(1952) 10 KL CK 0018

In the High Court Of Kerala

Case No : O.P. No. 32 of 1952

P.J. Joseph, Proprietor, Foreign Liquors — APPELLANT

Vs

Asst. Excise Commissioner and Others — RESPONDENT

Date of Decision : 24-10-1952

Acts Referred:

Cochin Abkari Act, 1077 — Section 11, 12, 14, 15, 17
Constitution of India, 1950 — Article 11, 14, 19(1) , 19(G), 226
Supreme Court Rules, 1950 — Order 35, Order 59 Rule 6
Travancore-Cochin Abkari Rules, 1104 — Rule 7

Citation : (1952) 10 KL CK 0018

Hon'ble Judges : Subramania Iyer, J;Sankaran, J

Bench : Division Bench

Advocate : M.S. Menon, K.V. Rajagopala, Shenoi and K.S. Krishnaswami Iyengar, for the Appellant; M.N. Parameswaran Pillai, for the Respondent

Judgement

Subramania Iyer, J.—This is an application presented by P.J. Joseph, Proprietor, Foreign Liquors, Ernakulam, against four Respondents, (1) The Assistant Excise Commissioner, Excise Division. Office, Ernakulam, (2) The Excise Inspector, Ernakulam Range, Ernakulam, (3) The Board of Revenue, Trivandrum, represented by its Secretary, Trivandrum, and (4) The Travancore-Cochin State, represented by the Chief Secretary to the Government, Trivandrum, under Article 226 of the Constitution of India, asking the Court:

(a) To call for the records of the case and quash by a writ of certiorari or other appropriate writ, order or direction the proceeding''s of the first counter-Petitioner No. A2-2126/50 dated 23-6-1951 and the endorsement of the 2nd counter-Petitioner No. R.52/50, dated 1-7-1951 calling upon the Petitioner to remit by way of commission 20 per cent, of the cost price of the liquor sold by the Petitioner in excess of the quota that has been attempted to be fixed;

(b) To issue a writ of mandamus or other appropriate writ, order or direction restraining the counter-Petitioners from collecting any amount by way of commission on the cost price of the liquor sold by the Petitioner in excess of the quota above mentioned;

(c) To restrain the counter-Petitioner''s by an order of injunction from collecting any amount from the Petitioner by way of commission till this petition is finally heard and disposed of; and

(d) To pass an order for costs and such other reliefs as the nature of the case requires.

2. The Petitioner is a vendor of foreign liquor, and trades under the name "Foreign Liquors, Ernakulam". His business was started some years ago in Perumannoor, in the outskirts of the town of Ernakulam, the capital of the erstwhile State of Cochin, wherefrom he shifted his business to a business place in the centre of the town in the year 1948.

3. The Cochin Abkari Act, 1 of 1077, by Section 15, prohibits the sale of liquor without a license and the rules made u/s 29 of the Act prescribes the particulars pertaining to licenses. The Petitioner was a wholesale licensee for the vend of foreign liquor, and his license is called ''F.L.I.'' in the rules.

4. The covenant entered into by the Rulers of Travancore and Cochin for the formation of the United State of Travancore and Cochin provided by Article 1 that "as from 1-7-1949, the States of Travancore and Cochin shall be united in and shall form one State, with a common Executive, Legislature and Judiciary, by the name of the United State of Travancore and Cochin". Article 6 is as follows:

Subject to the provisions of this Covenant, the Executive authority of the United State shall be exercised by the Raj Pramukh either directly or through officers subordinate to him; but nothing in this Article shall prevent any competent Legislature of the United State from conferring functions upon subordinate authorities or be, deemed to transfer to the Raj Pramukh any functions conferred by any existing law on any court, Judge or officer or any local or other authority in either of the covenanting States.

Article 11 provides that:

Until a Constitution framed or adopted by the Legislature comes into operation, the Raj Pramukh shall have power to make and promulgate Ordinances for the peace and good Government of the United State or any part thereof, and any Ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act of the Legislature, but any such Ordinance may be controlled or superseded by any such Act.

Pursuant to the last mentioned Article, His Highness the Raj Pramukh promulgated Ordinance 1 of 1124 which by Section 4 enacted that:

4(1) Subject to the provisions of this Ordinance, the existing laws of Cochin shall, until altered, amended or repealed by competent authority, continue to be in force ''mutatis mutandis in that portion of the territories of the United State which before the appointed day formed the territory of the State of Cochin.

(2) All references in any of the existing laws of Cochin to His Highness the Maharaja of Cochin or the Government or the Diwan shall be construed as references to the Raj Pramukh or the Government of the United State or the Minister concerned of the United State as the case may be.

Similar provisions were made for the operation of the existing laws of Travancore over that territory in Section 3, Section 2, Clause (c) defines "Existing law of Cochin" thus:

2(c) ''Existing law of Cochin'' shall mean any Proclamation, law, order, bye-law, rule or regulation in force in the State of Cochin immediately prior to the appointed day, except the provisions contained in Parts I, II, III and V of the Government of Cochin Act, 1113 and Form I of the Schedule thereto.

and the "Existing Law of Travancore" has been similarly defined in Clause (b) of that section. This Ordinance was replaced by Travancore-Cochin Act, 6 of 1125 containing identical provisions in the several sections bearing the same numbers as in the Ordinance except that the last and 10th section of the Act is one repealing the said Ordinance. There was in Travancore, Abkari Act 4 of 1073 (amended by Acts 1 of 1104, 6 of 1114 and 21 of 1118) and the Rules framed thereunder. The said "existing law" in case of the two States governed and still govern the areas of the respective States notwithstanding the integration, there having been no legislation in this regard by the United State. This case has to be approached in the above setting.

5. The point of difference between the existing laws of Travancore and Cochin material for the case is that whereas in Travancore the maximum quantity that could be sold by a wholesale licensee of foreign liquor to a non-licensee could be and was being fixed in the license, such quantitative restriction could not be and was not being imposed in Cochin. After the integration of the two States, the above rule obtaining in the Travancore, which is called the fixation of a quota, was sought to be introduced into the Cochin area. Exhibit B is the order served upon the Petitioner fixing his quota. It reads as follows:

A2-12063/24.

Office of the Board of Revenue (Excise), Trivandrum, 19-12-1949.

You are hereby informed that the following quantity of foreign liquors is fitted as quota to your Foreign Liquor 1 shop for sale in 1125 to persons other than licensees.

Beer. Wines. Spirit.

3576 quarts. 168 quarts. 1248 quarts.

Ex. A is the licence issued to the Petitioner for 1951-52, that is, for the year ending the last day of March 1952. During the currency of that license, a memo, Ex. C, reading as under:

A2-2126/50.

Excise Division Office, Ernakulam, 23-6-1951.

MEMO

The Excise Inspectors of Ernakulam and Mattancherry Ranges are requested to direct the licensees of their respective ranges who have conducted excess sales during the year 1125, to remit the 20 per cent, commission (on the cost price) on the excess sales made by them and to forward the chalans so obtained to this office at an early date. A statement showing the quantities so sold by each licensee in excess should also be enclosed. The quota for the first 7? months of 1126 and for 1951-52 (1-4-51 to 31-3-52) will be fixed as 15/24 of the quota for 1125 and the same as for 1125 respectively.

The Inspectors are requested to forward a statement for the first 7? months of 1126 showing the consumption in each shop, the quota for the period and excess sale, if any. If any excess sales are noticed they should direct those licensees to remit the commission required and report result in due course.

The Inspectors should also submit monthly statements showing the quota and the sales made by each of the licensees of their respective ranges from 1-4-1951.

Sd/- Asst. Excise Commissioner.

Copy forwarded to F.L. 1 licensees for favour of information and necessary action. Statements showing the excess sales, if any, conducted during the year 1125 M.E. along with the chalans evidencing payment of the amount of commission should be forwarded to this office positively within 10 days.

A statement showing the quota for the first 74 months of 1126 M.E. (i.e. from 17-8-1950) and sales during the period may be prepared and produced in this office along with the account book on or before 10-7-1951. The monthly statements of quota and sales from 1-4-1951 should also be forwarded immediately.

was served upon the Petitioner, on receipt of which he presented a petition before the 3rd Respondent on 22-7-1951. The order thereon is Ex. D which is as follows:

Sri P.J. Joseph, Proprietor, Foreign Liquors, Ernakulam, presented a petition on 23-7-1951 through his Advocates before the First Member Board of Revenue, praying for stay of proceedings for the recovery of commission due from the Petitioner as licensee for the wholesale vend of foreign liquor at Ernakulam for having conducted sale in excess of the quota fixed for him by the Excise Commissioner. It is stated in the petition that the Department has no authority for fixing a quota for sale and that there is no provision of law to penalise the sale of liquors in excess of the quota fixed and that the Petitioner is not liable to pay commission demanded by the Department. Perused the records and heard the Advocates and also examined the notes of argument filed by the advocates.

Order thereon L.Dis. 19301/51 dated 17-3-1952.

The Excise Commissioner is competent in law to restrict the sale of foreign liquors by a wholesale, licensee in the case of sales to persons other than the wholesale and retail licensees (F.L. 1 and F.L. 2). He is competent also to impose new conditions for such sales. Hence the contention of the advocates that it is illegal to levy 20 per cent, commission on the excess sales made by the Petitioner is untenable. Moreover, at the time of issuing licenses for 1125 all the licencees including the Petitioner, were informed that the sale of foreign liquor to persons other than license-holders should not exceed the quota fixed in each case by the Excise Commissioner. The quota for the Petitioner was fixed and communicated to him direct from the Board. Due intimation was also given to the Petitioner that sale of foreign liquors in excess of the quota granted to him will be subject to a payment of 20 per cent, commission. The Petitioner agreed to all these conditions without entering any protest. Since he has taken out the license subject to all these conditions just like all other licensees in the State trading in foreign liquors, no exception can be made in his case alone. He has therefore to pay 20 per cent, commission on the excess quantity sold by him like all other foreign liquor licensees in the State. The petition is rejected.

On receipt of this order, the Petitioner presented this Original Petition on 26-3-1952 accompanied by his affidavit wherein he avers that the Respondents have no right either to fix a quota or to demand any commission on sales in excess thereof, that the fixation of the quota amounts to unfair discrimination opposed to Article 14 of the Constitution, that the fixation of the quota and the direction to remit a commission of 20 per cent, as aforesaid amounts to unreasonable restriction on the Petitioner''s freedom of trade and constitutes an infringement of his rights under Article 19(G) of the Constitution and that, if there is any rule which would permit such infringement, it would be ultra vires. In para. 12 of his affidavit the Petitioner refers to the aforesaid order of the 3rd Respondent dated 17-3-1952 and in the next paragraph, 13, it is averred that

the statement in the said order to the effect that intimation was given to me that my sales in excess of the quota allotted will be subject to a payment of 20 per cent, commission is incorrect.

Along with the Original Petition, the Petitioner presented C.M.P. 779/52 requesting the Court:

(a) to restrain the counter Petitioners by an order of injunction from collecting any amount from the Petitioner by way of commission till the original petition is finally heard and disposed of; and

(b) to pass such other and further orders as are deemed just and proper in the circumstances of the case.

Notices were ordered to the Respondents upon the Original Petition as also on the C.M.P. on 26-3-1952. The notices to the 4th Respondent State were served on Sri K.C. Chacko, Government Pleader, on behalf of the Advocate General, the very next day.

6. On 16-6-1952 the 1st Respondent filed a counter-affidavit in which it is stated, inter alia, that the quota system was in vogue in Travancore, which was extended to the Cochin area to bring about uniformity that by order dated 19-12-1949 a sale quota was fixed for all the foreign liquor licensees including the Petitioner that it was after such fixation that the Petitioner took out the license for the year ending the last day of March 1951 and for the year ending the last day of March 1952. It proceeds to say that the Petitioner did not object to the fixation of the quota before 22-7-1951 and therefore he is not entitled to challenge the order fixing the quota. Paragraph 6 says that according to the Abkari Act and the Rules framed thereunder the counter-Petitioners have the right and authority to limit retail sale by fixing the sale quota of each of the foreign liquor licensees and by levying a commission on the excess quantity sold by the licensees. The restriction imposed by the fixation of quota is stated to be perfectly reasonable and that there was no unfair discrimination. The levy of 20 per cent, commission is claimed to be not illegal and not opposed to any of the provisions of the Constitution. The said restriction of quantity and impost of commission are claimed to be justified by the policy of the State of obtaining "maximum revenue with minimum consumption".

It is contended that the said levy does not really affect the Petitioner but only the consumers and the Petitioner is not in any way aggrieved thereby. An application by the Secretary, Wine Merchants'' Association, for the extension of commission sales prevalent in Travancore to Cochin area which was allowed by the Government as a general policy is also mentioned. It is contended that Article 19(1)(g) of the Constitution has no application as the Petitioner has no fundamental right or freedom to conduct sale of foreign liquor. It is significant that the averment contained in para. 13 of the Petitioner''s affidavit is not reversed in this which is the only counter affidavit filed in the case on behalf of the Respondents. The last sentence in para 10 of the counter affidavit states that "the Petitioner has subsequently remitted under protest the 20 per cent. on the excess sales conducted by him up to 31-3-1952".

In answer to this, the Petitioner filed an affidavit in reply on 8-7-1952 wherein he states, inter alia, that he protested to the order fixing the quota from the very commencement and that there was then no mention of any liability to pay a commission which was, for the first time, intimated to him only by the memo of 23-6-1951, which was objected to by him without delay. The Petitioner states therein that he is not a member of the Wine Merchants'' Association and cannot be bound by any representation that any such association may have made. He also states that the 20 per cent, commission demanded of him was collected under threat of closure of his shop on 9-6-1952. A copy of this affidavit was served on the Government Pleader, receipt whereof was acknowledged by him on its back noting it to be "without prejudice to the right to object to reception of supplemental pleadings in writs". No rejoinder was filed nor was permission sought to file any on behalf of the Respondents.

7. Upon the aforesaid pleadings and document the matters on which the parties are at issue: (1) whether the Cochin Abkari Act and Rules authorise the fixation of a maximum quantity for sale to non-licensees by a licensee like the Petitioner, (2) whether the said Act and Rules authorise the levy and collection of a commission on sales in excess of the said limit, (3) whether the Petitioner accepted the fixation of the quota and therefore rendered himself incompetent to question its propriety, (4) whether the Petitioner is bound by the application made by the Wine Merchants'' Association for extension of commission sales to Cochin area or the order thereon, (5) whether the Petitioner is a person aggrieved by the order fixing the quota or the impost of the commission and whether the collection of the said commission on threat of closure of the shop is authorised by law.

It was contended by the learned Government Pleader that the commission imposed upon the Petitioner will be included in the sale price and can be realised by him on sale, that as, for that reason he would not be subject to any pecuniary loss, he is not a person aggrieved and the petition is not maintainable. In the first place, the fact on which the argument is based is neither pleaded nor proved. There could have been no instance of a sale including the commission paid in the sale price for there has been no payment yet made so to include. Even if he can so include, the price will be to that extent enhanced which will make sales proportionally less. The reduction in the turnover affects his business. That would lead to pecuniary loss even if the assumption that pecuniary loss is essential - which is erroneous - is taken as correct. Even if the commission could be realised as suggested, a compulsory payment in advance and in a lump would be a sufficient pecuniary detriment. In our judgment, the levy of an illegal impost on the Petitioner is itself enough to render his petition competent.

8. Exhibits A to D were referred to and produced along with the Petitioner''s affidavit accompanying the Original Petition. In return to the notices issued to the Respondents, no record was produced in court.

9. In - ''Joseph John v. State of Travancore Cochin'' AIR 1953 Trav-C 130 (A) to which the 4th Respondent was a party, a Full Bench of this Court held, on-29-7-1952, as follows:

This is an application presented by the applicant in the O.P. for directing the Respondent-State for producing in court six documents listed in the affidavit accompanying the application.

The O.P. itself is for a writ of certiorari to bring up the proceedings terminating in the order removing the applicant from service dated 9-10-1951 and that the order dated 25-1-1952 rejecting his application for review of the order. The entire records of the proceedings leading up to those orders are those to be removed to this Court for purposes of the O.P. This Court being satisfied upon preliminary arguments that there is a case for consideration, issued notice to the Respondent. Pursuant to that notice, Respondent has not returned any document, but has filed a counter-affidavit and produced 33 documents stating them to be for purposes of evidence on behalf of the Respondent. The proper return to an order issuing notice upon an application of this description should be a return producing the records forming the subject-matter of the proceedings in certiorari.

Rules have not been framed by this High Court as regards the procedure applicable to Original Petitions. In the absence of such, rules, it cannot be regarded that the Respondent was in default in not having made the return as aforesaid. The Respondent, however, will now make the return in the manner above indicated.

There having been no return made by the Respondents by way of producing any paper in court even after the above decision, it must be taken that there is no other record relating or relevant to the matters involved in the case.

10. As regards the right to file further affidavits in proceedings like these in the High Court, we consider that the provisions contained in Order 19 of the CPC except as regards cross-examination of deponents can and should be followed. To confine parties to one affidavit would be improper as there is no reason to do so and as it, if done, would stand in the way of the court getting elucidation of necessary facts. If, for instance, a new matter is mentioned in the counter-affidavit, it may have to be accepted in the absence of an affidavit in reply and if the matter be one on which the Petitioner does not and need not rely in support of his application, an answer to or an explanation of it, in anticipation of its mention by the Respondents is unnecessary in the first affidavit filed by him or on his behalf, and there is no justification for depriving him of an opportunity to set out his version about it by an affidavit in answer. The reference to the application by the Secretary, Wine Merchants'' Association and the order thereon in the counter-affidavit affords an illustration. The Supreme Court would appear to be in favour of this procedure as even in the absence of a provision for an affidavit in reply, in proceedings in the Supreme Court under Article 32 of the Constitution (See Part 4, Order 35 of the Supreme Court Rules, 1950) an affidavit in reply has been accepted and acted upon. See - Ramjilal Vs. Income Tax Officer, Mohindargarh, where Their Lordships say "this allegation which is not denied in the affidavit filed by the Petitioner in reply must be taken as correct." The practice in England permits affidavits in reply and also amendments. (See Order 59, Rule 6 of the Rules of the Supreme Court, The Annual Practice, 1950, Volume II, Page 1307). We, therefore, consider that an affidavit in reply and rejoinder as the case may be as also an application for leave to amend are permissible. We indicated this view of ours in the course of the argument and we did not understand the learned Government Pleader appearing for the

Respondents pressing his objections to the reception of the affidavit in reply, nor did he, on its acceptance, seek leave to file a rejoinder.

11. Sri K.S. Krishnaswamy Iyengar who appeared on behalf of the Petitioner contended that there was no warrant for restricting the quantity which could be sold by the Petitioner under his license. The license issued, which is Ex. A, contains the terms and conditions of the license, whereof the limitation of the quantity which could be sold is not one. Besides the terms and conditions enumerated in Ex. A, there is a mention made therein that the licensee shall be bound by the general conditions applicable, to all Abkari and Opium licensees. The reference is to the general sale notification, as Ex. A itself shows that notification does not impose any limitation on the quantity which could be sold. The rules in force now regarding foreign liquor as also during the relevant period are the Rules dated 2-6-1949 corresponding to 20th Edavom 1124. Rule 7 reads as follows:

7. Licenses for the sale of foreign liquor.... Indian made foreign spirits, Indian made wines and beer brewed in India shall be of the following descriptions and in the forms appended hereto.

(1) F.L. 1 wholesale license for the whole vend of foreign liquor, Indian made foreign spirits, Indian made wines and Beer brewed in India not to be drunk in the premises. This will be issued at the discretion of the Commissioner for an annual fee of Rs. 1000. Under this license, the sale of foreign liquor to any person other than a retail or tavern licensee is prohibited except in sealed bottles to "such extent" and in such manner as may be permitted by the Commissioner the quantity sold in one transaction to persons other than licensees shall not be less than one pint. Liquor sold under this license shall not be consumed on the premises.

The license fee was afterwards enhanced to Rs. 2000 and instead of the Commissioner mentioned in the Rules, the authority competent is, after the integration, the Board of Revenue who are the 3rd Respondent. The limitation of the quantity which has been made and which is complained of has relation only to sales to persons other than licensees. (See Ex. B). The words underlined (here in " ") in the above Rule authorises the Commissioner (whose place is now taken by the Board of Revenue) to limit the quantity that could be sold to non-licensees. If the reason to limit the quantity which could be sold to non-licensees is to avoid unhealthy competitions between whole-sale licensees like the Petitioner and retail and tavern licensees as mentioned in the counter affidavit, in view of the prohibition against consumption on the premises of a whole-sale licensee, the liberty of the Commissioner to determine the extent, given by the Rule, would be in the direction of increasing the minimum quantity saleable, in one transaction namely, 1 pint fixed in the Rule rather than reducing it as the number of such transactions would vary in the inverse ratio that is to say, the smaller the quantity saleable at a transaction the more the number of transactions and the larger the said quantity the less the number as consumption cannot be on but should be off the premises of the wholesale licensee unlike in the case of retail and tavern licensees. This line of reasoning would limit the operation of the extent to a single transaction and operate in the direction of enhancing the quantity and would not involve an authority to limit the total quantity that could be vended to non-licensees. This rule is not expressly relied upon in the counter affidavit as justifying the limitation of the total quantity as what is relied upon therein is the practice prevalent in Travancore of fixing a quota which was extended to the Cochin area for uniformity. Assuming that such a practice prevailed in Travancore, its prevalence there would not justify its introduction into the Cochin area pursuant to a policy of securing uniformity however laudable it may be, unless such a course is authorised by the law applicable to the Cochin area.

12. The next argument urged by learned Counsel for the Petitioner is that the power given to the officer in this rule to fix the quantity is a "naked and arbitrary" power and has a potency of being exercised with unjust discrimination as there are no principles or standards prescribed guiding or regulating the exercise of the power. Whatever might have been the validity of such an authority before 26-1-1950, when the Constitution of India came into force, every citizen of India being thereunder and thereafter entitled to "equality before the law" or "the equal protection of the, laws" under Article 14, such power which is capable of being used with discrimination in favour or against particular individuals would be void and inoperative.

13. It is further contended that no ground for the fixation of the quota is mentioned in Ex. B and that the ground relied upon on behalf of the Respondents, namely an average of three years'' turn-over is not a proper or justifiable ground and that in fact the fixation of the quota has led to unjust results as shown in the Petitioner''s affidavit in reply. Reliance is placed by the learned Counsel on the decision in - R. Balakrishnan Vs. State of Madras, wherein, Clause 33(c) of the Cotton Textiles Control Order, 1948, which came into force on 2-8-1948 conferring upon the Textile Commissioner absolute and unbridled powers of withdrawal or relaxation of any order or restrictions was held to be void after the Constitution as offending Article 14. The result of the authorities is summed up in paragraph 38 of the judgment as follows:

The result of the authorities may thus be summed up. The legislature can confer on a person or body of persons large powers for the purpose of administering the Act. But it must prescribe the principles on which, these powers are to be exercised. If there are no rules for guiding and controlling the exercise of discretion by the person or body of persons, then the power must be held to be arbitrary and unreasonable.

This decision supports the contention urged by learned Counsel which we accept.

14. Another contention urged by learned Counsel for the Petitioner is based upon Article 265 of the Constitution which provides that

no tax shall be levied or collected except by authority of law.

It is urged that there is no law authorising the levy or collection of 20 per cent, commission upon the sales to non-licensees in excess of the quota fixed, even assuming that the fixation of the quota is legal, proper and binding upon the Petitioner. The ''law'' under Article 265 must be an act of the Legislature. No section of Act 1/1077 (Cochin) contemplates any such levy nor has there been any rule framed pursuant to the power in that behalf contained in Section 29 of the Act. Section 69 provides that:

All rules made and notifications issued under this regulation shall be made and issued by publication in the Cochin Sirkar Gazette, provided that all such rules and notifications whereby the doing or the not doing of anything is made punishable shall be published in three successive issues of the said Gazette. All such Rules and notifications shall thereupon have the force of law and be read as part of this Regulation and may in like manner be varied, suspended or annulled.

Note: This section does not apply to conditions of licenses prescribed by the Diwan.

There has been no such rule published. If the fixation of the quota is good, sale in excess thereof may be a contravention of the license. Section 55 of Act 1/1077 provides for the penalty for contravention of the Act or Rule or License and enacts that

Whoever in contravention of this Regulation or of any rule or order made under this Regulation, or of any license or permit obtained under this Regulation,

x x x x x shall, on conviction before a Magistrate, be punished for each such offence, with fine which may extend to one thousand rupees or with imprisonment for a term which may extend to six months, or with both.

If the Petitioner has violated, the provisions of the license it is contended that he might subject himself to the penalty under this Section, and to the consequence mentioned in condition No. 16 in Ex.(sic) which provides that

In case of breach of any of the conditions of this license, the Commissioner may cancel or suspend the license, or, in lieu thereof, impose a penalty not exceeding Rs. 100. The imposition of a penalty or the cancellation or suspension of the license under this condition shall not operate as a bar to the prosecution of the licensee for any offence which may have been committed by him.

or under the rules, but would not subject himself to an impost or levy of any commission and render himself liable to pay any such amount. The rules dated 2-6-1949 relating to foreign liquor provided that

Before the issue of each license detailed above, the fee fixed therefore shall, except in the case of taverns that are sold in auction, be paid in full to a Government treasury and the chalan submitted to the Commissioner along with the application for license.

making pre-payment of the fee a condition precedent to the grant of a license. No imposition of a pecuniary liability on a licensee subsequent to the issue of the license is contemplated by the said rule and any such imposition would even be impliedly, though not expressly, prohibited. The said rules also provide for the consequences of infraction of any of the rules and conditions of a license issued thereunder and the consequences are liability to pay a fine up to Rs. 100 for each such infraction or the suspension or cancellation of the license and forfeiture of the fees paid by the licensee. The imposition of a fine will not be a bar to the prosecution of the licensee or his agent for specific offences committed. The Commissioner of Excise is authorised to impose the said fines and penalties. The manner of collection of the commission by threat of closure of the shop is also impeached as illegal.

15. Learned Government Pleader contended that the right to sell foreign liquor is a monopoly of the State, that the Petitioner has no fundamental right for its sale and that the complaint that his fundamental rights have been violated is without foundation. The answer to this argument is in - Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, Their Lordships say at pp. 164-165 as follows:

Learned Counsel for the Respondent in reply takes a preliminary objection to this line of argument. He points out that as the levying of a tax without authority of law is specifically prohibited under Article 265 of the Constitution, Article 31(1) must be construed as referring to deprivation of property otherwise than by levying of a tax and that levying of a tax in contravention of Article 265 does not amount to a breach of a fundamental right. He contends on the authority of the decision of this Court in Ramjilal Vs. Income Tax Officer, Mohindargarh, , that while an illegal imposition of tax may be challenged in a properly constituted suit, it cannot be questioned by an application under Article 32. This argument overlooks the difference between a tax like the Income Tax and a license fee for carrying on a business. A license fee on a business not only takes away the property of the licensee but also operates as a restriction on his right to carry on his business, for without payment of such fee the business cannot be carried on at all. This aspect of the matter was not raised or considered in the case relied on by the learned Counsel, and that case, therefore has no application to the facts of this case. Under Article 19(1)(g) the citizen has the right to carry on any occupation, trade or business which right under that clause is apparently to be unfettered. The only restriction to this unfettered right is the authority of the State to make a law relating to the carrying on of such occupation, trade or business as mentioned in Clause (6) of that Article as amended by the Constitution (First Amendment) Act, 1951. If, therefore, the license fee cannot be justified on the basis of any valid law no question of its reasonableness can arise, for an illegal impost must at all times be an unreasonable restriction and will necessarily infringe the right of the citizen to carry on his occupation, trade of business under Article 19(1)(g) and such infringement can properly be made the subject-matter of a challenge under Article 32 of the Constitution.

16. It was next contended that the right of the Petitioner is contractual and that an application for a writ to enforce a private right under a contract would not lie. It was also contended on the strength of a document produced on behalf of the Respondents by learned Government Pleader in the course, of his arguments in reply that there is an implied contract to pay the 20 per cent, commission. The said document was marked as Ex. I and reads as follows:

TRAVANCORE-COCHIN GOVERNMENT.

Revenue Department, Excise and Estate Section.

Sub: Enhancement of foreign liquor quota to wholesale licensees in the Cochin Area.

Read the following letter No. E 4-20705/50 dated 6-7-1950 from the Secretary, Board of Revenue-

''The Secretary, the Travancore Wine Merchants'' Association, has requested the Board to sanction additional quota of foreign liquor to the wholesale licensees of the Cochin area for sale to private consumers. He has suggested that if a like system that is prevalent in the Travancore area is required, the wholesale licensees may be asked to pay a commission of 20 per cent, of the price of liquor, as is being done in Travancore.

The foreign liquor quota in the Cochin area was fixed on the basis of the average sales of each wholesale licensee for 1123 and 1124 as per powers conferred on the Excise Commissioner. There is no provision in Cochin for sanctioning the issue of additional quota on commission basis as in Travancore. The issue of such extra quota unconditionally will give a chance for the wholesale licensees, who pay only a fixed fee for their license, to sell liquor at a very low price and this will surely affect the sale of tavern licensees.

As the tavern licensees were not told at the time of auction the extent to which quota would be given to wholesalers, they could not make a legitimate complaint if a larger quota than that is allowed on the basis of 1123-1124 sales is given to the wholesalers. But Government, have an obligation to save the tavern licensees who bid their shops at high rentals from unfair competition on the part of wholesale licensees.

If Government, for the sake of uniformity, think that extra quota should be allowed to wholesale licensees in Cochin, the same may be allowed on payment of a commission at 20 per cent, of the price of liquor. But for the reasons stated above, the Board is of opinion that the commission so paid should be credited to Government as far as Cochin area is concerned.

If the procedure suggested above is adopted, it would while saving the tavern licensees from unfair competition and benefiting Government, prevent cheap liquor being brought from Cochin area into Travancore area where commission system is in vogue. I request that the Board may be favoured with the orders of

Government in the matter at an early date.

Order D. Dis. No. 5208/50/RD dated 14-7-50.

Sanction is accorded for extra quota of foreign liquor being allowed to wholesale licensees in Cochin on payment by them of a commission at 20 per cent, of the price of liquor. The commission so realised from the wholesale licensees in the Cochin area will be credited to Government.

By order of His Highness, the Raj Pramukh.

Sd/- Assistant Secretary.

The contention is that this order dated 14-7-50 was an offer made to all licensees of foreign liquor including the Petitioner for enabling them to sell in excess of the quota fixed on condition of their being liable to pay 20 per cent, commission of the price of liquor so sold. It was also contended that the Petitioner has accepted and acted upon this offer which conduct amounted to the grant of an oral license to the Petitioner in respect of sales in excess of the quota with an implied contract by him to pay 20 per cent of the price as commission. To a question by the court as to whether in the counter affidavit this plea has been set up, the answer was that it is not necessary to set up the plea but that the same could be raised in argument though not pleaded. It is not merely the case of a plea not being taken. Ex. I refers to the application for the extension of the system of commission sales prevalent in Travancore to the Cochin area made by the Secretary, Travancore Wine Merchants'' Association and the order allowing it. Mention is made of this in the order of the Board of Revenue dated 17-3-1952, Ex. D. Paragraph 13 of the Petitioner''s affidavit repudiates the statement contained in Ex. D that the Petitioner had intimation of this order. This allegation is not denied in the counter-affidavit filed on behalf of the Respondents and must, therefore, be taken as correct. (See the extract from Ramji Lal''s case read above). Thus the sole factual basis for the Argument of an implied contract or oral license goes. The term ''implied contract'' is itself out of place in the context. An oral license is prohibited as Rule 7 read above provides that

Licenses for the sale of foreign liquor.... shall be of the following description and in the forms appended hereto.

Reference may also be made to item 36 of the General conditions applicable to all Abkari and Opium Licenses (See pp. 237-238, Cochin Excise Manual, 1st Edn., Vol. 1) which is the only instance contemplated by the rules of the grant of an additional license, to a licensee, which provided that:

The right is reserved to the Commissioner to grant ''Occasional licenses'' for short periods not exceeding ten days for the sale of liquor, opium and intoxicating drugs on the occurrence of fairs, festivals, etc. in places in the vicinity of which there are no regularly licensed shops or where the existing number of shops is insufficient. Such licenses shall ordinarily be granted to the shop-keepers who already hold licenses in or supply the locality. The fees to be paid for such licenses shall be fixed at the discretion of the Commissioner.

17. To support the contention that the relation between the Petitioner and the State is contractual, reliance is placed upon - ''P.R. Krishnankutty v. State'' AIR 1951 TC 197 (E) which is a decision of a single Judge which was confirmed by the judgment of the Division. Bench in appeal in - ''P.K. Krishnankutty v. State'' AIR 1952 TC 287 (F). The question that arose there related to the competency of the State to direct the Petitioner, who had been a successful bidder at the auction of the right to conduct a toddy shop, to shift the shop from an unsuitable place at which it was started under a temporary license to a more suitable place for the purpose of granting the permanent license to enure for the period for which the auction was conducted. The rule regarding the said auction published at page 435 at seq Part I of the Travancore Cochin Gazette dated 2-5-50 provided for the execution of an agreement, which is called a contract in condition No. 5, by the bidder at the auction, undertaking, ''inter alia'', to locate the shop at any place within the boundaries according to the directions in that behalf to be given by the Revenue Board before granting a permanent license. The direction given by the Board of Revenue to so locate the shop for the purpose of granting a permanent license was impeached as ''ultra vires'' by the Petitioner. The Petitioner in that case was under a contractual obligation to submit to the directions of the Board of Revenue as regards the location of his shop for the purpose of a permanent license. It is this obligation that is referred to in the judgments as arising out of a contract. The decisions must be understood with reference to the facts and so understood, they have no manner of application to the facts of the present case and lend no support to the contention urged by the learned Government Pleader. There is also no plea raised in the counter affidavit that the relationship between the Petitioner and the Respondents is contractual nor is it averred that any agreement was taken from the Petitioner. In support of The position that an application for a writ to enforce contractual right will not lie, learned Government Pleader relied upon - P.K. Banerjee Vs. L.J. Simonds and Another, wherein the relief sought was for an order of mandamus u/s 45 of the Specific Relief Act which was refused on account of noncompliance with the requirements of that section. That, decision has absolutely no application to the facts here. It may also be mentioned that in the Adaptation of Laws Order, 1950 whereby the Specific Relief Act was extended to ''Part B States, Section 50 has been amended enacting that "nothing in this Chapter" (Chapter VIII which begins with Section 45) "shall affect the power conferred on a High Court by Clause (1) of Article 226 of the Constitution". Reliance was also placed upon the case referred to at p. 561 of Chaudhri on ''High Prerogative writs'', Volume I, wherein the decision in - ''Ganga Reddy v. Excise Commissioner'' 40 DLR 97 (FB) (H) is dismissed. This report has not been made available to us but the extract contained in Chaudhri from the judgment shows that two of the three learned Judges constituting the Full Bench were in favour of the view that even a right created under a contract can be made the subject-matter of a writ. Certain other decisions were also referred to wherein the question that arose was whether a writ of mandamus can

be issued against the State regarding rights arising under a contract to enforce which a suit is competent and it was held that mandamus could not issue. These decisions have no manner of application to the present case. Here no contract is sought to be enforced nor is there any contract to be enforced. The jural relationship between the Petitioner and the Respondents that arises for consideration in this case is only on the basis of the Cochin Abkari Act, 1 of 1077 and the rules framed thereunder. The Petitioner does not aver nor does he claim relief under any contract. No writ of mandamus is sought to direct the State or any of its officers to do any duty arising out of any contract. The idea of contract was introduced, for the first time, in argument by the learned Government Pleader.

18. Parties to proceedings like these should be confined to matters mentioned in the affidavits as constituting the scope of the proceedings. An oral contract or an oral license is a question of fact to be pleaded and if denied proved. There is neither pleading nor proof of any such oral transaction in this case. The alleged oral transaction could only have been after 14-7-50 which is the date of Ex. I. Article 299 of the Constitution provides that:

299 (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor or the Raj Pramukh of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor or the Raj Pramukh" by such persons and in such manner as ho may direct or authorise.

(2) Neither the President nor the Governor nor the Raj Pramukh shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

The word ''executed'' in Clause (1) of this Article indicates that the contract must be, in writing. An oral contract to which the State is a party is not recognised under the Constitution.

19. Learned Government Pleader sought to support the fixation of the quota on the ground that the order fixing it was passed in the year 1949 which could not therefore be called in question on account of any provision of the Constitution which came into force subsequently as the Constitution is not retroactive. He also contended that the Petitioner has accepted the said fixation and acquiesced in it and has rendered himself incompetent to call it in question. The order Ex. B, is of the year 1949 and only fixes a quota for sale in 1125, that is, the year ending 16-8-1950. Whether a similar order was issued in any subsequent year does not appear. When Ex. B was issued, license to the Petitioner had been granted to enure for the Malayalam year that is the year ending the last day of Karkadakom

1125 corresponding to 16-3-1950. The reckoning of the year was altered from the Malayalam era into the one under the Gregorian Calendar from 1-9-1949 and thereafter licenses were issued to terminate with the financial year that is the last day of March. After the expiry of the license which was current when Ex. B was issued, there must have been a license issued for 7? months ending with the last day of March 1951 because Ex. A is the license for a year from 1-4-1951 to 31-3-1952 and the Petitioner has been doing his business as a licensee without break.

20. Learned Counsel for the Petitioner did not question the binding character of the fixation of the quota before the date of the Constitution, the provisions of which that were relied upon by him cannot have and were not contended as having any retrospective operation in view of the decisions of the Supreme Court, in several cases, the latest of which is reported in - Lachmandas Kewalram Ahuja and Another Vs. The State of Bombay,

21. As regards the plea of acquiescense by the Petitioner in the fixation of the quota, what is stated in para. 5 of the Counter-affidavit is only that the Petitioner never objected to the fixation of the quota at any time prior to 22-7-1951 and that he is not, therefore, entitled to challenge the order fixing the quota. This is repudiated in the affidavit filed by the Petitioner in reply wherein he states that he has been objecting to the fixation of the quota from the very commencement. Even assuming the averment in the counter-affidavit to be true, mere silence to object to the quota fixed unaccompanied by any positive act or conduct when there is no duty to speak would not amount to acquiescence and would not debar objection, at a later stage. That the Petitioner did not accept the quota and limit his sales accordingly is clear as otherwise these proceedings which are occasioned by the impost of a commission on sales in excess of the quota would not have been started.

22. In answer to the contention urged on behalf of the Petitioner by his learned Counsel to the validity of the fixation of the quota as constituting an illegal discrimination and offending Article 14, learned Government Pleader cited several decisions wherein it has been held that the Legislature is entitled to make classifications which would not be hit as discriminations by Article 14. This proposition cannot be and was not questioned by learned Counsel on behalf of the Petitioner. Learned Government Pleader also cited several decisions holding that it is competent for the legislature to place reasonable restrictions upon the carrying on of a trade or business. That proposition was also not questioned by learned Counsel for the Petitioner.

23. The impost of the commission was sought to be justified by learned Government Pleader by relying on Section 17, Cochin Abkari Act, 1 of 1077. Assuming for purposes of argument that the commission imposed would constitute a ''duty'' within the meaning of that section, the condition precedent to its imposition has not been satisfied in this case because what the section provides is that:

A duty of such amount as the Diwan may prescribe shall, if he so direct, be levied on all liquor and intoxicating drugs:

(a) permitted to be imported under the proviso to Section 6; or

(b) permitted to be exported under the proviso to Section 7; or

(c) permitted u/s 11 to be transported; or

(d) manufactured under any license granted u/s 12; or

(e) manufactured at any distillery established u/s 14; or

(f) issued from a distillery or warehouse licensed or established u/s 12 or Section 14; or

(g) sold in any part of the Cochin State.

and "prescribe" under the General Clauses Act means "prescribe by rules", the framing of which should be u/s 69 of the same. Act, by publication in the Government Gazette. We are not aware of any such rule having been made nor was any brought to our notice by the learned Government Pleader.

24. Learned Government Pleader relied upon Ex. I dated 14-7-1950 wherein His Highness the Raj Pramukh has ordered that:

Sanction is accorded for extra quota of foreign liquor being allowed to wholesale licensees in Cochin on payment by them of a Commission at 20 per cent, of the price of liquor. The commission so realised from the wholesale licensees in the Cochin area will be credited to Government.

as justifying the levy of the 20 per cent commission. The contention of the learned Government Pleader is that an executive order like Ex. I is enough to authorise the said impost. This contention can hardly be accepted. The order of His Highness the Raj Pramukh was passed upon an application made by the Secretary, Travancore Wine Merchants'' Association, of which the Petitioner is not a member. It was the enjoyment of an unrestricted power of sale by the Cochin licensees which adversely affected the Travancore licensees that prompted them through their Association to request for the extension of the Travancore system of commission sales to Cochin. This conflict of interest rendered the Travanfore Wine Merchants Association inherently incompetent to represent the Cochin licensees. Any representation made by that Association and any order passed thereon could not, therefore, bind the Petitioner.

25. Whatever might have been the authority of His Highness the Raj Pramukh before the date of the Constitution, after that date (26-1-1950) Article 265 prohibits by the levy or collection of any tax except by authority of law, which means an Act of the Legislature.

26. Learned Counsel for the Petitioner admitted that that Article would not help him in questioning an impost for the period before 26-1-1950 but there could

have been no impost made before that date because, even the order sanctioning it, Ex. I, was issued only on 14-7-50. It was not contended before us on behalf of the Respondents that the commission that is imposed upon the Petitioner would not amount to a tax under the said Article. The attempt made merely being to contend that Ex. I would be sufficient to sustain it which, as already stated, is futile. This Article embodies the principle of no taxation without representation. The ''law'' under this Article is statute law i.e., an Act of the Legislature. A law authorising the levy of a tax must be made by the Legislature and cannot be made by executive action. This the House of Lords said in - ''Attorney General v. Wilt''s United Daires Ltd.'' (1922) 91 LJKB 897 (J). The order of His Highness the Raj Pramukh dated 14-7-1950, (Ex. I) is only an executive order and not ''law'' under Article 265. That order cannot justify the impost of a commission on sales by the Petitioner. The order imposing a commission of 20 per cent, on the sales made by the Petitioner in excess of the quota is therefore ultra vires and void.

27. Article 265 of the Constitution prohibits not merely the levy but also the collection of any tax except by authority of law. We have held that there is no law authorising the levy of the commission. The collection of the commission was on threat of closure of the Petitioner''s shop. There is no law justifying this manner of collection. Closing of a shop is authorised by condition No. 10 in the conditions for the sale of arrack, toddy, opium and ganja shops for default in payment of monthly kists. (See Travancore-Cochin Gazette dated 2nd May 1950, Part I, page 437). There is no other instance pointed out in which such a course is permitted. When a levy or collection of tax unauthorised by law under Article 265 is made, relief may be given to the citizen in appropriate proceedings, not as a violation of a fundamental right to property under Article 31 but as an ultra vires act of the State. See Ramjilal Vs. Income Tax Officer, Mohindargarh, In our judgment proceedings under Article 226 of the constitution are appropriate.

28. The collection was made on 9-6-1952 that is, more than two months after the presentation of this application and after notice thereof to the Advocate General. Whether at the time of the collection the other Respondents knew about these proceedings does not appear though it is likely they would have had notice. The payment is under pressure and admittedly under protest and no point was sought to be made on the fact of recovery of the amount in bar of the consideration of the petition or grant of appropriate reliefs nor was it contended that should we find the impost illegal, the amount thus recovered should not be directed to be repaid. We, however, desire to repeat what we said in - ''Ouseph Ouseph v. Minister for Food, Travancore Cochin'' AIR 1951 TC 226 (2) at P. 228 (K).

If a party, knowing that his opponent has either approached the Court or is taking steps to approach it for a certain specific relief, does anything to make the grant of the relief, by way of prevention, ineffective the court has always jurisdiction to pass orders even in ordinary cases, in a mandatory form and to direct restoration of the status quo ante in the manner and to the extent possible. It will be an ''a fortiori'' case when the relief claimed is for a grant of any of the writs or directions contemplated by Article 226 of the Constitution of India.

(See also Kerr on Injunctions, 6th edition, page 44, - ''Daniell V. Ferguson'' (1891) 2 ch. 27 (L), and - ''Von Joel v. Hornsey'' (1895) 2 Ch. 774 (M). When an application is made for a writ or directions for prohibiting anything being done, and the court admits the petition and issues notice, the Respondent should not after getting notice do the very thing sought to be prevented. There need not be any separate order of injunction restraining the doing of it. In cases of urgency, the orders of the court should be taken for the duration of the proceedings or a prayer made for expeditious disposal of the proceedings themselves.

29. Exs. A, B, C, D, I, two affidavits of the Petitioner (one that accompanied the original petition and the other, the one filed in reply) and the counter-affidavit filed on behalf of the Respondents constitute the entire evidence in the case. The facts ascertainable therefrom are that a license for the year ending the last day of Karkadakam 1125 that is, 16-8-1950 had been issued to the Petitioner. That license is not before court. Condition 15 attached to Ex. A which is in the form prescribed in the Rules for F.L. 1 licenses provides that:

The licenses shall on requisition by the Commissioner or by any other officer duly authorised by him, deliver up his license for amendment or for the issue of a fresh license....

The same is the provision contained in item 30 of the General Conditions applicable to Abkari and Opium licenses. (See page 236, Cochin Excise Manual, 1st edition, Vol. 1). There having been fresh licenses issued to the Petitioner, the old licenses should have been got back from him. They would, therefore, be in the possession of the Respondents. This observation applies to the next license issued for 7? months of the year 1126.

30. During the currency of the license for the year 1125, the order Ex. B was issued to the Petitioner fixing his quota for sale to non-licensees in the year 1125. Ex. I shows that the foreign liquor quota in the Cochin area was fixed on the basis of the average sales of each wholesale licensee for the years 1123 and 1124 as per powers conferred on the Excise Commissioner, who conferred the powers, when and what they are, have not been clarified. No rule or record conferring powers on the Excise Commissioner, has been brought to our notice.

31. Ex. I shows that on 14-7-1950 His Highness the Raj Pramukh accorded sanction for extra quota of foreign liquor being allowed to wholesale licensees in Cochin on payment by them of a commission of 20 per cent of the price of the liquor. The license for the period from 17-8-1950, that is commencement of the Malayalam year 1126, to 31-3-1951 is not before court. The quota for that period of 7? months is seen fixed as 15/24 of that of the previous year by Ex. C. dated 9-6-1951 that is more than two months after expiry of the period of license. Ex.

A is the license for a year from 1-4-1951 to 31-3-1952. It is dated 28-5-1951 and was delivered to the Petitioner on 12-6-1951. Ex. C dated 9-6-1951 also fixes the quota for the period covered by Ex. A which is stated to be the same as that for the year 1125. Neither the fixation of the quota nor the liberty to sell in excess of it on payment of 20 per cent commission is mentioned in Ex. A. Ex. A is a printed form to, suit the state and things that existed before the integration in the matter of the officers concerned namely the Commissioner as the Board of Revenue, Inspector as the Assistant Excise Commissioner and the territorial division ''Circle'' into ''Division'' are all seen made in handwriting. Ex. C demands an account from the licensees of the excess sold in the year 1125, that is till 16-8-1950, in the 7? months in 1126, that is from 17-8-1950 to 31-3-1951 as also remittance of 20 per cent on the price of such excess sales. It also demands monthly statements of quota and sales from 1-4-1951. The order, Ex. I, though passed by His Highness the Raj Pramukh on 14-74950 is forwarded to the Assistant Excise Commissioner, Ernakulam, only on 21-7-1950. There is no monthly quota fixed in order to comply with the directions contained in Ex. C as regards the period covered by Ex. A. The time of the excess sale for which the 20 per cent commission was imposed is not in evidence.

32. We have to dispose of this matter in the above unsatisfactory state of evidence and we do so following the lead given by the Supreme Court in - Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, which was a decision in an application for a writ under Article 32 of the Constitution and relying upon the onus of proof in respect of matters uncovered by the evidence adduced, with which both the parties were content.

33. In our judgment, therefore, the fixation of the quota for sale to non-licensees by the Petitioner as also the impost of a commission of 20 per cent upon sales in excess of the said quota are unauthorised and illegal. The collection of the aforesaid commission from the Petitioner by threat of closure of his shop and after the commencement of these proceedings in this Court are also illegal and it is directed that the Respondents do repay the Petitioner the amount so collected and desist from fixing a quota or levying impost of any commission upon sales in excess of such quota until a law authorising such an impost and collection is made.

34. The petition is, therefore, allowed in the above terms. The Respondents will pay the costs of the Petitioner with Advocate''s fee which we fix at Rs. 250/-.