminatory conduct - vide *A.P. Aggarwal Vs. Govt. of N.C.T. of Delhi and Another*, .

37. From the aforesaid analysis of the judicial discourse as to the state of the rights available to individuals engaged in trade, commerce or business in liquor, qua Articles 14 and 16 of the Constitution, the following broad principles emerge:

38. Trade and commerce in alcoholic beverages meant for human consumption is undoubtedly and inherently a pernicious and socially malignant activity. The constitutional exhortation that State action should endeavour to bring about prohibition of the consumption of intoxicating drinks (Article 47 in Part IV) does not per se disable the Legislative or Executive power of the State to regulate the trade in liquor. It is in recognition of the obligations of the State, inter alia qua Part IV of the Constitution that Courts have enunciated the principle that the exclusive privilege in the trade and business in liquor, inheres in the State and that no individual has a fundamental right to trade or business in this area. Such exclusive privilege, enables the State, in its discretion, to part with the privilege and to allow private participation in the manufacture, supply, distribution, import or export of this commodity. The exclusivity of the privilege of *necessitus*, extends to disentitle any private claims to a constitutional right in this area qua Article 19.

39. Where, however, the State does decide to part With its exclusive privilege and throws open any area of the trade or business to private participation, the equality injunctions of the Constitution come into play and disable the State from practising hostile or invidious discrimination between persons, entitled under such expressed State policy, to participate in the State largesse. The State can neither engender nor foster a plainly discriminatory regime on the jejune logic that the area of activity is pernicious. When permitted by the State and to the extent thus permitted, private participation in the trade and business of liquor is lawful and individuals are entitled to hold the State to the whole spectrum of its constitutional obligations under Article 14.

40. The caveat sounded to the effect that even while testing State conduct under

Article 14, due recognition must be had to the nature of the trade that the State is regulating and that Government policy in this area must receive a deferential consideration merely means that even while examining the State conduct under Article 14, which the policy enunciated by the State or the classification made by it to achieve that policy, is broadly directed towards regulating the trade with a view to ultimately achieve prohibition in the consumption of liquor, to whatever extent, such policy or the classification adopted should not be subverted on an expansive or strict application of Article 14 principles. The restraint ordained on the judicial branch in this area cannot, however, extend to abdication of its constitutional duty, permitting the State to wily-nily pick individuals for granting favours while excluding others similarly situate.

The applicable Statutory Environment: (to the extent relevant to this lis)

The Excise Act:

41. Chapter II of the Act sets out provisions for the establishment and control for administration of the provisions of the Act and inheres in a Commissioner of Prohibition and Excise, the chief control and administration of all matters under the Act, subject to the general or specific orders of the Government. There are also provisions in this Chapter for appointment of other officers and staff and for delegation of powers.

42. Chapter III sets out provisions for regulating the import, export and transport of intoxicants.

43. Section 13 occurring in Chapter IV (dealing with regulation of the manufacture, possession and sale of intoxicants) enacts that no person shall inter alia manufacture an intoxicant except under the authority of and subject to the terms and conditions of licence granted by a prescribed officer. Section 16 enables the Commissioner, with the previous sanction of the Government to licence the construction and working of a distillery or a brewery. Section 17 enables the Government, subject to the provisions of Section 28, to grant for a fixed period to any person lease or licence either generally or specially for the exclusive privilege of manufacture or supply by wholesale or retail, of any liquor or intoxicant in such area in the State as may be specified in the order. Section 72 sets out the rule making power and enables the State Government by notification to make rules for carrying out all or any of the purposes of the Act, including for regulating the manufacture of any intoxicant.

The 1993 Act:

44. Pursuant to a report submitted by a Cabinet Sub-Committee, the State Government engendered the 1993 Act, the core thrust of which is to exclusively vest the privilege of supplying in wholesale, Indian Liquor, Foreign Liquor, Wine and Beer, in the State and eventually in the A.P. Beverages Corporation. u/s 3, fortified by a non obstante provision all licences granted under the provisions of the Excise Act prior to the appointed date, for the import, export and transport of

Indian Liquor, Foreign Liquor, Wine and Beer in wholesale, were declared terminated with effect on or from the appointed date and enabled the State to takeover the entire stock of the specified liquor, which was in the possession of any holder of a permit or licence which stood terminated under the provisions of this Act. Section 4 enacted a declaration that the right to carry on wholesale trade and distribution of Indian Liquor, Foreign Liquor, Wine and Beer vests in the State on and from the appointed date and that this exclusive privilege is in turn given to the Beverages Corporation, a Corporation wholly owned and controlled by the State. Section 4 further declared that no other person shall be entitled to any privilege of import, export and supply of these forms of liquor in wholesale or distributing the same for the whole or any part of the State. Section 7 fortified this exclusive privilege on the Beverages Corporation by enacting that no person shall import, export or otherwise carry on wholesale trade in Indian and Foreign Liquor, Wine and Beer-a prohibition effectuated by penal sanctions for its contravention.

The 1993 Rules:

45. To effectuate the legislative purpose of the 1993 Act these rules were made. Rule 11 ordains that the Beverages Corporation shall get the supply of Indian and Foreign Liquor from such manufacturers within or outside the State in such quantities and at such prices as it may consider necessary and appropriate. Other rules herein enable the Beverages Corporation, with the permission of the Commissioner, to establish such number of wholesale depots in the State as may be found necessary by it, for the sale by wholesale, of Indian Liquor, to retailers and for other matters incidental to the functioning of the Beverages Corporation.

The Brewery Rules:

46. These rules have been made to regulate the establishment and control of breweries in the State.

The Distillery Rules:

47. Rule 2(c) and (h) defines "distillery" and "licence" as under:

"2. In these rules, unless the context otherwise requires:

(c) "distillery" means the manufactory where spirits are distilled, compounded, blended, processed fortified and/or diluted to produce wines or Indian Liquor other than arrack, beer or toddy and includes an operation for bottling of such liquor;

(h) "licence" means a licence granted for construction and working of a distillery under Sections 13 and 16 of the Act; and the work "licensee" shall be construed accordingly;"

48. Rule 9 ordains that a distillery licence shall be granted only to an applicant having sanction of the Government therefor.

49. Rule 3 requires an application for grant of a licence to construct and work a distillery to be in Form D-1, addressed to the Commissioner, within six months from the date of the sanction of the Government referred to in Rule 9.

50. Rule 4 mandates that no distillery licence for manufacture of Indian Made Liquor shall be granted unless the applicant deposits security for fulfilment of all the conditions of licence; the table thereunder specifies the security deposit in cash and bank guarantee, for different capacities, for which a distillery licence is applied for.

51. Rule 5 specifies that on the satisfaction of the Commissioner that an applicant has fulfilled the conditions specified in Rule 4, he may grant licence to the applicant which shall be in the Form D-2. This rule also specifies the annual licence fees for manufacture of rectified spirit dependent upon the licensed capacity of production per annum in bulk litre as also the annual licence fees for D-2 licence for manufacture of Indian Made Liquor depending upon the licensed capacity of production per annum, in proof litres.

52. Rule 6 requires the payment of excise duty at such rates as the Government may specify from time to time and further requires that every licensee shall before starting production, furnish to the satisfaction of the Commissioner a bank guarantee which shall not be less than Rs. 25,000/- for every one lakh litres of estimated monthly production, subject to maximum bank guarantee of Rs. 75,000/-.

53. Rule 10 specifies that every licence granted under these rules shall commence on such date as may be specified therein and be in force for a period of one year unless a different period is fixed by the Commissioner, so however that no licence shall be granted for a period longer than a year unless the fees specified for each year or a part of a year comprising in such period, has been deposited. Provision for renewal of licence is also contained in this rule.

54. Rule 37 reads as under:

"37. (1) The licensee shall not make any alterations in the buildings, plant or machinery specified in his licence without the sanction of the Commissioner:

Provided that any minor and urgent alteration or repair may be made with the consent of the Distillery Officer, who shall forthwith report to the Excise Superintendent concerned;

Provided further that where the alteration and addition to the plant or machinery have the effect of enhancing the annual production capacity of the distillery, they shall be carried out by the licensee only after obtaining prior permission of the Government.

(2) Before applying to the Commissioner for sanction of any alteration or repair of substantial nature, the licensee shall obtained the permission or other authorisation from the Chief Inspector of Factories and the Municipality or other

local authorities, as the case may be, required for carrying out any such alteration or repair and every such alteration or repair so sanctioned shall be noted in the licence." (emphasis)

55. Rule 66(6) mandates that only bottles of the specified capacity shall be used, viz. (a) Quart bottles of the capacity of 750 ml. or 600 ml.; (b) Ounce bottles of the capacity of 375 ml. or 300 ml.; and (c) Pint bottles of capacity of 180 ml.

56. The proviso to this sub-rule enables the Commissioner, in special cases, to permit use of bottles of any other size and for reasons to be recorded.

57. Other rules are in the nature of regulatory and house keeping provisions to ensure proper supervision and control of a distillery.

58. Form D1 sets out the format and the scheme notifying the proposal to establish a distillery. Para 3-A therein requires recording of the production capacity per annum. Para 10 requires the recording: for each item of manufacture, the annual quantity in metric measures; the capacity value; the estimated annual production and the GIF value per unit for the product. The application in Form D-1 is to be addressed to the State Government with copies marked to the Commissioner of Excise and the Director of Industries of the State.

59. Form D-2 is the form in which the licence for a distillery ought to be granted by the Commissioner. Apart from setting out the conditions to be complied with by the licensee in the running of the distillery, the form specifically requires the recording by the Commissioner, Excise of the varieties and quantities of spirits/ liquor which the licensee is permitted to manufacture and the period for which the licence is granted. Even the table impregnated into the Form D-2 reiterates the requirement of recording the quantity permitted for manufacture per annum in respect each variety of liquor or spirits, the manufacture of which is licensed and is to be recorded seriatim, as a part of the licence.

60. Along with the "further additional affidavit dated 4-9-2001" the petitioner has filed a set of material papers including a copy of the distillery licence granted in favour of one of the party respondents, M/s. R.K. Distilleries, in Form D-2. It requires to be noticed that in the table incorporated in this licence the varieties of liquor whose manufacture has been licensed is set out as Brandy, Whisky, Gin, Wine and Rum. However, the column which requires the recording of the quantity permitted for manufacture per annum - is blank. Nothing is recorded as regards the annual quantity permitted for manufacture in respect of any of the 5 varieties of liquor/spirits set out in the table.

61. Learned Counsel for the petitioners have urged that no licence granted to any of the existing distilleries has recorded the annual quantity that is permitted to be manufactured in respect of any of the varieties of liquor that were permitted to be manufactured under the various licences granted. It has been contended by Sri Venugopal that this omission is not by inadvertence, but is a deliberate and premeditated omission intended to permit manufacture of

unregulated and unspecified amounts of each variety of liquor/spirit. It is the further contention that such deliberately incorporated omission to specify the quantum of annually permitted quantity of liquor or spirit, is calculatedly intended to facilitate unrestricted manufacture of supply by the distillery and a concomitant unrestricted procurement by the State of various varieties of liquor in ever increasing quantities only from the existing distilleries and to the exclusion of any new entrant into this field. The intention of the State is clearly to create a monopoly in favour a select few private distilleries, to the economic detriment of others" interest in part-taking of this area of the State largesse, is the categorical assertion on behalf of the petitioner.

62. Another contention of the petitioner in this behalf is that the theme song of the respondent-State that the entire regulatory exercise under the Excise Act, the 1993 Act and the relevant Rules thereunder as also the disinclination of the State to permit any new distilleries to set up units in the State, is intended for the purpose of containing increased consumption of alcoholic beverages, is a facade and ruse projected to perpetuate facilitate and entrench the monopoly of existing private distilleries. The non-specification in the licence in Form D-2, of the annual quantity of manufacture permitted for each of the licensed varieties of liquor/spirits, in respect of any of the existing distilleries in the State, the permission granted to each of the distilleries for conversion of the existing lines into automatic and semi-automatic lines thereby enabling higher production, the permission for addition of a new line projected to be exclusively for manufacture of 90 ml bottles (in G.O. Ms. No. 525, dated 31-7-2000), the eschewing of this fig leaf and the permission shortly thereafter granted for the exclusively 90 ml line to be utilised for bottling liquor in other sizes also (vide G.O. Ms. No. 509, dated 21-7-2001) - are all integral to a well-orchestrated, premeditated and clearly intended agenda of the State to favour existing private distilleries to supply higher and higher quantities of liquor to the Beverages Corporation for eventual increased consumption in the State and to the exclusion of any new entrant.

63. We have set out the rival pleadings and contentions in some detail. The meat of the dispute between the petitioners on one hand and the respondent-State on the other, may be summarised as under:

64. The petitioners seek to pursue the occupation and business of a distillery with a view to supplying permitted varieties of alcoholic beverages, in the State of Andhra Pradesh. As the State has a policy of procuring certain categories and grades of liquor only from distilleries located within the State, they applied for grant of a licence to establish a distillery within the State. This application was rejected on unsustainable grounds. In the circumstances, they contend, the rejection amounts to their arbitrary exclusion from this business and deprivation of equal opportunity to them qua other private distilleries, in the matter of participation in the largesse of the State of Andhra Pradesh, in the area of manufacture and supply of liquor, which has been permitted for private

participation by the State.

65. The State of Andhra Pradesh and its instrumentality - the Beverages Corporation - resist the challenge of the petitioners, contending that trade and commerce in alcoholic beverages meant for human consumption is *res extra commercium*. The State has an absolute privilege in this area, both under the constitutional regime and the applicable statutory architecture. It further contends that the State's, Policy choices in general, and its policy choices in the area of regulation of trade and business in alcoholic beverages, in particular, are off-limits to judicial scrutiny and *ex-hypothesi* even if some degree of scrutiny is conceded, it is only a peripheral scrutiny, not extending to a deep and close analysis of the merits of the policy, the wisdom of it or into the detailed mechanics of the policy. The State also professes, as its aim the containment of consumption of alcoholic beverages and that in effectuation of that aim, an uncanalised and un-restricted freedom of action must be permitted to it, to regulate the trade and business in alcoholic beverages meant for human consumption, as it sees fit. The State additionally asserts that it has decided as a policy, not to permit any new distilleries to be set up within its territory. It defends the permission given by it, to existing distilleries, for conversion into automatic and semi-automatic lines (G.O.Ms.No. 525), as a measure of modernisation and as not being permission for increased production. The State also denies having facilitated accretion of a monopolistic hold to existing private distilleries, while excluding new entrants like the petitioners, into the field.

66. The contours of the State's freedom and privilege in the area of trade and business in liquor, have been noticed and hereinbefore in the judgment. To recapitulate, the extant and governing law in brief, is:

- (a) No citizen has a fundamental right to carry on trade or business in liquor.
- (b) The State under its regulatory power is entitled even to totally prohibit or pro tanto restrict activity in relation to intoxicants whether in respect of its manufacture, possession, import, export or transport.
- (c) Even where the State has decided to part with its constitutionally inherited exclusive right and privilege in this area, in favour of others, it could still regulate such farmed out right and privilege, but consistent with the principles of equality enjoined upon it under Article 14 of the Constitution of India.
- (d) Any infraction by the State in this area, in respect of its equality obligations, is judicially renewable.
- (e) Where the State arbitrarily, capriciously or irrationally declines purchase from particular manufacturers or declines permission to establish a distillery and at its sweet will and pleasure or fails to show a rational justification for such exclusion or denial, the State could legitimately be declared, by the Courts, to have transgressed its constitutional limits.
- (f) Having regard to the nature of the trade and business, a large measure of

latitude ought be extended to the State to structure and determine its policy in regulating manufacture and trade in liquor and it's policy in this regard should be upheld, unless it appears to be plainly arbitrary, irrational, discriminatory or mala fide.

(g) While the State is entitled to a monopoly in the area of trade and business in liquor, including monopoly in favour of its instrumentality, its exclusive privilege does not extend to permitting it to create a monopoly in favour of a private entity or individual, since such a construction would enable the State to discriminate between private entities or citizens, without any countervailing constitutional or public benefit.

The Core Issue:

67. Whether the impugned conduct of the State, as apparent from the pleadings on record and the facts recorded, is consistent with the governing legal architecture, is the question?

68. The Distillery Rules, 1970 were made by the State in exercise of the rule making powers u/s 72 of the Excise Act. Rule 9 enables the Government to accord sanction for establishment of a distillery when it is satisfied of the proposed scheme of an applicant and prohibits the grant of a distillery licence without such sanction. The sanction shall be communicated to the application in the form of a LOI in Form D-9, initially valid for a period of two years from the date of issue, extendable for a further period of two years. On the accord of such sanction, an applicant may apply to the Commissioner for grant of a licence to construct and work a distillery (Rule 3). Under Rule 10 every licence granted shall be in force for a period of one year unless a different period is fixed by the Commissioner provided however, that no licence shall be granted for a period longer than one year unless the fee specified for each year or part thereof comprised in such period, has been deposited. Under Rule 10 the licence may be renewed on application to the Commissioner, for a period of one year at a time or for such other period as the Commissioner may direct. It is not in dispute that all existing distilleries in the State have been accorded sanction by the Government and consequent thereupon are being granted licences by the Commissioner of Excise on an year to year basis and not for a longer period.

69. Rule 5 of these Rules enables the Commissioner to grant a licence and in Form D-2. This rule obligates recording of the licensed capacity of production per annum in Bulk Litres and under Form D-2 obligates recording of the quantity permitted for manufacture per annum. The statutory Form D-2 and the table set out therein require the Chief Executor under the provisions of the Act - The Commissioner of Excise, to record the quantity permitted to be manufactured, in respect of each variety of liquor/spirit that is permitted under the licence. A copy of the licence issued to one of the respondents - M/s RK Distillery, has been filed by the petitioner, to support their plea that none of the distillery licences issued in Form D-2 have recorded the permitted quantity of manufacture in respect of

any of the varieties of alcoholic beverages that were permitted to a licence. The petitioners have specifically pleaded that no licence of any distillery records this mandatory fact. The State has not denied this assertion nor has produced any licence of any distillery in the State to assert a contrary factual position.

70. The above fact situation lends credence to the petitioners allegation that this uniform omission by the State, of a mandatory statutory requirement warrants the inference, irresistible almost, that the executive has inexplicably relaxed vigil on the existing distilleries in the State, a vigil statutorily obligated on the executive and a vigil that is seen to be an integral component of the corollary obligation of the State in the context of its exclusive privilege in this area. Why the Commissioner has uniformly violated this mandatory statutory prescription, the State has not deemed fit to explain. The petitioners suggest that this uniform violation of the statutory mandate coupled with the failure of the State to explain such conduct, is indicative of the State's intent to confer a benefit to the existing distilleries and against aspiring entrants like themselves.

71. It is neither the expressed nor the implied case of the State that the liquor/spirit supplied to the Beverages Corporation by the existing distilleries, for eventual consumption by the inhabitants of Andhra Pradesh, is less addictive, more beneficent or less harmful than the liquor/spirit that the petitioners or other distilleries seeking to set up units in the State, might supply, if permitted to establish their units in the State.

72. The documents/statements placed by the State for perusal of this Court (which have been referred to earlier) demonstrate a huge increase in the manufacture of liquor/ spirit, by a majority of the distilleries in the State including during the year 2000-2001. This increase in the manufacture has been facilitated by orders of the State Government, initially under the facade of modernisation and in the interests of operational hygiene, vide G.O. Ms. No. 525. This facade was shortly thereafter discarded by the orders in G.O. Ms. No. 509.

73. In G.O. Ms. No. 168, dated 31-3-2000, (enunciating the Excise Policy for the year 2000-2001), it is stated that "modernisation and expansion of distilleries would be permitted to the extent of improving operational hygiene and efficiency and no licence would be issued to set up a new IML distillery as the existing distilleries, after modernisation and expansion, can meet the demand within the State."

74. In the counter-affidavit filed on behalf of respondents 1 and 2 it is asserted that as a matter of policy the State has rejected the applications of the petitioners for establishment of distilleries and that these orders of rejection (dated 4-8-1999) were passed after all relevant facts were considered. In Para 10 of this counter-affidavit figures have been given in support of this contention, that the existing capacity of the local distilleries would be sufficient to meet the requirements for the year 2000-2001, but not for the year 2001-2002. It has been pleaded that to effectuate the supply of IML in 90 ml. bottles orders were

issued in G.O. Ms. No. 525 dated 31-7-2000 permitting a separate automatic/semiautomatic line for production of 90 ml. bottles. It is also pleaded in Para 16 of this counter-affidavit that "The local manufacturers constitute a class and since the classification has a reasonable nexus to the object sought to be achieved i.e., to prevent smuggling of liquor trade in accordance with the underlying legislative policy of Act 5 of 1997 and the Regulation Act, 1993", the Government has rejected all applications for grant of LOI to establish new distilleries.

75. In the counter-affidavit filed by one of the party respondents M/s. Omar Khayyam Wineries, it is admitted, that since the respondent had started the extra bottling line (pursuant to the G.O.525), from 20-4-2001, its manufacturing capacity had increased from 27,647 cases per month to 47,711 cases per month and that the respondent was now paying an amount of Rs. 1,28,46,540/-pm, towards excise duty as against the amount of Rs. 59,15,880/- pm, it was paying, prior to the expansion.

76. In an additional affidavit dated 4-9-2001 the petitioners have asserted that the permission granted by the State in G.O. Ms. No. 525 for establishment of additional line for bottling liquor in 90 ml bottles was replaced by another order in G.O. Ms. No. 509 permitting the additional line to be utilised for bottling liquor in all sizes, thereby removing the earlier restriction that this additional line be utilised for bottling liquor in 90 ml bottles alone. This affidavit of the petitioners asserts that no licence granted to any distillery has recorded or fixed the licenced capacity for manufacture of any of the permitted varieties of liquor, contrary to Rule 5 of the Distillery Rules and Form D-2 thereunder.

77. In response thereto in the additional counter-affidavit dated 17-9-2001, the State has contended that each of the 31 manufacturers of different types of liquor in the State have plants of different capacities and that the total plant capacity of each manufacturer represents in actual practice the theoretical level to which it can manufacture liquor. It is also contended that every year the manufacturer applies for a licence and in that seeks a licence to manufacture a particular quality of liquor and pays the proportionate licence fee on such quantity. When it exceeds the quantity permitted for manufacture and on the basis of which the licence fee is paid, the distillery would have to pay excess licence fee as per the table in Rule 5. In this counter-affidavit the State seeks to justify its decision not to permit setting up of new distilleries, on the ground that to do so would entail calling for applications from all quarters and fixing the number of distilleries which could be permitted and making a choice and further that such a course has been perceived as totally detrimental to the objective of discouraging the habit of consumption of liquor, to the extent practically possible. It is also ingeniously pleaded that there has been no appreciable over all increase in the total quantity of liquor manufactured when compared to the (production?) capacity of the existing distilleries.

78. The State has not shown that the production capacity of a distillery was a

relevant criterion or was considered as such, while granting a sanction, a LOI or a distillery licence, nor that such capacity was an aspect of evaluation to determine the entitlement of a distillery for grant of a sanction, LOI or a licence. Responding to the allegation of hostile discrimination alleged by the petitioners, this counter-affidavit asserts that the existing distilleries constitute one class and the applicants constitute part of a distinct class of persons who desire to set up new distilleries in Andhra Pradesh. It is the case of the State that amongst the persons in the latter class there was no discrimination as no new distillery has been granted or sanctioned a LOI by the State.

79. The tautological and creative explanations of the State eschewed, the clear and direct consequence and impact of the State action in this area, warrants but the inference that the State favours existing distilleries for exclusive procurement of ever increasing quantities of liquor/ spirits from them and that the limits of such supply are stipulated neither in the sanction orders of the Government, the LOI nor the distillery licence granted by the Commissioner, but in the physical production capacity of the plant, a capacity which was not a criterion for licensing. Such physical and mechanical limits too pose no impediment as the State would, as its orders (G.O. Ms. Nos. 525 and 509) disclose, permit addition of new lines or alterations of plant and machinery to enable ever higher production capacity.

80. It is also clear that the State resists new applicants desirous of establishing distilleries in the State. The justification urged by the State in its response, as contained in its various affidavits, is in brief:

- (a) It has exclusive privilege in the area of trade and business in liquor;
- (b) The petitioners have no right, fundamental or otherwise;
- (c) The existing and intending distilleries constitute a distinct class and the classification between them, by the State is a reasonable classification;
- (d) The policy of the State is to regulate and control increase in the consumption of alcohol; and
- (e) The State has decided as a policy not to grant any fresh licence, to establish a distillery in the State.

We shall analyse these premises, on the basis of which the facially discriminatory conduct of the State, is attempted to be sustained.

81. Our Constitution has brought forth a Government dedicated to ensure equality of opportunity under law, to every person. Article 14 embodies and emphasises that idea. The substantive core of Article 14 and of the equal protection clause thereunder in particular, enacts a principle inter alia of equal citizenship. It requires that there should be public good justification for every classification by the State. Every exercise of the State power must be informed by reason and must extend only to such conduct as is done in good faith and for

the promotion of the public good, and not for the annoyance or oppression of a particular class. When Courts review State action that addresses itself to social issues such as regulation of alcoholic beverages, a wide latitude is given to the State to construct its policy. This latitude is, however, not a licence to despotism or to practise arbitrariness. It is the substantive harm that gives any equal protection claim its power; harm to the equal citizenship values of respect, participation and responsibility. For the Court faced with such a claim, there is no legitimate escape from inquiring into the nature and seriousness of that harm; assessing the State's asserted justifications; and weighing those substantive considerations against each other.

82. In the context of the established legal principle that even in areas of trade and business in liquor the State is not immune to its obligations under the equality injunctions of the Constitution when it farms out its exclusive privilege in this area, to private participation, the Courts should be vigilant and should closely scrutinise the petitioners' grievance of discriminatory treatment and the State's justification and defence to such grievance. Claims of the State in this area ought not to deflect the Courts from their normal responsibility in a constitutional case, to require weighty justification for a State action that seriously and demonstrably impacts important and protected constitutional interests (in these cases, of equal opportunity).

83. The command of Article 14 is a command that the State must respect and the benefits under it every person may demand. To the claim of absolute privilege asserted by the State, we say that in our constitutional constellation of enduring and transcendent values nothing is more certain than the principle that there are no absolutes and a name, a phrase or a standard and even the privilege of the State has meaning only when associated with the consideration which give birth to the nomenclature or has engendered the normative principle.

84. The seesaw between individual complaints of unequal treatment by the State and the resistance by the State of judicial scrutiny in increasing areas of our social fabric, pleading policy choices immune to any scrutiny and to public interest, constitute most of the history of Governments. It is the duty of this Court to reject as false, claims of the State, made in the name of policy, which if conceded would negate our very constitutional way of life, our goal of ushering a just and equal society, emphatically expressed in our constitutive instrument.

85. In the State of Andhra Pradesh trade and business in liquor is not prohibited, except of arrack. The trade and business in the permitted varieties of alcoholic beverages is legislatively sanctioned and administratively promoted. It is State administered commerce. The manufacture of the permitted varieties of liquor is, by the extant legal environment in the State, farmed out to private agencies.

86. The State claims to be relentlessly and assiduously pursuing the goal of containing the consumption of liquor. The facts reveal that this claimed pursuit notwithstanding, the manufacture and consumption of liquor is increasing at

quantum leaps year by the year. In recent years the consumptive need of its people has been felt by the executive Government to be so acute as to necessitate grant of permission to enable higher production by structural modifications of the plant and machinery and permitting a new assembly line characterised in G.O. Ms. No. 525 dated 31-7-2000, as being in the interests of modernisation, efficiency and operational hygiene, for exclusive manufacture of 90 ml bottles. This euphemism was eschewed within an year and by G.O. Ms. No. 509 dated 21-7-2001, the additional line enabled in G.O. Ms. No. 525 was permitted for manufacture of bottles of all sizes as well.

87. In its additional counter-affidavit dated 17-9-2001, the State has, inter alia, pleaded that permitting setting up of new distilleries "has been perceived as totally detrimental to the objective of discouraging the habit of consumption of liquor."

88. On 29-8-2003, the learned Advocate General of the State was requested to furnish the Court, information as to the liquor supplied by each of the existing distilleries in the State to the A.P. Beverages Corporation Ltd., from the year 1999-2000 up to date as well as the imports year-wise during the said period. The learned Government Pleader for Excise has furnished on 8-9-2003, statements under the signature of the General Manager, A.P. State Beverages Corporation Ltd. The statements set out the quantities of liquor supplied by the existing distilleries in the State and liquor imported by the A.P. State Beverages Corporation Ltd., from distilleries outside the State. The particulars are for the years 1999-2000; 2000-2001; 2001-2002; 2002-2003 and 2003-2004 (up to August, 2003)

89. As the lis pertains to the petitioners grievance as to hostile discrimination by the State vis-a-vis the distilleries already established in the State, we have analysed the quantum of supplies made by the distilleries established in the State during the above years. The statements are made a part of this judgment by way of an appendix to it. According to the statements, the total quantity of liquor supplies to the A.P. Beverages Corporation Ltd., by the distilleries established in the State during the years is as under:

Years	No of Cases	1999-2000	1,62,42,167	2000-2001	1,82,98,269	2001-2002	1,93,27,131	2002-2003	2,28,62,113	2003-2004 (upto August 2003)	92,04,613
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90. The supplies of liquor by the existing distilleries and the consumption of it by the inhabitants of the State has increased during each succeeding year after 1999-2000 as under (in number of cases):

2000-2001		20,56,102	2001-2002		10,28,862	2002-2003		35,34,982
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Going by the statistics available for the five months period up to August, 2003, for the current Excise year 2003-2004 the "robust" growth in the consumptive pattern appears possible during the current year too.

91. These statistics establish the assertion of the State to its pursuing a

calculated policy of discouraging consumption of alcoholic beverages, to be an assertion of a categorical inaccuracy. The States' exclusive patronage of the existing distilleries located in its territory has not contributed to serve its asserted policy of discouraging consumption of liquor. The statistics reveal quantum increases in the supply, procurement and consumption every year. The manufacture and supply monopoly in favour of existing distilleries of the State, facilitated by the State's disinclination to permit any new distilleries, has clearly failed to serve any discernable directive principles purpose, the implied legislative or the expressed executive purpose, of containing the consumption of liquor.

92. The doctrine evolved over time and through a catena of precedents, that trade and business in alcoholic beverages is *res extra commercium*, the State has an exclusive privilege in this area and is entitled to flexibility of administrative choices to regulate this socially pejorative trade; is a doctrine that has not evolved for the purpose of creating an absolute prerogative in favour of the Executive branch, without a discernable constitutional purpose. This doctrine has emanated as a response by the civil society to the need to limit the harmful impact and consequence of human consumption of alcoholic beverages and the corollary requirement for effective regulation of this trade and business, by the State. Where, however, the State finds itself incapable or unwilling, as is often the case for a variety of reasons, including the lure of the financial return from this unwholesome business, the ordained principle integral to this doctrine clearly is, that when non-state actors are permitted any area of this trade and business, the State shall not discriminate amongst them, in such privatised area.

93. When private trade is permitted and discrimination is alleged by an institution or a citizen, the State is bound to disclose the basis for excluding such institution or citizen from the trade and business. It is also bound to satisfy the Court, before which the challenge is presented, that its policy stratagem that has resulted in the exclusion has a rational nexus with a clearly demonstrated constitutional object and that such policy operates within the legal architecture of the discretion or privilege.

94. This Court has a constitutional obligation, specially when there is a challenge to the State's action which has the facial effect of discriminating or excluding a citizen from the trade and business in alcoholic beverages, to ensure that such exclusion or denial is founded on a policy that is not constitutionally prohibited and to ensure that the policy declaration is not a ruse and facade spun by the State for practising hostile discrimination, prohibited by the constitutional injunctions of equality.

95. The Court must ever be conscious that in matters of trade and business in liquor it is the exclusive privilege of the State and not of private participants, who found the favour of a State actor, and that the limits of the privilege of the State in this area are reached, when by its policy or action, the State visits a person with hostile discrimination or with irrational denial of participation in the States largesse qua other private individuals or institutions, who have inexplicably

found favour of the State, for such participation.

96. The vast increase in the administrative apparatus of modern Governments over the last two centuries, including our own, has posed many questions for which the political theories of republican and democratic Governments that we inherited from the 18th century, leaves us without a ready answer. How should our understanding of the rule of law take into account the proliferation of our administrative agencies and how should the challenges posed by such proliferation be harmonised with a constitutional order, is a challenge that faces judicial review in the contemporaneous social order.

97. If administrative agencies simply effecutate the laws passed by the Legislature without altering them in any way, they would not have much power. They would be mere instruments of legislation doing its bidding. What constitutes the power of contemporary State agencies is that they are not limited to such a mechanical role. In a modem Government, the State agency has acquired important and substantive power by two main methods - because Legislatures explicitly delegate it to them or because the legislation they must implement is vague and inconclusive, leaving the administrative agency little choice but to settle broad policy questions. The vast administrative power resultant from both the explicit delegation and the implicit delegation by vagueness, threatens the rule of law. Statutory vagueness is endemic in modern Governments and has for some time engendered a sense that their legitimacy is in crisis. In his article "The Rule of Law and the Welfare State; Towards a New Synthesis" published in the journal of Politics and Society (1994), William Scheuerman argues that there is a strong prima facie reason to think that statutory vagueness will redound to the benefit of the economically powerful for they have the money to influence agencies in whatever leeway the Statute leaves.

98. It is often possible to be lulled into a theoretical complacency by the thought that what the administrative agencies do is a simply technical, a simple way of finding efficient means to the ends directed by the legislation. In the case of a broad and vague delegation, by the legislation, it is however obvious that the administrative agency also sets the ends of legislation. In the circumstances, which are a reality of modem Governments, the role of judicial review becomes crucial and even critical to constitutional order when we realise that majoritarian supervision of the conduct of administrative agencies, by parliamentary supervision, is often illusory, considering the time-volume constraints of the Legislatures.

99. To the assertion of the State that the petitioners have no fundamental or other right to claim a consideration of their applications for establishing a distillery in the State, we must state that such overarching assertion by the State is misconceived.

100. As the State of Andhra Pradesh has by its statutory environment permitted manufacture of certain varieties of liquor by farming out this area to private

participation, consistent with the constitutional radiations of Article 14, the petitioners have a fundamental right to be rationally considered by the State for such participation. The corollary obligation of the State is that it must justify the petitioners' exclusion from such participation, on constitutionally sustainable grounds.

101. Another premise urged by the State to resist the challenge of the petitioners, is that the existing distilleries in the State and intending distilleries constitute two clear-cut classes and the State policy denying permission to new distilleries constitutes a reasonable classification. This contention needs closer scrutiny.

102. The doctrine of classification is an integral component of the doctrine of equality and of equal opportunity, guaranteed under Article 14 of the Constitution. Twin tests of classification have been reiterated and propounded since the birth of our republic. These tests have stood the test of time and have been so often stated that to recall them would be "an idle parade of familiar learning". However, despite the consistent and unvaried statement of the principle of classification, and for over half a century. State agencies appear to be oblivious to or ignore such tests while applying the classification, so uncomfortably often, that a reiteration of the principles becomes necessary.

103. In *The State of West Bengal Vs. Anwar Ali Sarkar*, , the principle of classification has been enunciated by stating that mere classification is not enough to get over the inhibition of Article 14. The classification must not be arbitrary but must be rational. In order to pass the test it must satisfy two conditions - (1) that the classification must be founded on a differentia which distinguishes those that are grouped together from others; and (2) that the differentia must have a rational relation to the object sought to be achieved.

104. In *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , Das, CJ, summarised the principle of classification after careful analysis of the extant case law on the subject. Earlier in *State of Bombay v. F.N. Balsara* AIR 1951 SC 318, Fazal Ali, J., formulated 7 principles enunciating Article 14. The entire case law on the subject was again exhaustively surveyed by a seven Judges Bench of the Supreme Court in *In Re: The Special Courts Bill, 1978*, . The Supreme Court stated that while Article 14 prohibits class legislation it does not forbid reasonable classification for the purpose of a legislation. After referring to the twin tests for classification, the Court observed that the classification may be founded on different bases, viz., geographical, or according to objects or occupations or the like. But what is necessary is that there must be a nexus between the basis for the classification and the object of the Act under consideration. The Court also held that Article 14 condemns discrimination by substantive law as well as by procedural law. The propositions set out by the 7 Judges Bench in the Presidential reference (*supra*) are as under:

(1) The first part of Article 14 is adopted from the Irish Constitution and

enshrines the basic principles of republicanism. The second part is a corollary of the first and is based on the Fourteenth Amendment to the U.S. Constitution.

(2) The State, in the exercise of its Governmental power, has of necessity to make laws operating differently on different groups or classes of persons and must possess large powers for distinguishing and classifying persons or things.

(3) Classification need not involve an exact or scientific exclusion or inclusion of persons or things; Courts ought not to insist on delusive exactness or apply doctrinaire tests to determine the validity of classification. Classification should not however be palpably arbitrary.

(4) Article 14 only requires that persons similarly circumstanced should be treated alike both in privileges conferred and liabilities imposed.

(5) While choosing a class of persons, some degree of inequality may result. Classification postulates a rational basis and prohibits grouping of persons or classes arbitrarily.

(6) The law can make and set apart classes according to the needs and exigencies of the society but the classification should not be arbitrary, artificial or evasive.

(7) The twin tests of classification must be satisfied.

(8) The differentia which is the basis of the classification and the object of the Act are two distinct things and there must be a rational nexus between them.

(9) If the legislative policy is clear, definite and provides an effective method of carrying out the policy, it cannot be treated as a piece of discriminatory legislation. On the other hand, if the statute itself does not disclose a definite policy or objective and confers authority to make selection at the pleasure of the executive/ administrator, it would be discriminatory irrespective of how it is applied.

(10) The possibility of abuse of power is by itself not a ground to treat a law as discriminatory. Discretionary power is not necessarily discriminatory power.

(11) The very idea of classification is that of inequality and mere inequality will not determine the constitutionality.

(12) A rule of procedure comes within the purview of Article 14 as any rule of substantive law.

105. As Article 14 qua Article 12 is a guarantee against State action by any instrument, executive classifications are equally amenable to the injunctions of Article 14 of the Constitution.

106. It is an equally well-established principle that while classification cannot provide abstract symmetry it must never be artificial, arbitrary or evasive. A classification must always rest on real and substantial distinction that has a

reasonable and just relation with the classification that has been made. In *State of West Bengal v. Anwar Ali Sarkar*'s case (supra) in an elegant prose Bose, J., observed that the test is not whether there is absolute equality in the academic sense of the term but whether men of resolute mind and unbiased view can regard the enactment as right and proper in a democracy resulting in substantially equal treatment.

107. As the doctrine of classification is a subsidiary rule evolved by the Courts to give a practical content and effect to the fundamental guarantee of equal protection of the laws, the doctrine should not be allowed to submerge and emasculate the precious guarantee of equality, as observed by the Supreme Court in *Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others*, , the doctrine of classification should not be extended to a point where instead of being a useful servant it become a dangerous master. Elaborating on the caution Bhagawati J, in this case, held that over emphasis on the doctrine of classification or an anxious and persistent attempt to discover some basis for the classification may gradually and imperceptibly deprive the guarantee of equality of its spacious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality - the fundamental rights to equality before law and equal protection of the laws may be replaced by the over worked methodology of classification. Reiterating this principle, the Supreme Court in *Shujat Ali's case* (supra), relied inter alia on the principle and the caution administered instate of *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, , where Chandrachud, J., cautioned that if classification is pursued to extreme limits "the guarantee of equality will be submerged in class legislation masquerading as laws made to govern well - marked classes characterised by different and distinct attainments." In the same judgment Krishna Iyer, J. cautioned "mini classifications based on micro-distinction are false to our egalitarian faith and only substantial and straight forward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality."

108. On the above established principle of equality under Article 14 of the Constitution and the doctrine of classification, we now proceed to examine the claim of the State that the petitioners belonging to the class of intending establishers of distilleries in the State, form a distinct class vis-a-vis existing distilleries in the State. That intending and existing distilleries form distinct classes is clear. This grouping by the State satisfies but one criterion of the doctrine of classification. The other criterion is a core criterion as well. This criterion is that the grouping founded on an identifiable differentia must have a rational relation to the object sought to be achieved.

109. It is not the contention of the State, and were such a contention urged it might have to be rejected as inconsistent with the statutory environment, that the existing distilleries have a perpetual licence or a sanction that is infinite and inviolable and is merely formally renewed year by year. The State also does not

state in so many words or implicate that there is something peculiar to the existing distilleries that requires their exclusive promotion for participation in the largesse of the State in the area of manufacture of liquor for distribution to the Beverages Corporation, eventually for consumption in the State. It is also not the case of the State that the existing distilleries are for any stated or discernible reason, specially qualified to supply the intoxicant beverage to the people of the State either for their transient or transcendent benefit, in public interest or for a constitutional purpose.

110. That licences are issued every year to existing distilleries is admitted. It is also the position under the Distillery Rules, 1970. The Distillery Rules mandate the recording of the licensed capacity per annum (Rule 5) and the quantity permitted for manufacture per annum (Form D-2). A mandatory statutory prescription that was violated by the Commissioner with gay abandon, without exception and without cause or excuse, in every licence granted to existing distilleries. Ipse dixit apart, the State has failed to enlighten this Court as to how procuring all its requirement of alcohol and increasing quantities of it for that matter, only from existing distilleries promotes any object of the Excise Act or even how such exclusive procurement is likely to sate the ever increasing thirst of the tipling inhabitants of the State and promotes the control of increased consumption. It is not the case of the State that the produce of the existing distilleries has any anti-addictive or addiction repressive characteristics.

111. In the above statutory environment, considered in the context of the State's equivocal admission in para 10 of the counter-affidavit filed by the respondents 1 and 2, implying that even the present capacity of the existing distilleries would not be sufficient for the year 2001-2002 as the utilisation of 80% of the capacity would be high, coupled with the State's conduct as discreditable from its orders in G.O. Ms. Nos. 525 and 509, whereby permission has been granted to existing distilleries to effect substantive alterations in their respective plant and machinery to enable higher production, the State's claim that its entire conduct in this area is in hot pursuit of the goal of containing the ill effects of consumption of alcoholic beverages, is seen to be vacuous.

112. Be that as it may. As equity injunctions under Article 14 of the Constitution are implicated and the petitioners entitled to equal opportunity in the matter of consideration of their applications for participation in the largesse of the State in the area of manufacture of liquor/spirit, the State is disabled from assuming the annual licences of the existing distilleries as being permanent licences coupled with executive orders granting periodical permission for unending extension of their plants and machinery, enabling them to exclusively and in perpetuity, supply liquor/spirit to the State of Andhra Pradesh.

113. The above conduct of the State is tantamount to conferring exclusive patronage on existing distilleries without any redeeming public interest justification or a constitutional purpose. No discernible Governmental interest is pleaded, urged or established for this conduct of the State in creating a perpetual

manufacturing and supply monopoly favouring the existing private distilleries.

114. On the above analysis we conclude that the avowed State policy not to grant any fresh licences to establish a distillery in the State, is a policy that has been set up to illegally and unconstitutionally favour the existing distilleries by consciously orchestrating a monopoly in their favour and by unconstitutionally visiting the petitioners and other persons/institutions desiring establishment of new distilleries in the State, in the area of manufacture of permitted varieties of liquor/spirit, for supply to the Beverages Corporation and for eventual consumption of the State, with invidious and hostile discrimination, by an artificial classification based on contrived and irrelevant differentia having no rational nexus with any legitimate legislative object, a discernible Governmental goal or a redeeming public interest trajectory

115. Another plea vehemently urged on behalf of the State is that it has enunciated a policy not to permit establishment of new distilleries, that this is a State policy and as such is not amenable to judicial scrutiny. It is well established that the wisdom of a State policy is not justiciable unless it is capricious, arbitrary or whimsical or the policy violates any statutory or constitutional provision. As long as the policy of the Government is not manifestly arbitrary or wholly unreasonable, it cannot be considered as subversive of Article 14. The Court should not embark upon a journey on the uncharted ocean of public policy. The Court may not weigh the pros and cons of the policy nor test the degree of its beneficent or equitable distribution and cannot vary, modify or amend the policy, unless it is arbitrary or violative of any statutory or constitutional provision. If, however, it is demonstrated that the discretionary power camouflaged as a policy has been exercised discarding constitutional injunctions including of equality or the policy or object of a governing legislation, such State policy is susceptible to scrutiny under Article 14, *M/s. Khoday Distilleries Ltd. etc. Vs. State of Karnataka and others*, , *Delhi Science Forum and others Vs. Union of India and another*, ; *State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc.*, .

116. The discernible and identifiable object of the Excise Act is to enable the State of Andhra Pradesh to make a choice in the matter inter alia of manufacture of liquor fit for human consumption. In this behalf and in recognition of the harmful effect of this alcoholic beverage, sweeping and broad regulatory powers have been vouchsafed to the State and specified State authorities. In the context of the constitutional exhortation to the State to endeavour to bring about prohibition in the human consumption of alcoholic beverages (in the Directive Principles of State Policy), the State Excise Act must be construed as enabling the State considerable latitude but within the statutory context, to rationally endeavour to achieve the constitutional purposes set out in the Directive Principles. To this extent, the State enjoys a flexibility in operationalising its policy choices.

117. There is nothing in the State Excise Act however, and there cannot be, that

immunises the State from its limitations qua Article 14. It is neither pleaded nor demonstrated before this Court by the State, how the creation of a manufacturing monopoly in favour of the existing distilleries enabling them to manufacture unlimited quantities of liquor in perpetuity to cater to the ever increasing demand of the tippling inhabitants of the State, subserves a constitutional or a statutory purpose or enhances the public good or subserves any public interest. We have tried to discover, the silence of the State in this regard notwithstanding, if any such purpose is discernible. We have found none.

118. In the facts and circumstances and on the legal and factual analysis above, we hold that the conduct of the State in granting licences/renewals to existing distilleries year after year for ever increasing quantities of the permitted varieties of liquor/spirit for supply to the Beverages Corporation of the State for eventual consumption in the State, while denying sanction/permission/licence to other applicants desirous of establishing distilleries in the State, subserves no constitutional or statutory purpose, constitutes invidious and hostile discrimination, amounts to unconstitutional classification based on irrational, artificial and micro-differentia having no rational nexus with the object sought to be achieved either qua the constitutional text and structure or the A.P. Excise Act and as a State conduct unredeemed by any constitutional or public interest goals. Consequently this conduct of the State whether based on a policy or on an administrative decision or otherwise is arbitrary and violative of Article 14 of the Constitution.

119. The A.P. Distillery Rules, 1970 (Rule 9) enables the State to consider the application of every person or institution intending to construct and work a distillery, if such application is made in compliance with the statutory prescriptions. This enabling grant of power to the State is a public power that subsumes a corollary public obligation to consider each such application on neutral criteria that subserve constitutional and legislative purposes. The State under the rubric of a policy decision, set out in Clause 4 of its Excise policy in G.O.Ms.No. 168 dated 31-3-2000, has circumscribed this statutory discretion conferred upon it and for no discernible public purpose. This policy of self-fettering of its statutory discretion without a demonstrated constitutional, statutory or public purpose legitimisation defence, constitutes arbitrary State action. It is so declared.

120. In the result, the writ petitions are allowed with the following declarations and directions:

(A) Clause 4 of G.O. Ms. No. 168, Revenue (Excise-II) Department, dated 31-3-2000, to the extent that it posits that no licence shall be issued to establish a new ML distillery, as the existing distilleries after modernisation and expansion can meet the demand within the State, is declared invalid.

(B) Orders of the 1st respondent is Memo Nos. 44781/Ex.II(2)/99-1 and 44781/Excise-II(2)/99-2, both dated 4-8-1999 (impugned in W.P. Nos. 11319 and

11320 of 2000 respectively), rejecting the applications of the petitioners for establishing and working a distillery in the State of Andhra Pradesh, are quashed.

(C) It is declared that the decision of the 1st respondent to procure the permitted varieties of liquor/spirit in increasing quantities and year after year exclusively from the existing distilleries in the State, while denying permission to any applicant to set up a new distillery and in the context of its policy not to procure specified categories of liquor/spirit from distilleries set up beyond the territory of the State, amounts to creation of an unconstitutional and illegal manufacturing and supply monopoly in favour of the existing private distilleries constituting insular, invidious, hostile and unconstitutional discrimination of distilleries intending to establish fresh units in the State.

(D) It is declared that the requirement of recording the annual licensed capacity of production and the annual permitted quantity of manufacture (vide Rules 5 read with Form D-2) prescribed by the A.P. Distillery Rules, 1970, is mandatory and these shall be recorded in every distillery licence granted afresh or renewed.

(E) Consequently, the respondents 1 and 2 are directed, to forthwith, evolve a fair, transparent and neutral administrative scheme by an appropriate instrument to enable equal participation of any individual or agency desirous and intending to establish a distillery in the State of Andhra Pradesh for the purpose of manufacture of permitted categories/ varieties of liquor/spirit for supply to the A.P. Beverages Corporation. Such administrative scheme shall include a public notification calling for applications from persons/ institutions desirous of establishing distilleries in the State of Andhra Pradesh in respect of stipulated categories/varieties of liquor/spirits.

(F) On the publication of such notification by the State the petitioners shall be entitled, if so desirous, to make appropriate applications for establishing a distillery in the State as would any other person or institution so desirous, be entitled.

(G) All applications made shall be considered and disposed of by the official respondents, duly communicating to each applicant the reasons for the decision.

(H) In disposing of the applications so received, respondents 1 and 2 shall be guided by the principles set out in the judgment above.

121. The statements showing distillery-wise supplies for the years 1999-2000, 2000-2001, 2001-2002, 2002-2003 and 2003-2004 (upto August, 2003) furnished by the General Manager, APBC Ltd., are appended herewith, which form part and parcel of this judgment.

122. There shall be no order as to costs.