

(2008) 12 KL CK 0044
In the High Court Of Kerala
Case No : W.A. No. 942 of 2002 (E)

Kunjan C.K. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 10-12-2008

Acts Referred:

Constitution of India, 1950 — Article 13(3), 19, 19(1), 19(1)(a), 19(1)(g)

Citation : (2009) 1 KLJ 563

Hon'ble Judges : K.T. Sankaran, J;H.L. Dattu, J

Bench : Division Bench

Advocate : C.C. Thomas, for the Appellant; Venganoor Chandrasekharan Nair (A.A.G.) and P.K. Babu Sr., G.P., for the Respondent

Judgement

K.T. Sankaran, J.—The appellants in the Writ Appeals and the petitioners in the Writ Petitions challenge the Validity of foreign Liquor (Amendment) Rules, 2001 made as per SRO. No 920/2001 dated 8.10.2001, published in the Kerala Gazette Extra Ordinary, dated 8.10.2001. The learned single Judge dismissed the Writ Petitioners and the four Writ Appeals were field by the writ petitioners therein. Two other Writ Petitions which came up subsequently were posted before the Division Bench along with the Writ Appeals. The appellants in the Writ Appeals and the petitioners in the Writ Petitions are referred to hereinafter as the petitioners. Appellant No. 4 in W.A.No. 11164 of 2002 is Kerala Bar Hotels Association, represented by its General Secretary. There are 401 members in the said Association. The list of all the members were submitted and separate court fee was paid by all of them. As per the order dated 23.10.2007, appellant No. 4 Association was permitted to prosecute the Writ Appeals on behalf of all the members of the Association as they had paid the necessary court fee and obtained leave of the Court. The petitioners own bar attached hotels having FL3 license issued under Rule 13(3) of the Foreign Liquor Rules. Licences were issued to the petitioners for the period from 1.4.2001 to 31.3.2002. Each of the petitioners were required to pay a sum of Rs. 13 lakhs as annual rental/fee as provided in rule 13(3) of the Foreign Liquor Rules. Rule 13(3) of the Foreign

Liquor Rules was amended and the annual rental of Rs. 13 lakhs was enhanced to Rs. 15 lakhs. By the same amendment Sub-Rule (15) was added to Rule 13.

2. The relevant portion of Rule 13(3) (before the amendment) was as follows :

(3) Foreign Liquor 3 Hotel (Restaurant) Licence : License in this Form may be issued by the Excise Commissioner under orders of Government in the interests of promotion of tourism in the State to Hotels or Restaurants conforming to the standard of Two Star and higher classification, owned or run by the Kerala Tourism Development Corporation Limited (KTDC) and India Tourism Development Corporation Limited (ITDC) and also to hotels having rating of Three Stars and higher classification, Heritage and Resort hotel as well as classified restaurants where the privilege of sale of foreign liquor in such Hotels or Restaurant, has been purchased on payment of an annual rental of Rs. 10,000 (Rupees Thirteen lakhs only)"

3. The relevant portion of the Amendment Rules 2001, is the following :

2. Amendment of the Rules : - (2) In the Foreign Liquor Rules, in rule 13, -

(a) in sub-rule (3) for the words, brackets and figures, "Rs. 13,00,000 (rupees thirteen lakhs only)" the words, brackets and figures "Rs. 15,00,000 (Rupees fifteen lakhs only)" shall be substituted;

(b) After sub-rule (14) the following sub-rule shall be added, namely :-

(15) Notwithstanding anything contrary contained in these rules, if the Government are satisfied that the annual rental/fee prescribed for the licenses issued under rule 13 is not reasonable, they may enhance the annual rental/fee at any time during the course of a financial year and on such enhancement all licenses are liable to remit the difference between the amount of annual rental/fee already remitted and the enhanced rental/ fee.

4. The contentions raised by the petitioners are the following : (1) Amendment of Rule 13 is beyond the rule making power of the Government. (2) Sections 18A, 24 and 29 of the Abkari Act do not empower the Government to make the impugned rules which are in effect and substance having retrospective effect. (3) The subordinate delegated authority has no power to frame a rule which has retrospective effect. (4) The rental/fee was settled on 31.3.2001 and the petitioners having paid the same for continuing to hold the licence for the period from 1.4.2001 to 31.3.2002, the rental/fee cannot be enhanced modifying or altering the terms of contract.

5. The question to be considered is whether the rental/fee could be enhanced during the currency of an Abkari year, i.e., from 1.4.2001 to 31.3.2002.

6. The learned counsel for the petitioners, Sri. K. Ramakumar, Sri.C.C. George Poonthottam would rely on the decisions in B. Six Holiday Resorts (P) Ltd. Vs. State of Kerala, , 1982 KLT 166, ILR 1979 (1) Kerala 344, Kuldeep Singh Vs. Govt. of NCT of Delhi, and Kerala Samsthana Chethu Thozhilali Union Vs. State of

Kerala and Others, . Learned Additional Advocate General would place reliance on Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, . He also distinguished the decisions in B. Six Holiday Resorts (P) Ltd. Vs. State of Kerala, contending that in that decision this Court was dealing with Rule 13 (3) regarding issue of new license. Sri. K. Ramakumar laid emphasis on the expression "permit and license" and contended that wherever permit is intended it is specifically provide in the Act and Rules. He referred to the various provisions of the Act and Rules including Sections 18A, 24, 26, 27 and 29.

7. In the counter affidavit filed by Commissioner of Excise, it is stated that the license fee was fixed at Rs. 13 lakhs as per the Excise Policy of the year 1999 -2000 issued as G.O.(MS) No. 18/99 dated 1.2.1999. No change in the payment of license fee was effected during the year 2000 - 01. Due to a ban to arrack in the State, there was much demand for Indian Made Foreign Liquor (IMFL). In the budget speech for the 2001-02 presented before the Legislative Assembly on 19.7.2001 by the Minister of Finance, it was declared that the license fee for bar hotels would be enhanced from Rs. 13 lakhs to Rs. 15 lakhs and thereby expected to raise an additional revenue of Rs. 9.5 crores. S.R.O.No. 920/2001 emending the Foreign Liquor Rules by the Amendment Rules, 2001 was issued in the above circumstances. No enhancement of bar license fee/rental was effected during the year 2000-01 and the ban of arrack in the State has resulted in much increase in the demand of IMFL in the State. In view of the peculiar situation prevailing due to the ban of arrack the owners of bar hotel would be in a position to remit the increased rental without incurring much difficulty. It is further contended that the when the amendment was introduced, the period of license was not over and therefore, it cannot be said that there was retrospective enhancement of rental. It was felt that the FL3 license fee was not reasonable and that one of the main reasons for enhancing the rental so as to raise and additional revenue of Rs. 9.5 crores.

8. The Abkari Act is a consolidating and amending Act of law relating to import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs in the State of Kerala. Section 3(1) of the Act defines "abkari revenue" as thus.

(1) abkari Revenue :- "Abkari Revenue" means revenue derived or derivable from any duty, fee, tax, fine or confiscation, imposed or order under the provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs.

Section 18A of the Abkari Act provides for grant of exclusive or other privilege of manufacture, etc., on payment or rentals. It reads as follows :

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

(i) of manufacturing or supplying by wholesale : or

(ii) of selling by retails : or

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

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

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

Section 24 of the Act provides for the forms and conditions of licenses. It reads as follows :

24. Forms and conditions of licenses, etc : - Every license or permit granted under this Act shall be granted -

(a) on payment of such fees, if any :

(b) for such period :

(c) subject to such restrictions and on such conditions and

(d) shall be in such form an contain particulars -as the Government may direct either generally, or any particular instance in this behalf."

Section 29 confers the rules making power on the Government. Sub-section (1) of Section 29 provides that the Government may make rules for the purpose of carrying out the provisions of the Act. Sub-section (2) states that in particular and without prejudice to the generality of the foregoing provision, me Government may make rules in respect of items mentioned therein.

9. Section 18A(1)(iii) confers power on the Government to settle the rental by auction, negotiation or by any other method. Section 24 confers power to prescribe the fee to be paid and the restrictions or conditions to be imposed. These substantive provisions confer power on the rule making authority and such power is traceable to Section 29(1) of the Act. Section 69 of the Act provides that all rules made notifications issued under the Act shall be made and issued by publication in the Gazette and all such rules and notifications shall thereupon have the force of law and read as part of the Act and may in like manner be varied, suspended or annulled.

10. In exercise of the powers conferred by Sections 10, 24 and 29 of the Cochin Abkari Act 1 of 1077 (ME), as subsequently amended and as continued in force

by the Travancore - Cochin State Administration and Application of Laws Act, Act VI of 1125 (ME), the Government, in super cession of the Government notification dated 2.6.1949 as subsequently amended, prescribed Foreign Liquor Rules for the issue of license for the possession, use or sale of Foreign Liquor. Rule 13 of the Rules provides for licenses for possession and sale of Foreign Liquor and for possession or use of Foreign Liquor. Rule 13(3) has already been quoted above. The license shall be issued by the Excise Commissioner. The Rule also provides for restrictions in the matter of issue of license. Rule 14 states that if any of the licenses referred to in Rule 13 is granted in the course of a financial year, the full annual fee shall be paid and the license shall expire at the end of the financial year. Except in the case of Foreign Liquor-1 shops, the rental or the fee, as the case may be shall be paid in full to the Government Treasury before the issue of license, as provided in Rule 18. Rule 36 empowers me Excise Commissioner, upon giving fifteen day's notice, to revoke any license. On such revocation, a proportionate part of me fee paid by the licensee shall be refunded to him. The conditions for the issue of Foreign Liquor-3 license also provide for the same.

11. We will now examine whether this decision of the Division Bench in B. Six Holiday Resorts (P) Ltd. Vs. State of Kerala, would cover the issue involved in the case. According to me petitioners, the decision in B. Six Holiday Resorts (P) Ltd's case would clinch the issue, while, according to the learned Advocate General, it would not. The facts stated in B. Six Holidays Resorts (P) Ltd's case would indicate the following : On 11.12.2000, the petitioner therein applied for Foreign Liquor-3 license which would permit it to serve liquor in its restaurant. The application was not processed expeditiously. Several Writ Petitions were filed by the petitioner there in at various stages where the application was rejected by several orders. On 20.2.2002, the Government of Kerala, in exercise of its powers u/s 18A read with Sections 24 and 29 of the Abkari Act, amended Rule 13(3) by adding a proviso that on new licence under the Rules shall be issued. The amendment to Rule 13(3) came into effect from 1.7.2001. On me basis of the amendment, me application for Foreign Liquor -3 license was rejected by the Excise Commissioner. That order was challenged in the Writ Petitions by B. Six Holiday Resorts (p) Ltd. On me question of law whether me authority exercising subordinate legislative functions can make a Rule with retrospective effect, it was held as follows :

11. Ground (D) : The learned counsel appears to be on firmer ground when he contends that the notification dated 20.2.2002 is bad to the extent it gives retrospective effect to me proviso added to rule 13(3) of the Rules. In I.T.O Alleppey v. M.C. Ponnosse (1969)2 SSSCC 351 (paragraph 5), the Supreme Court observed : "The Parliament can delegated its legislative power within the recognized limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in

express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect. (See in this connection *Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others*, *Modi Food Products Ltd. Vs. Commr. of Sales Tax, U.P.*, *India Sugar Refineries Ltd. v. State of Mysore* (AIR (1960) Mys 326 and *General S. Shivdev Singh and Andr. v. The State of Punjab and Ors.* 91959 PLR 514).

12. In *Hukam Chand etc. Vs. Union of India (UOI) and Others*, the Supreme Court pointed out that the underlining principle is that, unlike sovereign legislature, which has power to enact laws with retrospective operation, the authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The difference between subordinate legislation and the statute laws lies in the fact a subordinate law-making body is bound by the terms of its delegated or derived authority and that court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled.

13. In *Regional Transport Officer, Chittoor and Others Vs. Associated Transport Madras (P) Ltd. and Others*, the Supreme Court observed. "The legislature has no doubt a plenary power in the matter of enactment of statutes and can itself make retrospective laws subject, of course, to the constitutional limitations. But it is trite law that a delegate cannot exercise the same power unless there is special conferment thereof to be spelled out from the express words of the delegation or by compelling implication". To same effect is the judgment of a Full bench of this Court in *R.K.V. Motors & Timbers V.R.T.O* (1982 KLT 166)."

After holding, the Division Bench considered the contention of the learned Advocate General and held thus :

14. With the formidable array of precedents the learned Advocate General found it difficult to sustain the retrospective effect given to the proviso added by the amendment notified on 20.2.2002, since there is no provision in the Kerala Abkari Act, which empowers the rule making authority to make rules retrospectively. The learned Advocate General, therefore, frankly conceded that he would not be able to sustain the validity of the retrospective effect given to the proviso in R. 13(3).

14. Learned counsel for the petitioners would submit that the Division Bench held that there is no provision in the Kerala Abkari Act which empowers the rule making authority to make rules retrospectively. Learned Advocate General conceded that he could not sustain the validity of the retrospective effect given to the proviso in Rule 13(3). There cannot be any dispute that if the Act does not empower the rule making authority to make rules retrospectively, a rule cannot

be made with retrospective operation. We are in respectful agreement with the dictum laid down by me Division Bench in paragraphs 11 to 13 of the decision in B. Six Holiday Resorts (P) Ltd.'s case.

15. In *State of Kerala v. V.M. Koya* (ILR 1979 (1) Ker 344), the fact situation can be seen from paragraph 2 of the judgment which is quoted below :

2. The question raised in W.A.No. 32 of 1976 is regarding the quantum of license fee payable for the year 1975-76 (that is for the period from 1st April 1976 to 31st March 1976) in respect of foreign liquor 3 license which was applied for by the Writ Petitioner for that year. The application was made on 27th March 1975. At that time the license fee which was current and in force was Rs. 4,000. By Ext P.1 letter dated 2nd April 1975 sent by the Excise Inspector, the Writ Petitioner was informed, enclosing a copy of the Board of Revenue's order (Ext. P1), that the differential rental (license fee) had to be remitted within 24 hours. The enclosed order of the Board of Revenue stated that the rental in respect of foreign liquor 3 license had been enhanced to Rs. 12,000 per year. The Writ Petitioner claims that he was issued permit for the transport of the liquor to his place of business. The relevant Government notification enhancing the license fee was issued only on 10th April 1975 (Ext. P2). It was the petitioner's case that as the application for the license had been made on 27th March 1975, before the issuance of the notification enhancing the license fee, he was entitled to the grant of license at the rate in force on the date of the application, and not at the enhanced rate. He accordingly prayed to declare section 24 of the Kerala Abkari Act, 1077 M.E. Unconstitutional, and to quash Exts. P1 and P2. The learned Judge quashed Exts P1 and P2 and directed a renewal of the petitioner's foreign liquor 3 license directed a renewal of the petitioners foreign liquor 3 license with effect from 1st April 1975. It was ordered that the Government was entitled to get the annual fee as per Ext. R.2 notification dated 110th April 1975 only on and from that date : and that in regard to the renewal of the license asked for before 1st April 1975 the Government was bound to renew the license in accordance with the law then existing. The Fixed Deposit handed over to the authorities by the Writ Petitions as per the direction of this court was directed to be handed back to him.

The Division Bench allowed the was filed by the State holding thus :

From these provisions, we are unable to see any right on the part of the petitioner to have the license fee levied and collected only at the rate prevailing on the date of me application or on the commencement of the financial year for which the application was made. Indeed the provisions of tules 14 and 18, which we have extracted seem to militate against any such constitution. And neither the provisions of statue and the rules, nor the nature of the right to obtain a licence justify our applying in this region, the principle applicable else where, that an application made before an amendment of the substantive law is to be dealt with according to the law in force on the date of the application, unless express or implied provision is found to the contrary. The decisions of this court

which have sustained the provision of the abkari Act and the validity of the impost levied thereby, have explained the nature of the licence fee levied thereby, have explained the nature of the licence fee levied and collected by the Act. (see *Madavan v. Assistant Excise commissioner, Plaghat* (ILR 1969 (2) Ker. 71) confirmed on appeal in *Damodaran v. State of M.P.* (A.I.R 1975 S.C 360) where the first noted decisions, we are unable to sustain the direction given by the learned judge that the petitioner is entitled to renewal of the Foreign Liquor 3 Licence for 1975-76 at the rate prevailing on the date of the application, and that the enhanced licence fee will have application only from 10th April 1975. The licence applied for by the writ petitioner had not been granted. Before that, he had approached this court with the writ petition.. In the circumstances, he was not entitled to the relief granted by the learned Judge." The Division Bench also did not agree with the view taken by the learned single Judge that the enhancement of the rate of licence fee on 10.4.1975 cannot take effect on the pending applications for the licence for the same year.

16. In *Kuldeep Singh Vs. Govt. of NCT of Delhi*, , the Supreme Court considered a case where the Government, after inviting applications for the grant of licence to vend liquor and before the disposal of the application, took a decision not to grant any new licence. Applications for the grant of licenses for the sale of Indian made Foreign Liquor were rejected on the basis of the decision of the Government, which was challenged in writ petitions. The High Court allowed the Writ Petitions and directed the State to grant the licenses. Letters patent appeals filed against the decision in the Writ Petitions were allowed. The writ petitioners challenged the decision before the honorable Supreme Court. In that context, it was held in paragraphs 30, 33, and 36 as follows :

30. Unless, therefore, an accrued or vested right had been derived by the appellants, the policy decision could have been changed.

33. The question again came up for consideration in *Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others*, where in this Court categorically held L (SCC p. 680, para 37)

The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to "ownership of possession of any property" for which the expression "vest" is generally used. What we can understand from the claim of a vested right" set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a "legitimate" or "settled expectation" to contain the sanction. In our considered opinion, such "settled expectation", if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule 0 making power,

amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such "settled expectation" has been rendered impossible of fulfillment due to change in law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such "vested right" or "settled expectation"; is being sought to be enforced. The "vested right" or "settled expectation" has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a "settled expectation" or the so - called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon.

36. In a case of this nature where the State has the exclusive privilege and the citizen has no fundamental right to carry on business in liquor, in our opinion, the policy which would be applicable is the one which is prevalent on the date of grant and not the one, in which the application had been filed. If a policy decision had been taken on 16.9.2005 not to grant L-52 licence, no licence could have been granted after the said date.

17. Reliance was placed by the petitioners on paragraph 17 of the decision in Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and others (2004) 4 SCC 327), wherein was held thus :

17. A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violate of any plenary legislation made by Parliament ore the state Legislature.

18. In khoday Distilleries Ltd. And other v. State of Kerala and others ((1995) 1 sec 574), the Supreme Court summarized the law on the subject in paragraph 60 of the judgment thus :

60. We may now summarize the law on the subject as culled from the aforesaid decisions.

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

(b) The right to practice any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilized societies. it does not entitle citizens to carry on trade or business

in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e. news extra commercium (outside commerce). There cannot be business in crime.

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

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

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licenses to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

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

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

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

(i) The state carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.

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

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

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

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

As regards the contention whether the State can place restrictions and limitations under Article 19(6) of the Constitution by subordinate legislation, the Supreme Court held, in paragraph 64 of the judgment in *Khoday distilleries Ltd.*'s case, as follows :

64. The last contention in these groups of matters is whether the State can place restrictions and limitations under Article 19(6) by subordinate legislation. Article 13(3)

(a) of the Constitution states that law includes "any ordinance, order, by-law, regulation, notification, custom or usage having in the territory of India the force of law". clauses (2) to (6) of Article 19 make no distinction between the law made by the legislature and the subordinate legislation for the purpose of placing the restrictions on the exercise of the respective fundamental rights mentioned in Article 19(1) (a) to (g). We are concerned in the present case with clause (6) of Article 19. It will be apparent from the said clause that it only speaks of

"operation of any existing law insofar as it imposes..." "from making any law imposing" reasonable restrictions on the exercise of the rights conferred by Article 19(1)(g). There is nothing in this provision which makes it imperative to impose the restrictions in question only by a law enacted by the legislature. Hence the restrictions in question can also be imposed by any subordinate legislation so long as such legislation is not violative of any provisions of the Constitution. This is apart from the fact that the trade or business in potable liquor is a trade or business in *res extra commercium* and hence can be regulated and restricted even by executive order provided it is issued by the Governor of the State. We, therefore, answer the question accordingly.

19. No we shall consider the question whether the amendment to Rule 143 is really retrospective in operation. Rule 1(2) of the Amendment Rules provides that the Rules shall come into force at once. The date of commencement of the amendment was 8.10.2001. By amendment of sub-rule (3) of Rule 13, the annual rental was enhanced from Rs. 13 lakhs to Rs. 15 lakhs. There is no case for the petitioners that the rule making authority has no power u/s 29 read with Sections 18A and 24 to fix any conditions or to fix any rental or fee. The case of the petitioners is that no such enhancement could be made so as to affect the licenses already granted for a fixed period. The power of the Government to fix the licence fee/rental from time to time is also not disputed. There is also no case that the enhancement of the annual rental is illegal. The main challenge is against sub-rule (15) of rule 13, which empowers the Government to enhance the annual rental/fee at any time during the course of the financial year. In our view, sub-rule (15) of Rule 13 cannot be said to be having any retrospective effect. Section 18A empowers the Government to fix the rental by auction, negotiation or by any other method as may be determined by the Government from time to time and may be collected to the exclusion, or in addition to the duty or tax leviable under Sections 17 and 18. A licence u/s 24 shall be granted on payment of such fee, for such period and subject to such restrictions and so such conditions as the Government may direct either generally or in any particular instance. Sub-rule (15) of Rule 13 cannot be said to be contrary to the provisions of sections 18A and 24 of the Act. In our view, enhancement of rental/fee as provided in sub-rule (15) of Rule 13 at any time during the course of financial year cannot be said to be retrospective. The licensee would be entitled to continue to run the business for the rest of the period covered by the licence. The only restriction is that the licensee would be liable to pay the enhanced rental/fee fixed by the Government. In this context, it is to be noted that the exclusive right to deal in liquor vests with the Government and a citizen has no fundamental right to carry on the business in liquor. It is well settled that the right to vend liquor is a privilege granted by the Government. It would be illegal to fix rental/fee from time to time. There cannot be any vested right as claimed by the petitioners, since a licence granted to the licensee is liable to be cancelled at any time. Section 26 of the Abkari Act provides that the Commissioner may cancel or suspend any licence or permit granted under the Act if any fee, duty,

tax or rental payable by the holder the licence or permit can be exercised on the requisition in writing of the licensee as well u/s 26(d) of the Act or if the conditions of the licencee or permit provide for such cancellation or suspension at will as provided in Section 26(e) of the act. Rule 36 of the Foreign Liquor Rules states that the Excise Commissioner may, upon giving 15 days notice, revoke any licence, in which case a proportionate part of the fee paid by the licensee shall be refunded to him. These provisions would clearly indicate that enhancement of the rental/fee would not affect any right of the licensee much less a vested right, if any. Therefore, we are of the view that sub-rule (15) of Rule 13 is not retrospective in its operation. As regards the reasonableness of the 1.4.2003, the said question does not assume much importance and such an exercise would be purely academic.

For the aforesaid reasons, we hold that the Writ Appeals and the Writ Petitions lack merit and they are accordingly dismissed. No order as to costs.

Pending interlocutory applications in all these cases are also dismissed.