

(2016) 09 PAT CK 0065

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No.5795 of 2016

M/s. Samrat Laboratories

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 30-09-2016

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 2
Constitution of India, 1950 — Article 226

Citation : (2016) 4 PLJR 714

Hon'ble Judges : I.A. Ansari, C.J. and Mr. Navaniti Prasad Singh, J.

Bench : Division Bench

Advocate : Mr. Lalit Kishore, Principal Additional Advocate General, for the Respondents; Mr. Satyabir Bharti, Advocate, for the Petitioners

Final Decision : Allowed

Judgement

I.A. Ansari, C.J. - In these six writ petitions, the petitioners challenge the authority of the State Government to prohibit their business in and with regard to denatured spirit, which is unfit for human consumption. Specifically, the challenge is (i) to the notification, dated 04.02.2016, issued by the State Government, in so far as it prohibit distilleries, in the State, to manufacture rectified spirit after 29.02.2016 and further wherever, in course of manufacture of Ethanol/Extra Neutral Alcohol (ENA), whatever denatured spirit or any other bye-product is produced, it shall be compulsorily destroyed; and (ii) that part of the letter, dated 17.03.2016, issued by the Commissioner Excise, Bihar, Patna, which directs the Collectors-cum-District Magistrates of Bihar not to renew licences, wholesale or retail, for dealing in denatured spirit and not to grant new licences in respect thereof. Consequential challenge is to the consequences thereof.

2. Petitioners of the first two writ petitions (C.W.J.C. Nos. 5795 of 2016 and 6054 of 2016), namely, M/s. Samrat Laboratories and M/s. Shiva Laboratories Private Limited are industrial units engaged in the production of organic chemicals,

namely, ethyl acetate, acetic acid, acetic anhydride, vinyl acetate, organic solvents, formaldehyde and surgical spirits. These are basically lacquer, sealant, paint remover, thinner, premixed varnish and surgical spirits. The main raw material for this industry is rectified spirit/ethyl alcohol (ethanol) (industrial grade), methyl alcohol (methanol) (formaldehyde).

3. It may be noted that before rectified spirit/ethyl alcohol is issued from various distilleries to the petitioners' industry, it is added with specified denaturants rendering it unfit for human consumption. Upon its being denatured, it is termed as denatured spirit/special denatured spirit. Both these units have permission to store over one lakh bulk liters of special denatured spirit on monthly basis, which is the basic raw material for the industry by orders of the Excise Commissioner, Bihar. In respect of these units, they held licences, in Form No.24, granted by the respective Collectors of the districts in which the industry is situated.

4. Section 90 of the Bihar Excise Act, 1915 (in short, "the Act") empowers the Board of Revenue to frame rules and, in exercise of that power, the Board of Revenue issued notification No.23-137-2, dated 29.04.1919, published in the Bihar and Orissa Gazette, dated 07.05.1919, a set of rules. Rule 63 to Rule 71 thereof deals with denatured spirit. Rule 63 thereof provides for substances, which may be used as "denaturants". Rule 64 of the Rules provides that spirit may be denatured only under licences issued by the Collector at the distilleries or excise warehouse. Rule 65 provides for licence to denatured spirit at distillery. For this, distilleries are issued licences in Excise Form No.25. Rule 69 further provides that distilleries shall, ordinarily, not manufacture denatured spirit exceeding 10% of the total portable quantity and denatured spirit from the distilleries are to be delivered to any person only on production of export or transport pass. Rule 69 further provides for regulating the sale and purchase of denatured spirit by wholesale or retail licensee.

5. The Board of Revenue has issued executive instructions referable to, apart from others, Section 38 (1) (b) of the Act, with regard to the process of denaturing, storage and issuance of denatured spirit and various licenses in respect thereof. Paragraph 192 thereof provides for limit of retail sale. Paragraph 193 thereof provides for licences including licence in the prescribed Form No.24 for possession of denatured spirit in excess of limit of retail sale. Licence in Form No.24 are prescribed under these executive instructions and licence in Form No.24, which these two industries hold, for storing denatured spirit in bulk quantities, are issued by the respective district Collectors. From this, it would be seen that denatured spirit being the basic raw material for these industries, a licence in Form No.24 is a pre-requisite as per executive instructions issued by the Board of Revenue.

6. Thus seen, if the distilleries, which produce denatured spirit, are prohibited from selling denatured spirit or to be compulsorily destroyed as per the impugned notification, dated 04.02.2016, and the licences, in Form No.24, of these two industries not having been renewed, pursuant to the impugned letter,

dated 17.03.2016, of the Excise Commissioner, it would amount to complete closure of the two industries, whose basic raw material is denatured spirit. Effectively, down stream products like industrial thinner, varnish, surgical spirits and several other organic chemicals cannot be manufactured and sold in Bihar. This action of the State has brought these two industries to this Court challenging the actions of the State in this regard.

7. The next two writ petitions, namely, C.W.J.C. Nos.7411 of 2016 and 7550 of 2016 are by wholesalers and retailers of denatured spirit, who have licences in Form No.22 and 23 as prescribed under the executive instructions issued by the Board of Revenue. Consequent to the impugned letter, dated 17.03.2016, of the State Government, their licences have not been renewed, thereby totally stopping their business in denatured spirit.

8. The last two writ petitions, namely, C.W.J.C. Nos. 7634 of 2016 and 10598 of 2016 are by the same company. It is licensed to manufacture Extra-Neutral Alcohol (ENA) and is a grain based distillery situated, at Amarpur, in the district of Banka, having been set up with the approval of Department of Commerce and Industries, Government of India, with an investment of over Rs.200 crores. It has licences in Form No.28 A and Form No.25. In the process of manufacturing ENA, the manufacturing of which is not prohibited in this State, about 7 to 10% impure spirit is produced, which is denatured and sale thereof as denatured spirit gets them extra revenue of about Rs.1.50 crores. It has a stock of about 2 lakh bulk liters of denatured spirit. The grievance of the distillery is that by virtue of the Government notification, dated 04.02.2016, they are required to destroy the entire stocks of denatured spirit and, in future, whatever stocks are produced shall also be compulsorily destroyed. Thus, they are aggrieved by this part of the notification as it amounts to virtual confiscation of denatured spirit produced in the course of production of Ethanol/ENA.

9. In the last writ petition, namely, C.W.J.C. No. 10598 of 2016, the petitioners have made a further grievance that even the ENA or ethanol, as legitimately produced by them, are concerned, they are not being granted export permits merely because they have chosen to challenge the Government notification as aforesaid, even though they have ready buyers from outside the State. Other distilleries, who have not come to this Court, are being granted export permits, the result being that the petitioners' distilleries have to be shut down. The action, in this respect, it is submitted, is contemptuous and designed to thwart judicial redressal before this Court.

10. The basic submission, on behalf of the writ petitioners, as made by Mr. Satyabir Bharti, learned Counsel, is that denatured spirit, undisputedly, being unfit for human consumption and being industrial alcohol, though can be regulated, in a limited manner by the State, its production and usage, as an industrial raw material, cannot be prohibited by the State being beyond its legislative competence. Further, the notification, dated 04.02.2016, as issued by the State Government, not being issued under, or with respect to, any legislation

of the Central Government or the State Government, but with reference to the New Excise Policy, 2015, of the State Government, would be clearly ultra vires the powers and authority of the State Government. Further, the notification, dated 04.02.2016, and the letter, dated 17.03.2016, amounting to total prohibition of manufacturing, sale, possession and use of denatured spirit, would clearly be an unreasonable and arbitrary restriction on the rights to carry on business and trade in rectified/denatured spirit and, that too, could not be done by mere executive fiat.

11. To the contrary, Mr. Lalit Kishore, learned Principal Additional Advocate General, submits that by virtue of provisions of the Bihar Excise Act, 1915, denatured spirit is included with the definition of "intoxicant" and the State has competence not only to legislate in respect of intoxicant, but to prohibit its manufacturing and trade therein, notwithstanding the fact that the so called "intoxicant" may be industrial alcohol unfit for human consumption. Having prohibited the trade in denatured spirit, its possession would be illegal and, therefore, orders for its compulsory destruction would not amount to confiscation.

12. First, we would like to take up the issue, as raised by the learned Principal Additional Advocate General, that denatured spirit is an "intoxicant", as defined under the Bihar Excise Act, 1915, and, that being so, State has the legislative competence and jurisdiction to regulate, to the extent of prohibiting possession, sale or usage thereof, as no person has a fundamental right to deal in intoxicant. The first thing to be noted is that we are dealing with the provisions of the Bihar Excise Act, which was framed, issued and enforced in the year 1915, several decades prior to the Constitution of India. At that time, there was no such division of legislative fields as between the Union and the State and there were no such restrictions, on legislative powers, as provided for under the Constitution of India. However, we may note the provisions first. The relevant provisions would be, as per definition clause, as under:

"2 (19) "spirit" means any liquor containing alcohol obtained by distillation, whether it is denatured or not;

2 (5) (a) "denaturant" means any substance prescribed by rule made in this behalf under clause (3) of Section 90, for admixture with spirit in order to render the mixture unfit for human consumption, whether as a beverage, or internally as a medicine, or any other way whatsoever;

(b) "to denature" means to mix spirit with one or more denaturants in such manner as may be prescribed by rule made in this behalf under clause (3) of Section 90, and "denatured spirit" means spirit so mixed;

2(14) "Liquor" includes all liquids consisting of or containing alcohol, such as spirits of wine, spirit, wine, fermented tari, pachwai and beer, and also unfermented tari, and also any other substance which the State Government may, by notification, declare to be liquor for the purposes of this Act;

2 (12a) "intoxicant" means-

(i) any liquor, or

(ii) any substance from which liquor may be distilled and which is declared by the State

Government by notification in the Official Gazette to be intoxicant for the purpose of this Act, or

(iii) intoxicating drug, or

(iv) medicinal preparation as defined under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955."

(Emphasis is supplied)

13. On the strength of the aforesaid definitions, the learned Principal Additional Advocate General submits that "spirit" includes "denatured spirit" and "liquor" includes "spirit" and therefore, "liquor" would include "denatured spirit". "Intoxicant" means any "liquor" and thus would include "denatured spirit" even though by the definition of "denaturant" and to "denature", it is clear that once spirit is denatured, it is rendered unfit for human consumption. In other words, he submits that notwithstanding denatured spirit, by nature of thing being unfit for human consumption, it nevertheless remains, for the purposes of the Act, an intoxicant.

14. Our first answer to this submission would be that the very definition of intoxicant clause clearly states that the definition is for the purposes of the Act, which, as noted above, is a pre-constitutional Act. By artificially extending the meaning of a commodity, to what it is not, the State cannot usurp the legislative competence, which it, now, lacks after the Constitution of India was adopted and enforced. The extended meaning would only be for the purposes of the Act and only to the extent to which the State would have the constitutional jurisdiction and not beyond that.

15. Thus, there is no gainsaying that the Act defines intoxicant to include something, which is unfit for human consumption and not an intoxicant, the State can assume jurisdiction or legislative power treating non-intoxicant as intoxicant. If the State lacks legislative competence in respect of industrial alcohol, which includes denatured spirit, then, by this extended definition or artificial definition of intoxicant, the State cannot assume legislative competence.

16. Mr. Satyabir Bharti, learned Counsel for the petitioners, has referred to two decisions of the Supreme Court on the issue that rectified spirit, from which denatured spirit is obtained, both inclusive, are non-potable alcohol and are, therefore, industrial alcohol, which is beyond the legislative competence of the State Legislature to legislate upon.

17. With regard to the above, we may, first, note that in the case of Synthetics

and Chemicals Limited and others v. State of U.P. and others, reported in (1990) 1 Supreme Court Cases 109, the question, before the seven Judge Constitution Bench, was the power and authority of the Government of Uttar Pradesh to demand certain fees in relation to denatured spirit being supplied to the Company. In paragraph-19 of the report, their Lordships have noted the definition of foreign liquor, in the light of the notifications, issued under the Uttar Pradesh Excise Act, 1910, which expression would include rectified, perfumed, medicated and denatured spirits. Notwithstanding that extended definition, later, in the judgment, their Lordships clearly held that the rectified spirit and denatured spirit are industrial alcohol unfit for human consumption and, thus, not potable liquor and, as such, beyond legislative competence of the State.

18. Similarly, again, in y, this is what their Lordships held, in paragraph-15 :

"15. The Act is a pre-constitutional statute. Section 3 (18) of the Act defines spirit and Section 3 (14) thereof defines liquor. These definitions cover even denatured spirit. They are broadly worded pre-constitutional definitions?. "

19. Notwithstanding the aforesaid extended definition, their Lordships clearly held, in Mohan Meakin Limited (supra), that industrial alcohol or spirit/denatured spirit, not being alcoholic liquor for human consumption, cannot be subject matter of any regulation or control by the State.

20. We may, now, refer to the decision of State of U.P. and others v. Vam Organic chemicals Limited and others, reported in (2004) 1 Supreme Court Cases 225, wherein, while dealing with denatured spirit/rectified spirit, this is what their Lordships held, in paragraph-29:

"29.The State"s power is thus limited to (i) the regulation of non-potable alcohol for the limited purpose of preventing its use as alcoholic liquor, and (ii) the charging of fees based on quid pro quo. ?.."

21. We may hasten to add, lest it may be misunderstood, that here "regulation" would not include "prohibition", because we are not dealing with potable liquor, but industrial alcohol, where considerations are totally different.

22. Thus, in our view, there is no gainsaying that merely because an artificial extended definition, in the Bihar Excise Act, 2015, is given to the expression intoxicant, the State, by virtue of this extended definition, automatically assume legislative competence, even over rectified spirit and/or denatured spirit, which are inherently non-potable and unfit for human consumption. The State"s contention is, thus, rejected.

23. Now, we may refer to the relevant part of the impugned notifications/letter as issued by the State Government, being notification, dated 04.02.2016, and the relevant part being clause-3 of the letter being Excise Department"s letter, dated 17.03.2016, the English translation whereof are quoted hereunder:

"English translation of Clause (4) (iii) of notification, dated 04.02.2016.

4 (iii) Working distilleries in the State shall not produce rectified spirit after 29.02.2016 from 1st April, 2016. The molasses based distilleries shall utilise 100% of its capacity, in manufacture of Ethanol. This Ethanol shall be supplied to Oil Companies for blending in Petrol/Diesel. From 1st April, 2016, the grain based distilleries shall utilise 100% of its capacity, in manufacture of ENA. During the course of manufacture of Ethanol/ ENA, whatever Denatured spirit or any other bye-product is produced, shall be compulsorily destroyed.

English Translation of Clause (3) of the Excise Department's letter, dated 17.03.2016

3. All wholesale and retail denatured spirit licenses in the State, shall not be renewed and the licenses issued under the MNTP Act, 1955 in the State shall not be renewed and new licenses shall not be granted. The department's letter dated 18.01.2016, shall be deemed to be modified to the above extent."

24. The effect of these two is, firstly, the distillery is to destroy its stocks of denatured spirit and whatever is produced thereafter is also to be destroyed. Thus, not only affecting the industry with a bye-product, which is converted into denatured spirit that has commercial value, but also drying up the sole raw material for industry based on denatured spirit closing, thus, those industries too. Similarly, the letter, in terms, brings about absolute prohibition in trade of denatured spirit in the State.

25. On behalf of the petitioners, Sri Satyabir Bharti, learned Counsel, submits that in view of the decision of the Constitution Bench, in Synthetics and Chemicals Limited (supra) followed by Vam Organic chemicals Limited (supra) and Mohan Meakin Limited (supra), the Supreme Court has been consistent in holding that rectified spirit and denatured spirit, being industrial alcohol and unfit for human consumption, State lacks legislative competence in respect thereof, it being products of a controlled industry and in view of the provisions of the Industries (Development and Regulation) Act, 1951, State cannot, thus, restrict and/or prohibit the production, storage and usage of rectified spirit or denatured spirit. The impugned notification and the impugned letter, therefore, are beyond the legislative competence of the State. He further submits that the aforesaid impugned notification and the impugned letter have the effect of directly impinging upon and restricting the fundamental rights of the distilleries, the industry and the dealers, though no restriction on the fundamental rights can be imposed by executive fiat. The notification, not being with reference to any law, as made by the legislature, and the letter, being merely executive instructions, cannot, in any way, restrict or abridge the fundamental rights. Such action would be clearly arbitrary and unreasonable; so contends Mr. Bharti.

26. To the contrary, the learned Principal Additional Advocate General submits, with reference to the Constitution Bench decision, in Ch. Tika Ramji and others v. The State of Uttar Pradesh and others (AIR 1956 Supreme Court 676), that notwithstanding fermentation industries and products thereof being within the

declaration in terms of Entry 52 of List I of the 7th Schedule to the Constitution, under the Industries (Development and Regulation) Act, 1951 (hereinafter, in short, referred to as "the IDR Act"), the products of such an industry would fall under Entry 33 of List-III of the 7th Schedule to the Constitution. Thus, the State would have concurrent jurisdiction in relation thereto with the Union Government and unless there is specific legislation by the Union, factually and actually occupying the field of legislation in relation to the products of such an industry, the legislative competence of the State cannot be taken away.

27. It is the contention of the learned Principal Additional Advocate General that the State legislation cannot be said to be repugnant to the Central legislation unless there is actual conflict between the two legislations. Thus, according to learned Principal Additional Advocate General, the State has the necessary legislative competence to prohibit production, sale, trade and commerce in those goods, i.e., rectified spirit/denatured spirit. Learned Principal Additional Advocate General places further reliance on the decision of the Supreme Court, in *Ishwari Khetan Sugar Mills (P) Ltd. and others v. State of Uttar Pradesh and others*, reported in (1980) 4 Supreme Court Cases 136 = AIR 1980 Supreme Court 1955. He further submits that the Constitution Bench decision, in *Synthetics and Chemicals Limited (supra)*, has been doubted by three Judge Bench of the Supreme Court, in *State of Uttar Pradesh and others v. Lalta Prasad Vaish*, reported in (2007) 13 Supreme Court Cases 463, and the reference is, now, pending consideration before nine Judge Bench of the Supreme Court for reconsideration of *Synthetics and Chemicals Limited (supra)*. Learned Principal Additional Advocate General almost urges the Court not to feel, in the light of the facts of the present case, bound by the decision in *Synthetics and Chemicals Limited (supra)*.

28. First, we may refer to Article 246 of the Constitution of India, which is quoted hereunder:

"246. Subject-matter of laws made by Parliament and by the Legislatures of States -

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated to List I in the seventh Schedule.

(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List-III in the Seventh Schedule.

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List-II in the Seventh Schedule.

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter

is a matter enumerated in the State List."

29. Then, we may quote Article 254 of the Constitution of India:

"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of State. ?

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President has received his assent, prevail in the State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

30. Now, we may come to the relevant Entries in the Seventh Schedule to the Constitution:

"Seventh Schedule

List I ? Union List

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

54. Regulation of mines and minerals development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

84. Duties of excise on tobacco and other goods manufactured or produced in India except ?

(a) alcoholic liquors for human consumption.

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this Entry.

96. Fees in respect of any of the matters of this List, but not including fees taken

in any court.

List II ? State List

6. Public health and sanitation; hospitals and dispensaries.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

24. Industries subject to the provisions of (entries 7 and 52) of List I.

26. Trade and commerce within the State subject to the provisions of Entry 33 of List-III.

27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List-III.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this Entry.

66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

List III ? Concurrent List

33. Trade and commerce in, and the production, supply and distribution of, -

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed; and (e) raw jute.

42. Acquisition and requisitioning of property.

47. Fees in respect of any of the matters in this List, but not including fees taken in any court."

31. The first thing to be noted is, as is well established, that the entries, in the 7th Schedule to the Constitution, are entries demarcating the legislative fields conferring jurisdiction on the respective legislature to enact laws. Article 246 (1) gives prominence and dominance to the Parliament in respect of legislative fields as enumerated in List I of the 7th Schedule. Sub-clause (2) thereof deals with

concurrent powers in respect of legislative fields, as enumerated in List-III of the 7th Schedule, but it makes the power of the State subject to power of the Parliament. Sub-clause (3) clearly stipulates that State has exclusive powers in respect of legislative fields covered by List-II. The scheme, thus, gives dominance to the Parliament, which has superior efficacy in the matter.

32. We may, then, refer to Article 254, which clearly refers to the concurrent list and, again, gives dominance to the parliamentary legislation with an exception that in any case of repugnancy between the parliamentary law and the State law, the State law can only be valid if it has been reserved for consideration of the President and has received its assent.

33. When we come to the legislative fields, we find that the expression "industries" is mentioned both in Entry 52 List I and Entry 24 List-II; but plainly, Entry 52 List I stipulates that industries, in respect of which declaration of expediency in public interest is made by the Union, would fall within Entry 52 List I and, accordingly, Entry 24 List-II would, to that extent, stand denuded of its legislative competence and, therefore, making the provisions, in Entry 24 List-II, subject, inter alia, to Entry 52 List I.

34. We may, now, refer to Entry 33 (a) List-III, which clearly stipulates that once an industry is declared in terms of Entry 52 List I, the products of such an industry would come within the concurrent jurisdiction. We may, then, refer to Entry 26 and 27 of List-II, which, again, are subject to the provisions of Entry 33 List-III.

35. Thus, simply put, the scheme is that, in absence of a declaration in terms of Entry 52 List I, industries would be a field of legislation available to the State in terms of Entry 24 List-II and trade and commerce, production, supply and distribution of goods associated with such industry would also fall within the legislative field reserved for the State in terms of Entry 26 List-II and Entry 27 List-II; but no sooner any legislation is made by the Parliament with a declaration in terms of Entry 52 List I in respect of an industry, such an industry goes out of the legislative field of the State from Entry 24 List-II. Consequent to such a declaration, the trade and commerce and the production, supply and distribution of the goods of the declared industry, would, then, come in Entry 33 of List-III, taking it out of Entry 26 and 27 respectively of List-II. In such an event, if the Parliamentary legislation, in respect of any industry, covers the field of trade and commerce, production, supply and distribution of goods of such an industry, then, by virtue of Article 254 of the Constitution of India, the parliamentary legislation would prevail unless the State legislation, in respect thereof, has been reserved for consideration of the President and received his assent.

36. We may, now, first, refer to the decision of the Constitution Bench, in Ch. Tika Ramji (supra), on which strong reliance is placed by learned Principal Additional Advocate General. The Constitution Bench decision, in Ch. Tika Ramji

(supra), dealt with the competence of the U.P. State Legislature to enact law with regard to sugarcane. In terms of Entry 52 of List I and the declaration contemplated therein, the Parliament had enacted IDR Act, 1951. In the Schedule thereto, Entry 25 was "sugar" meaning thereby "sugar industry". The contention was that sugar industry, having been declared, in terms of Entry 52 of List I, the State legislation, with regard to sugarcane, the raw material of the sugar industry, was beyond competence of the State Legislature. The Court rejected the argument.

37. In paragraph 24 of Ch. Tika Ramji (supra), the Court has clearly held that in view of the declaration in terms of Entry 52 List I, both sugar and sugarcane would not fall within Entry 52 List I as they are product and raw material of the industry. As a raw material, sugarcane would fall in Entry 27 List-II and sugar would fall in Entry 33 List-III. But sugarcane being foodstuff would, then, come to Entry 33 List-III and both the Parliament and the State Legislature would operate in concurrent fields. Clearly, what the Constitution Bench meant, in Ch. Tika Ramji (supra), was that sugarcane did not form part of the industry, as envisaged under Entry 52 List I, sugarcane being the raw material for the industry, which manufactures sugar and the Union declaration cover sugar and not sugarcane.

38. With regard to the above, we may note what was said in paragraph 18 if it is read with paragraph 23 of the decision, in Ch. Tika Ramji (supra), in relation to sugarcane. What is said is that sugarcane is the raw material and not the finished product of sugar industry and, therefore, though sugar would come under Entry 33 List-III, being product of controlled industry, sugarcane does not fall in it. Sugarcane, being raw material and not product of the industry, would, then, come under Entry 27 of List-II; but Entry 33 List-III was amended to include foodstuffs. The effect of this amendment to Entry 33 of List-III would be that, now, sugarcane would come within the scope of Entry 33 List-III and, as such, State would have concurrent legislative powers in respect of both sugarcane and sugar. In paragraph 34 of the report, their Lordships, in Ch. Tika Ramji (supra), took note of Section 18 G of the IDR Act to hold that IDR Act was not applicable to the raw material like sugarcane and, thus, sugarcane was not covered under the IDR Act. That being so, the field of legislation of the IDR Act and the Uttar Pradesh Act were different. Thus, the State legislation was upheld not because sugarcane fell within the legislative field under List-II, but because it fell within the legislative field of Entry 33 List-III.

39. Here, Mr. Satyabir Bharti, learned Counsel for the petitioners, points out that there is a basic difference or distinction. Firstly, in Ch. Tika Ramji (supra), while dealing with sugar industry, the product sugar was held to fall within Entry 33 of List-III, that is, the concurrent jurisdiction, but when we come to the present case, the Entry, in the Schedule of IDR Act, is Entry 26 "fermentation industry", which is quoted hereunder:

"The First Schedule

26. Fermentation Industries:

(1) Alcohol

(2) Other products of fermentation industries."

40. Therefore, the declaration, in terms of Entry 52 of List I, is also in respect to products of such a fermentation industry. This is a vital distinction. We will advert to this again.

41. The learned Principal Additional Advocate General, then, argued that the concept of repugnancy, as contemplated in Article 254 of the Constitution of India, is actual and factual repugnancy as between the statutes of the Parliament and the State. According to him, unless there is a Parliamentary legislation, rules or statutory orders issued by the Parliament to which the State legislation is in direct conflict, being repugnant and the two legislations, one made by Parliament and the other by a State Legislature, cannot stand together, the legislative act of the State cannot be questioned. We regret our inability to accept this proposition, for, this has been clearly considered and answered by two Constitution Benches judgments of the Supreme Court.

42. We may, first, refer to the Constitution Bench judgment in the case of Hingir-Rampur Coal Co. Ltd. and others v. The State of Orissa and others (AIR 1961 Supreme Court 459). Here, the question for consideration was the challenge to the validity of the Orissa Mining Areas Development Fund Act, 1952, the State enactment, the validity of which was challenged, as being repugnant to the Central legislation, being Mines and Minerals (Regulation and Development) Act, 1948. The Central Act had declaration in terms of Entry 54 List I, which is similar to Entry 52 List I. What their Lordships held, in paragraphs 23 and 24 of the report, being relevant, are reproduced herein below:

"23. ???If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union to the extent of such declaration the jurisdiction of the State Legislature is excluded. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field occupied by the impugned Act, the impugned Act would be ultra vires, not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law??..

24. ?? Section 6 of the Act, however, empowers the Central Government to make rules by notification in the official gazette for the conservation and development of minerals. Section 6(2) lays down several matters in respect of which rules can be framed by the Central Government. This power is, however, without prejudice to the generality of powers conferred on the Central Government by Section 6(1). Amongst the matters covered by Section 6(2) is the levy and collection of royalties, fees or taxes in respect of minerals mined, quarried, excavated or collected. It is true that no rules have in fact been framed

by the Central Government in regard to the levy and collection of any fees; but, in our opinion, that would not make any difference. ??????????. Therefore, if a Central Act has been passed for the purpose of providing for the conservation and development of minerals, and if it contains the requisite declaration, then it would not be competent to the State Legislature to pass an Act in respect of the subject matter covered by the said declaration. In order that the declaration should be effective it is not necessary that rules should be made or enforced; ???????. In such a case the test must be whether the legislative declaration covers the field or not."

(Emphasis is added)

43. We may, now, refer to the case of *State of Orissa v. M.A. Tulloch & Co.*, (AIR 1964 Supreme Court 1284), which was, again, a case dealing with Entry 54 List I. The contention of the State is noted in paragraph 10. We would be concerned with the first and the second question so framed being (i) that the object and purpose of the State Act and its provisions were quite different and distinguished from the object and purpose of the Central Act with the result that the two enactments could validly co-exists, since they covered different fields and, (ii) even if the Central Act covers the same field, there would be no conflict unless rules were made effective and operative under the Central Legislation covering the field occupied by the State Act. The contention of the respondent, as noted in paragraph 11 of the report, was that the extent of parliamentary law had to be taken from the declaration made about its expediency in terms of Entry 54 List I. In paragraph 13 of the report, the contention of the State, with reference to the decision, in *Ch. Tika Ramji* (supra) and, in particular, to the statement therein that the possibility of an order under Section 18 G being issued by the Central Government could not be enough, was that the existence of such an order would be the essential pre-requisite before any repugnancy could even arise. The Court rejected the contention as noted in paragraph 14 of the reports and held that the law had been settled, in *Hingir-Rampur Coal Co.* (supra), the relevant observations, appearing at paragraph 14, read as follows:

"14. ?? In order that the declaration should be effective it is not necessary that rules should be made or enforced. All that this required is a declaration by Parliament that it is expedient in the public interest to take the regulation and development of mines under the control of the Union. In such a case, the test must be whether the legislative declaration covers the field or not."

(Emphasis is supplied)

44. Their Lordships further held, in paragraph 15 of *Hingir-Rampur Coal Co.* (supra), thus:

"15. ??The test of two legislation containing contradictory provisions is not, however, the only criterion of repugnancy, for, if a competent legislature, with a superior efficacy, expressly or impliedly, evinces by its legislation an intention to cover the whole field, the enactments of the other legislature, whether passed

before or after, would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes, but by the mere existence of the two pieces of legislation??"

(Emphasis is supplied)

45. It may be noted that in *Ishwari Khetan Sugar Mills (P) Ltd.* (supra), the Supreme Court has held that Entry 52 (I) and Entry 54 (I) of the 7th Schedule are substantially in pari materia.

46. Thus, the contention of the learned Principal Additional Advocate General has twice been rejected by the Constitution Bench, both with regard to necessity of subordinate legislation and the concept of repugnancy. [See *Hingir-Rampur Coal Co.* (supra) and *M.A. Tulloch & Co.* (supra)].

47. Then, the learned Principal Additional Advocate General referred to the case of *Ishwari Khetan Sugar Mills (P) Ltd.* (supra). In this case, which is a Constitution Bench judgment as well, the question was with regard to the validity of U.P. Sugar (Undertaking Acquisition) Act, 1971. One of the main grounds of challenge was that this legislation related to sugar industry, which was a declared industry and, as such, in view of the provisions of the IDR Act and the declaration, in terms of Entry 52 of List I, contained therein, State had no power to legislate. The State legislation was upheld not because of its competence under List-II of the 7th Schedule, but only because it related to legislation referable to Entry 42 List-III, which was "acquisition and requisition of property".

48. In our view, the decision, in *Ishwari Khetan Sugar Mills (P) Ltd.* (supra), does not help the State in any manner. The learned Principal Additional Advocate General also referred to the decision of Supreme Court, in *Lalta Prasad Vaish* (supra), wherein a Bench of three Judge has doubted the correctness of the seven Judge Constitution Bench decision in *Synthetics and Chemicals Limited* (supra).

49. All we can say is that this is only an order of reference. In the light of the fact that Article 141 of the Constitution of India makes the law, declared by the Supreme Court, binding on all Courts within the territory of India and the seven Judge Constitution Bench decision, in *Synthetics and Chemicals Limited* (supra), remains intact, to which we shall refer to, we are bound by the law as declared by the Supreme Court, in *Synthetics and Chemicals Limited* (supra), which, in clear and unambiguous terms, holds that the State has no legislative competence in respect of, inter alia, rectified spirit and/or denatured spirit, which is unfit for human consumption and, that being so, there is no escape from the fact that the notification and the letter of the State, as impugned, are constitutionally invalid and unenforceable.

50. At this stage, we may point out that the learned Principal Additional Advocate General has endeavored hard to persuade us to take the view that by virtue of

the decision, in Ch. Tika Ramji case (supra), the products of fermentation industry, namely, rectified spirit and denatured spirit, would fall under Entry 33 List-III of the Constitution and the State would have concurrent jurisdiction to legislate in respect of them. So far so good. But the problem, in our view, is that we cannot ignore the fact that unlike sugar industry, the entry, in the Schedule of IDR Act, is different there. Item No. 26 of the first schedule of the IDR Act, 1951, is exhaustive inasmuch as it reads, as already reproduced above, thus, "26. Fermentation Industries: (1) Alcohol (2) Other products of fermentation industries." From the fact that fermentation industry include alcohol and other products, the fermentation industry, coupled with the provisions of Section 18 G of the IDR Act, clearly confer power on the Central Government to issue notified orders, provide for regulating supply and distribution of articles relating to Scheduled industries, trade and commerce therein. Sub-section (2) thereof specifically refers to licence, permits, possession and consumption as also other incidental and supplementary matters.

51. Apparently, taking help from Ch. Tika Ramji's case (supra), it was urged by the learned Principal Additional Advocate General that the Central Government, not having notified any order under Section 18 G, the legislative field was open and available to the State Government. This contention has been negated by the two Constitution Bench decisions, in M.A. Tulloch (supra) and Hingir-Rampur Coal Co. (supra), wherein, having taken note of the decision, in Ch. Tika Ramji's case (supra), their Lordships clearly held that the power being there, the field is occupied and the rules or notifications thereunder are not necessary. Thus, the whole argument of the learned Principal Additional Advocate General on this line cannot be accepted. The State lacks the legislative power to legislate and, consequently, issue notifications, such as, the impugned ones. The impugned notification as also the impugned letter are, therefore, clearly ultra vires the Constitution.

52. To sum up, in our judgment, the effect in so far as we are concerned, in the present case, of the declaration contained in Section-2 of the IDR Act, 1951, in terms of Entry 52 List I of the 7th Schedule of the Constitution, in relation to "fermentation industry" with "alcohol" and "other products of fermentation industry", as appearing in Entry 26 of the first Schedule of the said Act read with Section 18 G of the said Act and the decisions, in Tika Ramji's case (supra), M.A. Tulloch (supra) and Hingir-Rampur Coal Co. (supra), is that the field of legislation, in respect of "fermentation industry" including "alcohol" and "other products of the fermentation industry", being covered by the declaration for expediency to control, would entirely fall within the legislative field reserved for the Parliament. By virtue of Article 246, State Legislature would be denuded of this entire legislative field. Thereafter, the products of such an industry would fall within Entry 33 of List-III. Again, in view of the declaration in terms of Entry 52 List I, read with Section 18 G of the IDR Act, the Union evincing its intention to cover the field of legislation in respect of supply, distribution, trade and commerce of the products relating to the Scheduled industry by virtue of Article

246 (2) and Article 254 of the Constitution, the concurrent power of the State under Entry 33 List-III stands denuded too. The significance of Article 246 (2) is to be gathered from the use of the expressions "Notwithstanding anything in Clause (3)", i.e., notwithstanding exclusive legislative field of State legislature, and "subject to clause (1)", i.e., subject to exclusive field of Union Legislature, the Union Legislature has overriding power to legislate in respect of matters enumerated in List-III, the Concurrent List denuding, thus, the State Legislature of the legislative field covered by Union Legislation. The repugnancy, in terms of Article 254 of the Constitution of India herein, arises not because of any conflict, actual and factual, between statutes made by the Parliament and the State, but because State has no field left in that regard to legislate. This is what has been ultimately held, in the seven Judge decision of the Supreme Court, in *Synthetics and Chemicals Limited* (supra). State's legislative field is, then, limited by virtue of Article 246 (3) to intoxicating liquors by virtue of Entry 8 List-II only. Thus, alcohol unfit for human consumption, including spirit and denatured spirit, which is not intoxicating liquor, remains within the exclusive domain of the Union Parliament and State is denuded of the said field of legislation.

53. Here, we may notice yet another argument advanced by the learned Principal Additional Advocate General. He has submitted that if this Court takes the view that State has no power to legislate in respect of denatured spirit or rectified spirit, then, there would be no licence that could be granted by the State in respect of rectified spirit or denatured spirit and, in absence of licence, no trade or business could be done nor could any industry in respect thereof be set up.

54. Our simple answer is we are, now, governed by the Constitution, which gives fundamental rights to trade or do business, unless regulated by law made by competent Legislature. If no licence is provided, then, its free trade. Gone are the days that no business could have been done without licence. Even where regulation by licences is provided, it has to be tested on the touchstone of reasonableness under Article 19 (6) and non-arbitrariness under Article 14.

55. Now, we may refer to another argument of the learned Principal Additional Advocate General on behalf of the State. The argument is that to prevent possible misuse of denatured spirit, which is otherwise unfit for human consumption, in view of the prohibition policy of the Government, it became necessary to prohibit its possession or use in any form. The answer to this is to be found in the Constitution Bench judgment of the Supreme Court, in *State of Bombay and another v. F.N. Balsara*, (AIR 1951 Supreme Court 318). In that case, pursuant to the Bombay Prohibition Act and in furtherance of the State policy under Article 47 of the Constitution of India, restriction was imposed on, apart from alcoholic beverages, on all liquids consisting of or containing alcohol, which included toilet or medicinal preparations containing alcohol. The Bombay High Court held the restrictions imposed to be unreasonable and void, which decision was affirmed by the Supreme Court and the plea of possibility of abuse justifying prohibition was not accepted. It is for this reason that we are of the

opinion and we have already held that the power of the State extends only to regulate such products to prevent possible abuse; but cannot, in any case, extend to prohibition as these products are unfit for human consumption and would neither fall within the object of Article 47 of the Constitution of India nor would it be *res extra commercium*.

56. Now, before adverting to the decisions of the Supreme Court in relation to alcohol, unfit for human consumption (rectified spirit/denatured spirit), it would be necessary to note the industrial process, which is not disputed by the parties. Distilleries are basically of two types. Molasses based or grain based. Initially, water and yeast are added to the aforesaid to produce fermented wash, which is, then, distilled, the product obtained as rectified spirit, containing 95% ethyl alcohol or ethanol. This is by itself unfit for human consumption as it is. When this rectified spirit is diluted by water, we get what we called country spirit/liquor, which is, then, potable. The second usage of rectified spirit, as such, is by adding denaturants to it, rendering it unfit for human consumption. This denatured spirit or special denatured spirit, both unfit for human consumption, then, go to organic chemical industries for manufacturing various other products. Rectified spirit, which is natural alcohol, may further be distilled for purity, which, then, produces Extra Neutral Alcohol (ENA), which by itself is, again, not fit for human consumption. It is, then, used after certain dilution processes to manufacture Indian made foreign liquor or exported from the distilleries, as such, to other units.

57. The question that arose is, as to what is the point, where State gets legislative competence and to what extent the State's regulatory power or power to impose tax and fee extends. So far as taxes are concerned, the fields of legislation are clear. The Union Government has taxing powers, as per taxing entries, specified in List I to the 7th Schedule to the Constitution with residuary power in Entry 97 of List I. Entry 84 of List I is the field of legislation in respect of excise duties; but it specifically excludes alcoholic liquor for human consumption. When we come to List-II, the taxing entry is Entry 51 List-II in respect of alcoholic liquor for human consumption. List-III, the Concurrent List, does not contain any taxing entry. So far as fee is concerned, the relevant entries are Entry 96 in List I, Entry 66 in List-III and Entry 47 in the Concurrent List; but there is Entry 8 in List-II dealing specifically with intoxicant liquor including production, manufacture, possession, transport, purchase and sale thereof.

58. We have already noted earlier that the IDR Act, 1951, was enacted by the Parliament with the requisite declaration in terms of Entry 52 List I to the 7th Schedule to the Constitution. In the Schedule thereto, Entry 26 is fermentation industry and it is specified as alcohol and products of fermentation industries. Section 18 G of the IDR Act confers authority on the Central Government to, inter alia, regulate the supply and distribution of trade and commerce in relation to any article relatable to any scheduled industries. Sub-section (2) thereof provides for regulation by licence, permit, transportation, disposal, acquisition,

possession, use or consumption of any such article. It cannot be disputed that these are very wide powers in relation to fermentation industry. The products of such industries, including alcohol, is covered by the declaration.

59. The first decision, we would like to refer to, is the seven Judge Constitution Bench decision, in *Synthetics and Chemicals Limited* (supra). The questions involved are noted in paragraph 2, the relevant part thereof is reproduced hereinbelow:

"2. ??The questions with which we are mainly concerned are the following :

(i) whether the power to levy excise duty in case of industrial alcohol was with the State legislature or the Central legislature?

(ii) what is the scope and ambit of Entry 8 List-II of the Seventh Schedule of the Constitution?

(iii) whether, the State Government has exclusive right or privilege of manufacturing, selling, distributing, etc. of alcohols including industrial alcohol. In this connection, the extent, scope and ambit of such right or privilege has also to be examined."

60. Their Lordships' observations made in paragraph 4, in *Synthetics and Chemicals Limited* (supra), being relevant, are reproduced hereinbelow:

"4. ?? It is essential that there should be uniformity in the industry so that these are free from the vagaries and arbitrary and differential treatment meted out from State to State and even in the same State from time to time??"

61. As noted in paragraph 53 of the reports, one of the contentions of the State was that it is all sorts of alcohol that would come within the control of the State as the State has exclusive right to deal in liquor. The Constitution Bench, in *Synthetics and Chemicals Limited* (supra), did not accept this argument and held, in paragraphs 53 and 54, as follows:

"53. ??..These submissions have been made on the assumption that industrial liquor or ethyl alcohol is for human consumption. It is important to emphasise that the expression of Constitution must be understood in its common and normal sense. Industrial alcohol as it is, is incapable of being consumed by a normal human being. The expression "consumption" must also be understood in the sense of direct physical intake by human beings in this context. It is true that utilisation in some form or the other is consumption for the benefit of human beings if industrial alcohol is utilised for production of rubber, tyres used. The utilisation of those tyres in the vehicle of man cannot in the context in which the expression has been used in the Constitution, be understood to mean that the alcohol has been for human consumption.

54. We have no doubt that the framers of the Constitution when they used the expression "alcoholic liquor for human consumption" they meant at that time and still the expression means that liquor which as it is, is consumable in the

sense capable of being taken by human beings as such as beverage of drinks. ??."

(Emphasis is supplied)

62. This is what their Lordships further held, in *Synthetics and Chemicals Limited* (supra), at paragraph 74:

"74. It has to be borne in mind that by common standards ethyl alcohol (which has 95 per cent) is an industrial alcohol and is not fit for human consumption. The petitioners and the appellants were manufacturing ethyl alcohol (95 per cent) (also known as rectified spirit) which is an industrial alcohol. ISI specification has divided ethyl alcohol (as known in the trade) into several kinds of alcohol. Beverage and industrial alcohols are clearly and differently treated. Rectified spirit for industrial purposes is defined as "spirit purified by distillation having a strength not less than 95 per cent of volume by ethyl alcohol". Dictionaries and technical books would show that rectified spirit (95 per cent) is an industrial alcohol and is not potable as such. It appears, therefore, that industrial alcohol which is ethyl alcohol (95 per cent) by itself is not only non-potable but is highly toxic. The range of spirits of potable alcohol is from country spirit to whisky and the ethyl alcohol content varies between 19 to about 43 per cent. These standards are according to the ISI specifications. In other words, ethyl alcohol (95 per cent) is not alcoholic liquor for human consumption but can be used as raw material input after processing and substantial dilution in the production of whisky, gin, country liquor, etc. In many decisions, it was held that rectified spirit is not alcohol fit for human consumption??."

(Emphasis is added)

63. Their Lordships answered the question with regard to the scope of Article 47 of the Constitution of India and clearly held, in *Synthetics and Chemicals Limited* (supra), that Article 47 would cover only intoxicant drinks. Their Lordships further elaborated this in paragraph 80, which reads thus:

"80. It was submitted that the activity in potable liquor which was regarded safe and exclusive right of the State in the earlier judgments dealing with the potable liquor were sought to be justifiable under the police power of the State, that is, the power to preserve public health, morals, etc. This reasoning can never apply to industrial alcohol manufactured by industries which are to be developed in the public interest and which are being encouraged by the State. In a situation of this nature, it is essential to strike a balance and in striking the balance, it is difficult to find any justification for any theory of any exclusive right of a State to deal with industrial alcohol??."

64. Their Lordships, then, in paragraph 85 of the reports, as quoted hereunder, considered the IDR Act and this is what their Lordships held:

"85. After the 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as Item 26 of the First Schedule to IDR Act the control

of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non-potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the central licences under IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which they do not possess. Nor can the States claim exclusive right to produce and manufacture industrial alcohol which are manufactured under the grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under such grant be amenable to States? claim of exclusive possession of privilege. The State can neither rely on Entry 8 of List-II nor Entry 33 of List-III as a basis for such a claim. The State cannot claim that under Entry 33 of List-III, it can regulate industrial alcohol as a product of the scheduled industry, because the Union, under Section 18-G of the IDR Act, has evinced clear intention to occupy the whole field??"

65. From the decision, in *Synthetics and Chemicals Limited* (supra), what can safely be gathered is that the Union, having, in exercise of power under Section 18 G of the IDR Act, evinced its clear intention to occupy the whole field of fragmentation industries, the State cannot impose any prohibition on the manufacturing and trading of industrial alcohol, though it may have, in respect of non-potable alcohol or industrial alcohol, regulatory power so that non-potable alcohol is not misused or used as potable alcohol. This aspect becomes more than evident, when we come to the observations made, in *Synthetics and Chemicals Limited* (supra), at paragraph 86, in relation to non-potable alcohol, which read as follows:

"86. The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:

(a) ??

(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol???"

(Emphasis is supplied)

66. From the decision of the Constitution Bench, in *Synthetics and Chemicals Limited* (supra), it is, now, undisputedly, clear that in spite of the fact that rectified spirit could, later, be converted into, and used as, potable spirit, it cannot be termed as alcohol fit for human consumption. Thus, once denaturants are added to rectified spirit, it renders it permanently unfit for human consumption and both, spirit and denatured spirit, are not within the legislative competence available to the State except for the purpose of exercising regulatory power.

67. Next, we may refer to the case of Vam Organic Chemicals Limited (supra). A similar dispute was, again, raised and this is what their Lordships held, in paragraph 22, of the reports:

"22. Article 246 gives to Parliament exclusive power to make laws with respect to the matters enumerated in List I of the Seventh Schedule. Entry 84 of List I and Entry 51 of List-II were construed by this Court in Synthetics case to hold that Parliament alone has the exclusive power to legislate and levy excise tax in respect of industrial alcohol. It is unnecessary to refer to the law with regard to the comparative competence of the Union and the States with regard to levy of excise, regulation and control of industrial alcohol prior to the decision of the Constitution Bench in Synthetics. Whatever the law was earlier, the decision in Synthetics now holds the field??"

(Emphasis is supplied)

68. Situated thus, it becomes transparent that the decision of the Constitution Bench, in Synthetics and Chemicals Limited (supra), is binding on all the Courts and is, therefore, binding on this Court too.

69. It appears that a question was raised that as industrial alcohol is the basis for manufacturing alcoholic liquor, State would have the jurisdiction. The reply, which appears in paragraph 23 of Vam Organic Chemicals Limited (supra), reads as follows :

"23. The principle was succinctly reiterated in State of U.P. v. Modi Distillery where it was said that the State's power to levy excise duty was limited to alcoholic liquor for human consumption and that the framers of the Constitution, when they used the expression "alcohol liquors for human consumption", meant, and the expression still means, that liquor which, as it is, is consumable in the sense that it is capable of being taken by human beings as such as a beverage or drink. ?Dictionaries and technical books showed that rectified spirit (95 per cent) was an industrial alcohol and not potable as such?.Therefore even if ethyl alcohol (95 per cent) could be used as a raw material or input, after processing and substantial dilution, in the production of whisky, gin, country liquor etc. nevertheless, it was not "intoxicating liquor" which expression meant only that liquor which was consumable by human beings as it was.

Thus the State cannot legislate on industrial alcohol despite the fact that such industrial alcohol has the potential to be used to manufacture alcoholic liquor."

(Emphasis is added)

70. From the observations made above, in Vam Organic Chemicals Limited (supra), it becomes more than abundantly clear that the State cannot legislate on industrial alcohol, though the industrial alcohol has the potential for use in manufacturing alcoholic liquor.

71. Then, we may refer to the decision of Mohan Meakin Limited (supra), where,

once again, similar dispute arose. The question for consideration is to be found in paragraph 10 of the reports and this is what their Lordships held, in paragraphs 24, 25 and 26:

"24. The State has to make distinction between a malt spirit of over-proof strength and potable liquor. Entries 8, 51 and 66 of List-II of the Seventh Schedule of the Constitution of India confer jurisdiction upon the State only to exercise its legislative control in respect of matters which are covered thereby. Industrial alcohol or spirit having regard to Entry 52 of List I of the Seventh Schedule of the Constitution of India cannot be the subject-matter of any regulation or control by the State, it being not alcoholic liquor for human consumption. The question is well settled in view of the decision of a seven-Judge Bench of this Court in *Synthetics and Chemicals Ltd. v. State of U.P.*?"

25. The doctrine of *res extra commercium* as applied by this Court in respect of potable alcohol in its various judgments including *Khoday distilleries Ltd. v. State of Karnataka* and *State of Punjab v. Devans Modern Breweries Ltd.* would have no application to industrial alcohol which is produced in an industry controlled and regulated in terms of Entry 52 of List I of the Seventh Schedule of the Constitution of India.

26. If manufacture and transport of industrial alcohol and/or malt spirit of over-proof strength is not *res extra commercium* in view of the binding decisions of this Court in *Synthetics and Chemicals Ltd.*, it is axiomatic that the provisions of Article 301 of the Constitution of India shall apply in relation to inter-State trade. The State's power to exercise control of inter-State transport which is within the exclusive legislative competence of Parliament having regard to Entry 42 of List I of the Seventh Schedule of the Constitution of India would, thus, be limited. Its power to impose compensatory tax and/or fee would also be limited as envisaged by Article 304 (b) of the Constitution of India."

(Emphasis is supplied)

72. Thus seen, the judicial authorities and the binding precedents are galore and clear that so far as industrial alcohol is concerned, i.e., rectified spirit and denatured spirit, it is completely covered by the field of legislation reserved for the Union. In view of the provisions of the IDR Act and the declaration contained therein, the power of the State is only regulatory not prohibitory. It may be noted that once rectified spirit, which could be used for alcoholic liquor, though itself is unfit for human consumption, is added with denaturants, it is rendered permanently unfit for human consumption taking it away, thereafter, from State's legislative field.

73. To conclude, we would only refer to the decision of the Supreme Court, in *Khoday Distilleries Ltd. v. State of Karnataka*, reported in (1995) 1 Supreme Court Cases 574, and, in particular, what their Lordships have held, in paragraph 60 of the reports, the relevant part whereof is reproduced hereinbelow:

"60. ???..

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 I the same in the interests of general public.

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

(m) The restrictions placed on the trade or business in industrial alcohol or in 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."

(Emphasis is added)

74. Considered in the light of the above observations made, in Khoday Distilleries Ltd. (supra), there can be no escape from the conclusion that State cannot prohibit trade and commerce in industrial alcohol although, as already indicated above, State can place reasonable restrictions on such trade or commerce in the interest of general public under Article 19(6) of the Constitution of India. Logically extended, one cannot escape from holding, and we do hold, that neither the impugned notification, dated 04.02.2016, nor the impugned letter, dated 17.03.2016, has any legal sanctity and validity much less enforceability.

75. There remains yet some subsidiary issues. The first is with regard to the notification, dated 04.02.2016, insofar as compulsory destruction of denatured spirit or bye-product by distilleries has been ordered. These are commercial products of an industrial unit, they are industrial alcohol. Apart from the State's lacking the legislative jurisdiction in respect thereof, the compulsory destruction would amount to its confiscation. It is commercial product, having commercial value, notification by the executive would not be law or procedure established by law as contemplated under Article 300-A of the Constitution of India, for, any deprivation of property, in terms of Article 300-A, has to be by law. A notification issued, not under any law, cannot take away property rights even though it is not a fundamental right. It is constitutionally protected right in terms of Article 300-A. There is no gainsaying as urged by the learned Principal Additional Advocate General that as liquor for human consumption has been banned, concept of confiscation could not apply. Denatured spirit is legitimately produced as a commercial commodity and the State has no competence to ban it. Thus, on this count also, the impugned notification, dated 04.02.2016, or the impugned letter, dated 17.03.2016, cannot be sustained.

76. We may usefully refer to the decision of the Supreme Court, in K.T. Plantation Private Limited and another v. State of Karnataka, reported in (2011)

9 Supreme Court Cases 1, wherein scope of Article 300-A and the necessity to pay compensation, which must be just, fair and reasonable, has been discussed, in absence whereof, even the law, made by the legislature, cannot be upheld valid.

77. The last question is as to whether any restriction on the fundamental right to carry on trade or business can be imposed by executive fiat or mere executive notification or letter. The straight answer must be no. Once it is accepted that right to manufacture industrial alcohol and to deal with industrial alcohol is a right guaranteed under Article 19 (1) (g), where Article 47 of the Constitution has no application, the rights, under Article 19 (1) (g), can only be restricted or regulated in a reasonable manner by law [Article 19 (6)]. Article 13 of the Constitution clearly provides that any law, which is inconsistent to the rights contained in Part-III, would be void. The law, in this context, could be the "law" made by the legislature or under authority of the legislature and not by executive fiat or executive instructions. We may only quote what was said, in paragraph 21, by a Division Bench of this Court, in State of Bihar and others v. M/s. Oswal Chemicals & Fertilizers Ltd. and others, (AIR 2001 Patna 184), which is reproduced hereunder:

"21. The law is well settled by catena of judgments of the Supreme Court that restrictions to the freedom guaranteed under Article 19 of the Constitution must be by a law or order having statutory force and not by executive instructions."

78. We may further, with regard to the above, refer to the decision of the Supreme Court, in State of Bihar and others v. Project Uchcha Vidya, Sikshak Sangh and others, reported in (2006) 2 Supreme Court Cases 545, and, in particular, what was held by their Lordships, in paragraph 69 of the report, which read as follows:

"69. The right to manage an institution is also a right to property. In view of a decision of an eleven-Judge Bench of this Court in T.M.A. Pai foundation v. State of Karnataka establishment and management of an educational institution has been held to be a part of fundamental right being a educational institution has been held to be a part of fundamental right being a right of occupation as envisaged under Article 19 (1) (g) of the Constitution. A citizen cannot be deprived of the said right except in accordance with law. The requirement of law for the purpose of clause (6) of Article 19 of the Constitution can by no stretch of imagination be achieved by issuing a circular or a policy decision in terms of Article 162 of the Constitution or otherwise. Such a law, it is trite, must be one enacted by the legislature."

(Emphasis is supplied)

79. Thus seen, both, the impugned notification, dated 04.02.2016, and the impugned letter, dated 17.03.2016, cannot be held to be valid as they would clearly be unreasonable restrictions falling foul with Article 19 (1) (g) of the Constitution.

80. In the last writ petition, being C.W.J.C. No.10598 of 2016, which, as noted above, has been filed by a grain based industry, the grievance of the petitioner is that solely because it has dared to file another writ petition, being C.W.J.C. No.7634 of 2016, challenging the notification of the State Government, dated 04.02.2016, with regard to compulsory destruction of denatured spirit, the petitioner is being deprived of export permit in respect of its main product ENA, which is unfit, as such, for human consumption. The petitioner has brought on record the counter affidavit of the State filed in the writ petition, being C.W.J.C. No.7634 of 2016, wherein, State has admitted, in paragraph 15, that as other distilleries had not challenged the decision of the Government and were acting pursuant to directions and orders of the Government, it was thought necessary to grant permit to them for export of ENA. It admitted that as some breweries challenged the prohibition policy, the Government decided to withhold the export permit. In paragraph 16 of the counter affidavit, as appended, this is what the Government's stand is, the relevant part whereof is reproduced hereunder:

"16. ??.. Since, the matter relating to destruction of denatured spirit and other allied matters were sub-judiced in C.W.J.C. No.7634 of 2014, it was found not desirable to issue necessary permit for export of ENA in favour of petitioner till the final disposal of the said writ petition."

81. The petitioner has also annexed a copy of the export permit granted to another distillery, namely, M/s. S.C.I. India Limited, by the State, as late as on 22.06.2016.

82. It was, accordingly, submitted that the sole basis, on which the petitioner's industry is virtually being driven to closure by the State, by not permitting to export its main product, ENA, which is neither taxable nor any export permit fee is levied in the State, is on account of the fact that the petitioner has chosen to challenge the authority of the State in respect of compulsory destruction of denatured spirit. This is, according to the petitioner, nothing, but an attempt to thwart or stifle bona fide litigation by mala fide means, which is, in the light of the judgment of the Supreme Court, in Pratap Singh and another v. Gurubaksh Singh, (AIR 1962 Supreme Court 1172) clearly a criminal contempt.

83. We asked the State to file that a counter affidavit. The counter affidavit, so filed, clearly admitted, again, in paragraph 9, that as the matter in relation to destruction of denatured spirit was sub-judice, it was decided, in good faith, not to issue export permits for ENA to the petitioner, awaiting the decision of the Court on petitioner's writ petition, being C.W.J.C. No.7634 of 2016. In paragraph 16 of the counter affidavit, the State has admitted that it has granted export permit in favour of S.C.I. India Limited, which had not litigated any matter in this Court.

84. A supplementary affidavit was, then, filed by the writ petitioner bringing on record the notings of the Principal Secretary of the Department, clearly showing that it is only because this petitioner has chosen to challenge the Government

policy, it is being deprived of the export permit. This was in spite of recommendation of the other authorities that export permit be granted.

85. The matter was, then, taken up by the Court on 05.08.2016, where we took a serious note of the events, which were undermining the authority of the Court and was destructive of the principles of judicial review, by trying to punish a person, who comes to the Court for redressal of his grievances. We adjourned the matter for State to reconsider the matter.

86. From further supplementary affidavit that has, now, been filed along with an application made, on behalf of the writ petitioner, for amendment of additional prayer, order of the Government, dated 06.08.2016, has been brought on record to show that after the matter was adjourned by the Court, State, now, has issued direction that all companies, which manufacture Indian Made Foreign Liquor (IMFL) including beer as also ENA, would be required to give a bank guarantee of Rs. one crore in favour of the Government. By amendment petition, the authority of the State to demand bank guarantee, valid for a period of one year of an amount of Rs. one crore, from exporters of ENA has been challenged. We have allowed the amendment. The prayer, sought for by the amendment, is to invalidate the said condition in so far as ENA export is concerned.

87. A counter affidavit has, now, been filed by the State stating that in the month of February, 2016, a truck, loaded with beer, in course of transit from Bihar to State of Jharkhand, was hijacked in Aurangabad district. Now, with prohibition having been introduced with effect from 05.04.2016, apprehensions are greater with regard to misuse or looting of ENA. It is in the light of this that the companies, which have to export IMFL or ENA, are required to furnish bank guarantee of Rs. one crore. It is not that the petitioner alone has been asked to do so. Enclosed are two letters of the State Government, dated 04.07.2016, and, the later part of this impugned letter, dated 06.08.2016. It is further submitted that all other distilleries are complying with the order of furnishing bank guarantee and, in view of statutory rules made by the State, under Section 89 of the Excise Act, 1915, vide notification No.471-F, dated 15.01.1990, Rule 10 B (1), which deals with export of foreign liquor to other provinces in India, there being provisions for bond, the demand of bank guarantee is valid.

88. We have considered the matter. The first thing we would like to point out is that ENA was never considered as intoxicant, fit for human consumption. State has no jurisdiction nor has the State ever sought to exercise any jurisdiction to tax the production or sale of ENA. There is no excise duty liability. There was a nominal export pass fee. This apart, the State's stand is, that after imposition of prohibition, as a purported incentive to manufacturers and exporters of ENA, even this export pass fee has been waived. Thus, the State is not to gain any revenue out of ENA; then, why this bank guarantee of Rs. one crore, which would, undoubtedly, require the industry to make substantial deposits with the bank as collateral to cover the bank guarantee causing it great financial strain. This is understandable for IMFL or beer as they are revenue earners for State.

89. Mr. Satyabir Bharti, learned Counsel for the petitioners, further points out, that already the entire assets of the distillery and the distillery itself are virtually pledged to the State and that the only reason for imposing such a condition is to justify its otherwise mala fide action. The submission, on behalf of the petitioners, as noted above, cannot be said to be unfounded.

90. The State, first, stated that, in April, 2016, a truck of beer was hijacked. Who is the loser would be the question? The excise duties and taxes were paid and it is the brewery that lost its stocks, not the State. Be that as it may, in spite of this, after 05.04.2016, as late as on 26.06.2016, other distilleries were issued export permit for ENA, but on the spacious plea that petitioner had challenged Government Notification, dated 02.04.2016, with regard to denatured spirit, the export permit for ENA was denied to the petitioners. Thereafter, on 04.07.2016, the condition of bank guarantee of Rs. one crore was imposed only in relation to beer industry. As apparent from the State's own counter affidavit, which is understandable, because beer is a State excisable commodity; but, then, only when, on 05.08.2016, we adjourned the matter, taking a very serious view of the events, on 06.08.2016, general direction was issued imposing condition of bank guarantee of Rs. one crore on all exporters of IMFL, beer and ENA.

91. We may note that, now, probably, there is no IMFL manufacturer left in Bihar. The justification is Rule 10 B (1) of the Rules, as noted above. A plain reading of the Rule shows that it applies only to export of foreign liquor, which is an excisable commodity in this State, Rule 10B(1) has no application, nor can it have any application, to non-potable industrial alcohol like ENA.

92. We may, now, note the argument of the learned Principal Additional Advocate General repeated once again, as noted and rejected earlier, that as spirit means any liquor containing alcohol [Section 2 (19)], liquor includes spirit [Section 2 (14)] and intoxicant for the purpose of the Act means any liquor [Section 2 (12a)], ENA is an intoxicant and, therefore, State has jurisdiction over ENA and it can impose such a condition to safeguard against loss of ENA in transit.

93. Firstly, we have already answered the question whether State has jurisdiction over ENA or not. It has been settled by the Supreme Court, in Synthetics and Chemicals Limited (supra), that ENA is unfit for human consumption, it is industrial alcohol and State cannot tax it. Then, the question is, if the State has no pecuniary interest in ENA unlike IMFL or beer, and so was understood by the State itself, till we adjourned the matter, on 05.08.2016, then, why, on 06.08.2016, the condition of bank guarantee, as required for IMFL and beer, was extended to ENA, which was never there earlier. Rule 10 B (1), which is a pre-constitutional Rule, cannot be extended to non-potable liquor like ENA.

94. We are, thus, constrained to hold, especially, in view of the facts and situations noted above, that the condition of bank guarantee, as imposed for facilitating exports, is a colourable exercise of power, only to spite the industry, which has challenged the authority of the State and, to justify its, otherwise,

mala fide and contemptuous action. We will deal with this aspect of contempt, as we prima facie opine that the defence is only a pretence to avoid consequences, separately in an independent proceeding to be instituted. We would, accordingly, in this regard, hold that the asking for bank guarantee as a condition for issuance of export permit, for export of ENA, is wholly illegal and not to be enforced. We would further direct that as the industry is at a standstill, for, they are unable to sell and dispatch their products, the State Government shall, immediately, issue export permits without the onerous condition of bank guarantee in respect of ENA.

95. In the end, we enquired from the learned Principal Additional Advocate General as to under what authority were the impugned notification and the letter issued or under what law or with regard to what law as made by the legislature? All that the learned Principal Additional Advocate General could say was that the impugned notification was issued pursuant to the New Excise Policy, 2015, of the State Government and the impugned letter is also pursuant to the said policy. We are surprised how such action could have at all been taken, because policy by itself is not law. Merely because the State has legislative competence, executive instruction, in absence of law as made by the legislature, impinging upon fundamental rights, cannot be issued.

96. Thus, we have no difficulty in noting that the impugned notification, dated 04.02.2016, and the impugned, letter dated 17.03.2016, as referred to above, to the extent it is challenged, are wholly ultra vires the Constitution and ultra vires the powers of the State and its executive. They are, accordingly, declared null and void and are quashed as such. It is held that the impugned notification, dated 04.07.2016, and the impugned letter, dated 06.08.2016, are not enforceable. Consequently, the distilleries are not required to destroy the stocks of denatured spirit or what is produced by them and would be entitled to sell the same and the State cannot restrict the sale, except in accordance with law, as we have indicated above. Also the decision, not to grant and/or renew licences for use, possession and sale of denatured spirit cannot be upheld. The State cannot, therefore, cancel, refuse to grant or renew any licence for manufacture of industrial alcohol or denatured spirit. Consequently, the District Collectors would be obliged to renew/grant the same, as was being done in the past, and the authorities concerned are restrained from interfering with the said business, trade and industry.

97. The writ applications are accordingly allowed. However, there shall be no order as to costs.

Navaniti Prasad Singh, J. - I agree.