

(1984) 06 KL CK 0016

In the High Court Of Kerala

Case No : O.P. No"s. 2459 and 2597 of 1984

Mrs. Moni Senan and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 29-06-1984

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 226
Kerala Abkari Act, 1077 — Section 5

Citation : AIR 1985 Ker 111

Hon'ble Judges : V. Bhaskaran Nambiar, J;K.K. Narendran, J

Bench : Division Bench

Advocate : V.M. Nayanar and M. Ratna Singh, for the Appellant; S. Narayanan Poti, A.A.G. and A.G., for the Respondent

Final Decision : Dismissed

Judgement

V. Bhaskaran Nambiar, J.—The formation of a public sector Corporation exclusively licensed for possession and supply of foreign liquor in wholesale, in the entire State of Kerala is the main subject of challenge in these writ petitions.

2. Regulated and restrained by the Kerala Abkari Act and the rules, Cochin Wines and Allapat Brothers, two partnership concerns carrying on business in liquor hold licences in Form F.L. 1 which assure them "the privilege of supplying foreign liquor by wholesale and selling in retail" and the "right to vend foreign liquor in specified shops subject the the terms and conditions of their license. The conditions of the licence and the relevant rules insist that the licensee shall purchase his supplies of foreign liquor only from the Corporation owned by the Government and holding an F.L. 9 licence.

3. Kerala Abkari Act consolidates and amends the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor, and of intoxicating drugs in the State of Kerala.

4. The Act and the rules classify the licences for foreign liquor thus : --

(1) Foreign liquor wholesale licence (F.L. 1) -- under this licence the sale of liquor in any quantity less than one pint at a time to one person is prohibited and liquor sold under this licence shall not be consumed on the premises.

(2) Foreign liquor (Tavern) licence (F.L.2)

(3) Foreign liquor Hotel (Restaurant) licence (F.L.3)

(4) Foreign liquor Club licence (F.L.4)

(5) Foreign liquor for the sale of medicated wines etc. (F.L.5)

(6) Foreign liquor special licences (F.L.6)

(7) Foreign liquor licence in Military units (F.L.8)

(8) Foreign liquor licence for possession and supply of foreign liquor in wholesale by the Bonded warehouse licensees to other foreign liquor licencees (F.L.9)

5. Pursuant to the Abkari Policy of 1981, the Government accorded sanction to the Kerala Civil supplies Corporation Ltd., a Government owned Corporation to establish Bonded warehouses in the State. Rule 3 of the Kerala Abkari Shops (Disposal in Auction) Rules was amended by inserting a proviso to read thus :--

"Provided that the Government shall have the right to permit the Kerala State Civil Supplies Corporation Limited to run two wholesale Foreign Liquor shops in the Ernakulam District and one such shop in each of the other Districts except Matappuram without public auction, at the rate of such rental as may be fixed by the Board of Revenue (Excise)".

6. In 1984, the Government again took a policy decision to establish a public-sector corporation "to procure spirit and arrange blending, bottling, sealing and supply of arrack and also for dealing in the sale of foreign liquor now dealt with by the Kerala State Civil Supplies Corporation Ltd. The Government" therefore ordered on 1-2-1984 as per G.O.Ms. 17/84/TD. that a Corporation under the Public sector by name, the Kerala State Beverages Ltd., with its headquarters at Trivandrum will be formed with immediate effect. The Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd. hereinafter referred to as the Beverages Corporation, was thereafter incorporated on 23-2-1984. Meanwhile on 16-2-1984, Rule 3 mentioned above was amended by substituting the proviso extracted earlier thus :--

"Provided that the Government shall have the right to grant the privilege of vending foreign liquor in all or any of the independent wholesale shops, to the Kerala State Civil Supplies Corporation Ltd., or to any other Corporation that may be formed by the Government without public auction, at the rate of such rental as may be fixed by the Board of Revenue (Excise)".

7. A new Rule, Rule 11-A was introduced in Chap. IX of these rules, relating to the special conditions applicable to licencees of foreign liquor wholesale shops. This rule reads thus :

"11A. The licensee shall purchase his supplies of foreign liquor only from the Corporation owned by the Government and holding F.L. 9 licence in the State."

8. On 21-2-1984, the Foreign Liquor Rules also were amended. In Rules 13(i) in Clause (1) the following sentence was added :

"The licence under this rule shall be subject to the condition that the licensee shall procure his supplies of foreign liquor only from the F.L.9 licensees in the State";"

9. A new condition was inserted in condition 40 in the Form FL 1 licence to read thus :--

"40. The licence under this rule shall be subject to the condition that the licensee shall procure his supplies of foreign liquor only from FL 9 licensees in the State";"

10. Both these amendments to the rules dt. 16-2-1984 were published in the gazette dt. 21-2-1984.

11. The result is that the petitioners cannot import foreign liquor to this State, the F.L. 1 licensees have to purchase their liquor from the State Beverages Corporation only and from no other licensee inside or outside this State for the purpose of their business in this State. The petitioners therefore contend that they suffer huge loss when they are not able to honour their contracts entered into with several manufacturers and distributors to import Indian made foreign liquor in this State in spite of the huge investment and heavy security deposits already made. They therefore challenge the Abkari Policy of 1981. when the Civil Supplies-Corporation was formed, the policy of 1984 when the Beverages Corporation was incorporated and the amendment to the rules made to effectuate these policy decisions.

12. Shri P.R. Mridul. Senior Advocate, who led the arguments on behalf of the petitioners contended that though the privilege of dealing in liquor is completely vested in the Government, the grant of the privilege is controlled by the provisions of the Abkari Act, and the Government cannot therefore lay down any policy which is opposed to the express provisions of the statute or grant any monopoly in favour of any Corporation, even if it be a fully State owned corporation. When the Act has prescribed that the grant of the privilege shall be made only in a particular way, the privilege shall be granted only in that manner and not in any other manner. He stated that the State and the Corporation are not same in the eye of law and the Corporation cannot have rights and privileges different from any other grantee under the Act. He therefore contends that the monopolistic right granted to the Beverages Corporation is ex facie discriminatory and plainly violative of Article 14 of the Constitution. Of course, he has placed his submissions on a larger canvass attacking the validity of the amended rules as not only beyond the very Act itself, but even in excess of the legislative powers of the State. This challenge in fact is fundamental as, its acceptance would invalidate the whole Act and the petitioners themselves may

not be entitled to any licence, even the F.L. 1 licence, they are having now. We shall advert to the detailed submissions when we deal with these points separately.

13. Shri Section Narayan Poti, appearing for the Corporation and Dr. George Mathew Kalappurakkal. Additional Advocate-General appearing for the State, however placed on the forefront of their submissions that the petitioners have no right, much less, any fundamental right to carry on trade in liquor; they participated in the auction with full knowledge of the conditions of the licence, and cannot therefore at this stage after obtaining the licence, approach this Court pleading that one of the conditions shall be deleted. The claim, it is said is in respect of a contractual obligation and therefore out of bounds of the writ jurisdiction. It was also strongly argued that there is no discrimination, that the trade has not suffered, that the petitioners can still carry on their business, and that they never had, even under the Act a right to import foreign liquor in this State. Import of Liquor from outside the State can be allowed only if the Government permits, and a policy that no permission will be given to any private individual or concern, is not opposed to any provisions of the Abkari Act. They contend that the Act and the Rules deal with intoxicating liquor, a subject covered by entry 8 of list 2 of the 7th Sch. of the Constitution and thus within the legislative competence of the State.

14. The following points thus arise for determination in these cases.

(1) Whether the Kerala Abkari Act and the rules are beyond the legislative competence of this State?

(2) Whether the rules amended in 1984 transgress the permissible limits of legislative delegation and whether they are ultra vires of the Act itself?

(3) Whether the Abkari policy of 1981 and 1984 and the amended rules to effectuate these policies violate the fundamental rights guaranteed under Article 14 and Article 19(1)(g) of the Constitution?

15. We shall consider these points and refer at the appropriate stage, in further detail, the contention of either parties. Meanwhile, we have to consider a preliminary point raised by the counsel for the Corporation and the State that the these writ petitions are not maintainable. Preliminary objection :

16. The contention is that the petitioners claim arise under contract and the writ jurisdiction is not the appropriate remedy. The facts admitted are that the amended rules were published on 21-2-1984 and notice regarding the sale by auction of the privilege of vending foreign liquor in wholesale shops during the period from 1st April 1984 to 31st Mar. 1985 was published on 22-2-1984 and the auctions were held on 7-3-1984. There were no bidders and there was reauction on 19-3-1984. The petitioners in these writ petitions look part in these auctions. These auctions were held under the amended rules which formed part of the conditions of sale and thus pan of the terms of the contract. The

petitioners were thus aware of the limitations imposed under the new rules and the counter affidavit of the State proceeds to state that for this reason, there has been considerable reduction in the bid amounts for the current year 1984-85, which have come down to about half of what they had been for the previous years 1983-84. In the case of Cochin Wines, the petitioner in O. P. 2459/1984, it was stated at the time of hearing that their bid was not accepted initially, and eventually they were granted F.L. 1 licence after negotiation, while in the case of the petitioner in O. P. No. 2597 of 1984 their bid was accepted and sale confirmed. Both the petitioners have executed agreements agreeing to comply with the amended rule also. The licenses issued to them also incorporate the new condition that they can purchase only from the Government owned corporation having F.L. 9 licence, i.e., the Beverages Corporation. The counter-affidavit therefore states "the attempt of the petitioners appear to be to challenge the amended rules in order to restore for themselves the privilege of importing foreign liquor direct from manufacturers and also to obtain their supplies from other sources as they used to previously. Such an attempt cannot be allowed to succeed as it would drastically hit the revenue of the State and also result in huge profits for the F.L. 1 licencees like the petitioners especially in view of the reduced bid amounts during the current year. The preliminary objection also thus rests on the plea that the conduct of the petitioners disentitled them to any relief in this Court.

17. The petitioners meet this objection by contending that the challenge is against the rules and if the rules are invalid the imposition of the condition becomes illegal; but the contract survives, the obligations remain and the petitioners will still be liable to pay the rental.

18. The counsel for the petitioners contended that a distinction has to be made between contracts voluntarily agreed to between parties and statutory contracts where the terms of the contract are controlled by statutory provisions. While in the former, writ jurisdiction of Court may not be available, in the latter, the contract and the statute have to be read together and if the provision of the statute can be challenged, the fact that it incidentally infringes on the contract will not be a ground for denying relief under Article 226.

He relies heavily on the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, to support his contention that even in the sphere of contracts, the constitutional door under Article 226 is still open at certain stages and under special circumstances. We proceed to decide this aspect first.

19. Parties are entitled to carry on trade in lawful business and enter into contracts for that purpose. Disputes between private parties arising out of those contracts are beyond the purview of judicial examination under ART. 226. But when Government is a party to such contracts, different considerations arise. The freedom of the Government to enter into contracts with the public is not a licence to act arbitrarily and the Government cannot pick and choose persons to award contracts violating the norms of selection and preference. At that stage, when

discrimination is alleged at the threshold of awarding the contract, this Court can under Article 226 enquire whether the challenge based on Article 14 is sustainable. Again, if it is a statutory contract, a contract entered into pursuant to the provisions of a statute, in obedience to a statutory command, the provisions of the statute can be assailed in writ proceedings. With the striking down of the statute, the contract may crumble either in its entirety or in material particulars. This is only the inevitable result of the statutory prop being lost to support the contract or its terms. But an entirely different principle applies when the contractual right relates to a business which is per se not lawful or which is plainly dangerous, speculative or harmful to society. The business of conducting liquor comes under this category. In these cases, no right inheres in any individual to carry on trade in noxious or dangerous goods. The State may completely prohibit the trade or impose severe restrictions on the business. Only those persons who are willing to abide by the stringent conditions are given the right to carry on trade. When, in those cases, they enter into a contract, and obtain the right to carry on business, they cannot thereafter turn round and challenge the provisions of the Act or the terms of the contract. They owe their right to trade in this business to the Act and the rules. They have no contractual rights independent of the statute. Article 226 cannot be invoked as an escape rule to wriggle out of contracts in respect of the liquor trade. The petitioners are estopped also by their conduct from claiming any relief under Article 226 of the Constitution when, with open eyes, aware of the terms of the contract, they participated in the auction, and one of them even negotiated for a contract, and both obtained contracts in their favour for reduced amounts, and have thus gained advantage under the very terms of the contract. They cannot be allowed to retain the advantage of the contract without at the same time being bound by the obligations arising therefrom.

20. The decision relied on by the petitioners in *Isaac v. Assit. Excise Commr.* 1984 KLT 88) can have no application to the facts of these cases, for, in that decision the petitioners sought to enforce the rules, and not to efface them. They claimed protection under the rules, not against the rules.

21. We quote the observation of the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, in practically identical circumstances.

"The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations."

22. We, therefore, upheld the preliminary objection and hold that the petitioners are not entitled to any relief. But in view of the fact that elaborate arguments were advanced in these writ petitions, we are dealing with the merits as well, as was done by the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*,)

23. Before, however, we deal with the specific points raised, it is pertinent to remember the decisions of the Supreme Court in *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, and the survey of the constitutional position regarding specially the liquor trade in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, .

24. Summarising the position in *Har Shankar's* case the Supreme Court observed as follows :--

"These unanimous decisions of five Constitution Benches uniformly emphasized after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to the health and welfare of the public, that elimination and exclusion from business is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by themselves by all civilized communities. The contention that the citizen had either a natural or a fundamental right to carry on trade or business in liquor thus stood rejected."

"In our opinion, the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decisions of this Court in *The State of Bombay and Another Vs. F.N. Balsara*, . *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, ; *The State of Assam Vs. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong*, ; *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, ; *Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others*, and the *The State of Bombay Vs. R.M.D. Chamarbaugwala*, as interpreted in *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, and *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, . There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants -- its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants, In "American Jurisprudence", Vol. 30 it is stated that while engaging in liquor traffic is not inherently unlawful, nevertheless it is a privilege and not a right, subject to governmental control (page 538). This power of control is an incident of the society's right to self-protection and it rests upon the right of the State to care for the health, morals and welfare of the people. Liquor traffic is a source of pauperism and crime."

25. Bearing in mind the nature and character of this trade, let us now proceed to decide the writ petitions on the merits.

26. Whether the Kerala Abkari Act and the rules made thereunder are beyond the legislative competence of the State?

27. The contention is that the Industries (Development and Regulation) Act, 65 of 1951, occupies the field, as a central legislation falling within entry 52 of List I of the 7th Sch, reading thus :--

"Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

Section 2 of the Act declares that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule and item 26 in that schedule is "Fermentation Industries : (1) Alcohol and (2) Other products of fermentation industries,

27A. Section 18-C of the Act runs as follows :--

"The Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability of fair prices of any article or class of articles relatable to any scheduled industry, may, notwithstanding anything contained in any other provisions of this Act, by notified order, provide for regulating the supply and distribution thereof and trade and commerce therein."

28. Thus the contention proceeds that the Alcohol is a controlled industry, the supply, distribution and trade and commerce in this industry can be regulated only by notified order by the Central Government and not by any State legislation. Rightly, this is countered by stating that the State Act falls entirely within entry 8 of List II of the 7th Sch., "Intoxicating liquors, that is to say the production, manufacture, possession, transport, purchase and sale of intoxicating liquors".

29. We are afraid that the contention raised by Sri Mridul is already concluded by three decisions of the Supreme Court.

30. In Mahant Parichchan Das Vs. Bihar State Board of Religious Trusts and Others, considering the validity of U. P. Excise Act 30 of 1972, it was held thus :--

"Under Entry 33, List III the Parliament and the State have concurrent powers to legislate regarding the production, supply and distribution of the products of industries notified by the Parliament. Furthermore it has to be noted that the exclusive power of the State to provide for manufacture, distribution, sale and possession etc. of intoxicating liquor is vested with the State. The power of the State Government to levy a fee for parting with its exclusive right regarding intoxicating liquor has also been recognised as is seen from the various State Acts regulating manufacture, sale etc. of intoxicating liquor.

A fair scrutiny of the relevant entries makes it clear that the power to regulate the notified industries is not exclusively within the jurisdiction of Parliament as List II Entry 33 in the concurrent list enables a law to be made regarding production, supply, distribution of products of a notified industry."

31. In Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others,

it was held thus :--

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

32. In *Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others*, dealing with the Kerala Act itself the Supreme Court held :

"It is sufficient to say upon the first ground that the impugned legislation is confined to "intoxicating liquor", that is, to ensure proper utilisation of rectified spirit in the manufacture of medicinal and toilet preparations and, therefore, within the powers granted to the State legislature under Entry 8, List II

XXX XXX XXX XXX XXX XXX"

33. To conclude, therefore, on this aspect, we hold that the Kerala Abkari Act and the Rules- are in pith and substance within the legislative competence of the State falling under Entry 8 of List II of the 7th Sch. of the Constitution. They are not repugnant to the Central enactment, the Industries (Development and Regulation) Act 45 of 1951; nor has the centre, in any case, occupied the field in the absence of a notification u/s 18-G of that Act empowering the authorities to control trade and commerce of alcohol.

Whether the amended rules of 1984 are ultra vires of the Abkari Act, transgressing the permissible limits of delegated legislation?

34. The contention on behalf of the petitioners is that the Act and the Rules provide the manner and method of granting the privilege of conducting trade in liquor either in wholesale or retail and require that public warehouses can be established only under licences issued under the Act. When, pursuant to an Abkari policy of the Government F.L. 9 licences can be granted only to a State owned Corporation, it was a fundamental change in legislative policy which can be effectuated only by an amendment of the Act and not by recourse to an amendment of the rules by the Government as a delegate under the Act. Of course, this contention is met by the formidable plea that the right to import, manufacture, and sell liquor is absolutely controlled by the Act; that no liquor can be imported without the prior permission of the Government; no public warehouse can be established, again without the prior approval of the Government, and thus the legislative policy that the Government is the sole grantor of the privilege is manifest throughout and the State can thus refuse to grant the privilege to any private body or person. There is neither a change of Abkari policy nor an exercise of excessive delegation.

35. A recent decision of the Supreme Court in *State of Tamil Nadu Vs. Hind Stone and Others*, throw considerable light on this aspect. Tamil Nadu Mineral Concession Rules, 1959 made under Mines and Minerals (Regulation and Development) Act 1957 were challenged successfully before the Madras High Court when Rule 8-C which directed "no lease for quarrying black granite shall be granted to private persons", was struck down on the ground it exceeded the rule making power given to the State Government. Reversing this decision. Mr. justice Chinnappa Reddy, speaking for the Supreme Court observed thus :--

"Another of the submissions of the learned counsel was that G.O.Ms. No. 1312 dated Dec. 2, 1977 involved a major change of policy, which was a legislative function and therefore beyond the competence of a subordinate legislating body. We do not agree with the submission. Whenever there is a switch over from "private sector" to "public sector" it does not necessarily follow that a change of policy requiring express legislative sanction is involved. It depends on the subject and the statute. For example, if a decision is taken to impose a general and complete ban on private mining of all minor minerals, such a ban may involve the reversal of a major policy and so it may require legislative sanction. But if a decision is taken to ban private mining of a single minor mineral for the purpose of conserving it. such a ban, if it is otherwise within the bounds of the authority given to the Government by the Statute, cannot be said to involve any change of policy. The policy of the Act remains the same and it is as we said, the conservation and the prudent and discriminating exploitation of minerals, with a view to secure maximum benefit to the community. Exploitation of minerals by the private and/or the public sector is contemplated. If in the pursuit of the avowed policy of the Act. it is thought exploitation by the public sector is best and wisest in the case of a particular mineral and. in consequence the authority competent to make the subordinate legislation makes a rule banning private exploitation of such mineral, which was hitherto permitted we are unable to see any change of policy merely because what was previously permitted is no longer permitted."

36. In the present case. The Act statutorily recognises the fundamental concept that the trade in liquor is a privilege or prerogative of the Government. Section 18-A begins by stating "It shall be lawful for the Government to grant to any person the exclusive or other privilege". The Government maintains an intimate and immediate control of almost all facets of liquor trade. The Commissioner of Excise grants licences to establish private warehouses where liquor may be deposited without payment of duty; but the licence can be granted only with the previous approval of the Government". No liquor can be imported or exported unless the permission of the Government or any officer authorised by the Government is obtained. If. therefore, under the Act, the Government can withhold permission to import, or to establish private or public warehouse distillery etc. the rules in furtherance of this legislative intent can prescribe that the licence can be granted only to a state owned corporation. Similarly, if, in the pursuit of the avowed policy of the Act the trade in liquor is to be exclusively

controlled by the Government and the Government thinks it best that in the case of foreign liquor, it can be stored without payment of duty only by a state owned corporation and not by any private individual, there is no change of policy because what was previously permitted is no longer permitted."

37. It was also contended that u/s 18A, the grant of a privilege can only be to a local area as distinct from the whole State and when the rules permit the grant of a licence to the Beverages Corporation for the whole State, the rule is clearly opposed to Section 18-A of the Act and thus beyond the rule-making power itself.

38. It is however not disputed that even though licences can be granted only for a local area, there is nothing preventing the same person having more than one licence and for different local areas. Though the licensee may be the same, the licences may be numerous and local areas different and even contiguous. The Beverages Corporation has four licences in this State operating in four different local areas, Tripunithura, Quilon, Palghat and Cannanore. Thus neither the relevant rules nor the actual grant of licence transgress the statutory provisions. The impugned rule is therefore within the permissible limits of delegated power and is not ultra vires of the Act.

39. The last and the most important question raised is based on Article 14 and Article 19(g) of the Constitution. Is the 1984 amendment to the Foreign liquor rule violative of Article 14 and Article 19(g) of the Constitution?

40. It is now settled that there is no fundamental right to carry on trade in liquor,

41. In *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, Chief Justice Ray speaking for the Bench observed :

"There are three principal reasons to hold that there is no fundamental right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise law shows that the State has the exclusive right or privilege of manufacture or sale of liquor."

These observations were approved by the Constitution Bench in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . Justice Chandrachud (as His Lordship then was) speaking for the Court held thus : --

"xxx As observed in *Harinarayan Jaiswal's* case, "if the Government is the exclusive power of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights."

42. There can thus be no dispute and there is no dispute either that the petitioners are not entitled to the protection of Article 19(1)(g). But the contention is that when once the Government decided to grant the privilege and the Act prescribed the mode of granting those privileges, a rule which directs that the privileges can be granted only to a State owned Corporation is arbitrary and violative of Article 14 of the Constitution. An Abkari policy, it is said, cannot go against the enacted provisions and a rule which treats the Corporation in a favoured position, different from the other grantees is plainly arbitrary. For this submission considerable reliance is placed on the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*,

43. On an analysis of the various decisions and the peculiar position of the liquor trade, and the relevant provisions of the State enactment, it is clear that the State has an inherent power to carry on the business of liquor even without legislation; it can carry on this business through its departmental officers or through corporations owned by the Government for. even then it is its business run by the Government. When, however, the Government proposes to farm out this privilege, the Act steps in and prescribes the mode of granting the privilege. The provisions of the Act cannot be ignored, for it would be a violation of the statute and an infringement of Article 14. The short question therefore is whether in creating the Beverages Corporation and by making rules granting monopolistic control of certain licences in favour of this State owned corporation, is there any violation of Article 14?

44. The concept of public corporation is the living language of modern administration. The corporation owned and controlled by the State may be an independent legal entity, but still an instrumentality of the State. Its creation may be on administrative necessity but never an executive luxury. It has freedom of action not possessed by civil servants, but freedom of choice controlled by the restraints of public accountability.

45. An industry, it is said, cannot run efficiently on civil service lines and it has to function, very often, outside the framework of normal departmental administration. As Wade puts it, "public corporations are the vehicles for the Government's involvement in industry."

46. At present a part of the business, in liquor trade is conducted by the Beverages Corporation which is a state owned corporation. It is completely controlled by the State and the members of the first Board of Directors are very senior officials. The Chairman is an Ex Chief Secretary of the State and while it could be so carried on even without a legislation in that behalf, statutory rules under the existing law are also made to enable this Corporation to function within the framework of the statute. In fact Article 298 recognises the right of the State to carry on business or enter into contracts and the State can create monopoly either for itself or in favour of a corporation created for the purpose as would be evident from entry 21 of list III of the 7th Sch, to the Constitution which reads

thus;-- "Commercial and industrial monopolies, combines and trusts."

47. It is said that the Beverages Corporation itself, is only a licensee to whom a privilege has been granted like any other licensee and therefore it is not the State that is carrying on the trade but the grantee of the privilege. The fact that the Corporation has also to take out a licence does not detract from the fundamental character that it is a State enterprise intended solely to conduct trade in liquor on behalf of the State. The licence is only insisted as a procedural fetter for its proper functioning within the four corners of the statute. Assuming therefore Article 14 applies to the liquor trade, there is no violation, no arbitrariness, and there is also reasonable classification. "Elimination and exclusion of business is inherent in the nature of liquor business and if is hardly proper to apply to such a business principles of trades which all could carry" (Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others,).

48. The petitioners have also a grievance that they are compelled to procure their quota of liquor only from an F.L.9 licences and this considerably hampers their trade. They also complain that they do not get certain brands of foreign liquor and the Corporation shows marked favouritism in favour of certain manufacturers. Both these grievances have no substance. While the F.L.9 licence is the source of supply to the F.L.1 licensee, it is the F.L.1 licensee who supplies liquor to the F.L.2 licensee, the retail dealer. The source of supply geared to a licensee seems to be a pervading factor in the grant of licences under the Act. It was stated before us that the Corporation stocks several brands of liquor in adequate quantities, and dependent on the extent of movements of the various brands, orders are placed from different manufacturers; and in fact there is a review of the purchase policy practically every month and that the number of manufacturers with whom orders are placed by the Corporation has steadily increased. It is common knowledge that trade in liquor is a very profitable venture in private hands and there is no reason to doubt that it will continue to be a profitable venture even in public hands. The new Corporation has to create an image for itself, establish healthy conventions and adopt fair and equitable principles and thus strive to secure public approbation.

49. The challenge to the Abkari policies does not survive as they have been incorporated by amendment to the rules. Summarising therefore we hold that in the liquor trade.

- (1) a licensee cannot have any remedy under Article 226 of the Constitution to challenge the term of his contract with the Government;
- (2) the licensee has no fundamental right under Article 19(1)(g) or Article 14 of the Constitution;
- (3) that the conferment of exclusive rights in favour of the Beverages Corporation, a State enterprise, is sanctioned by law and supported by constitutional principles;

(4) that the Kerala Abkari Act and the rules are within the legislative competence of the State falling within Entry 8 of List II of the 7th Sch.

(5) that the 1984 amendment to the rules is not ultra vires of the Act.

In the result the Original Petitions are dismissed; but in the circumstances of the case, no costs.