

(1999) 03 AP CK 0038

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 7996 and 8338 1998

Grag Martin Distillery Private Ltd. Tilamol

APPELLANT

Vs

State of A.P. and Others

RESPONDENT

Date of Decision : 15-03-1999

Acts Referred:

Andhra Pradesh (Indian Liquor and Foreign Liquor) Rules, 1970 — Rule 12
Andhra Pradesh (Regulation of Wholesale Trade and Distribution of Indian Liquor,
Foreign Liquor, Wine and Beer) Act, 1993 — Section 12, 6, 7
Andhra Pradesh Distillery Rules, 1970 — Rule 11, 2, 3, 4, 5
Andhra Pradesh Excise Act, 1968 — Section 16, 72
Constitution of India, 1950 — Article 14, 19, 21, 304, 47

Citation : (1999) 2 ALD 631 : (1999) 2 ALT 704

Hon'ble Judges : B.S.A. Swamy, J

Bench : Single Bench

Advocate : Mr. Sampath Kumar and P. Vasudeva, for the Appellant; Advocate General, Mr. T. Anantha Babu, for G. Manohar, SC for A.P. Beverages Corporation and Govt. Pleader, for the Respondent

Judgement

1. In both these writ petitions initially the vires of clause 8 of G.O. Ms. No.166, Revenue (Excise-11) Department, dated 18-3-1998 where under 1st respondent advised the 2nd respondent, the Andhra Pradesh Beverages Corporation Limited (for short "the Corporation") to procure A, B and C categories of liquor (hereinafter referred as "cheap liquor") from the distilleries located within the State as sufficient production capacity for this liquor exists within the State to the total exclusion of distilleries located outside the State on various grounds.

2. The brief and undisputed facts of this case are that the distilleries owned by Crag Martin Distilleries Private Limited, petitioner in WP No.7996/98 and Swan Distillers Private Limited, petitioner in WP No.8338/98 are located in Goa and they are involved in manufacturing of Indian liquors. The liquor that is being manufactured is being despatched for sale all over the country and in fact they participated in the tenders invited by the 2nd respondent for the excise year

1997-98 for supply of Indian liquor on rate contract basis for consumption in the State of Andhra Pradesh. But in the excise year 1998-99, there was a change in the policy and the Government directed its agent, the 2nd respondent to procure the required quantities of cheap liquor from the distillers located within the State as sufficient production for these categories of liquors is very much in existence within the State, while continuing the import of premium brands under D-category. At the same time, the Government gave three months time to outside distillers either to establish production facility within any existing distillery or tie-up with any local distillery for categories of liquor not produced or manufactured within the State that falls under the above three categories.

3. The Government resisted these writ petitions by raising its stock contention that the State has exclusive right or privilege to manufacture or sale of liquor and no citizen is having a fundamental right in the trade of liquor. It is true that the superior Courts have taken such a view keeping in view Article 47 of the Constitution of India whereunder a primary duty is cast upon the State to raise the level of nutrition and standard of living and to improve public health and shall endeavour to bring about prohibition of consumption of intoxicating drinks which are injurious to health except for medicinal purposes. In other words, the monopoly in the trade of liquor was conferred on the State keeping in view the ill-effects of drinking not only on the person concerned but on the society at large and to gradually control and restrict the consumption of intoxicating liquor to reach the ultimate goal of introducing prohibition of consumption of intoxicating drinks. This view was expressed by the superior Courts when drinking is considered to be a sin and a public wrong. But, now times have changed and the situation is otherwise. As per the changed values taking drink is considered to be a status symbol and a person who does not take drinks is looked down in the society as culture/ess brute. After the advent of independence one after the other States lifted prohibition and started indulging in the trade of liquor to the exclusion of other private individuals. Today the position is that the revenue from the trade of liquor became the main source of income to the States. The revenues from other sources have become practicably minimal or negligible, and the States cannot survive without the excise revenue. In the changed circumstances and changed value, I feel a time has come to reconsider the view that is being followed by the Courts till now.

4. Nextly, the State tried to defend its action by contending that during the excise year 1997-98, large quantity of non-duty paid liquor was smuggled into the State and in those circumstances, a Cabinet Sub-Committee was constituted vide G.O. Ms. No.199, Revenue (Excise-II) Department, dated 24-2-1998 to suggest ways and means to control the sale of non-duty paid liquor in the State. The Committee recommended ban of import of the liquor in the categories A, B and C while permitting the import of premium category of liquor i.e., D-grade liquor. In support of the contention of the State, it is stated that the enforcement wing of the Excise Department in its raids conducted from April, 1997 to January, 1998 and it is revealed : (1) that 72% of the non-duty paid Indian made liquor

seized is accounted for sensational cases involving more than 200 cartons along with lorry or tanker; (2) invariably 100% of the non-duty paid liquor caught is manufactured outside the State and not a single case has been detected involving brands manufactured within the State; (3) 46% of the cases are caught in border districts like Adilabad, Mahaboob-nagar and Nizambad, while 54% of the cases are caught within the territory of Andhra Pradesh like East Godavari and West Godavari, Krishna and Khammam districts; (4) nearly 40% of seconds caught belonging to C-category and nearly 60% belonging to A-category of liquor. Hardly any quantity has been caught relating to D-category; and (5) Except once, smuggling of beer has not been noticed during the 10 months period.

5. The respondents also stated that the rates quoted by the distillers during the excise year 1998-99 are almost similar to the rates quoted by the tenderers in the open tender system during the excise year 1997-98. All other contentions like formation of a cartel by the local manufacturers and the Government is acting to their dictation is denied by the Government.

6. Though the Government did not place any material in support of their findings on the basis of the raids conducted by the enforcement wing of the Excise Department that any of the distilleries situated outside the State are responsible for the smuggling of non-duty paid liquors into borders of the State, more so in the light of the denial by the petitioner that none of the liquor that are being manufactured by them were ever seized by the department while they are entering the State borders during their trade with the 2nd respondents, I was inclined to dismiss the writ petition on 10-7-1998 as the excise year was already half through and on the ground that the rates quoted by the local manufacturers for the excise year 1998-99 are almost similar to the rates quoted by the tenderers during the excise year 1997-98 when open tender system was followed wherein the petitioners also participated and the production in the local distilleries is more than the local demand in the State, by giving suitable directions to reconsider the policy of the Government for the excise year 1998-99.

7. Sri Sampat Kumar, learned Counsel appearing for the petitioners having seen the trend of the judgment, submitted that if his clients are permitted to establish a distillery of their own in Andhra Pradesh, he will not question the virus of G.O. Ms. No.166, dated 18-3-1998. Learned Advocate-General contended that the prayer in the writ petition being different, if the petitioner gives up his main relief sought for in the writ petition and files an affidavit seeking permission to establish a distillery, he will get instructions from the Government if two weeks' time is given. Immediately the petitioner's Counsel filed a petition WP MP No.25108/ 98 seeking permission of the Court to raise additional grounds in the writ petition inconformity with his oral request. Having directed the office to number the WPMP, I adjourned the matter for two weeks to enable the Advocate-General to file his counter moreso, with reference to 2nd half of clause 8 of the policy which is hereunder:

"A period of about three months may be given for those who would like to establish production facility with any existing distillery or tie up with any local distillery regarding A, B and C categories not manufactured or produced within the State."

On 27-7-1998 when the matter came up for hearing, the Government in its counter stated that the permission for establishment of new distilleries is being dealt with u/s 16 of the Act read with Rules 3 to 9 of A.P. Distillery Rules, 1970 and the Government in its memo dated 25-5-1998 rejected as many as 13 applications on the ground that there is no provision in the present excise policy for grant of letter of intent to IMFL distilleries. As grant of Letter of intent u/s 16 of the Act has nothing to do with the policy and as the petitioner intends to take a chance by filing their applications, I directed all the concerned to dispose of the applications that are going to be filed before them by fixing time schedule and lastly the Government was directed to dispose of the applications within four weeks from the date of receipt of the applications. On the same day, I directed the respondent to furnish the following information:

- (i) licences given to each distillery;
- (ii) brands of liquors that were produced during the year 1997-98, the quantity of each of the brand of the liquor that is being produced;
- (iii) under the tie-up what are the new brands of liquors that are being produced during the excise year 1998-99; and
- (iv) the quantities that have to be produced annually.

I understand that the Government seemed to have carried the matter in appeal against the orders passed on 10-7-1998 and after the dismissal of the appeal, the matter underwent two, three adjournments to enable the Government to pass orders and ultimately on 29-12-1998 the Advocate-General informed the Court that the Government rejected the applications filed by the applicants in Memo No.77453/Excise-III/98-5, dated 30-12-1998. In those circumstances, I directed the Advocate-General to serve a copy of the order and gave permission to the petitioner to amend the writ petition questioning the said order. Subsequently, after receiving the orders of the Government in Memo No.77453/Excise-III/98-5, dated 30-12-1998, necessary petitions seeking permission to amend the prayer in the writ petition and to raise additional grounds were filed and the Government also filed counters contending that the very cause of action in the main writ petition has since has changed by rejection of the application of the petitioner for establishment of distillery in the State, the petitioner has to file a fresh writ petition if he is aggrieved by the said rejection order, but no amendment to the present writ petition can be allowed apart from defending the impugned memo dated 30-12-1998.

8. Now this Court is called upon to decide whether the action of the 1st respondent in refusing to issue letter of intent for establishment of distillery

within the State of Andhra Pradesh for manufacture of Indian liquor is per se illegal and violative of Article 14 of the Constitution of India.

9. Before examining the facts of the case, it is useful to refer to the judgment of the Supreme Court rendered in the case of *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, whereunder their Lordships of the Supreme Court summarised the law relating to right to carry on the trade or business in potable liquor. In the above case, apart from assailing the validity of A.P. (Regulation of Wholesale Trade, Distribution and Retail Trade in Indian Liquor and Foreign Liquor, Wine and Beer) Act, 15 of 1993, some other enactments of neighbouring States were also assailed :

"(a) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1) (a) to (g) are therefore to be read along with the said qualifications. Even the rights guaranteed under the Constitution of the other civilised countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public i.e., *res extra commercium* (outside commerce). There cannot be business in crime.

(c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is therefore an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence, the trade or business in liquor can be completely prohibited.

(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purpose. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has therefore the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purpose.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of

the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercii*. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, toothers.

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

(h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.

(i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business. It carries on business in products which are not declared illegal by completely prohibiting their production but in products the manufacture, possession and supply of which is regulated in the interests of the health, morals and welfare of the people. It does so also in the interests of the general public under Article 19(6).

(j) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused within the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or derives income from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.

(k) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same

in the interests of general public.

(l) Likewise, the State cannot prohibit trade or business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19(6) of the Constitution.

(m) The restrictions placed on the trade or business in industrial alcohol or in the medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage."

10. Before considering the controversy cropped up in this writ petition, I would like to refer to the law laid down by the Supreme Court with regard to the dispensing of largess in a welfare State and the power of judicial review by a constitutional Court in exercise of its plenary powers in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . While considering the validity of the acceptance of the tender of the 4th respondent by the respondent authority, the Supreme Court held that "it is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.

11. Today the Government, in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuable dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Government and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largess in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private Corporations and individuals by way of lease or licence. All these mean growth in the Government largess and with the increasing magnitude and range of Governmental functions as we move close to a welfare

State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights, but the large majority of them are in the nature of privileges. But, on that account, can it be said that they do not enjoy any legal protection ? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure ? In the position of the Government in this respect, the same as that of a private giver ? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Professor Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorised." The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position as a private individual." As far as the power of judicial review of this Court is concerned, in *Union of India v. G. Ganayulham (dead) by LRs.* 1997 (8) Supreme 269, the Supreme Court considering the issue whether it is permissible for the Courts/Tribunals to interfere with the quantum of punishment imposed by the competent authority on the ground that it was too severe and hence disproportionate to the gravity of the charge proved, summed up the judicial power of the Court and held :

"1. To judge the validity of any administrative order or statutory discretion, normally the *Wednesbury* test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The Court would also consider whether the decision was absurd, or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternative open to him. Nor could the Court substitute its decision to that of the administrator. This is the *Wednesbury* test.

2. The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other

tests, including proportionality being brought into English Administrative Law in future is not ruled out. These are the CCSU principles.

3(a) As per *Budaycay*, *Brind* and *Smith*, as long as the Convention is not incorporated into English law, the English Courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

3(b) If the convention is incorporated in England making available the principle of proportionality, then the English Courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

4(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/Tribunals will only play a secondary role which the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on *Wednesbury* and CCSU principles as stated by Lord Greem and Lord Diplock respectively to find out if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

4(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principles of "proportionality" and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primacy role only if the freedom under Articles 19, 21 etc., are involved and not for Article 14."

12. From the above it is seen that today the State happened to the regulator and dispensing largess of the country in the shape of contracts, licences etc., which are steadily taking the shape of traditional forms of wealth and as such its actions must be informed with reasons and should be free from arbitrariness. Such a rule has not only emanated from Article 14 of the Constitution which prohibits discrimination between citizens and arbitrariness in the action of the State, but also a rule of administrative law which has been judicially evolved as a check against the exercise of power arbitrarily. Even in the case of trade or business in potable liquor, the State cannot discriminate between citizens who are qualified to carry on the trade or business. Though a citizen has no fundamental right to carry on trade or business in potable liquor, he can claim in such a situation equal right to carry on trade or business in potable liquor as against the other citizens. In other words, the actions of the executive Government should be informed with reasons and free from arbitrariness and the Court in exercise of its power of judicial review is empowered to consider whether all the relevant matters have not been taken into account or whether irrelevant matters have been taken into account and whether the action was not bonafide one and whether the decision is absurd or perverse even in cases

relating to trade or business in potable liquor. Likewise, the Court will not interfere with the decision of the administrator unless it is illegal or suffers from procedural impropriety or is irrational.

13. Keeping the above principles in mind, I would like to consider whether the action of the first respondent in rejecting the applications of the petitioners seeking permission to establish their own distilleries in the State for production of various brands of liquors that are not being manufactured within the State, is constitutionally valid and legal.

14. The A.P. (Regulation of Wholesale Trade and Distribution of Indian Liquor, Foreign Liquor, Wine and Beer) Act, 1993 (hereinafter referred as "Act 15/ 93") came into force with effect from 4th September, 1993. u/s 4 of the Act 15/1993, the Government has taken over the right to carry on the wholesale trade and distribution of Indian liquor, foreign liquor, wine and beer (hereinafter referred as "the liquors") and appointed the 2nd respondent Corporation, wholly owned and controlled by the Government to have the exclusive privilege of importing, exporting and carrying on the wholesale trade and also distribution of the same on behalf of the Government in the entire State to the exclusion of all others.

15. The retail trade in these liquors by the Corporation is regulated u/s 6 and the Rules made by the Government in that behalf.

16. u/s 7, all private persons/companies involved in the wholesale trade in these liquors were prohibited from carrying on the business.

17. u/s 12 of the Act, the Government is empowered to make Rules for carrying out all or any of the purposes of the Act by issuing notification.

18. In exercise of the powers vested in it u/s 4(1), the Government framed rules regulating the wholesale trade and distribution of these liquors in the State of Andhra Pradesh.

19. Under Rule 11, the 2nd respondent Corporation is entitled to get the supplies of these liquors from such manufacturers within or outside the State in such quantities and at such prices as it may consider necessary and appropriate.

20. Under Rule 12, the Corporation is empowered to import these liquors under an import permit by the authorised officer under the provisions of the A.P. Foreign Liquor and Indian Liquor Rules, 1970 and in accordance with the terms and conditions subject to which such import permit is issued.

21. For the excise year 1998-99, the Government constituted a Cabinet Sub-Committee to suggest steps to be taken for proper implementation of prohibition and excise policy during the ensuing year 1998-99 and also to advise the steps to be taken for controlling non-duty paid liquor in the State. On the basis of the recommendations made by the Cabinet Sub-Committee, G.O. Ms. No.166, dated 18-3-1998 was issued.

22. G.O.Ms.No.166,dated 18-3-1998 was issued for the excise year 1998-99 and

the same is extracted hereunder to the extent necessary:

"2.7 The revised excise duty will be as follows:

Category Rate per P.L. A Rs.35/- B, C & D Rs.65/- Note ."-Liquor is classified into categories A, B, C & D based on the basic price per case. The basic price includes ex-factory price + cost of bottles + cost of packing material + freight + Insurance -i- handling charges and Import fee if any.

The following is the classification adopted for the purpose.

Category Basic price per case A Upto Rs.400/- B From Rs. 401 to Rs.600/- C From Rs. 601 to Rs.900/- D From Rs.901 and above." 8. A.P. Beverages Corporation Limited is advised to procure A, B & C categories of liquor from the distilleries located within the State as sufficient production capacity for these categories exists within the State. However, they may continue to import premium brands i.e., "D" category. A period of about 3 months may 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."

23. After giving up the plea with regard to validity of the first limb of clause 8, only second limb of clause 8 of the G.O. is under attack in these writ petitions. A combined reading of Rules 2, 7 and 9 gives an impression that the Indian made liquor was divided into different categories on the basis of basic price per case and A, B and C categories are considered to be cheap liquors while "D" category is considered to be premium brands. This categorisation is not based on the strength of the liquor. In other words, under clause 8 of the policy, the second respondent was directed to procure A, B and C categories of liquor from the distilleries located within the State on the ground that sufficient production capacity of these categories of liquors is available within the State. At the same time, the Government has given three months time to the outside distilleries which are manufacturing the brands of liquor not produced within the State to establish production facilities within any existing distilleries or tie up with any local distillery for manufacture of the brands of liquor that falls under the" above category which are not being manufactured within the State. To put it the other way, for supply of brands of liquor that falls under the three categories which are not being manufactured or produced within the State, the distilleries established outside the State has to establish the production facility within the State in any existing distillery or it must have a tie up with any local distillery for supply of those brands of liquors locally.

24. Firstly, to my mind these two clauses run counter to each other. In the first instance, the Government has taken a policy decision to procure the required quantities of cheap liquor from the distilleries established within the State on the premise that the production capacity of these distilleries is sufficient to meet the requirement of the drinking public within the State and banned procurement from outside distilleries. When the policy of the Government is to procure the

required quantities from local distilleries, the question of allowing outside distilleries to establish the production facility within the State, more so in an existing distillery or under a tie up agreement with an existing distillery does not arise. Secondly, when the rules framed by the Government permit import of liquors from outside the State, the Government cannot take the stand that it will purchase the liquor only from those who establish production facility within the State under the guise of an excise policy.

25. Even assuming that the Government is having such a power, when persons involved in manufacture of liquors outside the State are given option to establish production facility within the State for manufacture of brands of liquor not being manufactured in the State to submit tenders for supply of liquors to 2nd respondent under rate contract system, the further requirement that they should establish production facility only in an existing distillery or to have a tie up with an existing local distillery is irrational. The action of the respondent in allowing the outsiders who are prepared to establish production facility in the local distilleries either by themselves or under a tie up agreement to submit tenders for supply of cheap liquors to second respondent under rate contract system and shutting the doors to others though they are prepared to establish their own distilleries by refusing permission amounts to hostile discrimination and the classification sought to be made has no nexus to the objective sought to be achieved for curbing smuggling of non-duty paid liquors into the State. Such an action is violative of Article 14 of the Constitution of India.

26. Having allowed the outside distilleries to establish production facility within the State, the Government cannot insist that they should produce their brands of liquor that too which are not being produced in the local distilleries either in the local distilleries or to have a tie up with them without allowing them to establish their own distilleries on the ground that some of the local distilleries having higher production capacity are able to produce less quantities as per demand, more so when the production of cheap liquors in the State is neither prohibited nor monopolised by the State is per se illegal, arbitrary, on the ground that some brands of liquors produced by the local distilleries are not finding market, the Government cannot insist that the outside distilleries should enter into a contract with them for production of their brands of liquors and such an action amounts to unreasonable restriction.

27. After Act 15/93 came into force, though the State has taken over the wholesale trade in liquors, their production was not monopolised by the State and the quantities of liquor required for consumption of drinking public through retail outlets are sought to be procured by the second respondent from the manufacturers on rate contract basis by way of tenders. That being the position, every citizen involved in the production is having a right to participate in the tenders and compete with others. Even assuming for argument sake that the Government is serious in curbing smuggling of non-duty paid liquors into the State from the border districts and has taken a decision to exclude outside

distilleries from participating in the tenders, to my mind it is now known how the Government can insist that they should establish the production facility in a local distillery or to have a tie up with a local distillery. Imposition of such a condition not only amounts to interference by the State with the internal management of their business, but also amounts to unreasonable restriction and offends Article 19(6) of Constitution of India as laid down in *Khoday Distilleries case* (supra). Ultimately, the action of the first respondent boils down to the principle "My State My People" which was deprecated by the Supreme Court in *State of Tamil Nadu and others Vs. M/s. Sanjeetha Trading Co. and others*, . In this case, the Government of Tamil Nadu in exercise of its powers conferred u/s 2 of Tamil Nadu Essential Articles Control and Requisitioning Act, 1949, declared timber as an essential article and (hereafter issued Tamil Nadu Timber (Movement Control) Order, 1982. Clause 3 of this order prohibits transport of timber from any place within the State of Tamil Nadu to any place outside the State except under and in accordance with the terms and conditions of a permit issued under the Tamil Nadu Timber Rules, 1968. By a further notification dated 22 September, 1983, the words "except under and in accordance with the terms and conditions of a permit issued under the Tamil Nadu Timber Rules, 1968" occurring in clause 3 of the Movement Control Order were omitted. After amendment of clause 3, a complete ban was imposed on the movement of timber from the State of Tamil Nadu to any place outside the said State. The Hon'ble Supreme Court having taken note of certain artificial barriers that are imposed by various States on the movement of produce of a particular State on consideration of "My State My People" observed as follows:

"The matter may be different where total prohibition has been imposed on the movement of goods or articles from one State to another which have not been declared to be essential commodities or articles. In those cases, the State, which has imposed such ban, has to satisfy the Court that in spite of total prohibition, it amounts only to regulation of the trade in such articles or that even if it was a restriction it was reasonable within the meaning of Article 304(b) of the Constitution and has been imposed by law as required by Article 304(b). Sometimes it is being said that many artificial barriers on movement of produce of a particular State are being contemplated or imposed only on the consideration of "My State My People". This will only amount to the protection of regional interests for political end and not of public interest. This was not conceived by Chapter XIII of the Constitution."1

28. On the other hand, by allowing the outside distillers to establish their own manufacturing centres in the State of Andhra Pradesh, the employment potential in the State would have been increased and the revenues in the shape of taxes and excise duty would have been increased. But the Government rejected as many as 13 applications for establishing new distilleries on the ground that there is no provision for grant of letter of intent in the excise policy for the year 1998-99 though neither the excise policy nor the Act and Rules banned production of these liquors nor limited their production only to the extent of their

requirement within the State. This Court having pointed out that letter of intent has to be sanctioned u/s 16 of A.P. Excise Act and Rules 3 to 9 of A.P. Distillery Rule, 1970, directed the respondents to consider the case of the petitioners as per the above provisions. The Government by the impugned memo dated 30-12-1998 rejected the request of the petitioners for establishments of distilleries on the ground that open tender system adopted by the 2nd respondent during the excise year 1997-98 did not support the allegation of the petitioners that excise policy for the year 1998-99 caused the formation of a cartel by the local distillery-owners detriment to the interest of the general public. Except taking the above stand, the Government did not choose to produce any material in support of its contention. Even assuming that the Government is justified in contending that there was no much variance in the prices of various brands of liquor during 1997-98, that cannot be a ground in shutting outside distilleries from participating in the auctions in the current year and creating monopoly in favour of the distilleries functioning within the State, moreso when the brands of liquors that are being produced by outside distilleries are not being produced by any of the distilleries in the State. The action of the respondents in allowing outside distilleries that establish their production facility in the local distilleries or tie up with them for participating in the tenders and shutting the doors to the outsiders who wish to establish their own distilleries within the State amounts to hostile discrimination between the citizens who are in the trade of liquors and violative Article 14 of the Constitution of India.

29. Nextly, as long as drinking cheap liquors are allowed, the State should respect the sentiments and preferences of the drinking public. A person may like to have a particular brand of liquor depending on his taste and the State cannot compel him to consume the liquor supplied by it on the ground that it is having exclusive privilege in vending liquors. As long as production and sale of cheap liquors is not banned, restricting the right of a citizen in manufacturing and selling a particular brand of liquor is not only an unreasonable restriction on his legal right to trade in liquors but also affects the interests of the drinking public adversely.

30. The next ground on which the Government rejected the application of the petitioners is that many outside suppliers have already entered into tie up arrangements with local distilleries for supply of their brands of liquor without any difficulty and the Cabinet Sub-Committee suggested ban on the import of A, B and C categories of liquor in order to curb the menace of non-duty paid liquor.

31. Pursuant to the directions given by this Court two tie up agreements were entered into between the parties were filed in the Court. Among them, one tie up agreement relate to Seagram Manufacturing Limited, New Delhi, with A.P. Met Engg. Limited, Bollaram, Medak district, Andhra Pradesh. It is useful to extract the same :

"AFFIDAVIT

1. Akram Fahmi S/o Late Mr. Rahman, Director, Seagram Manufacturing Ltd. having its registered office at 303, Mansarovar, 90 Nehru Place, New Delhi, having been authorised by the Company do hereby state as under:

M/s. A.P. Met. Engg. Ltd., IDA Bollaram, Medak district, Andhra Pradesh, are permitted by M/s. Seagram Manufacturing Ltd., 303, Mansarovar, 90 Nehru Place, New Delhi - 110 019 to manufacture IMFL under the following trade marks, of which M/s. Seagram Manufacturing Ltd. are the owners :

(1) Seagrams Royal Stag Blended Whisky

(2) Seagram's Imperial Blue Superior Grain Whisky

The affidavit is to be treated as an authorisation to M/s. A.P. Met. Engg. Ltd., to use the above trade marks. The arrangement has been entered into with the specific understanding that M/s. A.P. Met. Engg. Ltd. shall pay to M/s. Seagram Manufacturing Ltd. such charges per case of IMFL as may be mutually agreed upon. M/s. A.P. Met. Engg. Ltd. is responsible to have labels for these brands prepared satisfying the provision of the Excise Rules prevailing in the State of Andhra Pradesh and obtain the necessary approval of the Excise authorities for these labels to be used by M/s. A.P. Met. Engg. Ltd. M/s. Seagram Manufacturing Ltd. is also responsible for the supply of required flavouring material for the manufacturing of these brands on payment to M/s. A.P. Met. Engg. Ltd. and is also responsible for the quality of the flavouring material should there be any quality control problems.

For Seagram Manufacturing Ltd."

32. From this it is evident that the local distillery has to pay royalty on each case of IMFL as may be mutually agreed upon, apart from the cost of supply of required flavouring materials for manufacturing those brands. Another agreement entered into is between Jagatjit Industries Limited, Jagatjit Nagar, District Kapurthala (Punjab) with R.K. Distilleries, Yellampet, Medchal taluq Ranga Reddy district, is also in the same lines. Hence, under tie up agreement, the local distillery has to pay the royalty as may be agreed between the parties on each brand of Indian liquor that is being allowed to produce in his distillery apart from paying cost of flavouring materials to be supplied by the outside distillery, transportation charges etc. From this it is evident that the local distillery has to incur extra expenditure atleast to the extent of royalty payable on each brand of liquor and cost of the flavouring material to the original manufacturer and to that extent the State has to pay extra cost for supply of those brands. On the other hand, if those factories are allowed to supply the brands of liquor that are being produced by them by establishing their own production facility, the State could have saved the excess monies that are being paid to the local distillers and to that extent, the drinking public would have saved their monies, who are the ultimate people who bear the brunt of the cost of liquor. Further, by allowing competition between the producers of these liquors, there will be healthy competition which may ultimately lead to

procurement of qualitative liquor at comparative rates. Further, neither the word "tie up" was defined nor any procedure prescribed either in the agreement or in the rules. But in the clarification sent to this Court by the Director of Distilleries and Breweries, in his proceedings Cr. No.B2/207/99/DDB/ Ex, dated 6-2-1999 informed the Court that after obtaining authorisation (in the shape of affidavit on the stamp paper) from outside distillery, the local distillery applies for registration of label which is owned by the outside distillery and for this purpose, the procedure as prescribed under Rule 66(12) of A.P. Distillery Rules, 1970 are followed and the Commissioner has to approve the labels within three months. Except this, no other formality need be fulfilled.

33. Firstly, the reason given by the Government in prohibiting the outside distilleries from participating in the tenders is to control smuggling of non-duty paid liquor into the State. I have already observed that the statistics given by the Government in the counter is not supported by any documentary evidence. Even assuming that there is any truth in the allegation, even according to the Government only 46% of the cases were booked in the border districts and 54% of the cases were booked in Godavari districts i.e., in the middle of the States. To my mind, unless there is cooperation from the department officials, the smuggling of liquor into the territory of Andhra Pradesh would not have been possible. Merely on the ground of its inability on the part of the Government in controlling the smuggling, which is the bounden duty of any Government worth the salt, the State cannot altogether blame the outside distilleries for the smuggling of non-duty paid liquors and prohibit the outside distilleries from participating in the tenders.

34. Further, there is no evidence that the liquor seized is the genuine one i.e., the original Indian liquor manufactured by the distilleries situated outside the State or they are spurious in nature.

35. The first respondent further held that the Government did not grant any Letter of Intent to anybody to establish new distillery, in the State of Andhra Pradesh during 1998-99 as the production capacity of the existing distilleries is more than sufficient to meet the demand.

36. It is also on record that local distilleries are not producing the same brand of liquor that are being produced by the outside distilleries. By suddenly stopping their entry into the State, the people habituated to take that brand of drink will be forced to opt for some other brand of drink which may or may not be to their liking. The matter can be viewed from another angle also. If the real intention of the Government is only to control the sale of non-duty paid liquor, nothing prevented the Government to purchase the liquors at the premises of the distilleries and transport the consignment by itself if those distilleries come forward to offer their produce at a comparatively cheaper rates. Hence, I am of the opinion that the action of the Government amounts to a colourable exercise of power to confer undue favour on the local distilleries.

37. The respondents themselves produced certain statements in the Court : (1) the statement showing the total quantity of liquor that is required to be produced for the year 1998-99. They have shown that about 30 distilleries are functioning in the excise year 1998-99 with a total estimated capacity of 1,32,58,548 cases whereas in the counter filed by the respondents, in para 9 of it is stated that during the peak demand registered in the State, the consumption never exceeded eight lakh cases per month. In other words, even this is taken as average requirement, the total requirement of the liquor manufactured under various brands does not exceed 96 lakhs cases per year. The presumption that can be drawn is that the remaining liquor is being sold outside the State.

(2) Statement showing the list of distilleries who licences were renewed for the year 1998-99.

(3) The statement showing the new brands of liquor that are being produced under the tie up agreements during 1998-99. As per this statement, as many as 15 distilleries entered into tie up agreement with the outside suppliers for production of various brands of liquor that are not being manufactured in the State of Andhra Pradesh. In this statement, conveniently the estimated production of these brands of liquor in the State was not given. In the first statement, the production capacity of each of the distillery is given, out of that production capacity to what extent the new brands of liquor are being manufactured under the tie up agreement is neither given nor the quantities of these brands of liquors that are being produced in the local distilleries are given. Further, from this statement the local distilleries entered into tie up agreements to produce as many as 65 new brands of Indian liquor. Now assuming that the local distilleries reached optimum production, with the new brands of liquor that are going to be produced by them under the tie up agreement, 40 lakh cases of Indian liquor is being produced over and above the needs of drinking public in the State. It is neither the case of the Government that the local distilleries are prohibited from producing the liquors over and above the requirement nor are they prohibited from selling the liquor outside the State of Andhra Pradesh. In fact, different rules framed by the Government has taken care of the procedure to be followed for transmitting the liquor from the premises of distilleries to their destination.

38. Coming to the provisions of the statute and rules made thereunder with regard to establishment of distilleries within the State of Andhra Pradesh, u/s 16 of the Act the Commissioner is empowered to establish or continue a distillery after obtaining the sanction of the Government and subject to the conditions imposed therein. A.P. Distillery Rules are framed by the Government in exercise of its powers u/s 72 of the A.P. Excise Act deals with the procedure for establishment of a distillery in the State of Andhra Pradesh. Rule 3 specifies the procedure for making an application for establishment of a distillery. Rule 4 deal with the security deposit Rule 5 deals with grant of licence by the Excise Commissioner on payment of annual licence fee prescribed thereunder and other

steps to be taken by the applicant for establishment of distillery. Under Rule 6, the licensee before starting production has to furnish bank guarantee for Rs.25,000/-for every one lakh litres of estimated monthly production provided that the maximum bank guarantee to be furnished shall not exceed Rs.75,000/- towards excise duty payable by the licensee at the rates prescribed by the Government from time to time and other miscellaneous requirements to be complied with before starting production. We are concerned with Rule 9 in these writ petitions. Under Rule 9(1), the licence for establishment of distillery until shall be granted only to an applicant having sanction of the Government. Under Rule 9, the procedure for giving sanction by the Government is prescribed. It is useful to extract Rule 9(2)(a) and (b) which are relevant for the purpose of these writ petitions :

"(a) The person intending to construct and work a distillery shall notify his scheme to the Government by an application in FormNo.D-I(A).

(b) No application mentioned in clause (a) shall be entertained unless a fee of Rs.200/- is paid into Government Treasury and the challan in original in support of payment is produced along with the application."

39. Under Rule 9(2)(c), if the Government is satisfied with the proposed scheme of the applicant, they may accord sanction and communicate it in the form of letter of intent stipulating other conditions like furnishing security deposit etc., to be fulfilled by the applicant. The said sub-clause is not being extracted in its entirety as the same is of no relevance in this case. From the above, it is seen that under Rule 9(2)(a), a person, who intends to establish a distillery and informs the scheme to the Government in the prescribed proforma D-I(A), under sub-clause (b) shall enclose a challan Rs.200/- in proof of payment of fee in the Government treasury. Except the above two, no other requirement need to be complied with by the applicant and when once the Government is satisfied that the scheme is workable, it is bound to accord sanction and issue letter of intent. As stated supra, under the Rules framed by the Government under Act 15/93, the second respondent Corporation, which is appointed as an agent to the Government to carry on wholesale trade in Indian liquors, is empowered to get the Indian liquors and foreign liquors from such manufacturers within or outside the State in such quantities and at such prices as it may consider necessary and appropriate. Under this rule, the Government has taken a decision to get the supply of these liquors by inviting tenders from the owners of the distilleries located both within or outside the State. As a matter of fact, till the excise year 1997-98, the distillery-owners within or outside the State were participating in the tenders. But, coming to the Excise year 1998-99, the Government has taken a decision restricting procurement of liquors in ABC categories from the distilleries located within the State. But, at the same time, under second limb of clause 8 of Excise Policy, outside distillery-owners, who are prepared to establish production facility of the brands of liquors not being produced within the State or tie up with local distilleries, were also permitted to participate in the tenders. In

other words, the Government has taken a policy decision not to procure its requirement from outside distilleries even if they are prepared to establish their distilleries within the State, leave apart permitting them to participate in the tenders. To put it in a nutshell, the persons involved in the production of liquors were divided into two groups : (I) outside distillery-owners with or without production facility of their own within the State and (2) outside distillery-owners, who entered into agreement with local distilleries to manufacture their brand of liquors or tie up agreement with local distilleries to participate in the tenders for supply of these liquors on rate contract basis to the second respondent.

40. The only object sought to be achieved by classifying liquor producers into two groups, according to the State Government, is to curb the illegal entry of non-duty paid liquors into the State. I have already held that this classification made by the Government has no nexus with the object sought to be achieved. Further, as long as the statute and rules permit the production of liquor within the State more so the brands of liquors not being produced within the State, the Government is not justified in rejecting the applications of the petitioners for establishment of distilleries of their own in the State of Andhra Pradesh with a view to compete with the local manufacturers and to supply liquors either to the second respondent Corporation at competitive rates by participating in the tenders along with others or to export the liquors manufactured in their distilleries outside the State of Andhra Pradesh, which is not prohibited either under the Act or under the Rules from which the Government is likely to improve its excise revenues both by way of excise duty and sale tax apart from providing employment potentiality without compelling the drinking public to drink particular brand of liquors against their taste and liking, under the guise of exclusive privilege in the trade of potable liquors is nothing but arbitrary exercise of power and the action of the Government lacks bona fides.

41. For the foregoing reasons, I have no option except to set aside the impugned Memo No.77453/Excise-III/98-5, dated 30-12-1998 and the matter is remitted back to the Government for fresh consideration in the light of this judgment. As the applicants have complied with all the requirements under the Rules and the Government rejected their applications only on extraneous grounds, the applications have to be disposed of within four weeks from the date of receipt of a copy of this order. Accordingly, the writ petitions are allowed with costs. Advocate's fee Rs.5,000/- (Rupees five thousand only) in each of the writ petitions.