(1998) 09 P&H CK 0090

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 1359 of 1998

Rajesh Kumar APPELLANT

Vs

State of Haryana RESPONDENT

Date of Decision : 07-09-1998

Acts Referred:

Citation : (1999) 1 RCR(Criminal) 1

Hon'ble Judges : Iqbal Singh, J and G.S.Singhvi, J

Advocate : Sanjiv Sheoran, Naresh Katyal, Jaivir Yadav, D.C. Mittal, Vivek Suri, Manjit Singh Guglani, Adish Gupta, Gurcharan Dass, Narottam Kaushal, S.S. Behl, Jeety Kaul, Surinder Gandhi, Atual Lakhanpal, Jagdish Manchanda, S.S. Dalal, Surinder Batra, G.S. Kler, S.S. Dinarpur, Jitender Dhanda, B.S. Rana, Rakesh Nagpal, Harsh Kinra, Jitender Chetan, B.L. Gupta, J.S. Maanipur, B.S. Walia, Rainder Pal Singh, Vijay Dahiya, Tarun Aggarwal, Ramesh Hooda, Arvind Singh, Sanjiv Kumar, Virkam Singh, R.K. Sharma, V. Ram Swaroop, J.B. Tacoria, A.S. Virk, P.C. Dhiman, Maharaj Kumar, Bhag Singh, P.S. Rana, Mahesh Grover, R.K. Aggarwal, Kamal Sharma, R.S. Mamli, A.K. Jain, S.K.S. Bedi, Pritam Saini, Deepak Sibal, Mukesh Kaushik, B.C. Bitta, S.P. Laler, S.P. Singh, Bimal Chander, Sandeep Kumar, Hemant Kumar, D.K. Singla, Davinder Kumar, B.R. Vohra, Rajiv Bhalla, J.P. Chhokar, Sudhir Aggarwal, V.M. Gupta, D.K. Siyal, Gopal Mittal, J.P. Khokkar, R.S. Longia, Mehesh Gupta, Vimal Kumar, Y.P. Malik, Babbar Bhan, M.S. Chauhan, Nand Lal Sammi, Sanjiv Jain, S.K. Garg, Kulvir Narwal, Anil Walia, Daya Chaudhary, Jaswant Singh, G.S. Gandhi, Rupinder Khosla, Kapil Aggarwal, H.K. Rooprai, Rajni Kaushik, Kiran Bala, Ashish Aggarwal, Munish Sharma, Sanjiv Murari, M.L. Saini, H.S. Hooda, R.K. Jain, Kirti Kumar, Manjeet Dalal, Sulekh Chand, Arvind Bansal, Govind Goel, Heman Aggarwal, A.K. Rathee, Ramesh Chahal, Sanjiv Gupta, Ajay Sharda, Baldev Kapoor, A.K. Sharma, Satish Kadiyan, Ashwani Talwar, R.A. Sheoran, S.S. Ahlawat, Rakesh Gupta, Vishal Gupta, Harish Sharma, Kanwaljit Singh, Anurag Goyal, H.P.S. Deol, N.K. Banka, Mahavir Sandhu, J.C. Wadhawan, Manoj Bajaj, Sanjiv Vashishth, Hemant Bassi, S.K. Mittal, Rajinder Sharma, P.N. Arora, M.R. Verma, Vinod Gupta, R.C. Chaudhary, M.K. Sangwan, Parduman Yadav, R.S. Tacoria, Advocates for appearing Parties

Judgement

G.S. Singhvi, J.

1. In the course of its campaign for elections to the Haryana Legislative

Assembly in 1996, Haryana Vikas Party made a promise to the electorate that if voted to power it will introduce total prohibition in the State. After coming to power, it decided to fulfil the said promise. With this end in view and also for giving effect to the directive principles of State Policy embodied in Article 47 of the Constitution of India, the Government decided to use the legislative power vested in the Governor under Article 213 of the Constitution for amendment of the Punjab Excise Act, 1914 (hereinafter referred to as `the principal Act''), as applicable to the State of Haryana. The first step in this direction was the promulgation of Punjab Excise (Haryana Amendment) Ordinance, 1996 (Haryana Ordinance No. 1 of 1996) under Article 213(1) of the Constitution. By this Ordinance, Sections 3, 20, 25, 26, 34, 41, 57 and 61 of the Principal Act were amended. On 1.6.1996, Notification No. S.O. 80/P.A.1/14/Ss.17, 20, 24 and 26/96 was issued by the Governor of Haryana under Sections 17, 20, 24 and 26/96 of the principal Act to prohibit w.e.f. 1.7.1996 import or export of any intoxicant into or from the State of Haryana or any part thereof; transport, manufacture, sale; purchase; consumption and possession of any intoxicant. This was subject to certain exceptions made in the cases of Military and Para Military Personnel etc. After about 4 months of the issuance of the first Ordinance, the Governor of Haryana promulgated the Punjab Excise (Haryana Second Amendment) Ordinance, 1996 (Haryana Ordinance No. 9 of 1996) substituting the existing Sections 61, 63 and 72 of the principal Act. Simultaneously, Section 81 was added to the principal Act. These Ordinances were replaced by the Punjab Excise (Haryana Amendment) Act, 1996 (Haryana Act No. 22 of 1996) which was notified in the gazette dated 13.12.1996. Two more amending Acts, namely, the Punjab Excise (Haryana Amendment) Act, 1997 (Haryana Act No. 12 of 1997) and the Punjab Excise (Haryana Second Amendment) Act, 1997 (Haryana Act No. 19 of 1997) were passed by the State Legislature for amendment of Sections 61, 72 and 80 and also for substitution of Section 68A of the Principal Act.

2. The imposition of prohibition led to the cancellation of licences of vends, bars etc. Some of those affected by these consequential actions challenged the constitutional validity of the notifications issued by the government by filing writ petitions in the High Court which were dismissed on 17.12.1996 M/s. Rattan Singh Kishore Chand & Co. v. The State of Haryana and others, 1997(1) AIJ 381. In this manner, the policy of prohibition introduced by the government received judicial recognition.

3. Notwithstanding this, it was felt that implementation of the policy was defective and the amendments made in the principal Act did not yield the desired results. Therefore, the government sought instructions of the President of India for promulgation of another Ordinance to introduce some provisions in the principal Act which were apparently inconsistent with the provisions of the Code of Criminal Procedure, 1973. In October, 1997 the President granted the request made by the government. This was followed by promulgation of the Punjab Excise (Haryana Third Amendment) Ordinance, 1997 (Haryana Ordinance No. 4 of 1997) (notified in the Haryana Government Gazette (Extra.) dated

19.11.1997) for bringing about amendments of far reaching implications in Sections 78 and 79 of the principal Act.

4. In the next session of Haryana Vidhan Sabh which was convened from 19.1.1998, the Government introduced the Punjab Excise (Haryana Second Amendment) Bill, 1998 (Bill No. 5, HLA of 1998) to replace Ordinance No. 4 of 1997. The statement of objects and reasons incorporated in this Bill reads as under :

"The existing provisions of Section 78 and 79 of the Punjab Excise Act, 1914 regarding release of Vehicles on superdari are not adequate. Keeping in view the prevailing situation in the State, it was felt that Section 78 and 79 may be amended on the pattern of Andhra Pradesh Excise Act. So, on the advice of Law Department the instructions of President of India to promulgate the Ordinance were obtained and the Governor of Haryana has promulgated the Ordinance Vide Haryana Ordinance No. 4 of 1997, dated 19th November, 1997. The said Ordinance is now to be converted into Act."

5. After the said Bill had been passed by the Haryana Legislative Assembly, the Governor of Haryana reserved the same for consideration of the President of India under Article 254 of the Constitution of India keeping in view Entries 8 and 54 of List II and Entries 2 and 13 of the List III of the Seventh Schedule because some of the provisions of the proposed statutes encroached upon the field occupied by the law enacted by Parliament under Entry 2 of the Concurrent List i.e. the Code of Criminal Procedure, 1973.

6. The record produced by the learned Advocate General in pursuance of the Court''s order shows that vide letter dated 12.2.1998, Secretary to Governor, Haryana wrote to the Secretary to Government of India, Ministry of Home Affairs to obtain the assent of the President of India. On 20.2.1998, Director (Judicial), Ministry of Home Affairs wrote back to the Secretary to Governor, Haryana to clarify some mistakes in the Bill sent for assent of the President. On 27.2.1998, Secretary to Governor wrote to the Commissioner and Secretary to Government, Haryana, Prohibition and Excise Department to give certain clarifications. For this purpose, reminders dated 4.5.1998 and 8.6.1998 were also sent. After about 4 months and 15 days, the Commissioner and Secretary to Government, Prohibition and Excise Department wrote to the Secretary to Governor, Haryana that the mistakes have been corrected. On the next date i.e. 20.7.1998, Secretary to Governor wrote to the Commissioner and Secretary to Government, Haryana, Pohibition and Excise Department to clarify whether any action is required to be taken on the Bill which was reserved for the consideration of the President in view of the withdrawal of the policy of prohibition. Thereafter, nothing appears to have been done by the State Government to seek President''s assent. The record does not show that any communication was ever sent to the Government of India after 20.2.1998 for seeking President''s assent to the Punjab Excise (Haryana Second Amendment) Bill 1998.

7. In the absence of Presidential assent to the Bill passed by the Legislative Assembly for replacing Haryana Ordinance No. 4 of 1997, the Government may have faced insurmountable legal hurdles in implementing the amended Sections 14, 78 and 79 and newly added sections 78A to 79F of the Principal Act. Therefore, Ordinance No. 1 of 1998 titled as "The Punjab Excise (Haryana Third Amendment) Ordinance, 1998" was promulgated by the Governor under Article 213(1) of the Constitution. The reasons for issuance of this Ordinance, which have been incorporated in the notification dated 27.2.1998 read as under :

"HARYANA ORDINANCE NO. 1 OF 1998,

THE PUNJAB EXCISE (HARYANA THIRD AMENDMENT) ORDINANCE, 1998.

AN ORDINANCE to further to amend the Punjab Excise Act, 1914 in its application to the State of Haryana.

Promulgated by the Governor of Haryana in the FortyNinth Year of the Republic of India.

Whereas the Punjab Excise (Haryana Third Amendment) Ordinance, 1997 (Haryana Ordinance No. 4 of 1997), was promulgated on 19th November, 1997, after obtaining the instructions of the President of India and the said Ordinance was converted into the Punjab Excise (Haryana Second Amendment) Bill, 1998 which has been passed by the State Legislature and the same has been reserved by the Governor of Haryana for the consideration of the President of India on which the assent of the President of India is still awaited;

And whereas the Legislature of the State of Haryana is not in session and the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action to give continued effect to the provisions of said Ordinance.

Now, therefore, in exercise of the powers conferred by clause (1) of Article 213 of the Constitution of India, the Governor of Haryana hereby promulgates the following Ordinance :

xx xx xx xx"

8. On 27.3.1998, the Governor of Haryana issued order No. Leg. 12/98 under Article 213(2) of the Constitution of India and withdrew the Haryana Ordinance No. 1 of 1998 w.e.f. 30.3.1998. Simultaneously, Punjab Excise (Haryana Fourth Amendment) Ordinance, 1998 (Haryana Ordinance No. 2 of 1998) came to be promulgated for amendment of Section 41 and substitution of Sections 61 and 72 of the Principal Act.

9. After the issuance of Haryana Ordinance No. 4 of 1997, the officials of Prohibition and Excise Department as well as Police Department started a Statewide campaign for registration of cases under Sections 61/1/14 of the principal Act and also for seizure and confiscation of vehicles like scooters, cars, jeeps vans, trucks, buses (including the buses of the State Roadways of

Himachal Pradesh, Punjab, Delhi and even Haryana) on the ground that the drivers and occupant/passengers were carrying liquor. We have been informed that thousands of such cases have been registered under the amended provisions. The details of the quantity of liquor recovered from various vehicles sized by the concerned authorities, as are borne out from the First Information Reports, incorporated in these writ petitions are given in the form of a chart which is annexed as Schedule `A'' to this judgment. The petitioners have challenged the constitutional validity of Ordinance No. 4 of 1997 and 1 of 1998 as well as the seizure and/or confiscation of their vehicles on the various grounds set out in the writ petitions.

10. In order to decide whether the petitioners are entitled to relief sought by them, we may notice few facts from C.W.P. No. 1359 of 1998. TVS, Suzuki Motor Cycle bearing registration No. HR02/C4766 belonging to petitioner Rajesh Kumar was seized by the officials of police station Chhachrauli in connection with F.I.R. No. 23 dated 11.1.1998 registered against Subash Chand son of Rakam Chand, resident of Lohriwala, Thana Jagadhri on the allegation that he was carrying four pauches, each containing 200 mls. of liquor. The petitioner made representations to the Collector, Yamuna Nagar and the Deputy Excise and Taxation Commissioner (Prohibition) for release of his vehicle but failed to convince them. Therefore he has invoked writ jurisdiction of the High Court and challenged the constitutional validity of Ordinances No. 4 of 1997 and 1 of 1998 on the ground of lack of legislative competence and violation of his fundamental rights guaranteed under Articles 14 and 19 of the Constitution as well as his constitutional right to property guaranteed by Article 300A of the Constitution. Other petitioners have also challenged the vires of impugned Ordinances on similar grounds.

11. The respondents have contested the writ petitions by asseting that the Ordinances issued by the Governor under Article 213(1) of the Constitution are within the legislative competence of the State and they do not infringe or violate the fundamental/constitutional rights of the petitioner. In the detailed written statement filed by them in C.W.P. No. 1359 of 1998, the respondents have averred that Sections 78 and 79 have been amended to prevent smuggling of liquor from the neighbouring States. Their stand is borne out from the following extract of para No. 1 of the preliminary subjections :

"Keeping the prevailing situation in the State where many persons started indulging in smuggling of liquor from neighbouring States to the State of Haryana, it was felt by the government to amend Sections 78 and 79 of the Act on the pattern of Andhra Pradesh Excise Act. The geographical location of the Haryana State reveals that almost all the Districts in the State adjoin the neighbouring States where there is no prohibition. To meet this situation and to achieve the object of complete prohibition in the State, the Governor of Haryana in exercise of powers under article 213 of the Constitution of India promulgated the Ordinance No. 4 of 1997 after receiving the instructions from the President of

India which was published on 19.11.1997 (Haryana Govt. Gazette Extra PartII) vide which Sections 3, 14, 78, 79 of the above mentioned Act were amended. For the ready reference copy of the Ordinance No. 4 of 1997 is attached as Annexure R3/1. To replace this Ordinance a bill was introduced and passed by the Legislature as the Punjab Excise (Haryana Second Amendment) Bill, 1998. The same has been reserved for the consideration of the President of India by the Governor for which the assent of President of India is still awaited and as such another Ordinance No. 1 of 1998 was promulgated to replace Ordinance No. 4 of 1997 under clause (1) of Article 213 of the Constitution of India by the Governor of Haryana on 27.2.1998 as the earlier Ordinance was to expire on 1.3.1998. Copy of the Ordinance No. 1/98 is attached as Annexure R3/2. Persons indulging in smuggling of liquor in the State of Haryana from other States had started using various types of vehicles either belonging to them or stolen vehicles or vehicles belonging to others, borrowed or otherwise. Under these circumstances, to make the policy of prohibition a success in the State of Haryana, it was decided to make law deterrent and more stringent."

12. From the pleadings and the record produced by the learned Advocate General, the points which arise for adjudication in these petitions are :

(1) Whether Haryana Ordinance No. 4 of 1997 and 1 of 1998 are liable to be struck down on the ground of lack of legislative competence in the State ?

(2) Whether the provisions contained in the impugned Ordinances are repugnant to the Code of Criminal Procedure, 1973 ?

(3) Whether the impugned Ordinances are violative of the fundamental rights guaranteed to the petitioners under Articles 14 and 19 of the Constitution of India and their constitutional right under Article 300A of the Constitution ?

13. Before dealing with the respective contentions urged by the learned Counsel for the petitioners and the learned Advocate General, it will be useful to refer to the relevant constitutional provisions, the unamended and amended Sections 78 and 79 of the principal Act and Sections 451, 452, 454 and 457 of Chapter XXXIV of the Code of Criminal Procedure, 1973.

Article 213 : Constitutional Provisions.

Power of Governor to promulgate during recess of Legislature :

(1) If at any time, except when the Legislature Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if :

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance

(a) shall be laid before the Legislature Assembly of the State, or where there is a Legislature Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period of resolution disapproving it is passed by the Legislature Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

Explanation : Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as on Ordinance under this Article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to be the Governor, it shall be void :

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this Article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

Article 245 : Extent of Laws made by Parliament and by the Legislatures of States.

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation.

Article 246 : Subjectmatter of laws made by Parliament and by the Legislature of

States.

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

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

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in list (sic) in the Seventh Schedule (in this Constitution referred to as the State list).

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

Article 254 : Inconsistency between laws made by Parliament and laws made by the Legislature of State.

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

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

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

Entries 8 & 64 of the State List.

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

64. Offences against law with respect to any of the matters in this List.

Entry 2 of the Concurrent List.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

Unamended Sections 78 & 79 of the Principal Act.

78. Confiscation of article in respect of which offence committed.

(1) Whenever an offence punishable under this Act has been committed;

(a) every intoxicant or excise bottle in respect of which such offence has been committed together with the contents of such bottle, if any;

(b) every still, utensil, implement or apparatus and all material in respect of or by means of which such offence has been committed;

(c) every intoxicant or excise bottle lawfully imported, transported, manufactured, had in possession or sold alongwith, or in addition to any intoxicant or excise bottle liable to confiscation under clause (c).

(d) every receptacle, package and covering in which any intoxicant for clause bottle, materials, still, utensil, implement or apparatus as aforesaid is or are found together with the other contents if any of such receptacle or package; and

(e) every animal, cart, vessel, raft or other conveyance used for carrying such receptacle, or packages, covering or articles as aforesaid;

shall be liable to confiscation :

Provided that when it is proved that the receptacles, animals or other articles specified in clauses (d) and (e) are not the property of offenders, they shall not be liable to confiscation if the owner thereof established that he had no reason to believe that such offence was being or was likely to be committed.

(2) When confiscation may be ordered. When in the trial of any of offences punishable under this Act the Magistrate decides that anything is liable to confiscation under subsection (1), he may order confiscation :

Provided that in lieu of ordering confiscation he may give the owner of the thing liable to be confiscated an option to pay such fine as the Magistrate thinks fit.

79. Further provisions for confiscation. When there is reason to believe that an offence under the Act has been committed, but the offender is not known or cannot be found and when any thing or animal liable to confiscation under this Act and not in the possession of any person cannot be satisfactorily accounted for, the case shall be enquired into and determined by the Collector, who may order confiscation :

Provided that no such order shall be made until the expiration of one month from the date of seizing the thing or animal in question or without hearing the person (if any) claiming any right thereto, and the evidence (if any) which he produces in support of the claim.

Provided further, that if the thing in question is liable to speedy and natural decay, or if the Collector is of opinion that the sale of the thing or animal in question would be for the benefit of its owner, the Collector may at any time direct it to be sold; and provisions of this Section shall, so far as may be, apply to the netproceeds of the sale.

Amended Sections 78 and 79 of the Principal Act.

For Sections 78 and 79 of the principal Act, the following Sections shall be substituted, namely :

78. Liability of certain things to confiscation Whenever an offence has been committed, which is punishable under this Act, following things shall be liable to confiscation namely :

(1) any intoxicant, materials, stills, utensils, implements or apparatus in respect of or by means of, which such offence has been committed;

(2) any intoxicant lawfully imported, transported, manufactured, had in possession, sold or brought alongwith, or in addition to, any intoxicant liable to confiscation under clause (1); and

(3) any receptacle, package or covering in which anything liable to confiscation under Clause (1) and Clause (2) is found, and the other contents, if any, or such receptacle, package or covering and any animal, vehicle, vehicle felt or other conveyance used for carrying the same.

79. Confiscation by excise officers in certain cases (1) Notwithstanding anything contained in this Act or any other law for the time being in force, where anything liable for confiscation under Section 78 is seized or detained under the provisions of this Act, the excise Officer (below the rank of Deputy Excise and Taxation Commissioner) seizing and detaining such property shall, without any unreasonable delay, produce the said seized property before the Deputy Excise and Taxation Commissioner who has jurisdiction over the area :

Provided that where anything liable for confiscation under Section 78 is seized or detained under this Act, by the Deputy Excise and Taxation Commissioner such property shall, without unreasonable delay, be produced before the Collector.

(2) On production of the said seized property under subsection (1) the Deputy Excise and Taxation Commission or Collector, as the case may be, if satisfied that an offence under this Act has been committed, may, whether or not a prosecution is instituted for the commission of such an offence, order confiscation of such property.

(3) While making an order of confiscation under subsection (2), the Deputy Excise and Taxation Commissioner, or Collector, as the case may be, may also order that such of the properties to which the order of confiscation relates which in his opinion cannot be preserved or are not fit for human consumption, be destroyed.

(4) Where the Deputy Excise and Taxation Commissioner or Collector, as the case may be after passing an order of confiscation under subsection (2) is of the opinion that it is expedient in the public interest so to do, he may order the confiscated property or any part thereof to be sold by public auction or dispose of departmentally.

(5) The Deputy Excise and Taxation Commissioner or Collector, as the case may be, shall submit a full report of (sic) Commissioner or Collector, as thee case may be, shall, for the purpose of this Act have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (Central) Act 5 of 1908), when making enquiries under this Section in respect of the following mattes, namely) :

(a) receiving evidence on affidavits;

(b) summoning and enforcing the attendance of any person and examining him on oath; and

(c) compelling the production of documents.

79A. Issue of show cause notice. No order of confiscation of any property shall be made under Section 79 unless the person from whom the said property is seized.

(a) is given a notice in writing informing him of the ground on which it is proposed to confiscate such property; and

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice.

79B. JUDGMENT of confiscation in the absence of offender : When an offence under this Act has been committed, but the offender is not known or cannot be found, or when anything liable to confiscation under this Act, and not in the possession of any person cannot be satisfactorily accounted for, the Deputy Excise and Taxation Commissioner or Collector, as the case may be, may by order confiscate such property :

Provided that no such order shall be made until the expiration of one month, from the date of seizing the goods intended to be confiscated.

79C. Appeal Any person aggrieved by an order passed by Deputy Excise and Taxation Commissioner or Collector, as the case may be, under Section 79 may, within sixty days from the date of passing such order, appeal to the Excise Commissioner who may, after giving reasonable opportunity to the appellant, pass such orders as he deems fit.

79D. JUDGMENT of confiscation not to interfere with other punishment : The order of confiscation under subsection (2) of Section 79 or Section 79B shall not prevent from initiation of criminal proceedings against the accused under this Act. The result of criminal proceedings, either acquittal or conviction or otherwise under the provisions of the Act, will have no bearing on the order of confiscation passed under this Act.

79E. Bar of Jurisdiction. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Act 2 of 1974) when the Deputy Excise and Taxation Commissioner or Collector, the appellate authority, as the case may be, is seized with the matter under this Act, no court shall entertain any application in respect of excisable articles, any package, covering, receptacle, an animal, vehicle or other conveyance used in carrying such articles as far as its release, confiscation is concerned, and the justification of the Deputy Excise and Taxation Commissioner or Collector or the appellate authority, is the case may be, with regard to the disposal of the same, shall be exclusive.

79F. Property confiscated when to vest in Government. When an order for confiscation of any property has been passed under Section 79 and such order has become final in respect of the whole or any portion of such property, such property or portion thereof, as the case may be, shall vest in Government, free from all encumbrances."

Sections 451, 452, 454 and 457 of Chapter XXXIV of Code of Criminal Procedure.

451. JUDGMENT for custody and disposal of property pending trial in certain cases. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation for the purposes of this Section. "property" includes :

(a) property of any kind or document which is produced before the Court or which is in its custody;

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

452. JUDGMENT for disposal of property at conclusion of trial. (1) When a inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under subsection (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that be executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if

the order made under subsection (1) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under sub section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in Sections 457, 456, and 459.

454. Appeal against orders under Section 452 or Section 453. (1) Any person aggrieved by an order made by a Court under Section 452 or Section 453, may appeal against it to the Court to which appeal ordinarily lie from convictions by the former Court.

(2) On such appeal, the appellate Court may direct the order to be stayed pending disposal of the Appeal, or may modify, alter or annul the order and make any further orders that may be just.

(3) The powers referred to in subsection (2) may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in subsection (1) was made.

457. Procedure by police upon seizure of property. (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit, respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known the Magistrate may order the property to be delivered to him on such conditions, (if any) as the Magistrate thinks fit and if such person is unknown the Magistrate may detain it and shall in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and obstablish his claim within six months from the date of such proclamation.

14. The stage is now set for consideration of the various grounds of challenge to the impugned Ordinances and the contentions urged by the learned Counsel for the parties.

Re. Question Nos. 1 and 2

15. Learned Counsel for the petitioners argued that the amended Sections 78 and 79 and the newly added Section 79A to 79F are ultra vires to the legislative power of the State because they are repugnant to the provisions contained in Chapter XXXIV of the Code of Criminal Procedure. They submitted that Entry 8 of the State list does not empower the State Legislature to enact a law which is inconsistent with the law enacted by Parliament. The learned Advocate General argued that the entries contained in Seventh Schedule must be given wider and liberal interpretation with a view to preserve the legislative power of the State on

all matters which are incidental to its plenary power to enact laws on the subject matters specified in the State List. He further argued that even though some of the provisions introduced by the impugned Ordinances may be inconsistent with the provisions contained in Chapter XXXIV of the Code of Criminal Procedure, 1973, the same cannot be declared ultra vires in view of the instructions issued by the President in terms of Article 213 of the Constitution.

16. With a view to fully appreciate the above noted contentions, it will be proper to take cognizance of the nature of power vested in the Governor under Article 213 of the Constitution in the context of the various entries of ListII (State List) and ListIII (Concurrent List) of the Seventh Schedule. Article 213 empowers the Governor to promulgate appropriate Ordinances at any time except when the legislative Assembly and/or Legislative Council is/are in session. Proviso to Article 213(1) restricts the power of the Governor to promulgate Ordinance without instructions from the President if a Bill containing the same provisions would have required the previous sanction of the President for the introduction thereof into the Legislature or where the Governor would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President or an Act of the Legislature of the State containing the same provisions would have been invalidated without the assent of the President. Article 213(2), which is declaratory in nature, lays down that an Ordinance shall have the same effect as an Act of the Legislature of the State. This is subject to the requirement that the Ordinance shall cease operate at the expiration of six weeks from the reassembly of the Legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any. Clause (b) of Article 213 empowers the Governor to withdraw the Ordinance at any time. Article 213(3) declares that if the State Legislature is not competent to enact an Act, the Ordinance promulgated by the Governor for this purpose shall be void. Proviso to this Article says that an Ordinance promulgated under the said Article in pursuance of the instructions from the President shall be deemed to be an Act of the Legislature of the State for the purposes of provisions of the Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List.

At this stage, it will also be useful to take notice of the judicially recognised principles which should govern the interpretation of the provisions relating to distribution of powers between Parliament and the State Legislatures.

17. Articles 245 and 246 delineate the powers of the Parliament and the State Legislature. While Article 245 is general in nature, Article 246(1) specifically empowers the Parliament to make laws with respect to any of the matters enumerated in List I (Union List) in the Seventh Schedule. Article 246(3) confers exclusive power up the Legislature of any State to make laws for such State or any part thereof with respect to any of the matters enumerated in List II (State List) in the Seventh Schedule. Clause (2) of Article 246 contains a nonobstante

clause empowering the Parliament and State Legislature to make law on the matters enumerated in List III (Concurrent List) in the Seventh Schedule. Article 248 confers residuary power upon the Parliament to make any law with respect to any matter not enumerated in the Concurrent list or the State List. Clause (1) of Articles 254 gives overriding effect to the provisions of a law made by Parliament which Parliament is competent to enact or to any provision of any existing law in respect of any of the matters enumerated in list III and if a law made by the Legislature of the State is repugnant to the provisions of the law made by Parliament, the law made by the Legislature of the State is to be treated as void to the extent of repugnancy. Clause (1) is, however, subject to clause (2). Under clause (2), the law made by the Legislature of a State with respect to one of the matters enumerated in List III will prevail over the provisions of an earlier law made by Parliament or an existing law with respect to that matter if the law made by the Legislature of the State has been reserved for consideration by the President and has received his assent. The proviso to clause (2) curtails the ambit of clause (2) by providing that Parliament can enact a law with respect to the same matter on which the State Legislature has made the law and by such law Parliament can add to, amend, vary or repeal the law made by the Legislature of a State. The provision corresponding to Article 254 was contained in section 107 of the Government of India Act, 1935. The only difference between that provision and Article 254 is that there was no provision similar to the proviso to clause (2) of Article 254 in Section 107 of the Government of India Act, 1935. As a result of the proviso in Article 254, the Legislative power of Parliament has been enlarged in the sense that it can add to, amend, vary or repeal the law made by the Legislature of the State.

18. Explaining the meaning of repugnancy in the context of Section 107 of the Government of India Act, 1935, B.N. Rau, has stated :

"It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says do and the other don''t, there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test; there may well be cases of repugnancy where both the laws say don''t but in different ways. For example, one law may say, `No person shall sell liquor by retail, that is, in quantities of the less than five gallons at a time, and another law may say, `No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time''. Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified."

19. How the Court should ascertain whether there is repugnancy between the laws enacted to two Legislatures ? This question was considered in Deep Chand v. State of U.P., AIR 1959 SC 648. The Apex Court analysed the provisions of the

Constitution and held :

"Repugnancy between two statutes may thus be ascertained on the basis of the following three principles :

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subjectmatter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field."

20. In State of Orissa v. M.A. Tulloch & Co., AIR 1964 SC 1284, their Lordships observed :

"Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent Legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other Legislature whether passed before or after would be overborne on the ground of repugnancy."

21. Reference in this regard may also be made to the decisions of the Supreme Court in Javeri Bhai v. State of Bombay, AIR 1954 SC 752, T. Barai v. Henry An Hoc and another, AIR 1983 SC 150, M/s Hoechst Pharmaceuticals Ltd. and another v. State of Bihar and others, AIR 1983 SC 1019, and Thirumuruga Kirupananda Variyar Thavathiru Sundara Swamigal Medical Education and Charitable Trust v. State of Tamil Nadu and others, 1996(3) SCC 15.

22. For construing entries contained in the Lists of Seventh Schedule, the Courts have evolved certain rules of interpretation. It is now well settled that the entries in the three lists are only Legislature heads or fields of legislation. They demarcate the area over which the appropriate Legislature can operate. It is also well settled that widest amplitude should be given to the language of the entries. Some of the entries in the different lists or in the same List may overlap and sometimes may also appear to be in direct conflict with each other. In such situation, it is the duty of the Court to find out its true instant and purpose to examine a particular legislation in its pith and substance to determine whether it fits in one or the other of the Lists Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal and others, AIR 1962 SC 1044, The India Cement Ltd. etc. etc. v. State of Tamil Nadu etc., AIR 1990 SC 85, Shri Jilubhai Nijbhai Khachar & others v. State of Gujarat and others, JT 1994(4) SC 473 and State of Andhra Pradesh v. McDowell & Co. and others, 1996(3) SCC 709. It is also an established

principle of law that lists in the Seventh Schedule are designed to define and delimit the respective areas of respective competence of the Union and the States. These neither impose any implied restriction on the legislative power conferred by Article 246 of the Constitution, nor prescribe any duty to exercise that Legislature power in any particular manner. Therefore, the language of the entries should be given widest scope. D.C. Rataria v. Bhuwalka Brothers Ltd., AIR 1955 SC 182.

23. In the light of the principles laid down by the Apex Court it is to be decided whether the impugned ordinances are liable to be invalidated on the ground of lack of legislative competence in the State or on the ground repugnancy with the provisions of Chapter XXXIV of the Code of Criminal Procedure.

24. The argument of Shri Hemant Kumar and other learned counsel for the petitioners that Entry 8 of List II does not empower the State Legislature to enact law for punishing those found guilty of violating the statute enacted for regulating production, manufacture, possession, transport, purchase and sale of intoxicant liquors and, therefore, amended Sections 78 and 79 and newly added Section 79A to 79F should be declared ultravires to powers of the State, sounds plausible but cannot stand closer scrutiny. Entry 64 of ListII which is similar to Entry 93 of ListI empowers the offences against laws which the State can enact with respect to the matters enumerated in ListII. In other words, the State has the jurisdiction and competence to take legislative measures to deal with offences involving violation of laws enacted within the four corners of entries of ListII. In our opinion, these entries must be given widest possible interpretation to as to sustain the legislative competence of the State for effective implementation of the laws made under other entries of list II because without such power it may become impossible for the State to implement the substantive provisions of the statutes enacted on the subject matter falling within its jurisdiction. Therefore, we do not find any legitimacy in the argument of the learned counsel that the amendments made in Sections 78 and 79 of the principal Act and the newly added provisions of Section 79A to 79F are ultravires to the power of the State Legislature.

25. We shall now examine the question whether the amended sections 78 and 79 and newly added Section 79A to 79F of the principal Act are inconsistent with the provisions contained in Chapter XXXIV of the Code of Criminal Procedure which have been enacted by the Parliament. For this purpose, it will be useful to analyse the relevant provisions of the Code of Criminal Procedure and the principal Act.

26. Section 451 of the Code of Criminal Procedure empowers the Criminal Court to make an order for the proper custody of property which appears to have been used for commission of any offence and which is produced before it during an enquiry or trial. Such an order operates till the conclusion of the enquiry or trial. If the property is subject to speedy and natural decay or if the Court otherwise thinks expedient to do so, it may, after recording such evidence on it thinks

necessary, order that the property be sold or otherwise disposed of. Section 452(1) confers power upon the Criminal Court to deal with the property at the conclusion of enquiry or trial. At that stage, the Court can order disposal of the property by destruction, confiscation of delivery to any person claiming to be entitled to possession thereof. Section 452(3) gives power to the Court of Session to direct that the property be delivered to the Chief Judicial Magistrate, who shall deal with it in the manner provided in Sections 457 to 459. Section 454 enables a person aggrieved by an order made by the Court under Sections 452 or 453 to file an appeal to the Court to which the appeal ordinarily lies from conviction by the trial Court. Section 457 confers power upon the Magistrate to make appropriate order of disposal of property or delivery thereof to the person entitled to possession of the same or to give custody of the property seized by the police and report is submitted by the police officer to the Magistrate. As against this, Section 78 of the principal Act declares that whenever an offence punishable under that Act has been committed, not only the intoxicant, materials, stills, utensils, implements, apparatus in respect of or by means of which offence has been committed but any receptacle, package or covering in which such intoxicant, material etc. is found and the other contends of such receptacle, package or covering, any animal, vehicle, vessel, raft or other conveyance used for carrying the receptacle, package or covering shall be liable to confiscation. Section 79(1) which begins with a nonobstante clause provides that if anything liable to confiscation under Section 78 is seized or detained by an officer below the rank of Deputy Excise and Taxation Commissioner, then such property shall be produced before the Deputy Excise and Taxation Commissioner having jurisdiction over the area. If such thing(s) is/are seized by the Deputy Excise and Taxation Commissioner then he shall produce the same before the Collector, SubSection (7) thereof vests power in the Deputy Excise and Taxation Commissioner or the Collector to order confiscation of the property if he is satisfied that an offence under the principal Act has been committed. Such an order can be made irrespective of the fact that a prosecution has not been instituted for commission of the offence. Subsection (3) empowers the competent authority to order destruction of the property which cannot be preserved or is not fit for human consumption. Subsection (4) empowers the Deputy Excise and Taxation Commissioner or the Collector, as the case may be, to sell by public auction or dispose of departmentally the property confiscated under subsection (2). Section 79(5) imposes a duty on the Deputy Excise and Taxation Commissioner and the Collector to submit full report containing all particulars of confiscation to the Excise Commissioner within 24 hours of such confiscation. Subsection (6) of Section 79 lays down that for the purpose of effective implementation of the provisions of Section 79 and more particularly of Section 79(2), the Deputy Excise and Taxation Commissioner or the Collector, as the case may be, shall have the same powers as are vested with the Civil Court under the Code of Civil Procedure in respect of the following matters :

(a) receiving evidence on affidavits;

(b) summoning and enforcing the attendance of any person and examining him on oath; and

(c) compelling the production of documents.

26. Section 79A requires giving of notice and opportunity of making representation to the person from whom the property is seized. Section 79B empowers the Deputy Excise & Taxation Commissioner or the Collector, as the case may be, to order confiscation of the property in the cases in which offender is not known and cannot be found. This power can be exercised only after the expiry of the one month from the date of seizing the goods intended to be confiscated. Section 79C provides for appeal by any person aggrieved by an order passed under Section 79(2). Section 79D is declaratory in nature. It lays down that the provisions relating to confiscation shall not bar initiation of criminal proceedings against the accused. Simultaneously, it lays down that the result of criminal proceedings shall have no bearing on the order of confiscation passed under the Act. Section 79E also begins with nonobstante clause and it bars all the courts from entertaining any application in respect of excisable articles, any package, covering, receptacle, vehicle etc. used in carrying such articles. By virtue of Section 79F, the property confiscated under Section 79 shall vest in the State Government free from all encumbrances.

27. From the above analysis of various provisions of the Central Act and the State Act, it is clear that while the Central Act vests power in the Criminal Court to pass an order for proper custody of the property during pendency of enquiry or trial and also empowers such court to order disposal of the property by destruction, confiscation etc. at the conclusion of trial, under the amended provisions of the State Act the jurisdiction of the Court to deal with the property has been altogether ousted. Simultaneously, power has been vested in the executive officers of the rank of Deputy Excise and Taxation Commissioner and the Collector to order confiscation of the excisable goods as well as the receptacles, package or covering in which the excisable goods are found and other contents of such receptacle, package or covering and also any animals, vehicle, vessel, raft for carrying the same. A bare reading of Sections 78, 79A and 79B shows that the power vested in the executive authorities to order confiscation of the property and goods is absolute and unbridled and it is only subject to the condition that before passing the order of confiscation, the concerned authority should give notice and opportunity of making representation to the person from whom the property is seized. While the Central Act does not empower the Criminal Court to order disposal of the property/goods relating to the offence before completion of enquiry or conclusion of trial and there is nothing in Chapter XXXIV of the Code of Criminal Procedure which may be construed as conferring power upon the Court of competent jurisdiction to order confiscation of the property/goods in case the prosecution fails to bring home the charge against the accused. Section 79 empowers the Deputy Excise and Taxation Commissioner or the Collector, as the case my be, to confiscate the

property and goods even in those cases in which the prosecution is not launched. Such an order can also be made before the prosecution for offence involving violation of the provisions of the principal Act is started. Moreover, it makes confiscation absolute irrespective of the result of the criminal proceedings to which the person accused of committing offence under the principal Act is subjected to. In other words, even if the competent Court finds that no offence has been committed or that the evidence produced by the prosecution is not sufficient to prove the charge, the order of confiscation remains intact. Moreover, the State Act does not contain any provisions which makes it obligatory for the competent authority to make enquiry about the true owner of the property or goods. It also does not provide for giving of opportunity of hearing to the owner of the goods or property. Rather, Section 79A makes a show of compliance of the principles of natural justice by providing that notice and opportunity of making representation be given to the person from whom the property is seized. It is, thus, evident that the provisions of the State Act are clearly inconsistent with the provisions of the Central Act.

28. Ordinarily, the aforementioned conclusion of ours should have been sufficient to strike down the impugned Ordinance in view of the provisions of Article 254 of the Constitution but this is not to be so. Admittedly, Haryana Ordinance No. 4 of 1997 was promulgated by the Governor after the President had granted the request of the Government of Haryana to issue instructions for promulgation of the said Ordinance. Therefore, at the time of its promulgation the said Ordnance was within the legislative competence of the State, notwithstanding the fact that the provisions contained therein were repugnant to the provisions of the Code of Criminal Procedure. If the Bill passed by the Haryana Legislative Assembly had not been reserved for the assent of the President, the petitioners contention that the impound Ordinance should be struck down being inconsistent with the Central Act may have merited acceptance. However, the fact of the matter is that Haryana Bill No. 5LHA of 1998 was reserved by the Governor for assent of the President. It is a different thing that after some clarification had been sought by the Government of India, Ministry of Home Affairs, the functionaries of the State did not bother to resubmit the Bill for the Presidential assent. This appears to have been done in view of the fact that the government in its political wisdom decided to give up the policy of prohibition and withdraw Haryana Ordinance No. 1 of 1998. The withdrawal of the Ordinance and the absence of assent by the President cannot, however, be made basis for holding that the exercise of legislative power vested in the Governor is vitiated due to violation of the constitutional provisions. Therefore, we are unable to agree with the learned counsel for the petitioners that the impugned Ordinance are ultravires to the legislative power of the State.

Re : Question No. 3.

29. Learned counsel for the petitioners argued that the provisions contained in the impugned Ordinances are liable to be declared unconstitutional because they

are violative of the fundamental rights guaranteed to the petitioners under Articles 14 and 19 of the Constitution and also their constitutional right to property guaranteed under Article 300A. Shri Hemant Kumar relied on the provisions of the Punjab Separation of Judicial and Executive Functions Act, 1964 and argued that the impugned provisions which take away the powers of the Court to deal with the property connected with the offence involving violation of the provisions of the principal Act should be declared ultra vires to Article 50 of the Constitution. Learned counsel for the petitioners vehemently assailed Section 79(2) which authorises confiscation of the vehicles and other property even before the commencement of the prosecution. They further submitted that section 79D which makes confiscation final irrespective of the result of prosecution is draconian. Some of the learned counsel attacked the impugned provisions on the ground of unreasonableness and consequential violation of Articles 14 and 19 of the Constitution by arguing that the vehicles which are not intended to be used for carrying intoxicants have also been made liable to confiscation under the Act merely because person travelling in such vehicles may be found in possession of intoxicant. They submitted that recovery of intoxicant from the person travelling in a vehicle cannot lead to an inference that the vehicle was being used for carrying the intoxicant and, therefore, the provisions authorising confiscation of such vehicle must be held unreasonable and unjust. Another contention of the learned counsel is that the provisions which empower the Deputy Excise and Taxation Commissioner and the Collector to confiscate vehicle even without hearing the owner of the vehicle must be declared as wholly unreasonable and unconscionable and violative of Articles 14 and 19(1)(d) and (g) of the Constitution. Shri S.P. Singh and some other learned counsel sought invalidation of Section 79E on the ground that it amounts to violation of the basic structure of the Constitution.

30. The learned Advocate General defended the impugned provisions and argued that the legislative interjection through the fiat of Ordinances became necessary to effectively implement the policy of prohibition. He read out the preliminary submissions contained in the written statement of the respondents and argued that the powers conferred upon the executive authorities to confiscate the property are neither unreasonable nor unconstitutional. Shri Hooda argued that the provisions contained in Section 79(5) read with Section 79A operate as sufficient safeguard against the arbitrary exercise of power by the confiscating authority. He submitted that the rule of audi alteram partem has been engrafted in Section 79A with a view to prevent abuse of the power of confiscation. While conceding that the scheme of Sections 79 and 79A does not expressly envisage issuance of notice to the owner of the vehicle, he submitted that in exercise of powers vested in it under Section 79(5) the competent authority can elicit in formation about the true owner of the vehicle and then give opportunity of hearing to the affected person before ordering confiscation. Learned Advocate General relied on the observations made in State of Andhra Pradesh and Ors. v. McDowell & Co. and Ors. Etc., JT 1996(3) SC 679 and argued that the impugned

provisions cannot be invalidated only on the ground of unreasonableness and the Court should not invalidate the exercise of legislative power by the State in the absence of any patent offence to the constitutional dictates.

31. We shall preface consideration of question No. 3 by extracting the observations made by the Supreme Court in McDowell & Co.''s case (supra) with regard to the scope of the Court''s jurisdiction to examine the vires of statutory enactments. That was a case in which the provisions of Andhra Pradesh Prohibition (Amendment) Act, 35 of 1995 were assailed by the manufacturers of liquor on the ground of violation of Articles 14 and 19(1)(g) of the Constitution. One of the contentions urged on behalf of the petitioners was that the exemptions granted to various categories of persons is arbitrary and, therefore, the amending Act is liable to be struck down. Rejecting this contention the Supreme Court observed :

"In India, the position is similar to the United States of America. The power of the Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by the Parliament of the Legislature can be struck down by Courts on the grounds and the two grounds alone, viz., (1) lack of legislative competence, and (2) violation fo any of the fundamental rights guaranteed in PartIII of the Constitution or of an other constitutional provision. There is no third ground...................... It is enough for us to say that whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before in validating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom."

32. A brief survey of the various provisions of the Principal Act (unamended and amended) is necessary before we deal with the merits of the respective contentions urged by the learned Counsel on question No. 3. Chapter III of the unamended principal Act contains provisions relating to import, export and transport of intoxicants. Section 17 empowers the State Government to prohibt import, export and transport of intoxicants. Section 20, as it stood before amendment, restricted manufacture of intoxicants except under the provisions of the Act. Section 24 deals with possession of liquor, Section 26 deals with sale of intoxicants. Chapter VI deals with offences and penalties. Section

61(unamended) which occurs in the Chapter relating to offences and penalties provides for impostion of punishment of imprisonment for a term upto 3 years and fine upto Rs. 2000/ for offences involving contavention of the provisions of the Act or rules etc. framed thereunder. Section 47, which appears in the Chapter relating to powers and duties of the officers, confers power upon various authorities to arrest, without warrant, any person found committing offence punishable under Section 61 or 63. It also empowers such officer to seize and detain any intoxicant or other article liable to confiscation under the principal Act or any other law for the time being in force. It also empowers such officer to detain and search any person or any vessel, raft, vehicle, animal, package, receptacle or covering. Section 48 empowers the Magistrate to issue warrants for search or arrest. Section 72 (unamended) made all offences punishable under the Act bailable within the meaning of the Code of Criminal Procedure, 1898 except certain offences specified in proviso thereto. Sections 78 and 79 (unamended) contained provision for confiscation of article in respect of which offence was committed. Proviso thereto prohibited confiscation in case it was proved that the receptacle, animal or other articles specified in clauses (d) and (e) are not the property of offender if the owner could prove that he had no reason to believe that such offence was being or was likely to be committed. In terms of Section 78(2), the power to order conficaction was vested with the Magistrate. Section 79 provided for confiscation of articles if the offender is not known and cannot be found. By Haryana Ordinance No. 1 of 1996, which was published in the gazette dated 30.5.1996, scope of the provisions relating to prohibition was enlarged by insertion of clause (17A) in Section 3. By Haryana Ordinance No. 9 of 1996, the imposition of punishment by way of imprisonment for 6 months was made mandatory. Simultaneously, Section 72 was amended and offences publishable under Section 61(1) were made non bailable in addition to the offences punishable under Section 63. The unamended Section 78 enumerates the things which shall be liable to confiscation. They include intoxicant, materials, stills, utensils, implements or apparatus in respect of or by means of which such offence has been committed and also include any receptacle, package or covering in which anything liable to confiscation is found and any animal, vehicle, vessel, raft or other conveyance used for carrying the same. Section 79(2) empowers the competent authority to order confiscation of the seized property if it is satisfied that an offence under the principal Act has been committed. This is irrespective of the fact that prosecution for commission of offence has not been initiated. Section 79(4) empowers the competent authority to dispose of the confiscated property. The second part of Section 79D makes the order of confiscation final irrespective of the result of prosecution which may be launched against the accused in respect of violation of the provisons of the Principal Act. Section 79E bars the jurisdiction of the competent Court. Section 79B provides for confiscation of property where the offender is not known or cannot be found. Section 79A provides for giving of written notice to the person from whom the property is seized but there is no requirement of giving notice to the owner.

33. This survey of unamended and amended provisions of the principal Act brings out the following salient features :

(i) The power to deal with the seized property which may be subject matter of offence or which may be connected with the offence involving violation of the provisions of the Principal Act was vested in the Criminal Courts of competent jurisdiction. By virtue of the amending Ordinances, the Courts have been denuded of this jurisdiction and under Sections 79(2) and 79B, the executive authorities of the rank of Deputy Excise and Taxation Commissioners and Collectors have been empowered to deal with such cases and to confiscate the property.

(ii) In terms of the unamended Section 78(2), an order of confiscation was not to be passed if the owner could prove that he had no reason to believe that an offence was being or was likely to be committed. By virtue of the impugned amendments, this provisons has also been done away with. As a matter of fact, the amended provisions do not even provide for giving of notice and opportunity of hearing to the owner of the vehicle. In other words, confiscation of the vehicle cannot be saved under the amended provisions even if the owner appears and proves that he had no knowledge that the vehicle was being or was likely to be used for commission of offence.

(iii) Under the unamended provisions, the order of confiscation could be made by the Magistrate during trial of any offence punishable under the principal Act only if the concluded that the thing was liable to confiscation. Moreover, he had the jurisdiction to give option to the owner of the thing liable to confiscation to pay appropriate fine. As against this, under Section 79(2) (amended), the power of confiscation can be exercised by the concerned authorities irrespective of the fact that prosecution for alleged commission of offence has not been initiated. That apart, the order of confiscation has been clothed with finality irrespective of the result of criminal proceedings. That means that even if the person accused of having committed offence under the Act is acquitted on the basis of a finding that the charge against him is fabricated or false or has not been proved, the order of confiscation would stand.

34. It is, thus, evident that by virtue of impugned amendments, the power of the Courts to deal with the property, which is subject matter of offence or connected with the offence involving violation of the provisions of the Principal Act has been taken away and at the same time, unbridled power has been conferred upon the executive authorities not only to seize but also to confiscate and dispose of receptacles, coverings, packages in which the intoxicants may have been found, as also the vehicles, vessels etc. used for carriage of the same. This power is exercisable even before the prosecution is initiated under the provisions of the Principal Act. Above all, an order made under Sections 79(2) and 79B has been made final, subject only to the right of appeal under Section 79C to the higher executive authority. The right of appeal vested in the owner of the vehicle under Section 454 of the Central Act has been extinguished. Thus, the real owner of

the vehicle can be deprived of his property without being heard and without having the right to avail judicial remedy against the arbitrary exercise of power by the concerned authority under Section 79(2) or section 79B. A bare perusal of the details incorporated in Schedule A shows that in 138 out of 299 cases, the quantity of liquor recovered is 2 bottles or less. In some cases, only a nip of liquor has been recovered from the drivers of the vehicles or passengers travelling in buses, jeeps and cars. This is sufficiently indicative of the fact that such cars, buses and jeeps were not being used for carrying liquor but for transporting human beings or goods. Ignoring this vital aspect, the concerned authorities ordered their confiscation. Therefore, we are constrained to hold that the power of seizure and confiscation has been used indiscriminately and in most injudicious manner resulting in depriving the citizens of their valuable property. Those who were travelling in the vehicles were directly prevented from use of the vehicles by virtue of seizure and confiscation. In this manner, the rights of the citizens to move freely throughout the territory of India, which is guaranteed under Article 19(1)(d) of the Constitution has been seriously impeded and restricted without any reasonable cause. Similarly, those who used the vehicles like trucks and buses for their trade, business and occupation have been deprived of their right guaranteed under Article 19(1)(g) of the Constitution without any rhyme or reason. The learned Advocate General made effort to convince us that these provisions fall within the ambit of Article 19(5) and (6) and, therefore, the restriction on the fundamental rights of the petitioners must be treated as reasonable. In our view, there is no merit in his submission. Article 19 guarantees the six freedoms to the citizens of the country including the right to move freely throughout the territory of India and to practise any profession or to carry on any occupation, trade or business. These freedoms can be subjected to reasonable restrictions by Parliament and State Legislations. What is reasonable restriction ? This question has been examined by the Apex Court and other Courts in Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118, M/s Dwarka Prasad Luxmi Narain v. State of Uttar Pradesh, AIR 1954 SC 224, Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, The Lord Kirshna Sugar Mills Ltd. v. Union of India, AIR 1959 SC 1124, K.K. Kochuni v. State of Madras, AIR 1960 SC 1080, Jyoti Pershad v. Administrator for the Union Territory of Delhi, AIR 1961 SC 1602, Bachan Singh v. State of Punjab, AIR 1971 SC 2164, Pathumma v. State of Kerala, AIR 1978 SC 770 and McDowell & Co.''s case (supra). The principles which emerge from the analysis of these decisions are :

(i) That in judging the reasonableness of the restrictions imposed by clauses (2) to (6), the Court has to bear in mind the directive principles of the State Policy.

(ii) That restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(iii) That in order to judge the quality of the reasonableness no abstract or general pattern or a fixed principle can be laid down so as to be of universal application.

(iv) That a just balance has to be struck between the restriction imposed and the social control envisaged by Article 19(6).

(v) That there must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. In other words, the Court has to see whether by virtue of the restriction imposed on the right of the citizen the object of the statute is really fulfilled or frustrated.

(vi) That the Court must see the prevailing social values whose needs are satisfied by restrictions meant to protect social welfare.

(vii) That so far as the nature of reasonableness is concerned, it has to be viewed not only from the point of view of the citizen but the problem before legislature and the object which is sought to be achieved by the statute. This means that the Court must see whether social control envisaged is being effectuated by the restrictions imposed on the fundamental right.

35. Viewed in the light of these principles, the provisions of the principal Act authorities seizure of the vehicle used for carrying intoxicants etc. may not be fraught with the danger of being declared unconstitutional and the same can be construed as provisions enacted in order to effectuate the purpose of legislation enacted for imposing prohibition. However, conferment of unguided power upon the executive authorities to confiscate the seized goods and vehicles even before the initiation of the prosecution, absence of the requirement of giving notice and opportunity of hearing to the owner and making the order of confiscation final irrespective of the result of prosecution and simultaneous denial of redress to the aggrieved party in a Court of law cannot be treated as reasonable restrictions within the ambit of Article 19(5) or (6) of the Constitution. Rather, these provisions not only impose unreasonable restriction on the rights of the citizens to move freely throughout the territory of the country but also to carry on their trade, business, occupation because by virtue of powers vested in the Excise Authorities and Collectors, the vehicle, whether it be a car, jeep, truck, bus, scooter, worth lakhs of rupees can be detained and even confiscated permanently in utter disregard of the principles of natural justice and the affected person is deprived of the opportunity of legal redress in a Court of law. Judicial notice can also be taken of the delay in filing chargesheets in cases of this nature and also in the disposal of criminal cases pertaining thereto. The enormous loss the Nation will be put to by the holding up of such costly vehicles for an unauthorised transport of even negligible quantity of liquor is also a factor to be taken note of. The unreasonableness is writ large in this piece of legislation and this one is a striking example for the saying : "Wherever the enforcement machinery is sluggish, it is sought to be covered up by plethora of legislations."

36. We are also of the opinion that Section 79(2) and Section 79B which empower the Deputy Excise and Taxation Commissioner or the Collector, as the case may be, cannot be treated as a provision which is ancillary or incidental to the power available to the State under Entry 8 to prohibit manufacture, sale,

possession, transportation of the intoxicants. In support of this, we may refer to the decision of the Supreme Court in The Check Post Officer, Coimbatore and others, K.P. Abdulla and Bros., 1971(27) STC 1.

37. The argument of the learned counsel for the petitioners that the concerned Deputy Excise and Taxation Commissioners and Collectors have used the power of confiscation without application of mind to the provisions of the Statute and in a most arbitrary manner also merits acceptance. At the cost of repetition, we may observe that in 138 out of 299 petitions, the vehicles were detained and/or confiscated on the ground that the driver or passenger or occupant of the vehicle was found in possession of two bottles of liquor or less. No person of ordinary prudence, in the circumstances of these cases, could conclude that the vehicles in question were used for carrying intoxicants. However, the authorities who confiscated such vehicles exhibited lack of minimum prudence of a reasonable person by ordering confiscation of the vehicles without giving hearing to the owner. By way of illustration, we may refer to the order of confiscation passed in C.W.P. No. 2981 of 1998 Delhi Transport Corporation v. State of Haryana and others. The facts of that case show that two quarters of Bonny Scot, one pint of Patiala and one nip of Director Special were found in a card board in the bus bearing registration No. DEP9478 of Delhi Transport Corporation which was being driven by Suresh Kumar driver No. 17286 and Dharam Pal conductor No. 14806. The bus was seized on 13.12.1997 by the Incharge, Police Station Sirhauli, District Gurgaon at Sirhauli Tax Barrier. The Deputy Excise and Taxation Commissioner (Prohibition), Haryana issued notice Annexure P.2 dated 13.12.1997 under Section 79A to the driver and conductor of the bus and on 16.12.1997 he passed order Annexure P.3 for confiscation of the vehicle. The appeal filed by the Depot Manager, Delhi Transport Corporation, Shadipur Depot, New Delhi was dismissed by the Prohibition and Excise Commissioner, Haryana on 6.2.1998 on the ground that the bus was being used for carrying liquor. For reference purposes, we deed it appropriate to reproduce the orders dated 16.12.1997 and 6.2.1998.

JUDGMENT dated 16.12.1997.

"Shri U.K. Gupta, Assistant Excise and Taxation Officer (Prohibition) Gurgaon, while conducting checking along with supporting staff hear Sirhaul Border detected that bus No. DEP9478 belonging to Shadipur Depot of Govt. of N.C.T. of Delhi was carrying Two Quarters (Bonney Scot), 1 pint of Patiala and 1 Nip of Director Special, and as such offence has been committed u/s 61(1)14 of the Punjab Excise Act, 1914 for which FIR No. 2279 dated 13.11.1997 was lodged in Sadar Police Station, Gurgaon. Shri U.K. Gupta, A.E.T.O.(P) who is an Excise Officer under the provisions of the Punjab Excise Act, 1914 detained the abovesaid vehicle and after detaining this bus he produced the abovesaid vehicle before me for confiscation under subsection 79(1) of the Punjab Excise Act. As liquor has been recovered from Bus No. 9478 owned by Delhi Transport Corporation, as such the bus in question is liable to confiscation under Section

78(3) of the Punjab Excise Act, 1914. The abovesaid vehicle was being driven by Shri Suresh Kumar, Driver of the Delhi Transport Corporation. Before confiscation of vehicle No. DEP9478 u/s 79(2) for violation of Section 61(1)14 of the Punjab Excise Act, 1914, a show cause notice u/s 79A(a) was given in writing informing him all the grounds on which it was proposed to confiscate the abovesaid vehicle, to appear before the undersigned on or before 23.12.1997. In response to this show cause notice Shri Rattan Lal Sharma, Traffic Supervisor of Shadipur Depot, Delhi, appeared before the undersigned along with the representation in writing. In his written reply, Shri Rattan Lal Sharma submitted that the Driver Shri Suresh Kumar, was busy in driving the bus whereas conductor was busy in issuing tickets to the passengers. He further submitted that during the course of checking by the excise staff none of the passengers accepted the unclaimed liquor. The representation and the reasons given therein are not found enough as it is the responsibility of the Corporation to ensure that no intoxicant be smuggled through their transport in the State of Haryana. So I find that the representation given by Shri Rattan Lal Sharma, Traffic Supervisor, and reasons therein have no force and I reject the same. I, therefore, order for confiscation of the vehicle No. 9478 u/s 79(2) of the Punjab Excise Act, 1914. Issue copy of the order.

Sd/

Deputy Excise and Taxation

Commissioner (Prohibition)

Gurgaon."

JUDGMENT dated 6.2.1998.

Brief facts of the case are that :

Shri U.K. Gupta, Assistant Excise and Taxation Officer (P), Gurgaon while conducting checking near Sirhaul Border (Gurgaon) detected two quarters (Bonne Scot), one pint of Patiala and one nip of Director Special in Bus No. DEP9478 belonging to Delhi Transport Corporation. Since an offence under Section 61(1) of the Punjab Excise Act, 1914 was committed, an FIR No. 2279 dated 12.12.1997 was lodged with Sadar Police Station, Gurgaon. Vehicle involved in liquor smuggled was detained and was produced before the D.E.T.C. The D.E.T.C.(P) issued show cause notice as required under Section 79A of the Act. Since satisfactory reply was not given by the representative of Delhi Transport Corporation, the bus was ordered to be confiscated by the DETC vide his order dated 16.12.1997. Against these orders, the appellant has filed the present appeal.

During the course of arguments, the counsel for DTC argued that due to heavy rush on the route, the conductor was busy in issuing tickets to the passengers and the driver was busy in driving the bus. Somebody from the passengers side may have boarded the bus along with liquor which could not be noticed either by the conductor or by the driver. He further argued that the bus in question cannot be said to have been used for smuggling liquor by the DTC because the liquor which was found in the bus was not kept there with the consent of DTC.

The D.A. appearing on behalf of the department has argued that the case clearly falls under Section 78(3) where it is provided that any receptacle, package or covering in which anything liable to confiscation under clause (1) or clause (2) is found and the other contents, if any, of such receptacle, package or covering and any animal, vehicle, vessel, raft or other conveyance used for carrying the liquor is liable for confiscation. A notice under Section 79A was issued and the DETC has rightly ordered confiscation under Section 79B of the Act. He has argued that it is immaterial whether the liquor was being smuggled without the consent of the D.T.C. or it was not in the knowledge of bus driver and the conductor.

After hearing the arguments and going through the record, I am satisfied that the bus in question was being used for carrying liquor. There is no denial that liquor was being carried. Therefore, the case is squarely covered under Sections 78(3) and 79B of the Act. I do not find any reason to interfere with the order of DETC. The appeal is therefore dismissed.

JUDGMENTs be communicated.

Sd/

Prohibition & Excise

Commissioner, Haryana

Chandigarh

6th Feb., 1998.

38. Almost in all other cases orders of confiscation have been passed in the like manner.

39. In our opinion, the confiscation of buses of State Roadways merely because travelling passengers or drivers were found in possession of small quantity of liquor or the drivers of the trucks were found in possession of half, one or two bottles of liquor should be treated as examples of blatant arbitrariness in the exercise of power under the impugned provisions. The fact that no notice or opportunity of hearing was given to the owners of the vehicles before the passing of order of confiscation under Section 79(2) or 79B and the notice issued to the driver or the conductor was treated as sufficient compliance of the rules of natural justice only goes to compound the grave adverse consequences suffered by the citizens and even public authorities due to wholly arbitrary, capricious or whimsical orders passed by the authorities who were vested with the powers to confiscate the vehicles. It should have been a matter of serious concern to those who were instrumental and responsible for supervising the implementation of the amendments that such arbitrary orders caused loss of lakhs and crores of rupees to the citizens and even to the public bodies due to seizure and confiscation of

the vehicles.

40. We are conscious of the fact that Ordinance No. 4 of 1997 will be deemed to have become redundant after the passing of Bill No. 5HLA of 1998 by the Haryana Legislative Assembly and the Haryana Ordinance No. 1 of 1998 stands withdrawn w.e.f. 30.3.1998, but it is necessary to adjudicate upon the constitutional validity of these provisions because the orders passed under the two Ordinances have not been withdrawn.

41. On the basis of above discussion, we hold that Haryana Ordinances No. 4 of 1997 and 1 of 1998 are not beyond the legislative competent of the State. We also hold that notwithstanding the apparent repugnancy between the provisions contained in Sections 79(2) and (4), 79B, 79C, 79D and 79E with the provisions of Chapter XXXIV of the Code of Criminal Procedure, 1973 the same cannot be struck down in view of the fact that Ordinance No. 4 of 1997 was enacted after seeking instructions from the President and Bill No. 5HLA of 1998 was reserved for the assent of the President as per the requirement of Article 254 of the Constitution. However, we hold that Sections 79(2) and (4), 79A, 79B, 79D and 79E of the principal Act are ultra vires to Articles 14 and 19 of the Constitution and the same are liable to be struck down. The orders of confiscation as well as the appellate orders passed under these provisions are liable to be declared illegal and quashed not only on the ground of arbitrariness and violation of the principles of natural justice but also on the ground that the same have been passed under the provisions which have been found to be unconstitutional.

42. In the result, the writ petitions are allowed. Sections 79(2) and (4), 79A, 79B, 79E and 79E, as introduced by Haryana Ordinances No. 4 of 1997 and 1 of 1998 are struck down being violative of Articles 14 and 19 of the Constitution. The orders of confiscation and appellate orders which are under challenge in these petitions are also declared illegal and quashed with the direction to the concerned authorities to release the vehicles of the petitioners, if no already released, in favour of the registered owners on superdari with an undertaking that the vehicle in question shall be produced as and when required by the authorities and shall not be disposed of till the final decision of the matter.

43. As a consequence of this, the competent Criminal Courts shall now be free to exercise power under Chapter XXXIV of the Code of Criminal Procedure and decide applications pending before them or which may to filed in future for release of vehicle seized on the allegation of commission of offences under the principal Act.

44. Before parting with the case, we consider it proper to observe that after having given up the policy of prohibition, the government should examine the desirability and propriety or withdrawing the pending cases involving violation of the provisions of the Act by persons who were found in possession of two or less than two bottles of liquor. This will not only reduce the burden of thousands of petty cases pending in the Courts but will also go a long way to save the

expenses which public exchequer will gave to bear in prosecution of such cases.

