
(1999) 10 RAJ CK 0015
In the Rajasthan High Court
Case No : Civil Writ Petition No. 3756 of 1999

Murlidhar

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 05-10-1999

Acts Referred:

Constitution of India, 1950 — Article 161, 162, 163, 164, 165
Criminal Procedure Code, 1973 (CrPC) — Section 144
Rajasthan Excise Act, 1950 — Section 53, 8
Rajasthan Excise Rules, 1956 — Rule 41, 93
Representation of the People Act, 1951 — Section 135C

Citation : AIR 2000 Raj 170 : (2000) 2 RLW 744

Hon'ble Judges : B.S. Chauhan, J

Bench : Single Bench

Advocate : K.N. Joshi and N.M. Lodha, for the Appellant; Dinesh Maheshwari and Rajendra Vyas, A.A.G.s, for the Respondent

Final Decision : Dismissed

Judgement

1. The instant writ petition has been filed for quashing the order dated 16-8-99 so far it relates to declaring 5th and 6th October, 1999 to be the dry days for the purpose of sale of liquor.

2. The facts of the case are not in dispute. Petitioner has been awarded the exclusive privilege for the years 1999-2000 and 2000-2001 for retail and wholesale sale of country liquor, Indian-made foreign liquor and beer vide contract-order dated 27-5-99 (Annexure 1). During the period of election of Lok Sabha, the Government of Rajasthan has passed the order dated 16-8-99 (Annexure 2) that days of polling and counting of votes, i.e. 6-10-99, and the day preceding the counting day, i.e. 5-10-99, shall remain dry days. Polling day has already passed. Thus, the present petition has been filed on various grounds for quashing the order declaring 5th and 6th October, 1999 as dry days.

3. It has been averred by the petitioner that to maintain law and order situation

on the relevant days, the administration, i.e. the District Collector-cum-District Magistrate, Jodhpur, has already issued an order dated 12-7-99 (Annexure 3) resorting to the powers u/s 144 of the Code of Criminal Procedure and that order also prohibited any person consuming the alcohol on any public place; same prohibition applies for serving liquor to any person in public places; even the transaction/transfer of liquor is prohibited except for the contractors; it is only the Excise Commissioner who has been entrusted with the power to pass such an order u/s 8 of the Rajasthan Excise Act, 1950 (hereinafter called "the Act, 1950") and the State Government is not competent to do so; the counting would take place on 6-10-99, therefore, there is no justification for declaring 5-10-99 also as-a dry day; Section 135-C of the Representation of People Act, 1951 (for short, "the Act, 1951") provides for prohibition of sale, supply and distribution of liquor only on the polling day for forty-eight hours and, therefore, the Authorities have no power to extend it on the days of counting; the licence has not yet been issued to the present petitioner though his bid has been accepted and, therefore, the terms of the notice inviting tenders cannot be enforced against him; conditions, on which there can be prohibition on sale of liquor, have been contemplated in Section 53 of the Excise Act, and the same do not exist in the instant case. Thus, the Impugned order is liable to be quashed.

4. Respondents have filed their replies rebutting all the allegations/contentions made in the petition. According to them, the writ petition is not maintainable as the petitioner cannot be permitted to wriggle out of the contractual obligations. Moreso, specific condition incorporated in the notice inviting tenders/licence, providing that the shops for the sale of articles licensed to the petitioner would be required to be closed on the dry days" which have already been fixed or which may be fixed in future by the State Government/Excise Commissioner is binding on him. Thus, the State Government is competent to declare a particular day as dry day to meet any particular contingency and it is the satisfaction of the Government or the law enforcing agency for declaring a particular day as dry day. The prohibition contemplated in Section 135-C of the Act, 1951 is the minimum and petitioner may not be permitted to urge that Authorities/State cannot put embargo on sale etc., for the dates of counting of votes. Explanation to Section 36 of the Act, 1950 provides that the holder of a licence also includes a person whose tender or bid for a licence has been accepted, although he may not have actually received the licence and, petitioner has neither suffered any legal injury nor he has any legal right to enforce through writ petition. Contractual obligations cannot be enforced in writ jurisdiction, nor petitioner can seek alteration, variation/modification in the terms of contract/licence. Thus, all the averments made in the petition are untenable and the petition is liable to be rejected.

5. I have considered the rival submissions made by the learned counsel the parties.

6. So far as the issue regarding disputing the contractual obligation in the writ

jurisdiction is concerned, it has been said from time and again by the Hon'ble Supreme Court that a party cannot be permitted to dispute the contractual obligations by invoking the extraordinary writ jurisdiction. In Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, a similar contention had been raised. The Apex Court considered a catena of judgments, particularly, Radhakrishna Agarwal and Others Vs. State of Bihar and Others, Premji Bhai Parmar and Others Vs. Delhi Development Authority and Others, and Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., and arrived at the conclusion that where the contract entered into between the State and the persons agreed (sic) is non-statutory and purely contractual and the rights are governed only by the terms of the contract, writ petition under Article 226 of the Constitution of India is not maintainable. Similar view has been taken in State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, and Noida Entrepreneurs Association v. U.P. Financial Corporation 1994 Suppl 2 SCC 108.

7. In Indore Development Authority Vs. Sadhana Agarwal (Smt) and Others, the Hon'ble Supreme Court affirmed and approved the view taken by the Apex Court in Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, but it further observed that the High Court, while exercising its extraordinary jurisdiction under Article 226 of the Constitution, may satisfy itself on the materials on record that the State has not acted in an arbitrary or erratic manner. A similar view has been taken by the Supreme Court in Union of India v. Graphic Industries Co. (1994) 5 SCC 389: AIR (1994 SCW 4617) . In the said judgment, the Apex Court referred to its earlier judgments, particularly in Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, and observed that even in contractual matters, public authorities have to act fairly and if the State or its instrumentalities have failed to do so, then writ jurisdiction of the High Court under Article 226 of the Constitution can be resorted to because acting unfairly and arbitrarily amounts to flagrant violation of Article 14 of the Constitution.

8. In LIC of India and Another Vs. Consumer Education and Research center and Others, the Apex Court observed as under (Para 28,40 at P. 1822 and 1826 of AIR):

"While exercising the power under Article 226, the Court would be circumspect to adjudicate the disputes arising out of the " contract depending on the facts and circumstances in a given case each case is to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy If a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties."

9. In Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, the Apex Court has held as under (Para 22) :--

The writ jurisdiction of the High Court under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred."

10. Similarly, in *State of Orissa and others Vs. Narain Prasad and others, etc.*, the Apex Court has observed as under (Para 21) :--

"A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round . . . and question the validity of these obligations or the validity of the Rules which constitute the terms of contract. The extraordinary jurisdiction of the High Court under Article 226, which is of a discretionary nature and is exercised only to advance the interest of justice, cannot certainly be employed in aid of such persons. Neither justice nor equity is in their favour."

11. Similarly, in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, the Hon'ble Supreme Court has held that in absence of mala fides or extreme case of arbitrariness, it is not permissible for the Writ Court to have a judicial review of contract or to enforce the contractual obligations in exercise of its jurisdiction under Article 226 of the Constitution.

12. Thus, there seems to be no law of universal application regarding the issue of maintainability of the writ petition in contractual matters, rather it would depend upon the facts and circumstances of an individual case.

13. However, the Court should not lose sight of the distinction between the "non-statutory contract" and "statutory contract". Whatever may be the legal position in respect of the non-statutory contract, the present case falls under the different categories being a statutory contract within the meaning of Section 3 of the Act, 1950. It is a contract different to that entered under Article 299 of the Constitution of India by the State. The business in liquor cannot be held to be trade or commerce in common parlance of the said terms as the business in liquor is not, per se, lawful except when carried on under licence or permit and, thus, no right inheres in any individual to carry on trade in noxious or dangerous drugs. It is only the licence or exclusive privilege granted by the State to carry on the trade in such noxious drugs which allows the licensee to deal in liquor or drugs but the authority to carry on such transaction would not change the pernicious character of the activities as such. Consumption of liquor is a social evil and it is injurious to health, but as it was not found possible to eradicate the evil, it was considered to regulate it by grant of licence. Therefore, neither the inherent obnoxious quality of the activity is erased nor a socially acceptable characteristic injected into it, by the licence. Such a privilege granted to a licensee cannot be elevated to the status of a right either for the purpose of Article 199(g) or for the purpose of Article 301 of the Constitution. It is within the competence of the State to put complete prohibition on the trade or impose severe restrictions on such business. There can be no trade or business in crime and, therefore, such privilege cannot be termed as trade or business. [Vide *Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others*, *The State of*

Bombay Vs. R.M.D. Chamarbaugwala, and M/s. Jagadale and Sons, Bangalore and Vs. State of Karnataka and Others, etc.,

14. In The State of Bombay Vs. R.M.D. Chamarbaugwala, the Hon"ble Apex Court, for this type of transaction, used the term "res extra commercium". The concept of trade or business cannot include the activities which are inherently pernicious such as trafficking in women, gambling or training persons in Goondalism.

15. In Nashirwar and Others Vs. State of Madhya Pradesh and Others, the Hon"ble Supreme Court considered a large number of its earlier judgments and observed as under (Para 35) :--

Trade in liquor has historically stood on a different footing from other trades. Restrictions, which are not permissible on other trades, are lawful and reasonable so far as the trade in liquor is concerned, that is why even prohibition of trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public in-terestand harmful and dangerous character of the liquor. The State possesses the right of complete control over all aspects of intoxicants, viz., manufacture, collection, sale and consumption. The State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue."

16. In Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, the Constitution Bench of the Apex Court held that an important purpose of selling exclusive right to sell liquor in wholesale or retail is to raise revenue as the excise revenue forms an Important part of State Revenue. The fact that the price fetched by the sale of country liquor is an excise revenue, does not change the nature of the right. The sale of such a privilege is a mode of raising revenue. Thus, the lump-sum amount voluntarily agreed to be paid by the licensee to the State is not levied on excise duty but is in the nature of lease money or rental for the exclusive privilege of retail sales granted by the State to the licensee. The Court further observed that "in such a situation, no citizen can claim to sell intoxicating liquor as an inherent right, nor it can be claimed as a privilege as it is a business attended with danger to the community which may be entirely prohibited or be permitted under such conditions as will limit to the utmost evils."

17. The said judgments were approved and followed by the Hon"ble Supreme Court in Panna Lal v. State of Rajas than., : AIR 1975 SC 2008; Lakhanlal and Others Vs. The State of Orissa and Others, and Bishnu Ram Borah and Another Vs. Parag Saikia and Others,

18. In Rajendra Singh Vs. State of Madhya Pradesh and others, the Hon"ble Supreme Court held as under (Para 7) :--

The object of all Excise Laws is twofold, viz., to raise revenue and to regulate the trade in the liquor which is a noxious substance. There is no fundamental right to trade in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others,

The only right of the licensee, is to seek to enforce the terms of contract (which is statutory in nature) and the statutory provisions governing the contract. The considerations afore-mentioned should be kept in mind while making balance of violation of Statutory Rules, conditions and terms of contract as well as complaints of lack of reasonable opportunity."

19. In *Ram KishanVijayVargiya v. State of Rajasthan* 1981 WLN 267, this Court observed as under :-

"A persual of the Act and the Rules makes it clear that no person has any absolute right to sell liquor and that the purpose of the Act and the Rules is to control and restrict the consumption of intoxicating liquor. Such control and restrictions are obviously necessary for the preservation of public health and moral and to raise revenue and the State Government is within its right to lay down conditions regarding payment of Initial fees, for grant of retail sell off licence relating to Indian-made foreign liquor and country liquor, the provisions of Articles 14, 19 or 300-A of the Constitution of India are not attracted in this case."

20. In *Badrudeen v. State of Rajasthan*, (1991)2 WLC 390, this Court has held that the High Court, in its exercise of power under Article 226 of the Constitution, cannot enforce a contract. Bidders offering with full knowledge of terms and conditions attached about auctions, they would not be permitted to wriggle out of voluntarily incorporated contractual obligations by invoking writ jurisdiction.

21. Thus, it is apparent from the aforesaid discussion that a licensee does not have any right and it is merely a privilege to carry on trade in liquor, subject to the terms and conditions of the licence. A licensee does not have any vested right to enforce. In *Masammatt Bibi Sayeeda and Others etc. Vs. State of Bihar and Others*, the Hon"ble Supreme Court has explained the scope of "vested right" and held as under (Para 17) :--

"The word Vested" is defined in Black"s Law Dictionary (6th Edn.) at page 1563 as "Vested; Fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership ; not contingent; not subject to be defeated by a condition precedent." Rights are Vested" when right to enjoyment, present or prospective, has become property of some particular person or persons as present Interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights. In Webster"s Comprehensive Dictionary (International Edn.) at page 1397 Vested" is defined as "(L)aw held by a tenure subject to no contingency ; complete; established by law as a permanent right; vested interest."

22. It is settled law that a writ petition under Article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is complaint by the petitioner that there is a breach of the statutory duty on the part of the respondents. Therefore, there must be judicially enforceable right, for the

enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on its performance. The existence of the said right is a condition precedent to invoke the writ jurisdiction. (Vide *State of Kerala and Others Vs. K.G. Madhavan Pillai and Others*, *State of Kerala Vs. Smt. A. Lakshmikutty and others*, *Mani Subrat Jain and Others Vs. State of Haryana and Others*, and *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*,

23. In *Rajendra Singh Vs. State of Madhya Pradesh and others*, the Hon''ble Supreme Court observed that mere violation of each and every provision of a law or general principles of law, does not furnish a ground for the Court to interfere. In most of the cases, substantial compliance of law would be enough and unless it is established that violation of law has caused substantial prejudice to the party, the interference is not warranted.

24. Therefore, the question does arise whether the petitioner has any legal right to enforce through writ jurisdiction. The Pro forma of the Tender Inviting Notice, issued by the Excise Department of Rajasthan, contains Clause 5.1.2, which clearly provides that the liquor shops shall remain closed on dry days fixed and the days, 50 declared in future by the State Government / Excise Commissioner. It further provides that apart from the aforesaid, there may be other restrictions imposed from time to time for regulating the sale, closing of shops, and the licensee shall be bound by the said terms and if the shops of the licensee remain closed on account of law and order situation, there shall be no reduction in exclusive privilege amount. Therefore, by the aforesaid terms, the respondents have an exclusive domain to regulate and restrict the trade in liquor. It has a power to fix the time of sale, place of sale and to licensee is bound by the said terms. In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, the Constitution Bench of the Hon''ble Supreme Court held that writ is not an appropriate remedy for impeaching the contractual obligations while dealing in trade of liquor.

25. In *State of Punjab v. Balbir Singh*, AIR 1977 SC 1717 , the Hon''ble Apex Court held that the conditions stipulated in the contract/licence become binding on both the sides as a result of mutual obligations carried out by following the conditions on which the liquor vends were auctioned. The High Court cannot entertain a petition agitating the issue of enforcement of liabilities arising out of mutually agreed conditions of auction which may be sought to be enforced by the demand notice and the same cannot be quashed by the High Court in exercise of its writ jurisdiction. Similar view has been reiterated in *Pannalal* : AIR 1975 SC 2008) (supra); *State of Haryana and Others Vs. Lal Chand and Others*, and *State of Orissa and others Vs. Narain Prasad and others*, etc. etc.,

26. In *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, the Hon''ble Supreme Court considered its earlier judgements in *Kumari Shrulekha*

Vidyarthi and Others Vs. State of U.P. and Others, ; Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, on the issue whether the doctrine of fairness and reasonableness is attracted in a case of liquor contract to amend, alter or vary the expressed terms of the contract between the parties. The Hon"ble Supreme Court held that in none of the aforesaid judgements it has been held that the terms and conditions of the contract can be varied, added or altered by importing the said doctrine as each case is to be decided on the facts and circumstances involved therein for the reason that there may be cases where the rights of the parties are governed by the contract and in such cases, the said doctrine may not be attracted. The Court further held as under :-(at Pp.2636 and 2637 of AIR SCW)

"We are therefore, of the opinion that in case of contracts freely entered into with the State, like the personl ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts There is no compulsion on any one to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. There is no warranty against incurring losses. It is a business for the licencees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the Contract. It is not as if the licencees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

27. Similar view had been taken by the Hon"ble Supreme Court in State of M.P. and Others Vs. Nandlal Jaiswal and Others,

28. The issue of imposing restriction on sale at the lime of election, has been considered by this Court from time to time. A Division Bench of this Court in D. B. Civil Special Appeal No.775 / 1993, Sunil Talwar v. State of Rajasthan, decided on 5-5-1995, held that restriction on account of election cannot be said to be unjust or unreasonable. The contention of the petitioner therein that he should be refunded the amount of rent for the said days, was also held to be lacking any merit as there had been no provision in the contract that in case the licensee was restrained from selling the liquor on a particular day, the licensee would be exempted from payment of rent. In the contract, no term or condition could be pointed out providing for non-payment of rent in such an eventuality.

29. In *Sunil Talwar and Anr. v. State of Rajasthan and Ors.* S. B. Civil Writ Petn.No. 5073 / 1990, decided on 22-2-1991, this Court held that a contract matter cannot be enforced through writ jurisdiction and the prayer of remitting a particular amount for the reason that the licensees of the liquor shops could not sell the liquor because of curfew was rejected. The petition was rejected on the ground that the Condition No. 12 (Kha) of the Licensee and other conditions incorporated therein did not entitle the licensee for any damage on account of closure of the shops or reduction in the hours of sale in such contingency and the petitioners therein were held to be bound by those conditions.

30. In *Ram Prakash v. State of Rajasthan*, S. B. Civil Writ Petition No. 6760 / 1993, decided on 23-11-1993, the same controversy was dealt with by this Court. In fact, an additional issue was also agitated that the respondents may be restricted to declare the dry days only at the District Headquarters where the counting took place and not in the entire district. The Court held that undoubtedly the State or State Authorities cannot be permitted to issue any instruction which may be unreasonable or violative of the provisions of Article 19 of the Constitution, placing reliance upon the Constitution Bench judgement of the Hon'ble Supreme Court in *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, wherein it was held that dealing in liquor was a business and citizen has a right to do business in liquor and therefore, the question of morality or otherwise of a deal did not affect the character of an activity and the Authority cannot pass an order which is unreasonable, arbitrary and violated the mandate of the Constitution. The Court has observed as under ;-

The law and order situation has to be anticipated by the Collectors and District Magistrates and over all by the Election Commission and prohibition orders are rightly issued. When the instructions have been given by the Chief Electoral Officer, the Collector was bound to follow them and I do not see any unreasonableness in this order."

31. Even the said judgement has lost significance after the Constitution Bench Judgement in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, took a different view reconsidering *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*,

32. In *Murlidhar v. State of Rajasthan*, S. B. Civil Writ Petition No. 245 / 1995, decided on 5-9-1995, this Court rejected the submission made by the petitioners therein that there was no application of mind either by the Government or by the Excise Authority, nor there was any nexus in issuing the prohibitory order and restrictions imposed were unreasonable and arbitrary. Similarly, this Court rejected the plea that only the Excise Commissioner can issue such direction and no other authority. This Court interpreted the provisions of Condition No. 12 (Kha) of the licence which clearly made out that the licensee shall be required to keep the shop closed on dry days and on account of that, no rebate could be given. The Court refused to enter into the merit of the case holding that the licensee was estopped from agitating the issue being bound by the terms and

conditions incorporated in the licence. The Court further held as under :-

"The Government and other law and order enforcing agencies in a given situation can always issue such kind of directions which cannot be termed as illegal, unjust or arbitrary. When the condition itself lays down that in a situation where the shops are ordered to be closed, the licensee shall not be entitled to any rebate, rather creates a problem in the way of the petitioner for claiming the desired relief from this Court."

33. In the said case, restriction from selling the liquor for a period of seven days in November, 1993 was found to be reasonable and in public interest on account of the election pursuant to the directions issued by the Chief Electoral Officer (Election Commission). While deciding the case, this Court has placed reliance upon its earlier judgement in *Shyani Sunder & Party v. State of Rajasthan and Ors.* S. B. Civil Writ Petition No. 5516 / 1991, decided on 24-8-1992.

34. In view of the above, it cannot be held that the petitioner has a right to challenge the terms and conditions of the Licence or he can be permitted to impeach the contractual obligations. Thus, petitioner cannot be permitted to assail the validity of the impugned order on these counts.

35. It has vehemently been submitted by the learned counsel for the petitioner that the Excise Commissioner is the only competent authority to pass the order and no one else is authorised to deal with the issue.

36. It is settled proposition of law that when Statute confers power on a particular Authority or person to perform certain functions, it cannot be exercised by any other person. (Vide *Toda Ram v. State of Rajasthan* 1998 RLW 1603 ; *Anirudhsinhji Jadeja and another Vs. State of Gujarat, The state of U.P. and Others Vs. Ram Naresh Lal, Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, Board of High School and Intermediate Education, U.P., Allahabad Vs. Ghanshyam Das Gupta and Others, Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and Chandrika Jha Vs. State of Bihar and Others,*

37. In *The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others*, the Hon"ble Supreme Court has observed as under :- (Paras 13 and 14)

The powers exercisable by the Cane Commissioner under Clause 6 (1) is statutory power. He alone could have exercised that power. While exercising that power, he cannot obligate his responsibilities in favour of any one ; not even in favour of the State Government or the Chief Minister. It was not proper for the Chief Minister to have interfered with the functions of the Cane Commissioner The Executive Officers, entrusted with statutory discretion, may. In some cases, be obliged to take into account consideration of public policy and in some context the policy of a Minister or the Government as the whole when it is relevant factor in weighing the policy but this will not absolve them from the duty to exercise the personal Judgement in individual case un less

explicit statutory provisions have been made for them to be given binding instructions by a superior."

38. In the instant case, as the State Government has an exclusive right of manufacture, storing and sale of liquor and only the privilege has been extended to the petitioner, the said judgements are of no assistance to him and the submission made by the petitioner that only the Excise Commissioner is the Competent Authority to issue such direction, is preposterous for the reason that Section 8 of the Act, 1950 provides that the Excise Commissioner shall control the administration of Excise Department subject to the directions of the State Government. Thus, it is the State Government, which has an over-all supervision and control even on the Excise Commissioner and the State Government can issue such directions assessing the situation of law and order or even the Chief Electoral Officer of the State can ask the State Government to pass such an order. Rules 41 and 93 of the Rajasthan Excise Rules, 1958 providing for Rule-making Power and control of the State further fortify this view.

39. The issue of passing the order of closure by the Election Commission was considered by the Division Bench of Karnataka High Court in M/s. Dasappa and Brothers, Bangalore and Vs. Election Commission, New Delhi and others, and the Court observed that even if no reasons are contained in the message of the Election Commissioner directing the State Government for imposing the ban on sale and storage of liquor during the election for nine days, it would not be proper for the Court to interfere with and invalidate such direction for the reason that Article 324 of the Constitution imposes the responsibility on the Election Commission to conduct free and fair election. Therefore, the Election Commission has been clothed with such powers impliedly and it has the power to issue directions as it would amount to incidental and ancillary power of the Commission. The Court further observed as under :-(at P. 236 of AIR)

"Vitiation of a direction of the Election Commission Issued for conduct of a free and fair election as a precautionary measure for being carried out by the concerned Government on the ground of its non-application of mind or on the grounds of the direction not containing the reasons or being arbitrary, can never arise when there is apparent nexus between the direction and the purpose sought to be achieved by such direction. Hence, we are not left in doubt that the contentions and pleas urged against the validity of the direction contained in the message impugned requiring the State Government to ban the sale and storage of liquor in the circumstances for a period of nine days preceding the date of poll, have any force as would warrant their acceptance, particularly when the validity of the direction is not challenged on the ground of their vitiation due to malafide or violation of any Constitutional or Statutory provisions.

40. Thus, the contention raised on this ground is also untenable.

41. It has lastly been submitted by the learned counsel for the petitioner that the

impugned order has been passed by His Excellency the Governor of Rajasthan, who is not competent to do so and, therefore, it is bad. The order may be bad if not issued in the name of the Governor. In fact, the impugned order has been issued in the name of the Governor and has not been Issued by the Governor and it is so in consonance with the provisions of the Constitution, particularly the provision of Articles 161 to 166, as has been explained by the Constitution Bench of the Hon''ble Supreme Court in *The State of Bihar Vs. Rani Sonabati Kumari*, wherein the Court has placed reliance upon the judgement of Privy Council in AIR 1945 156 (Privy Council) wherein the Court had held that the term "executive" is used in a broader sense as including both decision as to action and carrying out of the decision. The impugned order has been authenticated strictly in accordance with law and is in consonance with the judgement of the Constitution Benches of the Hon''ble Supreme Court in *R. Chitralekha and Another Vs. State of Mysore and Others*, *Bejoy Lakshmi Cotton Mills Ltd. Vs. State of West Bengal and Others*, and *E.P. Royappa Vs. State of Tamil Nadu and Another*,

42. In *L.G. Chaudhari Vs. Secretary, L.S.G. Department, Government of Bihar and Others*, the Apex Court has held that even the provisions of Article 166 were directory and not mandatory and, therefore, if they were not complied with, it could be established as a question of fact that the order was issued by the State Government. Thus, in view of the above, I find no force in this contention also.

43. In the totality of the circumstances, petitioner does not have any legal right to enforce through writ jurisdiction. He is bound by the terms and conditions of the contract licence. Even if the licence has not yet been issued to him, he will be deemed to be a licensee as provided in the Explanation of Section 36 of the Act, 1950. Petitioner cannot challenge the terms and conditions of the licence, nor writ jurisdiction can be resorted to alter, modify or varying the same. Section 135-C of the Act. 1951, undoubtedly, provides for prohibition on sale, transportation and distribution of liquor on the polling day out that is the minimum requirement of law and it cannot be urged that the other Authorities cannot put such an embargo on the day of counting of votes. The Excise Commissioner, no doubt, has the power to declare a particular day as dry day but that does not mean that the State Government, in whose supervision and control the Excise Commissioner performs his duties, cannot exercise the same powers. Even the Election Commission / Chief Electoral Officer of the State can issue such direction in order to hold free and fair election. Non-mentioning of reasons, even if any, cannot be a ground of vitiation of the order as it is to achieve a particular purpose, i.e. maintaining peace and harmony in the society on the day of counting of votes, it cannot be said that the order has been passed without application of mind as prohibition has been imposed only in a particular area for particular time and it does not apply in the cities where counting is not taking place. More so, in absence of any allegation of malafides and without impleading any authority by name, it is not worth entering into this controversy. The law enforcing agency, i.e. the District Administration had already resorted to the provisions of Section 144 Cr. P.C. The impugned order may be said to have

been passed to enforce the said order and , in fact, is a step to achieve the same goal. The contract of liquor cannot be equated with contract in other cases, nor the issue of reasonableness be agitated in liquor contract. His Excellency the Governor is the Executive Head of the State and the Constitutional provisions mandate that every order shall be carried in his name. In the instant case, no fault can be found on these ground or on the grounds of authenticity of the same.

44. "The petition is devoid of any merit and accordingly dismissed. In the facts and circumstances of the case, there shall be no order as to costs.