

(1993) 06 KAR CK 0006

In the Karnataka High Court

Case No : Writ Petition No's. 16646 to 16652, 16659, 16660, 16695 to 16702
and 17070 of 1993

Karnataka Breweries and Distilleries Pvt. Ltd.

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 30-06-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 213, 47

Karnataka Excise Act, 1965 — Section 16 B, 2 (2)

Citation : (1993) ILR (Kar) 2117 : (1993) 3 KarLJ 126

Hon'ble Judges : Vasanthakumar, J; Shivashankar Bhat, J

Bench : Division Bench

Advocate : Kapil Sibal, for Javaji Srinivasalu, P. Chidambaram, S. Vijay Shankar and N.S. Narasimhaswamy, for the Appellant; B.V. Acharya, General and B.G. Sridharan, for the Respondent

Final Decision : Dismissed

Judgement

Shivashankar Bhat, J.—In this batch of Writ Petitions the main relief sought is for a declaration that the Karnataka Excise Amendment Ordinance 1993 is arbitrary and unconstitutional. Further an appropriate Writ of Mandamus is sought against the respondents from taking any steps for the supply of arrack in polythene sachets or bottles through respondents-4 and 6. The impugned Ordinance is referred hereinafter as "the Ordinance". Respondent No.4 is referred as MYSUGAR and the 5th respondent as MSIL.

2. Writ Petition No. 17070/93 is alleged to be a public interest litigation filed by a person who is concerned about the consumption of arrack and the hazards that is likely to be caused on account of the decision of the State Government in making available arrack in sachets and bottles without proper Rules and Regulations. For the sake of convenience the term "petitioners" referred in this order shall refer to the licensees who are immediately affected by the enforcement of the Ordinance and the amendment of certain Rules which are also challenged by seeking

amendment of the Writ Petitions. Since no separate order is made on the amendment applications we permit the amendments and the amendment applications are to be read as part of the pleadings.

3. The petitioners are the licensees under Rule 6(1) of the Karnataka Excise (Manufacture and Bottling of Arrack) Rules 1987 -(hereinafter referred as "Arrack Bottling Rules"). Each licence is confined to a particular area within which licensee has to supply bottled arrack to the persons holding the rights to vend arrack in retail. The period of licence is five years, renewable for another term of five years and so on as per the existing law prior to the Ordinance.

4. All the 18 petitioners obtained licences in the year 1987. On the expiry of initial period of licences in the year 1992, the licences were renewed for a period of further five years from 1.7.1992 to 30.6.1997. In pursuance of the issuance of these licences the petitioners entered into appropriate agreements with the State Government.

5. All the petitioners are also licensees under the Karnataka Excise (Distillery & Warehouse) Rules, 1967 (for short "Distillery Rules). In fact only a licence holder under the Distillery Rules could be granted the licence under the Arrack Bottling Rules, as was in force earlier to the Ordinance. However, a licence issued under the Distillery Rules operates only for a period of one year and has to be renewed every year.

6. Section 16-A of the Karnataka Excise Act, 1965 ("the Act" for short) provided for the grant of licence to manufacture and bottle arrack, for sale. In these Writ Petitions we are concerned with Section 16-A(1)(c) which stated that:

"Notwithstanding anything contained in this Act, no licence, to manufacture and bottle arrack for sale be granted to any person who is not the holder of a distillery licence granted u/s 16".

The Ordinance amends this provision and the amended provision reads as follows:

"Notwithstanding anything contained in this Act, no licence, - to manufacture and bottle arrack for sale be granted to any person other than a company or an agency owned or controlled by the State Government or a State Government Department".

The Ordinance also introduced Section 16-B, which reads as follows:

"Licences granted for manufacture and bottling of arrack cease to be valid:-

(1) Notwithstanding anything contained in this Act or in any judgment, decree or order of any Court, every licence granted: -

(i) to manufacture arrack; or

(ii) to bottle; or

(iii) to manufacture and bottle arrack;

for sale shall, cease to be valid on the expiry of 30th June, 1993;

Provided that nothing contained in this section shall affect any obligation or liability incurred in respect of such licence before the first day of July 1993.

(2) When a licence ceases to be valid under Sub-section (1), a part of the licence fee proportionate to the unexpired portion of the term of the licence and the deposit made by the licensee in respect thereof shall be refunded to him after deduction of the amount due from him to the State Government".

The resultant position brought about by the Ordinance is to confine the grant of licence to manufacture and bottle arrack for sale, only, to a company or agency owned or controlled by the State Government or State Government Department. Therefore, if, Section 16-A is taken by itself, in future, the grant of licence would be only to a Government company, a Government agency, a Government controlled company or a Department of State Government.

7. Section 16-B operates on the existing licence issued under Arrack Bottling Rules. By virtue of its Sub-section (1), the existing licence ceases to be valid on the expiry of 30th June 1992. As per Sub-section (2) appropriate refund of the deposit made by the licensee shall be refunded. The combined effect of these two amendments to the Act results in the termination of the licences of the petitioners and empowers the Government to issue fresh licence to any State Government company or a company controlled by the State Government, etc.

8. The Ordinance also amends Section 2(2) by inserting the words "polythene sachet". By virtue of this insertion, Section 2(2) would read as follows:

" "to bottle" means to transfer liquor from a cask or other vessel to bottle, jar, flask or other vessel to bottle, jar, flask, polythene sachet or similar receptacle for the purpose of sale, whether any process of manufacture be employed or not, and includes re-bottling;"

(underlined words were added by the Ordinance)

9. By this amendment it is made clear that arrack can be packed either in a bottle or in polythene sachet, apart from jar, flask or similar receptacle. Three relevant Rules were amended, which are also under challenge. In Rules 2(2) and 5(2) of the Karnataka Excise (Arrack vend Special conditions of Licences) Rules, 1967 (hereinafter referred to as "Special Conditions Rules"). The words "Polythene sachets" were added to place polythene sachets on par with sealed bottles.

10. Arrack Bottling Rules was amended by inserting Clause (C-a) in Rule 2, which reads:

" "bottle" includes "Polythene sachets" ".

11. The Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules,

1969 (hereinafter referred as "the Retail Vend Rules") was also amended to the extent of adding the words "arrack in polythene sachet" in Rule 3(3) and its Proviso. The amended Rule 3(3) reads thus:

"(3) the right of retail vend of arrack disposed under these rules shall be the exclusive right but in such districts as may be specified by the Government only bottled arrack or arrack in polythene sachet shall be sold to consumers.

Provided that if for any reason supply of bottled arrack or arrack in polythene sachet cannot be arranged in sufficient quantity, Government may specify the areas in which bulk arrack may be permitted to be sold subject to the conditions specified therein".

(underlined words are added by the Ordinance)

12. By the amendment of the Rules specific words were inserted providing for the retail sale of arrack in polythene sachets.

13. The petitioners are mainly aggrieved by the termination of their licences with effect from 1.7.93. In the process of attacking the Ordinance they questioned the implementation of the Ordinance by the entrustment of the licences to MYSUGAR and MSIL on the ground that the public interest is not served by the entrustment of the licences to these two Companies. Further, it was contended that MYSUGAR is not a Company owned or controlled by the State Government. The amendment of the aforesaid three Rules are challenged on the ground that draft Rules were not published at all. Even otherwise the Rules are arbitrary and further that the State Government has notified the auction of the right to retail vend arrack only in polythene sachets and the sale of arrack in polythene sachet is not in public interest.

14. The petitioners attack the Ordinance on the ground that no circumstance existed calling for the promulgation of an Ordinance under Article 213 of the Constitution. The provisions of the Ordinance are unreasonable, arbitrary and unfair and therefore violate Article 14 of the Constitution. It was entirely unreasonable to terminate the existing licences when licensees have another four years to operate under the existing licences. When bottling of arrack is considered to be in public interest, and all these years there has been no complaints against the petitioners, no public interest is served by terminating their licences. The Ordinance is therefore arbitrary. It was also contended that there is no reasonable nexus between the object sought to be achieved by the Ordinance and the classification made. The respective contentions of the parties before us will be referred hereinafter in detail while considering the arguments.

15. The following contentions were advanced in support of the Writ Petitions:

I. The Ordinance takes away the entrenched statutory rights of the petitioners and therefore it is unconstitutional, unless justified by the supervening public interest.

II. The legislative policy incorporated by amendment to the Act in the year 1987 and the relevant Rules of the year 1987 and effectuated by the grant of licences to the petitioners, was a policy consistent with public interest:-

- i. there was lesser danger of adulteration in the case of bottling of arrack;
- ii. greater control over the manufacturing and sale of bottled arrack was possible;
- iii. there was assured supply of arrack to the consumer-public; and
- iv. this policy is now discarded for reasons not disclosed.

Therefore the Ordinance is arbitrary and violative of Article 14 of the Constitution.

III. Five years duration of the licence created a legitimate expectation that during the period of licence, licences can carry on with the licensed activity and the legitimate expectation stood further strengthened by Rule 6A of the Rules providing for renewal of the licence as a matter of course. The curtailment of this period of licence offends Article 14.

IV. When under the existing Act and the Rules there are provisions like Sections 29 and 30 and Rule 28 for the termination/withdrawal of the licence, non-resorting to them, and terminating the licences through the Ordinance without the existence of any overriding public interest, renders the Ordinance colourable.

V. Equating a polythene sachet to a bottle, in the definition u/s 2 of the Act renders the definition invalid, because, the definition becomes over inclusive. Similarly exclusion of "bottling" as such by virtue of Section 16B introduced by the Ordinance, runs counter to the policy of the Act and results in the "under inclusion" of the subjects, thereby contravening Article 14 of the Constitution.

VI. The classification of the bottles for the purpose of taking away their licences and providing for the licensing of Government companies/Government controlled companies/Department of the Government, has no nexus to the object of the Ordinance and hence it is violative of Article 14.

VII. The amendments made to the three Rules are unenforceable and invalid.

16. It was argued at the outset that even a plenary legislation can be held to be invalid if it is unfair, unjust or unreasonable, because, such unfairness, unjustness or unreasonableness, renders the law arbitrary, resulting in the contravention of Article 14 of the Constitution; this is all the more so, because, no public interest sought to be advanced or served by the provisions of the Ordinance is forthcoming.

17. The effect of the implementation of the impugned provisions will be to replace bottled arracks, by arracks in polythene sachets. Bottling of arrack was introduced as a safe measure and in the public interest. This has been the stand of the Government all along and has been judicially noticed. If sale of arrack in bottles was adopted as a policy because of the public interest it served, it is for the State, now to explain as to why the said policy requires to be abandoned. As

against the several advantages of using the bottle as the container, polythene sachets has several disadvantages, such as:-

- (i) transportation of polythene sachets is more hazardous, in view of its easy tendency towards leakage and the contents would get contaminated;
- (ii) it is sensitive to heat;
- (iii) it is likely to burst easily;
- (iv) sealing of the package is less fool proof;
- (v) printing and labelling are liable to get erased by leakages;
- (vi) the quantity of the content is not easily verifiable; and
- (vii) it is easy to manufacture and pack the arrack in sachets, even in vehicles, thereby illicit mobile manufacturing of arrack would be quite easy and encourage smuggling of illicit arrack.

18. It was also contended that when consumption of arrack is not prohibited as a matter of policy and its manufacture and sale is permitted, while considering the validity of a particular mode of implementing this permissive policy, principles based on morality have no place and the law, in such a situation, should be tested just like any other law regulating a trade or industrial activity; the State has already ignored Article 47 and thought it fit to permit the circulation of intoxicant drinks; the particular mode of this circulation being the subject of the legislation, that mode has to be justified solely on considerations of public interest and comparative advantages of adopting one mode, as against the other; the substance of the contention, on this aspect is that, State cannot just pick and choose one method, allow the licensee to invest large sums of money to adopt that method of sale and then, suddenly abandon it, in favour of another method without valid reasons based on public interest and welfare.

19. In other words, the petitioners contend that the licences granted to the petitioners are statutory in character and the rights vested in them is of a higher character, which cannot be taken away arbitrarily; further, the legitimate expectation of the petitioners that they can carry on with the activity of manufacturing and bottling the arrack for atleast another four years (the balance period out of the licence period of five years) has been totally discarded while promulgating the Ordinance. The Ordinance read with the Rules, vest the right of manufacturing and sachet ting the arrack, in MSIL and MYSUGAR (two alleged Government or Government controlled Companies) who have no expertise or experience in this line of business and no public interest is served by vesting the said right in these two Companies. It is further contended that, since public interest is the dominant consideration in such matters concerning liquor trade, burden is entirely on the State to prove and explain to the Court that the public interest requires the sale of arrack in sachets. Therefore the Ordinance offends Article 14 of the Constitution, as it is not in public interest and its provisions are

unreasonable, unjust and unfair; arbitrariness pervades the entire body of this Ordinance.

20. The learned Counsel further contended that no circumstance existed rendering it necessary for the Government to take immediate action by promulgating the Ordinance under Article 213 of the Constitution. While elaborating this contention, Mr. Kapil Sibal made a distinction between a law enacted by the Legislature and an Ordinance promulgated by the Governor, the latter is basically a law made by the executive, unlike the former; a law enacted by the Legislature is always preceded by discussions in the Assembly and normally is subjected to prior public debates; Ordinance is sudden and is the result of the advice tendered by the Cabinet and in these circumstances, while testing the validity of an Ordinance Court should not credit it with all the credentials to which an enacted law is credited with. We are referring to this last submission based on Article 213 of the Constitution only to state that we are not considering the same, because, the contention as on today, seems to us covered by several Decisions of the Supreme Court and in the light of the law as it now stands, the contention has to be rejected by the High Court:

(vide: 1. R.K. GARG, ETC., ETC., v. UNION OF INDIA AND ORS. AIR 1981 SC 2138;

2. S.K.G. Sugar Ltd. Vs. State of Bihar and Others,

3. A.K. Roy and Others Vs. Union of India (UOI) and Others,

4. T. Venkata Reddy and Others Vs. State of Andhra Pradesh,

In Venkata Reddy's case, the relevant observations are found at page 731, thus:

"...The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the Courts. An Ordinance passed either under Article 123 or under Article 213 of the Constitution stands off the same footing. When the Constitution says that the Ordinance making power is legislative power and an Ordinance shall have the same force as an Act, and Ordinance should be clothed with all the attributes of an Act of legislature carrying with it all its incidents, immunities and limitations under the Constitution, it cannot be treated as an executive action or an administrative decision".

21. The facts of the present case do not attract the ratio or the Decision in Dr D.C. Wadhwa and Others Vs. State of Bihar and Others,

22. All these were considered by a Bench of this Court in C. Narayanaswamy and Others, etc. Vs. State of Karnataka and Another, It was held therein, that there is no difference between an enacted law and an Ordinance and it is not for this Court to examine the existence of circumstances for promulgating the Ordinance. The two questions to be considered will be whether the Ordinance is within the legislative competence and whether it offends any of the fundamental rights. The

wisdom behind the Ordinance and reasons for its promulgation are not for the Court to enquire into at all. The said Decision also points out the distinction between a fundamental right and a mere statutory right, while testing reasonableness of the law and in the latter case, of a statutory right, Legislature has a greater freedom to interfere.

23. In addition to the above contention advanced by Sri Kapil Sibal, Mr. Chidambaram contended that, any rule, bye-law or executive order or action can be tested by applying the touch-stone of reasonableness and fairness and could be invalidated on the ground of arbitrariness or as being unfair. In England, a law enacted by the Parliament is supreme and Courts are not competent to declare such a law as unconstitutional. However, in India, every State action (the term "State" comprises all organs of the State including the Legislature) is liable to be tested by applying the fundamental rights and if any State action is violative of any one of the fundamental rights, the action is liable to be declared unconstitutional by the High Court (or the Supreme Court). While English Courts have no such jurisdiction, Indian Courts have not only the jurisdiction, but also a Constitutional duty to scrutinise every State action so as to see that fundamental rights are not offended by such State action; requirement of fairness and reasonableness in State action is inherent in Article 14 of the Constitution, which is a fundamental right. Therefore, any State action which is unfair, unreasonable, unjust or arbitrary, is liable to be nullified by the Court; the provisions of the Ordinance are unjust, unfair and unreasonable and therefore they should be declared non est. The learned Counsel further submitted that definition of the term "bottle" in Section 2 of the Karnataka Excise Act, is enlarged by the Ordinance by including "sachet" and this results in making the definition "over inclusive", and thus violates Article 14 of the Constitution, Similarly, Section 16B of the Act introduced into the Act by the Ordinance excludes bottling of arrack in the real bottle, and makes the sachet the exclusive container or package of arrack; this results in "under inclusion" and thus offends Article 14. Actually the contentions could be classified as follows:

(A) The Ordinance by itself or read with the implementation of the new provisions render the Ordinance, violative of Article 14 of the Constitution, because, the provisions of the Ordinance are unreasonable; at any rate, there is no reasonable nexus between the object sought to be achieved and the basis of the classification made by the Ordinance.

(B) The amended Rules are unenforceable and ultra vires.

At first, it is necessary to answer the question whether a law can be declared unconstitutional because its provisions are considered to be unreasonable. It is also necessary to examine whether the doctrine of legitimate expectation has any relevance to the validity of a law.

It is necessary to note that there are a large number of Decisions wherein the doctrine of unreasonableness has been applied to the facts involving purely

administrative actions; we do not intend to burden this Judgment with all those Decisions; a few, referred to hereinafter are sufficient to emphasise the nature of this doctrine and its relevance to the contention advanced on behalf of the petitioners.

24. In *E.P. Royappa Vs. State of Tamil Nadu and Another*, , the validity of an order transferring the petitioner (who was the Chief Secretary of the State) and posting him as an Officer on "Special Duty" (declared as having an equal status with the office of the Chief Secretary) came up for consideration. Bhagwati, J., (as he then was) speaking for himself and two other Judges observed at page, 583:

"The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against the discrimination, Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure and fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber 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 and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: In fact, the latter comprehends the former. Both are inhibited by Articles 14 and 16".

Thus it was said that where an act is arbitrary it is violative of Article 14 and the said Article strikes at arbitrariness in State action and ensures fairness and equality of treatment.

25. The principle was reinforced further in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, ; it was observed,-

"Now, the question immediately arises as to what is the requirement of Article 14: What is the content and reach of the great equalising principle enunciated in

this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa Vs. State of Tamil Nadu and Another*, namely, that "from a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies: one belongs to a rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to the political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would be not satisfied".

26. The right to equality and equal treatment referred to in Article 14 thus, requires un-arbitrariness in State action; the State action must answer the test of reasonableness; and it must be "right, just and fair".

The idea was reiterated by Krishna Iyer, J.; at page 658, it was held:-

"Law is law when it is legitimated by the conscience and consent of the community generally. Not any capricious command but reasonable mode ordinarily regarded by the cream of society as Dharma or law, approximating broadly to other standard measures regulating criminal or like procedure in the country. Often, it is a legislative act, but it must be functional, not fatuous".

Though this observation was made in the context of Article 21, the learned Judge was actually pointing out the concept of "law", and it has relevance while considering the contents of Article 14.

27. In *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, it was observed at page 499:

"... It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to

above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution".

The observation makes it abundantly clear that the requirement of un-arbitrariness is all pervasive and governs "state action whether it be of the legislative or of the executive", etc. This golden thread of reasonableness and non-arbitrariness, if not found in a legislative measure, the measure cannot be held together as a valid piece of law.

28. Atleast, as early as *The State of West Bengal Vs. Anwar Ali Sarkar*, the above principle was noticed. The Court was considering the validity of a law enacted by the Legislature, which was ultimately held unconstitutional by the High Court; the Decision was affirmed by the Supreme Court. Bose, J., in his concurring Judgment observed that Article 14 cannot be applied to test a law, only by the doctrine of classification. At page 102, the learned Judge held:

"I can conceive of cases where there is the utmost good faith and where the classification is scientific and rational and yet which would offend this law. Let us take an imaginary case in which a State legislature considers that all accused persons whose skull measurements are below a certain standard, or who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their sub-standard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely simply this that the judges would not consider that fair and proper. However much the real ground of decision may be hidden behind a screen of words like "reasonable", "substantial", "rational" and "arbitrary" the fact would remain that judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a judge is called upon to crystallise a vague generality like Article 14 into a concrete concept".

29. The learned Judge pointed out the need to have judicial restraint in applying this test and the observations which are relevant are found at page 103:

"This, however, does not mean that judges are to determine what is for the good of the people and substitute their individual and personal opinions for that of the government of the day, or that they may usurp the functions of the legislature. That is not their province and though there must always be a narrow margin within which judges, who are human, will always be influenced by subjective

factors, their training and their tradition makes the main body of their decisions speak with the same voice and reach impersonal results whatever their personal predilections or their individual backgrounds. It is the function of the legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it falls to the lot of judges to determine where those limits lie, the basis of their decision cannot be whether the Court thinks the law is for the benefit of the people or not. Cases of this type must be decided solely on the basis whether the Constitution forbids it."

Again, it was said,

"What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and un-biased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be: Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the fore-front must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it in my opinion, "law" as used in Article 14 does not mean the legal precepts which are actually recognised and applied in the tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn and by which we criticise, them". (Dean Pound in 34 Harvard Law Review 449 at 452)".

The learned Judge while concluding said:

"Tested in the light of these considerations I am of opinion that the whole of the West Bengal Special Courts Act of 1950 offends the provisions of Article 14 and is therefore bad. When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, not indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled or whether it is an experiment in speedier trials made for the good of society at large. It matters not how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable, un-biased and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it

reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad".

30. The learned Counsel pointed out that these observations were endorsed in *A.R. Antulay Vs. R.S. Nayak and Another*, 31. Mr. Kapil Sibal also contended that while testing the law enacted by way of an Ordinance several factors which are relevant while testing validity of an administrative action, could be applied. If there is a failure to consider relevant factors such as the "legitimate expectation" of those who would be adversely affected by the law, prima facie, the law would be violative of Article 14, unless the State justifies the law by placing before the Court sufficient materials to show that the law was made to advance the public interest. In the instant case, the Ordinance has no statement of objects and reasons attached to it; the Statement of Objections filed before the Court (in opposition to the Writ Petition) does not explain the public interest to be advanced by the Ordinance. The facts disclose that sale of arrack in sealed bottles is equally good, if not better and more hygienic, as against the sale of arrack in sachets; if so, why should the State now eliminate the sale of arrack in bottles and replace it by arrack in sachets, is the question repeatedly posed by the learned Counsel.

32. In this context the learned Counsel referred to a large number of Decisions wherein the Supreme Court imposed the onus on the State to prove the public interest that necessitated particular actions. If public interest is not established for the impugned State action, prima facie, it would be arbitrary, when the result of the impugned act affects the rights or the legitimate expectations of the persons like the petitioners. In the sphere of liquor trade, the public interest is to be the dominant factor that should govern any State action; economic considerations take secondary place. This contention of the learned Counsel has a direct bearing while applying the standard of reasonableness. To what extent the contention of the learned Counsel would attract Article 14 of the Constitution and renders the ordinance arbitrary, unjust and unfair and unreasonable could be examined, after considering the relevant principles involved.

33. The validity of the State action depends upon its effect on the rights of the affected persons. In *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, the Court held at page 593:

"Under the Constitution protection against impairment of the guarantee of fundamental rights is determined by the nature of the right, the interest of the aggrieved party and the degree of the harm resulting from the State action. Impairment of the right of the individual and not the object of the State in taking the impugned action, is the measure of protection. To concentrate merely on power of the State and the object of the State action in exercising that power is therefore to ignore the true intent of the Constitution. In this Court, there is, however, a body of authority that the nature and extent of the protection of the

fundamental rights is measured not by the operation of the State action upon the rights of the individual, but by its object- Thereby the Constitutional scheme which makes the guaranteed rights subject to the permissible restrictions within their allotted field fundamental got blurred and gave impetus to a theory that certain Articles of the Constitution enact a code dealing exclusively with matters dealt with therein, and the protection which an aggrieved person may claim is circumscribed by the object of the State action".

Again, at page 596, Court observed:

"...But it is not object of the authority "making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief".

34. In Maneka Gandhi's case, this test was accepted and reiterated, and the Court observed at page 635:

"It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject matter of the State action but in testing the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded".

35. The direct and inevitable consequence of the State action on the fundamental rights of any person has to be the basic test to be applied in such a situation.

36. We are of the view that while considering the direct and inevitable consequences, on a right, the substance of the said right cannot be ignored. Article 14 guarantees (in the context of this case) a right to be treated fairly, reasonably and justly. But this treatment to be meted out is with reference to a particular subject-matter and that subject-matter is the right to trade in arrack by manufacturing and selling arrack in bottles, during the currency of the licence. This right is adversely affected because, exercise of that right is completely prevented by the Ordinance; this is the direct and inevitable consequence. Can this right be compared and placed on the same pedestal as any other fundamental right, like, the right to freedom of expression, personal liberty, freedom of trade etc., etc., ?

37. The nature of the right to trade in liquor is now quite settled in this, Court in M/s. Jagadale and Sons, Bangalore and Vs. State of Karnataka and Others, etc., , to which one of us was a party. At page 119, it was held:

"It is, thus clear that none has a fundamental right to trade or do business in liquor. As in the case of gambling activities, though dealing in liquor has "the

external forms, formalities and instruments of trade" the activities are in fact "extra-commercium", (as observed regarding gambling activities in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, and applied to liquor trade in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . Liquor cannot be treated as a recognised article of commerce or merchandise and hence dealing in liquor cannot be conferred with the status of a "trade", "business" or "commerce" falling within those concepts in the Indian Constitution".

Further, it was pointed out that fundamental right is a right which inheres every person in the Country and recognised by the Constitution; fundamental right cannot be created by a statute. A right or privilege created by a statute will be a statutory right; it cannot have the status of a fundamental right. At page 120, the Bench observed:

"To reiterate, we hold that the business in liquor is not per se lawful except when carried on under licence or permit and thus no right inheres in any individual to carry on trade in noxious or dangerous drugs. A licence granted for carrying on trade in such noxious drugs allows the person or licensee to carry on the activity of dealing in liquor. But grant of licence to carry on such activity does not by itself take away the pernicious character of the activity as such. As it is not possible to eradicate this evil, it is tolerated by the grant of licence. Neither the inherent obnoxious quality of the activity is erased nor a socially acceptable characteristic injected into it, by the licence. The moment the licence expires, cancelled or withdrawn the right or privilege gets extinguished. Therefore, such a privilege granted cannot be elevated to the status of a right either for the purpose of Article 19(1)(g) or for the purpose of Article 301. The State may completely prohibit the trade or impose severe restrictions on such business. Only those persons who are ready and willing to comply with such strict, severe and stringent conditions are enabled to carry on the activity".

In the very Decision, the scope of Article 14 and Court's approach in applying it to the claim of the licensees engaged in liquor trade, were stated, which is quite apposite here. At page 116 (Para-12) the Bench held:

"The right flowing out of Article 14 is by virtue of the requirements of fair play, reasonableness, un-arbitrariness, equality etc., in any State action. The State cannot pick and choose for conferment of the privilege to trade in liquor, arbitrarily. The choice has to be based on reasonable norms. But, while testing the legality and reasonableness of such a State action, the scope of judicial scrutiny is limited, as observed at page 279 *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, .

But, while considering the applicability of Article 14 in such a case, we must bear in mind, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude

to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government had done, unless it appears to be plainly arbitrary, irrational or mala fide".

At page 135, it was observed that liquor trade and the Excise law, operate in the sphere of economic activities and the State has a very wide latitude to experiment with the laws and the regulations in this sphere, as observed in State of M.P. and Others Vs. Nandlal Jaiswal and Others, , the Bench held:

"Social purpose, like the concept of "public interest" or "public policy" is incapable of precise definition and its identification does not depend upon any particular mark. While testing the validity of the law or a subordinate legislation the Court cannot apply the standards governing the quasi judicial orders. Test of relevancy and purpose applicable to measure up the validity of a subordinate legislation, should primarily be taken out of the subject of the statute under which rule is made, the objects behind the statute and its scheme".

Therefore, the nature of the interest created by the licences issued to the petitioners to bottle arrack for a period of five years, cannot be equated to that of a fundamental right, like, a right to carry on with a trade or business. It is purely a licence conferring a privilege. The activity carried on under the licence, is an activity which normally could have been carried on only by the State. The manner of carrying on with the liquor trade, in any of its aspects, is a matter for the State to decide, on the basis of its policy. It is true, that, the State has to bear in mind the several Constitutional provisions especially, Article 47 of the Constitution which directs the State to endeavour to bring about prohibition of the consumption of intoxicating drinks; it is also possible to take into consideration the fundamental right to life guaranteed under Article 21, which includes within its content a guarantee of a qualitative life and therefore, State should not indulge in any manner, carrying on liquor business nor permit others to do so.

But, these are essentially policy matters. Realities of life, difficulties of implementing total prohibition in practice, economic considerations, and a need to take a balanced view of the situations in the context of large scale poverty, illiteracy and cultural confusion among the masses, past experience of total prohibition and such other matters may weigh with the State in permitting manufacture and sale of intoxicating drinks. If the State finds it difficult to impose total prohibition, it may still evolve other measures to control manufacture and the sale of these commodities, so that the evil caused by the unwholesome drinks could be prevented.

38. We are faced with a situation wherein the State has thought it fit to permit the manufacture and sale of arrack; hitherto arrack was permitted to be sold in bottles and the bottling and sale was licensed to the petitioners. Under the

impugned Ordinance bottling and sale is to be entrusted to any Government owned or controlled Company or to a Department of the Government. The Notification to lease the right of vending arrack provides for the sale of the arrack only in polythene sachets and this sachet ting and sales are to be done only by Government companies. Whether this change of policy resulting in the nullification of the existing licences and permitting a change in the mode of packing the arrack from bottling system to sachet ting is arbitrary has to be considered.

39. The contention involves two aspects:

(i) Whether a law enacted by a competent legislature could be nullified as merely unreasonable, unfair, unjust or arbitrary?

If the answer is yes, then, (ii) What is the standard of reasonableness to be applied?

40. Certain, basic principles are to be borne in mind. The Legislature which enacted the law is presumed to be aware of the needs of the people and the conditions prevalent in the society which require remedial or creative measures to be taken; the Legislature passed the law after due deliberation and the law is in the public interest. As to the motive of the Legislature, there is an irrebuttable presumption that the law is enacted in absolute good faith. Courts are ill-equipped to judge the wisdom behind the law. The several tests and factors applied to consider the validity of an administrative action or a quasi judicial order, are entirely inapplicable in testing the validity of a law.

41. In *I.E. Newspapers (Bombay) Private Ltd. v. Union of India* (1), (1986) 159 ITR 856 (SC) , the Court pointed out the distinction between an enacted statute and a subordinate legislation, in the matter of being tested for unreasonableness; at page 542, Court held:

"A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock L.J. in *Mixnam Properties Ltd. v. Chertsey U.D.C.* (1964) 1 QB 214 thus:-

The various grounds upon which subordinate legislation has some times been said to be void.... can, I think, today be properly be regarded as being particular

applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus the kind of unreasonableness which invalidates a bye-law is not the antonym of "reasonableness" in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a Court would say: "Parliament never intended to give authority to make such Rules: they are unreasonable and ultra vires..."

If the Courts can declare subordinate legislation to be invalid for "uncertainty" as distinct from unenforceable... this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain..."

Manifest unreasonableness renders these instruments of law invalid. In the same Decision, it was further pointed out,-

"In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned to the ground that it is contrary to the statute under which it is made to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution".

Again, regarding a subordinate legislation, it was held at page 543:

"On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into consideration very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say the constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant".

(underlining is ours)

Also refer:- Indian Aluminium Co. Ltd. Vs. State of Karnataka,

42. The learned Advocate General contended that no law of a competent Legislature can be declared unconstitutional on the ground of mere unreasonableness, arbitrariness or unjustness. These concepts cannot be applied in abstract and the test of arbitrariness applied to executive or quasi-judicial orders are inapplicable to test the validity of a law.

43. In The State of Bihar Vs. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others, , the Supreme Court held:

""The constitutionality of a statute passed by a competent legislature cannot be

challenged on the ground that the law made is not reasonable or just".

Accordingly, the Court rejected the contention in the said case that the impugned Act was unconstitutional because it was not reasonable or just.

In A.K. Gopalan Vs. The State of Madras, Mahajan, J. (as he then was) observed at page 80 that, -

"It is quite obvious that the Court cannot declare a statute unconstitutional and void simply on the ground of unjust and oppressive provisions or because it is supposed to violate natural, social or political rights of citizens when it can be shown that such injustice is prohibited or such rights are guaranteed or protected by the Constitution",

In Bhandara District Central Co-operative Bank Ltd. and Others, Vs. State of Maharashtra and Another etc., , it is stated that the Courts cannot enquire into the public policy behind a legislation.

44. The learned Advocate General also brought to our notice, the oft referred passage requiring judicial self restraint on the part of the Judges while testing the validity of an enacted law and the need to respect legislative wisdom.

In Murthy Match Works and Others Vs. The Asstt. Collector of Central Excise, and Another, , the Court observed:

"Right at the threshold we must warn ourselves of the limitations of judicial power in this jurisdiction. Mr. Justice Stone of the Supreme Court of the United States has delineated these limitations in United States v. Butler (1936) 297 U.S. 1 : 56 Sup.Ct. 312 : 80 Law Ed. 477 American Constitutional law third edn. by Tresolini and Shapiro thus:

The power of Courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that Courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the Courts but to the ballot and to the processes of democratic Government".

In short, unconstitutionality and not unwisdom of a legislation is the narrow area of judicial review. In the present case unconstitutionality is alleged as springing from lugging together two dissimilar categories of match manufacturers into one compartment for like treatment".

Earlier in Murthy Match Works and Others Vs. The Asstt. Collector of Central Excise, and Another, , the Supreme Court referred to a Decision of the Privy Council and pointed out that, --

"the Court has no concern with the wisdom of the legislature and that it would be a dangerous precedent to allow the views of the members of the Court as to the serious consequences of excessive taxation to lead to a conclusion that the law is "ultra vires""

45. Therefore, the doctrine of reasonableness in its abstract sense is wholly inapplicable to the validity of an enacted law or an Ordinance. The observations of Bose J., in Anwar Ali Sarkar's case and A.R. Antulay's case are to be understood in the context of the facts of those cases. In Anwar Ali Sarkar's case the unreasonableness, or arbitrariness found in the law was the same as the denial of "the equality before law and equal protection of the law", referred to in Article 14 of the Constitution. In Antulay's case, the procedure followed (as per the earlier order of the Court) to try the petitioner was not in accordance with law and hence violative of Article 21 of the Constitution. The observations of Bose, J., referred to in Antulay's case, were the observations pertaining to the good faith with which the impugned order was made and the irrelevancy of the good faith, while testing the validity of the order. In fact A.R. Antulay Vs. R.S. Nayak and Another, after referring to the observations of Bose, J., it was held:

"The question which must be examined is, can fair-minded, reasonable, unbiased and resolute men regard that with equanimity and call it reasonable, just and fair, regard it as equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which are obtained in India today".

This makes it clear that the entire observation of Bose, J., was understood as related to the concept of "equal treatment and protection".

46. The difficulty of applying the standard of reasonableness (the 2nd aspect of the question) to an enacted law, is sufficient to show that the doctrine of unreasonableness in its abstract form is outside the content of Article 14 while testing the validity of a law under that Article. This illusive standard of reasonableness read with the presumptions attached to a law, makes the law immune from being attacked as "merely unreasonable".

In State of Madras Vs. V.G. Row, it was held:

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition the prevailing conditions at the time should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conceptions of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative

judgment in such cases can only be dictated by their sense of responsibility and self restrained and the sobering reflection that the constitution is meant not only for people of their way of thinking but for all, and that the majority of elected representatives of the people have, in authorising the impositions of the restrictions, considered them to be reasonable."

Same idea is emphasised in *Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others*, , thus:

"Indeed, in the United States of America after the hey-days of the substantive due process, the Supreme Court in 1963 in *Ferguson v. Skrupa* 372 US 726 said:

"We refuse to sit as a "super legislature to weigh the wisdom of legislation" and we emphatically refuse to go back to the time when Courts used the Due Process Clause" to strike down, State laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.... Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."

In *C. Narayanaswamy and Others, etc. Vs. State of Karnataka and Another*, this Court has referred to the Decision of Lord Denning M.R. (*Secretary of State for Education & Science v. Tameside Metropolitan Borough Council* - (1976 3 All.E.R. 665) indicative of the difficulty in measuring the unreasonableness which would invalidate an administrative decision; the learned Master of Rolls had said,-

"No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view".

In *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, , the Supreme Court was examining the validity of a project to develop an area into a commercial complex; the project was finalised by the Municipality. One contention attacked the scheme in question as arbitrary and violative of Article 14 of the Constitution; another contention attacked the scheme as ultra vires, because of certain unconventional aspects of the scheme; the policy of the municipality behind the scheme was questioned. Speaking for the Court, M.N. Venkatachataiah, J., (as he then was), observed at page 1160:

"In regard to Courts and policy we might recall the following words of, a learned author:

The Courts are kept out of the lush field of administrative policy, except when policy is inconsistent with the express or implied provisions of a statute which creates the power to which the policy relates or when a decision made in purported exercise of a power is such that a repository of the power, acting reasonably and in good faith, could not have made it. In the later case, "something overwhelming" must appear before the Court will intervene. That is, and ought to be, a difficult onus for an applicant to discharge. The Courts are not very good at formulating or evaluating policy. Sometimes when the Courts have

intervened on policy grounds, the Court's view of the range of policies open under the statute or of what is unreasonable policy has not won public acceptance. On the contrary, crucial views of policy have been subjected to stringent criticism. In the world of politics, the Court's opinions on policy are naturally less likely to reflect the popular view than the policies of a democratically elected Government or of expert administrators....."

"The considerations by reference to which the reasonableness of a policy may be determined are rarely judicially manageable...."

Again at page 1161:

"While the concern of public law is to discipline the public power by forging "legal techniques as both part of the way in which public power is made operation and part of the process through which it is attempted to render such public power legitimate and to think of issues of legal regulation of public power in a way that goes deeper than particular instances and seeks to elaborate issues of general principle. There is, however, as Professor Wade points out, ample room, within the legal boundaries for radical difference of opinion in which neither side is unreasonable. In Tameside case Lord Denning pointed out the error of confusing difference of opinion, however, strong, with unreasonableness on the part of one side or the other. Lord Diplock said that the very concept of administrative decision involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred".

As to the problem regarding the standard of reasonableness that could be applied, it was pointed out at page 1164:

"In the arguments there is some general misapprehension of the scope of the "reasonableness"-test in administrative law. By whose standard of reasonableness that a matter is to be decided?"

It was then held that,-

"Different context in which the operation of "reasonableness" as test of validity must be kept distinguished".

In this regard, it was further held:

"Yet another area of reasonableness which must be distinguished is the constitutional standards of "reasonableness" of the restrictions on the fundamental rights of which the Court of judicial review is the arbiter".

Further, --

"The "reasonableness" in administrative law must, therefore, distinguish between proper use and improper abuse of power. Nor is the test the Court's own standard of "reasonableness" as it might conceive it in a given situation".

At page 1165, the learned Judge observed:

"Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as "irrelevant considerations", and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question..."

(See Administrative Law: H.W.R. Wade, 6th edn. page 408).

The point to note is that a thing is not unreasonable in the legal sense merely because the Court thinks it is unwise".

46. Further discussion by us is certainly unnecessary. The application of the test of unreasonableness to an administrative action itself is to be with great caution, taking care not to trench upon the prerogative of the decision taking authority regarding the policy to be adopted and the option available to the said authority to choose between several alternatives.

If so, application of the said test to an enacted law becomes impossible.

47. Mr. Chidambaram contended that the Rule made under Article 309 of the Constitution is qualitatively the same as a law enacted by the Legislature except that the Rule yields to any legislation made on the subject. If such a rule could be struck down on the ground of unreasonableness, logically a law enacted by the Legislature also could be struck down on the ground of unreasonableness. B.S. Yadav and Others Vs. State of Haryana and Others, was relied upon for this proposition. The observations at page 577 were relied upon by the learned Counsel to show that a Rule made under Article 309 was compared to an Ordinance made under Article 213 of the Constitution. In the said Decision, the Court was concerned with the reasonableness of the date for the purpose of making the Rules retrospective. The Supreme Court observed, as follows at page 586:-

"...But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case. No such nexus is shown in the present case on behalf of the State Government. On the contrary, it appears to us that the retrospective effect was given to the rules from April 9, 1976 for the mere reason that on August 25, 1976 the High Court had issued a notification fixing seniority of the promotees and direct recruits appointed to the Superior Judicial Service of Punjab. The notification issued by the Governor on December 37, 1976, will therefore, operate on future appointments or promotions made after that date and not on appointments or promotions made before that date".

From the above, it is clear that the test of reasonableness was applied with reference to the nexus between object of the Act and the subject matter of the legislation. There can be no two opinions about the applicability of the test of reasonableness when a law is tested under Article 14 by applying what is now

referred as the "classical doctrine".

48. The application of the doctrine of mere unreasonableness, without reference to its consequences not being inequality before law or unequal protection of the law, will be outside the purview of Article 14, while testing a law enacted by a competent Legislature. It is only when the law is so unreasonable and it can be demonstrated that it denies any persons equality before the law or the equal protection of the law, the said law would offend Article 14.

49. The learned Counsel cited several Decisions, wherein the Supreme Court used the word "unjust", "or "unreasonable" while considering several impugned rules-involved in those Decisions.

We consider those observations of the Court were made in the context of the particular facts before the Supreme Court and the Supreme Court has not laid down the proposition that the test of "mere reasonableness" could be applied while considering the validity of an enacted law. We are bound by the Decision of the Supreme Court rendered in *Indian Express Newspapers*" case referred already.

50. Mr. Chidambaram contended that the Ordinance and the impugned Rules are aimed at switching over to sachet ting of arrack for sale and this activity of bottling or packing arrack in a container has nothing to do with the obnoxious nature of liquor trade and therefore Court can freely and liberally consider the reasonableness of the change sought to be made.

This contention also is not acceptable. The Ordinance affects the licencing of manufacture and bottling of arrack; it is not confined to the bottling of arrack only. Manufacturing activity in relation to arrack cannot be considered innocuous; certainly it is pernicious in character and, as the law now stands, no one can claim any fundamental right to manufacture arrack.

51. Now we come back to the question whether the Ordinance is violative of Article 14 on the ground of lack of nexus between the object and the basis of classification. The relevant principles are stated by the Supreme Court in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , the Supreme Court held:

"...The decisions, of this Court further establish-

(a) that a law may be constitutional even though it relates to a single individual, if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been clear transgression of the Constitutional principle;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people that its laws are directed to problems

made manifest by experience and that its discrimination are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislation are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne-in-mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws".

52. The petitioners contend that no Objects and Reasons for the Ordinance is forthcoming.

There is no legal requirement that a law should have explanatory "Objects and Reasons" attached to it. Even in a case where the law has an "Object and Reasons" attached to it, the reasons given are not conclusive. There is a strong authority for the proposition that statement of Objects and Reasons accompanying a Bill, cannot be used except for the limited purpose of understanding the background and the antecedent state of affairs leading upto the legislation. (See *State of West Bengal Vs. Union of India*, While considering the constitutionality of a law even the affidavits filed by the parties (including those filed on behalf of the State) as to the purpose and the scheme of the law, are not conclusive and Courts may ignore them, (vide *Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another*,

The basis for the legislation and the object sought to be realised by the law can be inferred by the Court on a consideration of all the provisions of the law in question.

53. Here, the Ordinance has only three Sections; one inserts the "sacheting" into the definition of "to bottle" in Section 2(2). This is obviously by way of abundant caution. The second part amends Section 16A by making everyone ineligible to the grant of licence to manufacture and bottle arrack, except Government company, government controlled company or a Department of Government. This amendment clearly brings out an intention to create an exclusive right for vesting the licence in the Governmental Companies, apart from a Department of

the Government. The third part introduces Section 166, by which existing licences stand terminated with effect from 1.7.1993. In other words the exclusive right created u/s 16A is to be operative from 1.7.1993. Section 16B affects existing licences of the petitioners; but this is incidental to the main object of the Ordinance to vest an exclusive right of manufacturing and bottling arrack in the Department of the Government or in Governmental Companies; private enterprise including the existing ones has to yield to the public sector. The object of the classification is the vesting of exclusive right of the manufacturing and bottling of arrack in the public sector; this object could be realised and effectuated only by terminating the existing licences from the date of the creating the exclusive right in the public sector. It cannot be said that there is no nexus at all between the object and the basis of classification.

54. It was then contended that a right to retail vend arrack only in polythene sachets is notified for auction, why should bottling be given up for sacheting, was the question posed by the petitioners.

It is true that arrack in bottles is not found to be against public interest; but arrack in sachet also is not proved to be against public interest, though petitioners contend that polythene sachets would react to the arrack and arrack would get contaminated, leading to health hazards.

If it is not proved that sacheting of arrack does not affect the quality of arrack and arrack in bottle or in polythene sachet does not make any difference, then, it is a matter of choice for the Government to sell arrack either in sachets or in bottles or in both. Exercise of this option and the decision to sell arrack in sachets only cannot render the Ordinance invalid; Ordinance has nowhere confined the sales of arrack to be, only in sachets.

55. Since polythene sachets is specifically referred as one of the containers/ receptacle, by its inclusion in the definition now, it has to be noted that, acceptability of polythene sachets for packing arrack is recognised by the legislative wisdom. Vesting of exclusive right, to manufacture and sell arrack, in Government Company/Government Controlled Company, in no way would contravene Article 14 of the Constitution. Even in the case of recognised and harmless trade or industry, monopoly may be created in favour of the public sector, as is clear from Article 19(6). Thus, if a specific guaranteed right of a citizen to carry on trade, business, etc. could be taken away and vested in the State or its instrumentality, exclusively, it does not require further argument to justify the taking away of the privilege of vending arrack from the private sector. In Jagadale's case the validity of entrusting the sole "distributionship" to a Governmental company (MSIL) was challenged. At page 129 the Bench held:

"It cannot be said that the retention of its exclusive privilege to deal as a distributor of liquor, by having the privilege retained by it exclusively is not in public interest. The effect of the rules is to activate the functioning of the State in the sphere of its own privileges. The resulting restriction, if any, on the alleged

rights of others, cannot be held to be unreasonable, nor as against the public interest".

56. The executive decision of selling arrack only in polythene sachets is questioned; the relevant notification to conduct the auctioning of the right to vend liquor in sachets is challenged on the ground that there was no material before the Government to show that sacheting is not harmful to the health of the consumer. This contention assumes that the burden of justifying the exercise of discretion is on the State Government. We do not think so. It is for the petitioners to prove by cogent material that the executive decision opting to sell arrack in polythene sachets is arbitrary, opposed to the scheme of the Act and the relevant rules. If the State Government discloses that it had before it relevant materials from which it could be shown that sacheting of arrack for sale is not harmful to the health of the consumer and would not affect public interest, it is not possible for the Court to interfere with the said decision. State Government has placed before us a Decision of Madras High Court in ADITYA MAHAPATRA v. THE GOVERNMENT OF TAMILNADU AND ORS., W.P. No. 3692 of 1990 (Madras) wherein Srinivasan, J. has considered this aspect in detail. The learned Judge has referred to several expert opinions and the prevalent practice in many other States where arrack in polythene sachets are being sold. The conclusion was:

"...As pointed out already, my province is only to find out whether the Government has acted arbitrarily in deciding upon the use of sachets - in particular polyethylene sachets - for packing arrack or country liquor and whether the Government has failed to take into account relevant materials before coming to such a conclusion. From what I have stated above, it is clear that the State Government had in its custody sufficient technological information and other relevant facts on which it was possible for the State to conclude that use of polyethylene sachets will not affect the health of the persons who consume country liquor or arrack supplied in such sachets. At any rate, it is not possible for this Court to hold that the decision of the State Government is arbitrary or that it is based on irrelevant material".

Earlier, several materials placed by the State Government were referred in the Judgment, which it is not necessary for us to refer here.

57. The respondents before us also relied on these materials. The learned Advocate General pointed out that the Government has been considering this question of sacheting arrack for a considerable time, and the Government is entitled to rely on the practice prevailing in other States in this regard. The State Government referred to the practice of selling arrack in sachets in several States in India.

58. We are of the firm view that it is not for this Court to decide whether sacheting of arrack is good or bad. The practice of similar sales in other States and the Decision of the Madras High Court are certainly relevant factors that

could be taken note of by the State Government. Kerala High Court has not given a definite finding that sacheting is injurious to the health of the consumer. In *Dr. GEORGE MAMPILLAY AND ANR. v. STATE OF KERALA AND ANR.* AIR 1985 Kant 24, it was held that Government resorted to sacheting without examining the advisability of introducing arrack in sachets and material before the Court was insufficient to decide the question.

59. Arrack in sachets was being sold in this State for sometime after 1984; it was given up not because of any doubt as to the injurious character of polythene sachet. State Government thought it advantageous to have bottling of arrack in "bottles". Now, the State Government has opted for sacheting.

State Government has asserted that illicit arrack is being sold in unauthorised sachets. If the government is able to sell arrack in polythene sachets at a competitive price, illicit manufacture and sales could be curbed. The cost of sacheting is shown to be far cheaper to that of bottling.

If cheap, authenticated arrack is made available, certainly, the consumer would prefer the arrack supplied by the State Government and illicit arrack would cease to have any charm. The contention of Mr. Chidambaram that the Ordinance is violative of Article 14, because by amending Section 2(2) of the Act, it becomes "over inclusive" while the relevant Rules by confining themselves to polythene sachets become "underinclusive" is another facet of the argument already considered by us.

60. Polythene sachet as a receptacle falls within the category of "bottle" jar, flask, etc. Its inclusion now is by abundant caution; even otherwise, if polythene sachet can be used as a container of arrack, there is nothing wrong in its inclusion in the definition of bottling or "to bottle".

61. Section 16B nowhere excludes the real bottle as a container of arrack and therefore, it does not suffer from under inclusion of the real bottle to be used as a receptacle. The problem of over inclusion or under-inclusion has been considered by the Supreme Court in *The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another*, , the Supreme Court held:

"A classification is under-inclusive when all who are included in the class are tainted with mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his down fall employed such a classification".

At page 1314,

it was pointed out in short, the problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think".

After a few observations, the Court held-

"The question whether, under Article 14, a classification is reasonable or unreasonable must, in the ultimate analysis depend upon the judicial approach to the problem. The great divide in this area lies in the difference between emphasising the actualities or the abstractions of legislation. The more complicated society becomes, the greater the diversity of its problems, and the more does legislation direct itself to diversities.

"Statutes are directed to less than universal situations. Law reflects distinctions that exist in fact or at least appear to exist in the judgment of legislatures - those who have the responsibility for making law fit fact. Legislation is essentially empiric. It addresses itself to the more or less crude outside world and not to the neat logical models of the mind. Classification is inherent in legislation. To recognise marked differences that exist in fact is a living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic". [See: the observations of Justice Frankfurter in *Morey v. Boud* (1957) 354 US 457,

That the legislation is directed to practical problems, that the economic mechanism is a highly pensive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry, that exact wisdom and nice adoption of remedies cannot be required that judgment is largely a prophecy based on meagre and uninterpreted experience, should stand as a reminder that in this area the Court does not take the equal protection requirement in a pedagogic manner.

(see; Joseph Tussman and Jacobus ten Breck, "The Equal Protection of the Laws", 37 California Rev. 341")

Contention based on the theory of under or over inclusion is accordingly rejected.

62. Arguments based on Articles 47 and 48A of the Constitution require to be considered, it was contended that the State Government has no competence to indulge in liquor trade. At any rate, the present policy does not take into consideration the Directive Principles contained in these Articles of the Constitution.

63. Sections 29 and 30 of the Act provide for the cancellation or termination of the licence; withdrawal/termination of licence u/s 30 need not be only on the ground of any misconduct on the part of the licence holder. Now, if the legislation

deems it fit to terminate the licences, directly, instead of leaving it to the executive power of the Government u/s 30, the law cannot be stigmatised as colourable. Legislature has full competence to make such a law and if so question of colourability of the law does not arise.

64. Directive Principles enumerated in Part IV of the Constitution, in no way limit the legislative powers of the State. Article 37 makes it abundantly clear that these principles are not enforceable; however, these principles are fundamental in the governance of the Country and the State to apply these principles in making laws. The Courts are to take into consideration these principles while interpreting any law; and any law or State action (which is otherwise valid) would be read, to be in harmony with those principles. Unlike the fundamental rights, these Directive Principles do not affect the validity of a law made by a competent legislation. Out of the four propositions summarised, in *Deep Chand Vs. The State of Uttar Pradesh and Others*, , two are the following:

"(i) whether the Constitution affirmatively confers power on the legislature to make laws subjectwise or negatively prohibits it from infringing any fundamental right, they represent only two aspects of want of legislative power;

(ii) the Constitution in express terms makes the power of a legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constitution and thereby circumscribes or reduces the said power by the limitations laid down in Part III of the Constitution;"

In *THE U.P. STATE ELECTRICITY BOARD AND ANR. v. HARI SHANKER JAIN AND ORS.* AIR 1979 SC 65 the Supreme Court held,

"...The mandate of Article 37 of the Constitution is that while the Directive Principles of State Policy shall not be enforceable by any Court, the principles are "nevertheless fundamental in the govern of the country" and "it shall be the duty of the State to apply these principles in making laws". Addressed to Courts, what the injunction means is that while Courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of. Judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy".

65. Under Article 298, it is clarified that the executive power of the State shall extend to the carrying on any trade or business. This cannot be read as the only source of power for the State to carry on any trading activity subject to the Directive Principles. Article 298 is a clarificatory provision.

66. It was contended that the concept of "franchise" is not available in India. This does not mean, a right to carry on an activity dealing with liquor does not vest in the State. Such a right does not inhere in any person in the Country, in

view of its pernicious character (vide: M/s. Jagadale and Sons, Bangalore and Vs. State of Karnataka and Others, etc., If no such right is inherent in the people, the right should exist elsewhere. The only other custodian of the right could be the State.

67. Even though legislative Entries in Schedule VII of the Constitution by themselves do not vest the power to legislate in respect of the topics stated therein, but demarcate the fields of legislation, those Entries in no way limit the legislative power in respect of any specified topic. For example, if a law falls within the purview of any Entry in List II of Schedule VII, law would be valid (subject to any other limitations, such as the fundamental rights). The law making power in respect of the topic falling under any of the Entries in List II is wide and has been always broadly construed (so long as the said power does not conflict with the legislative power of the Parliament, provided for elsewhere, like the Entries in List I). Therefore it is not possible to accept the contention that the State Government cannot legislate a law empowering it to carry on any kind of activity concerning liquor.

In Sahyadri Wine Traders Vs. State of Karnataka, a Bench of this Court pointed out that,

"All kinds of rights to deal in intoxicant (which is also referred here as liquor) thus, basically belong to the State".

There is no scope to apply the doctrine of franchise; similarly the doctrine of unseeded power has no bearing on the State's power to deal in liquor.

Contention of Mrs. Nagarathna, therefore cannot be accepted. Accordingly a similar contention of Mr. Nagendra Naidu also falls. The observation of Oza, J. in SYNTHETICS & CHEMICALS LTD. ETC. v. STATE OF U.P. AND ORS., , cannot be construed as debarring the State from engaging itself in any liquor trade. At any rate, that is not the view expressed by the majority. The observations of the Kerala High Court in Dr. George Mampilly and Anr. v. State of Kerala and Anr., also cannot be taken as laying down the proposition in absolute terms to deny a right in the State to carry on liquor trade.

The contention that as per the Decision in Synthetics & Chemicals Ltd.'s case, the State legislation has no competence to enact a law in respect of liquor, is not a correct reading of the ratio of the said Decision. (Vide Decision of this Court in M/s. Jagadale and Sons, Bangalore and Vs. State of Karnataka and Others, etc., and State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, An observation in P.N. Kaushal and Others Vs. Union of India (UOI) and Others, was relied upon to contend that Article 47 controls the Government Policy in connection with liquor trade. In the said case, liquor sales were prohibited partially on two specified days in a week; the prohibition was against private bars, restaurants, etc. and did not govern the institutions run by the Government. In this connection, Article 47 was referred while testing the reasonableness of the classification between Governmental and non-

Governmental sales. Supreme Court did not say that in view of Article 47, the State Government shall not engage itself in liquor trade. Similarly the interim order of the Supreme Court in Writ Petition (C) No. 5740 of 1992 (Shersingh's case) in no way advances the contention, further.

67. The broad proposition was that failure to consider the legitimate expectations of the petitioners contribute to the unreasonableness of the law; at any rate, this results in snapping the nexus between the object of the Ordinance and the basis of classification. A discussion on this aspect is unnecessary, in view of the Decision of the Supreme Court in *State of Himachal Pradesh and another Vs. Kailash Chand Mahajan and others*, . In the said Decision, the retirement age was introduced by amending the relevant enactment and its effect was to reduce the period of appointment of the Chairman of the Electricity Board from a period of five years to the date of his attaining the age of 65 years. The Supreme Court rejected the contention that the amendment interfered with the legitimate expectation of the respondent who reasonably and legitimately expected to continue in office for a period of five years. After referring to the law in England on the doctrine of legitimate expectation, the Supreme Court concluded at page 1301 that, "...it will be clear even legitimate expectation cannot preclude legislation". There is a presumption that Legislature bears in mind the needs of the society and law is enacted to meet particular situations; legislation need not be backed by any disclosed, specific, authenticated reasons. The legislators are answerable to the people who elect them. In this situation, individual expectation may be or may not be considered by the law makers. It is impossible to dissect the legislative process to find out whether a particular factor was considered or not. There is no Constitutional obligation to have a "statement of objects and reasons" to a law. In fact reference to "statement of objects and reasons" as an aid to construction is of recent development. There are pronouncements of the Supreme Court stating that "statement of objects and reasons" has only a limited use in the construction of statutes (vide: G.P. Singh's *Statutory Interpretation*, 4th Edn. page 149 etc.). Law enacted by a competent Legislature operates by its own force, without the support of a speaking order. In these circumstances it is not possible to hold that "legitimate expectation" of the petitioners should have been taken care of or should have been considered, while promulgating Ordinance. The doctrine of legitimate expectation has no relevancy while testing the reasonableness of a law under Article 14 of the Constitution.

In a recent Decision in *Union of India and others Vs. Hindustan Development Corpn. and others*, , the doctrine of legitimate expectation was considered in connection with the supply of bogies to the railways and the policy governing the awarding of the contracts. The impugned action, was an executive order; even then, a cautious approach is indicated while applying this doctrine. The Supreme Court held at page 56:

"On examination of some of these important decisions it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial

review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negating a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straight away from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision, then decision maker should justify the denial of such expectation by showing some overriding public interest. Therefore, even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or respected. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above, a person who bases his claim on the doctrine of legitimate expectation, in the first instance must satisfy that there is a foundation and thus has a locus standi to make such a claim. In considering the same several factors which give rise to legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the Courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the Court is satisfied that a case of legitimate expectation is made out then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so, then what should be the relief is again a matter which depends on several factors".

Again at para 38 it is held:

Legitimate expectation may come in various forms and owe their existence to different kinds of circumstances and it is not possible to give an exhaustive list in the context of vast and fast expansion of the governmental activities. They shift and change so fast that the start of our list would be obsolete before we reached the middle. By and large they arise in cases of promotions which are in normal course expected, though not guaranteed by way of a statutory right, in cases of contracts, distribution of largess by the government and in some what similar situations. For instance, in cases of discretionary grant of licences, permits or the like, carries with it a reasonable expectation, though not a legal right to renewal or non-revocation, but to summarily disappoint that expectation may be seen as unfair without the expectant person being heard. But there again, the Court has to see whether it was done as a policy or in the public interest either by way of G.O., Rule or by way of a legislation. If that be so, a decision denying a legitimate expectation based on such grounds does not qualify for interference

unless in a given case, the decision or action taken amounts to an abuse of power. Therefore, the limitation is extremely confined and if the according of natural justice does not condition the exercise of the power, the concept of legitimate expectation can have no role to play and the Court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the Court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the Court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. For instance, if an authority who has full discretion to grant a licence and if he prefers an existing licence holder to a new applicant, the decision cannot be interfered with on the ground of legitimate expectation entertained by the new applicant applying the principles of natural justice. It can therefore be seen that legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. It would thus appear that there are stronger reasons as to why the legitimate expectation should not be substantively protected than the reasons as to why it should be protected. In other words such a legal obligation exists whenever the case supporting the same in terms of legal principles of different sorts, is stronger than the case against it. As observed in Attorney General for New South Wales" case "To strike the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the Courts adrift on a featureless sea of pragmatism. Moreover, the negotiation of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law". If a denial of a legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the Court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the Courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the Court out of review on the merits", particularly when the element of speculation and uncertainty is inherent in that very concept. As cautioned in Attorney General for New South Wales" case the Court should

restrain themselves and restrict such claims duly to the legal limitations. It is a well meant caution. Otherwise a resourceful litigant having vested interest in contract, licences, etc., can successfully indulge in getting welfare activities mandated by directive principles thwarted to further his own interest. The caution, particularly in the changing scenario, becomes all the more important".

A few more Decisions require to be referred (though the argument based on legitimate expectation was not directly considered).

C. Vadiappan and Others Vs. The State of Tamil Nadu and Others, refers to an earlier Decision of the Madras High Court, where during the currency of the licences issued to the various dealers, the licences were made inoperative, in exercise of the Governor's power of regulation of trade in intoxicants and this was upheld.

In MOHD. FIDA KARIM AND ANR. v. STATE OF BIHAR AND ORS. AIR 1992 SCW 1154 the controversy related to the mode of settlement of the right of vending country liquor, etc. Government changed its policy from time to time. The licences clearly mentioned that the grant of licence was on annual basis and renewal every year was subject to any change in policy. Supreme Court observed "it is also well settled that the right of vend of excisable article is exclusively and absolutely owned by the State Government". The impugned change was by an executive order and this was attacked, as not a "change of policy" at all; this attack failed and executive order was accepted as reflecting the change of policy. This change was to get away from the earlier policy of granting the right to vend for a period of five years, because such a settlement for five years would give rise to monopolistic tendency which will not be in public interest and not in the interest of public revenue.

The facts disclose that the policy was changed during the period of settlement for five years and then the impugned Government Order affected petitioners whose term under the earlier order settling the right of vend would have continued for another four years. Instead of the doctrine of "legitimate expectation", "promissory estoppel" was relied by the petitioners without any success.

The Decision in State of Andhra Pradesh and Others Vs. Guntakal Toddy Tappers Co-operative Society and Others, is based on the facts of the said case. Without changing the basic policy of granting the licences to private persons, existing licences granted to Toddy Tappers Co-operative Societies were terminated even before the expiry of five years period under the licences. The fashion in which Government dealt with the said Co-operative Societies was remarked as "cavalier" by the Supreme Court. The Bench of this Court in M/s. Jagadale and Sons, Bangalore and Vs. State of Karnataka and Others, etc., has referred, considered and distinguished this Decision at page 144.

Though doctrine of legitimate expectation was not specifically considered, the principle underlying the doctrine was implicit in the contentions of Indian Aluminium Company, which questioned the validity of amendment made to the

Electricity Supply Act, 1948, because, said amendment nullified the agreements between the consumer and the State Government regarding the electricity tariffs. In *Indian Aluminium Company Limited and another Vs. Karnataka Electricity Board and others*, , the Supreme Court upheld the amendment to the Act which took away the contractual right of the consumer of the electricity. The same view had been taken earlier in *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*,

68. Doctrine of promissory estoppel has created a more powerful and valuable right than that of the uncertain right flowing from the doctrine of legitimate expectation. If the former yields to the legislative power, the latter cannot claim a higher status as a relevant factor to be considered while testing a law under Article 14.

It was contended by Sri Kapil Sibal that the Ordinance affects the licences issued for manufacturing and bottling of arrack; these licences form a class; to that extent one aspect of Article 14 is satisfied. Object of the Ordinance is to do away with these licences and provide for the licencing of Government companies to manufacture and sell arrack in sachets. This object has no nexus at all to the basis of the classification and thus the second aspect of Article 14 of the Constitution, is not satisfied. The reasonableness of the nexus to the classification has not been established; the doctrine of classification itself is not satisfied and thus Article 14 is contravened by the Ordinance. The learned Counsel repeatedly posed the question as to what is the object sought to be achieved by this Ordinance; the object, as revealed from the files produced before the Court and the Statement of Objections to the Writ Petitions is the elimination of illegal sales of arrack. There is not a single instance of the present licence holders having indulged in illegal sale of arrack; probably smuggling of arrack from across the border of the State is the cause for this illegal sales. Distilleries are under strict control and supervision of the Excise Officer. This apart, illegal sales are mostly in sachets, as alleged by the State Government; how can this be eliminated or reduced by licencing the sale of arrack in polythene sachets, asked, the learned Counsel; illegal sales in sachets would continue even after the introduction of licensed sachets and it will be convenient and easier for those engaged in illegal sales, now, to easily transport and sell them, by camouflaging the illicit arrack as licensed ones. The dominant object, rather, the exclusive object behind the Ordinance is entirely revenue considerations and not the considerations of the health of the consumers. According to the learned Counsel, in the field of liquor trade and legislation regulating it, the only consideration has to be the principle embodied in Article 47 of the Constitution; when it is not shown that bottling of arrack (in real bottles) is harmful to the health, it is unreasonable to change the container of arrack to polythene sachets. The real object and impact of the Ordinance, clearly, is to get rid of the current licence holders, who are licensed to bottle arrack in bottles; when no public interest is proved to exist to eliminate the bottling of arrack, it is clear that no nexus exists between the object and the basis of the classification.

69. Another contention is that the Ordinance and the relevant Rules nowhere contemplates banning of bottled arrack; on the contrary, bottling the arrack is still provided for in these provisions. But the legislative object of continuing the bottling is defeated by the Notification issued, whereby, right to vend the arrack is auctioned only aspect of arrack in sachet; by resorting to this process of confining the retail sales of arrack only in sachets, the legislative intention is clearly defeated and therefore the Notification is ultra vires. In support of this contention, the learned Counsel referred to the definition of the term "to bottle" u/s 2(2) of the Act which retains the real bottle as one of the containers for sale of liquor; even under the amended rules, Karnataka Excise (Arrack Vend Special Conditions of Licences) Rules, 1967, arrack in sealed bottles could be sold; Rule 5(2) says that "no arrack except in sealed bottles of the approved sizes with the excise labels or in sealed polythene sachets obtained from the authorised warehouse or depots shall be sold in the licensed premises" (underlined words were inserted by the amending Rules of May 1993 after the Ordinance). In Karnataka Excise (Manufacture and Bottling of Arrack) Rules 1987, Clause (c-a) was inserted by the amending Rules to say that "bottle" includes "polythene sachets". These Rules, earlier, provided for the grant of licence for manufacturing and bottling of arrack to persons holding distillery licence. The Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules 1969, provide for the disposal of the right of retail vend of liquors. Rule 3(3) governs arrack. This was amended in May 1993, by including the words "or arrack in polythene sachet" after the words "bottled arrack". By virtue of the amendments, these Rules provide for the sale of right of retail vend of arrack either in bottles or in polythene sachets. It was argued that when the law thus clearly contemplates sale of arrack in bottles also, said provisions cannot be defeated by notifying the right of retail vend in arrack only in sachets.

This contention as to the invalidity of the Notification dated 22.5.1993 providing for the auction of the right of retail vend of arrack in polythene sachets only, can be straightaway considered. Section 2(2) of the Act is not confined to "arrack" only; the definition of the phrase "to bottle" governs the entire clan of liquors; arrack is only one form of liquor. Rule 3(3) of the "Retail Vend of Licences Rules" provide for the disposal of right of vend arrack, while Rule 3(1) covers all varieties of liquors, Rule 3(3) reads:

"The right of retail vend arrack disposed under these rules shall be the exclusive right but in such districts as may be specified by the government only bottled arrack or arrack in polythene sachet shall be sold to consumers".

Therefore, this Rule empowers the government to specify the districts where only bottled arrack or arrack in sachets shall be sold; it is for the Government to choose one of the two modes; the Rule vests a discretion in the government/ either to direct sale of arrack in bottles or in polythene sachets and this discretion may be exercised with reference to specified districts. "To bottle" includes "to sachet"; in other words bottling includes sacheting. The Rules do not

compel that every licence under the said Rules should enable the licensee either to use the bottle or the sachet. Therefore, it cannot be said that these legislative provisions require the sale of arrack in bottles. It cannot be said that the Notification issued to sell the right to retail vend arrack only in polythene sachets, is ultra vires the Act and any of the Rules.

70. Mr. M.R. Naik, the learned Counsel, who argued as intervenor, pointed out that while, the cost of bottling is Rs. 9/-, the cost of sacheting arrack is only Re.1/- and therefore, this year with effect from 1.7.1993, issue price of arrack per litre is fixed at Rs. 16/-and during the previous year the issue price was Rs. 25/- per litre. Issue price is fixed with reference to the cost of receptacle, the arrack and tax elements. Since the arrack in sachets supplied officially will be cheaper it can conveniently compete with illicit arrack and this will result in eliminating illicit arrack from circulation.

The learned Counsel pointed out that the lower fixation of issue price has resulted in fetching far higher price to the Government at the recent auctions of the right to retail vend arrack, than the price fetched during the previous year, indicative of the confidence of the contractors/licensees to defeat the circulation of illicit arrack. As to the fixation of the retail price it was pointed out that in view of Section 44-AC of the Income Tax Act and the need to facilitate its enforcement, Government fixed both the minimum and the maximum price in advance, during the previous years. This provision has been deleted with effect from the current financial year and therefore Government could wait to fix the maximum price till all the auctions are over. In addition to this, the learned Counsel explained as to how, fixation of maximum price for retail sale in advance would prevent the bidders at the auctions from bidding higher, because, no one would like to outbid the other in such a way as to go beyond the maximum price. After the auctions, depending upon the highest bid, the Government may fix the maximum price this year, if the Government thinks it necessary to do so.

71. Before parting with this subject of sachets, it is necessary to note that, so far Government has not indicated the specifications governing the nature and quality of the polythene sachets for packing the arrack. Under the Act the Government or the Commissioner for Excise have ample powers to issue appropriate directions in this regard, if the Rules are silent. We have no doubt that the Government or the Commissioner would consider this aspect to ensure not only safe packing but also prevent any kind of health hazards by the alleged toxic substance and reaction of polythene to the arrack. The Decision of the Madras High Court in *Aditya Mahapatra v. The Government of Tamil Nadu and Ors.*, (W.P.No. 3692 of 1990 - D.D. 24.4.1990) referred by us also refers to the specifications suggested by one of the research laboratory in this regard.

72. Before leaving this part of the discussion, we may as well consider one more contention affecting the enforceability of the Rules. Petitioners contend that draft Rules were not published and made available to the public and therefore finalisation of the Rules was opposed to the requirements of the Act. The State

Government has denied this assertion. A reading of the Writ Petitions and the I.A. seeking amendment to the Writ Petition on this question, reveals that, nowhere the petitioners assert that one of them atleast visited the Government Press on the date of the draft Rules, shown to have been printed. In fact, Writ Petitions proceed as if the amendments were printed and circulated amongst a few officers and one of the draft Rules is produced as an Annexure to the Writ Petitions. Petitioners thus admit the circulation of the draft Rules and their accessibility to Government offices for information. The main grievance is that the draft Rules were not sent to the subscribers of the Gazette. No specific assertion that draft Rules as printed in the Gazette was not available at the Government Press, is found in the pleadings.

73. There is a presumption that official acts are done in the manner required by law; the presumption can be rebutted by clear assertion and proof of facts showing that official acts were not done in accordance with law.

74. As to the publication of a Gazette, a similar question came up before this Court in *Indo Nissin Foods Ltd. Vs. Union of India*, A Notification issued u/s 25 of the Customs Act was the subject matter of discussion; the pleadings in the said case clearly proved that the Gazette containing the Notification was not made available to the public. The requirement of publication of a Notification would be satisfied when it is made available to the public, at page 1561 the Bench held:

"When Section 25 states that the Central Government "by notification in the official gazette" grant exemption, it means that the process of or the manner of notifying the exemption is through the official gazette; if so, process of and the manner of notifying will not be complete unless the gazette is made available to the public to read it. A purported notification merely printed in the gazette and kept within the four walls of Government Press would not be available for the public to read it, it cannot result in notifying the contents to the public".

"It was argued that even if the Gazette is made available to Delhi, residents of remote parts of India would not know the contents of the Notification and if the petitioners' argument is accepted, the Notification issued at Delhi wilt become operative on different dates at different places, depending upon its availability in the locality concerned, this would lead to an absurd result".

"No argument should be stretched to its extreme logical end. The purpose of the Notification could be held as achieved, when it is made available to the public, at a place, where normally such a Notification is made available; it is the accessibility to the Gazette that makes its contents an effective Notification. The fortuitous circumstance of people residing in different parts of the country is wholly irrelevant; the contents of the Gazette could be said to have been notified when it is issued and made available to the public".

Therefore if the Gazette was available at the Government Press, where normally it is made available, the requirement of publication is satisfied.

75. The petitioners have produced the draft Rules notified as F.D. 15 dated 15th April 1993, proposing the amendment of Arrack Bottling Rules. Atleast to the extent of these Rules, it is clear that there was a due publication of the draft. The notification F.D. 5 pertains to the proposal to amend Special conditions of Licence Rules by inserting "or in sealed polythene sachets" after the word "bottles" or "labels", as the case may be. The original file was placed before us by the learned Advocate General, which indicates that the amendment was proposed by the Excise Commissioner on 21st January 1993. The idea of selling arrack in polythene sachets, appears to be, was under consideration even at that time and therefore the relevant Rule was sought to be amended. On 29th January 1993 there is a note of one of Under Secretaries stating that the proposal may be approved, providing for the sale of arrack in polythene sachets in addition to the bottled arrack. The matter was thereafter referred to the Law Department on 16.2.1993. Thereafter, it is seen that the proposal was shelved for some time even though Law Department had scrutinised the draft Rule earlier. The shelving of the proposal was to await the announcement of the Chief Minister on the floor of the House. On 16th March 1993 the draft Rules was finalised and the note says that the draft may be issued for inviting objections/suggestions. The file also indicates that the draft Rules amending the Karnataka Excise (Manufacture and Bottling of Arrack) Rules reducing the period of contract from 5 years to one year and providing sale of arrack in sachets have been proposed in File No.FD 15 and that the F.D.5 provides for consequential amendments in "Arrack Vend Special Conditions of Licences Rules 1967". The matter was approved by the concerned Officers and also by the Chief Minister. A note in the File made on 20.5.1993 also states that the draft Rules have been published on 15.4.1993. The draft Rules F.D.5 no doubt states that the same will be taken into consideration after 30 days from the date of its publication in the Gazette. There was a mistake in the final Rules, as published in the Gazette on 20.5.1993 stating that 15 days time was given for the affected persons to file objections. This, according to the learned Advocate General, was a mistake and as a matter of fact 30 days was mentioned in the draft published on 15th April 1993. The file discloses that one Sri Shivagangappa, Advocate, had filed some objections as per his letter dated 21st April 1993 and there was a consideration of the said objection on 18.5.1993. In fact, the said file contains the original letter sent by Mr. Shivagangappa, Advocate, in which he made certain suggestions after going through the draft Rules as per the notification F.D.5. Even assuming that there was delay in the publication of the draft Rules, it is clear that it was certainly published far earlier to 21.4.1993 in view of the aforesaid letter of the Advocate found in the file. It is quite clear that the draft Rules were published atleast 30 days prior to the finalisation of the Rules.

76. F.D.No. 16 pertains to the amendment to Lease of the Right of Retail Vend of Liquors Rules 1969. The proposal to amend the Rules started atleast in March 1993. On 16th March 1993, the draft amendments were referred to Law Department. A note dated 1st April 1993 shows that the Government's decision

for sale of arrack in sachets has been announced. The draft amendments, as scrutinised by the Law Department were received, as noted in the file and on 21st April 1993 the draft Notification was placed before the Chief Minister and thereafter there was an order to issue the Notification on 24th April 1993. The file states that the Notification dated 24th April 1993 was published on 24th April 1993 itself, as could be seen from a Note of the Under Secretary to the Finance Department (Excise) made on 11.5.1993. A note made on 20th May 1993 states that no objection has been received to the proposed amendments and consequently the amendments were finalised. Even the finalised Notification is dated 20th May 1993 and the draft Rules had given 15 days time to file objections.

Thus, on facts, we find that draft Rules were published as printed in the Gazette and in the circumstances we consider it unnecessary to probe into the matter further.

77. In the instant case, the amendments to the Rules are only by way of abundant caution. Wherever "arrack in bottles" is mentioned the phrase "arrack in polythene sachets" is added. In other words, in the concept of bottling the arrack, concept of sacheting is included, as was done by amending Section 2(2) of the Act. Since the term "to bottle" is clarified by adding, sacheting of arrack, a separate amendment of relevant Rules was certainly by abundant caution. Even without the amendment of Section 2(2), sacheting of arrack would have been covered by the earlier phraseology of Section 2(2), because, "to bottle", arrack, included, several receptacles like jar, flask or "similar receptacles". The idea was to cover all varieties of containers which can hold the liquor for storage or transport. There is no dispute that during earlier years for some time since 1984, sacheting was allowed under the Rules, without amending Section 2(2) and none objected to the said Rules on the ground that sacheting was outside the scope of Section 2(2). In these circumstances, we are of the view that even without the amendments of the impugned Rules, the provisions of the Ordinance could be properly enforced.

78. Incidentally we have to note that prior to the Ordinance, licences for the manufacturing and bottling of arrack were issued only to those who held licences to run distilleries. The "distillery licence operates only for one year; therefore a licence issued for the manufacturing and bottling of arrack for a period of five years, in effect, is a licence for one year; the latter licence is dependent upon the former.

79. It was further contended that Mysugar is neither a government Company, nor a Government controlled Company. A Decision of this Court in P.M. Machaiah Vs. Mysore Sugar Co. Ltd., was cited in support of this plea. In the said Decision it was held that Mysugar was not a "State" for purposes of Article 12 of the Constitution.

80. The scope and context of Article 12 are entirely different from the context in

which the terms "Government Company" and "Government controlled Company" are used in the Ordinance. Therefore, we cannot agree with the contention that the said Decision is a conclusive answer in favour of the petitioners.

Mr. Sundaraswamy the learned Counsel pointed out that Mysugar is a Government Company as per Section 617 of the Companies Act and there is no dispute on this aspect of the matter. State Government owns 51% of the share capital. Further, the Rudraiah Raju Vs. State of Karnataka, the Court proceeds as if Mysugar was a Government Company. We find considerable force in this submissions of Sri Sundaraswamy.

80. The term "Government Company" has to be understood in the context of the Company Law, because, the incorporation of the company is governed by the Companies Act. "Government Company" is a phrase of description of an entity. The phrase has to be understood in the same manner as understood by the law governing the incorporation and functioning of that entity. Anyone familiar with Company Law, would certainly refer to the Companies Act to understand the meaning of a word used in connection with a company.

81. In the result, we reject all the contentions advanced on behalf of petitioners. Writ Petitions are accordingly dismissed. However, in the circumstances, parties to bear their respective costs.

ORDER ON ORAL APPLICATION

An oral application is made by the learned Counsel for the petitioners seeking our Certificate to go in appeal to the Supreme Court.

We have only followed the principles laid down by the Supreme Court in several Decisions and applied them to the facts of the case and hence we do not think these cases call for a Certificate as fit one to be considered by the Supreme Court. Application is accordingly rejected.