

(2015) 12 OHC CK 0046

In the Orissa High Court

Case No : W.P.(C) Nos. 13328, 5438, 13274, 16969, 17104, 17105, 17175, 17328, 17329, 17330, 17332, 17414, 17415, 17416, 17477, 17480, 17481, 17497, 17498, 17499, 17500, 17501, 17505, 17506, 17507, 17538, 17539, 17540, 17628, 17647, 17714, 17716, 17723, 17725, 17733

Sanghamitra Dash and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 24-12-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 47

Citation : (2016) 1 OLR 536

Hon'ble Judges : I. Mahanty and Dr. Durga Prasanna Choudhury, JJ.

Bench : Division Bench

Advocate : A.N. Routray, U.R. Bastia and M. Routray, for the Appellant; J. Patnaik, Addl. Government Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Dr. Durga Prasanna Choudhury, J.—The petitioners have got common question of law involved in this writ petitions for which they are disposed of by this common judgment on consent of parties. The petitioners in all the writ petitions challenge the clause 4.2.2 of the Excise Policy relating to excise duty, fee structure and guidelines for the year 2015-16 issued by the Department of Excise, Government of Odisha.

FACTS OF THE CASE:

2. The backdrop of the case of the petitioners is that they are licensees of their beer parlours at different places of the State as described in the writ petitions. It is stated inter alia, that the opposite parties have published new Excise Policy relating to excise duty, fee structure and guidelines (for settlement of excise shops and establishments) for the year 2015-16 vide Annexure-1. Clause 4.2.2 of Annexure-1 states in the following manner:--

"4.2.2 IMFL "ON" SHOPS AND BEER PARLOURS

a) It has been decided to convert all BEER Parlours to IMFL "ON" Shops (Hotel/ Restaurants), As a result from 1st April 2015 onwards, all Beer Parlour ON Shops should either convert to IMFL ON Restaurant or should close their operation."

b) New "ON" License for Star Hotels with or without Lodging accommodation and duly financed by banks and other recognized agencies may be allowed with above mentioned license fee.

c) The License fee "ON" shops may be realized in two equal installments."

3. It is the case of the petitioners that in pursuance of the aforesaid clause, the Superintendent of Excise of the respective districts where the petitioners have opened the Beer Parlour, issued letter for renewal of license of beer parlour for converting the same to IMFL hotel/restaurant by 30.9.2015 during the year 2015-16 subject to fulfillment of terms and conditions and provisions of law vide Annexure-2. It is also stated that the Superintendent of Excise of respective districts issued reminders to adopt the said excise policy otherwise the beer parlour will be closed.

4. The petitioners further averred that in their locality, the State Government has established IMFL "OFF" shop and there is no such provision for the IMFL "OFF" shop whereas the said excise policy clause without having any legal sanctity, has been made applicable to them. It is also stated that in most of the areas, there are members of Scheduled Tribe and Scheduled Caste and there is no necessity of star hotel facility of international standard or national standard so as to follow the said provision of excise policy for the year 2015-16. It is also stated that the financial condition of the local people are not good to fetch income for the petitioners to pay the licence fee in the event of opening of IMFL "ON" shop with restaurant so that the people can consume the beer along with other products of liquor with food. Moreover, there are many restaurants road side available to cater to the needs of people. It is stated by the petitioners that the opposite parties have not taken into consideration the fact that the policy of the State Government will permit the liquor consumed by the citizens instead of prohibiting them. This shows the policy of the State Government is against the public policy and arbitrary resulting the same to be against the natural justice. It is therefore prayed by the petitioners to quash the said clause 4.2.2 of excise policy 2015-16 and consequent notification/letter issued to implement the same.

5. Counter has been filed by O.Ps.1 & 2 and they have submitted therein that the writ petitions are devoid of merit as they are not competent to challenge the policy decision of the Government with regard to the conversion of beer parlour to IMFL "ON" shops. It is also stated that to avoid misuse of licensing conditions, Government have taken policy decision not to grant beer parlour license any more while making provision for conversion of existing beer parlour into IMFL "ON" shops. However, it is stated in the counter that this Court in W.P.(C) No. 5627 of 2010 following the decision of the Hon"ble Apex Court, have observed

that law is well settled that the policy decision taken by the State or its authority/ instrumentality is beyond the purview of judicial review unless otherwise consumed beyond arbitrary and unreasonable or in contravention of the statutory provisions or the same infringes the fundamental right of individual. According to this opposite parties, the same license holders having beer parlours have already applied to the State Government to follow the impugned excise policy. If the object of granting license is not achieved, then grant of license which is misused otherwise, cannot per se meet the need of the people. It is also averred in the counter that in lean season, there is less demand of beer for which the beer parlour owners illegally sell IMFL by giving sitting facility to the customers. As such there is discontentment of the public resulting the present excise policy in question to come up. By virtue of new policy, the public can comfortably sit in the restaurant/hotel and enjoy the beer and liquor. Since the impugned excise policy is for the benefit of the people and for achieving the object of excise policy, the writ petitions should be dismissed.

SUBMISSION:

6. Learned counsels for petitioners submit that the excise policy as framed by the State Government is not supported by any provisions of Bihar & Excise Act, 1915 (hereinafter called as "the Act") or the Rules made thereunder. Mere policy without being legislated under any Act or Rules, cannot be made applicable to the petitioners. He further submitted that by such impugned policy followed by the correspondence of the Excise Department to the Collector and the Superintendent of Excise and consequent letter of the Superintendent of Excise to the petitioners, are violative of Article 14 of Constitution of India because the impugned policy is not applicable to the IMFL "OFF" shop and only applicable to the beer parlour. It is stated that the impugned policy having said that the licensee either has to renew the license as per the impugned clause 4.2.2 of the Excise Policy 2015-16 or they may close down the shop, is against the Article 19(1)(g) of the Constitution of India as every person has fundamental right to choose the trade or profession. It is also submitted that the licensee-petitioners have been illegally overburdened being directed to follow the impugned policy, their natural justice has been violated. It is the bone of contention of the petitioners that the said impugned clause is not only unreasonable, unjust and illegal but also they are against the constitutional provisions. So he submitted to quash such impugned excise policy and allow the licensees to operate as usual.

7. Learned Additional Government Advocate appearing for the State submitted that relevant policy regarding conversion of beer parlours to "ON" shops/ Restaurants have been duly communicated by the State Government in Excise Department vide letter No. 1067/Ex dated 3.3.2015. He further submitted that the beer parlour license have been granted for selling of beer only for consumption inside the premises but exclusive privilege holders of the beer parlours are selling IMFL in violation of the licenses conditions. According to him, to avoid abuse of license conditions, the Government have taken a policy

decision as alleged in the petition. He further submitted that this Court in W.P.(C) No. 5627 of 2010 has clearly held that the policy decision by a State is beyond the purview of judicial review, unless the same is arbitrary, unreasonable and in contravention of the statutory provision or fundamental right. He also submitted that the aforesaid view has also been taken by the Hon''ble Apex Court in the decision reported in Tamil Nadu Education Department Ministerial and General Subordinate Services Association and Others Vs. State of Tamil Nadu and Others, and Ekta Shakti Foundation Vs. Govt. of NCT of Delhi, . Since the policy is beyond the judicial review, the petitioners have no locus standi to file such petitions. Moreover, it is submitted that in State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another, , Hon''ble Apex Court have held that trading liquor is not a fundamental right for which the contention of the learned counsel for the petitioners that the policy intervenes their fundamental right, is not correct. According to him every State Government is competent to take policy decision for the benefit of the people but not against the interest of the people. Since the present policy has been frustrated by the Beer Parlour licensees and the consumption of liquor being against the object of public order, such excise policy has been formulated. He further submitted that according to the need of the people in the society, the policy decision has been taken and the beer parlour owners have been given option for such conversion so that they can take advantage of their own license and operate the same for the consolidated period. It is submitted to reject the writ petitions filed by the petitioners.

POINTS FOR DISCUSSION:

8. A. The main point for discussion is whether clause 4.2.2. of Excise policy 2015-16 is against the object of excise policy and against the provisions of law ?

B. Whether the petitioners are entitled to any relief as prayed for ?

DISCUSSION:

9. It is admitted fact that the petitioners are license holders of beer parlours for the year 2014-15. It is not disputed that the State Government has issued excise duty fee structure and guidelines for the year 2015-16 and the impugned clause 4.2.2 contained therein. Article 47 of the Constitution of India States:

"47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

10. The aforesaid provision of the State directive in Chapter IV of the Constitution makes it mandatory for the State for raising level of nutritional standard of living of its people and their health. It also speaks about the total prohibition in the State but for medicinal purposes, there could be use of drinks

and drugs which are not injurious to health. This provision has been well deliberated in the decision reported in Razakbhai Issakbhai Mansuri and Others Vs. State of Gujarat and Others, in the following manner:

"xx xx xx We are, therefore, of the considered view that in pith and substance it is a law relating to intoxicating liquor providing for regulatory measure and squarely falls under Entry 8 List II of Seventh Schedule. As rightly urged by Mr. Subramania Poti, learned counsel for the respondent, if the manufacture of liquor could be prohibited, certainly its manufacture with rotten gur could be regulated. Entry 8 confers the necessary competence on the State Legislature to enact laws for such regulation. We may also add that 1968 Order excludes alcohol from its purview because it is covered by Entry 8 of List II. It is, therefore, incorrect to suggest that the State Legislature was lacking in legislative competence in passing the Amendment Act." (Para -6)

"xx xx xx A large body of legislation under Article 19(1)(g) when challenged, has been upheld by courts, as being in furtherance of such policy, as valid on the ground of the Directive Principle. So far the intoxicating drinks are concerned their evil effects are well established specially for the Indian society. This was why the framers of the Constitution considered it fit to include it, in expressed terms, in Article 47 while indicating the duty of the State to raise the standard of living and to improve the public health. It is, therefore, within the authority of the State to prohibit consumption of intoxicating liquor and the State of Gujarat was fully justified when it adopted the policy of prohibition. In order that this policy may succeed, it is not sufficient to merely ban manufacture and consumption of alcoholic drinks. To render it really effective further measures became essential in order to defeat the illegal activities of the anti-social elements engaged in illicit manufacture and illegal distribution of the liquor in the market. It, therefore, became obligatory for the State to take all such steps as found necessary for implementing the prohibition policy, by not only placing restrictions on the manufacture, sale and consumption of liquors but also by adopting such other regulatory measures, essential to achieve the objective. xx xx" (Para -11)

11. With due respect to the aforesaid authority we find that the Bombay Prohibition Act, 1949 was challenged before the Apex Court on the ground that under Article 47, the State Government made restriction on possession of rotten Gur in excess of prescribed limit and regulation of manufacture, use or consumption thereof in terms of permit/license etc. Their Lordships after analyzing all the factors held that in absence of any scientific basis for determining whether Gur became rotten, would not make it arbitrary. Moreover, the Hon'ble Apex Court in State of Kerala and Others Vs. Kandath Distilleries, held:

"9. The State Government, in pursuance of the directions given by the learned Single Judge in Kandath 3 Distilleries v. State of Kerala, again considered the matter and took the view that the Government has to make an "independent

assessment of eligibility" of the applicant for the grant of licence. Holding so, the Government passed an Order on 16-3-2006. The operative portion of the order reads as under:

"Whenever, applications for distillery and compounding (blending and bottling) units are received, they are processed separately. The decision taken in each application may be based on the facts and the circumstances akin to the individual application and may not be a common decision. Licences were given on the applications of M/s. Amrut Distilleries, Palakkad; Empee Distilleries, Palakkad; Elite Distilleries, Thrissur and KS Distillery, Kannur during the period as alleged by the petitioner. At the same time applications from Kandath Distillery, S.R. Distillery, Sree Chakra Distillery, Rajadhani Distilleries, etc. were rejected. The Government cannot grant the privilege to all those who had applied for such licence, for a host of reasons. Restrictions have to be imposed, which is permissible under the Constitution. The Government has with effect from 29-9-1999 issued Government Order deciding not to grant fresh licences for distillery and compounding (blending and bottling) unit. The granting of licence for the distillery and compounding (blending and bottling) units is a prerogative of the Government and not the right of the petitioner. The directions and the communications from the offices to the petitioner are only the statutory requirements for processing the application and do not cast any right or claim on the petitioner.

In the above circumstances, the Government finds no reasons to reconsider the request of the petitioner under Section 14 of the Abkari Act. Request of the petitioner is settled accordingly, keeping in abeyance of the judgment of the Hon"ble High Court read 5th paper.

The Excise Commissioner will pass fresh orders on Ext. P-1 within the time-limit prescribed by the Hon"ble High Court."

xx xx xx xx

"Right to carry on trade or business in liquor

24. Article 47 is one of the directive principles of State policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. The State has, therefore, the exclusive right or privilege in respect of potable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are *res extra commercium*, cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade

or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni v. Shamrao Tukaram Power*, *P.N. Kaushal v. Union of India*, *Krishan Kumar Narula v. State of J&K*, *Nashirwar v. State of M.P.*, *State of A.P. v. McDowell & Co.* and *Khoday Distilleries Ltd. v. State of Karnataka*.

25. The legislature, in its wisdom, has given considerable amount of freedom to the decision-makers, the Commissioner and the State Government since they are conferred with the power to deal with an article which is inherently injurious to human health.

26. Section 14 of the Act indicates that the Commissioner can exercise his powers to grant licence only with the approval of the State Government because the State has the exclusive privilege in dealing with liquor. The powers conferred on the Commissioner and the State Government under Section 14 as well as Rule 4 are discretionary in nature, which is discernible from the permissible language used therein."

xx xx xx xx

"Mandamus - To issue licence

30. The legislature when confers a discretionary power on an authority, it has to be exercised by it in its discretion, the decision ought to be that of the authority concerned and not that of the court. The court would not interfere with or probe into the merits of the decision made by an authority in exercise of its discretion. The court cannot impede the exercise of discretion of an authority acting under the statute by issuance of a writ of mandamus. A writ of mandamus can be issued in favour of an applicant who establishes a legal right in himself and is issued against an authority which has a legal duty to perform, but has failed and/or neglected to do so, but such a legal duty should emanate either in discharge of the public duty or operation of law. We have found that there is no legal duty cast on the Commissioner or the State Government exercising powers under Section 14 of the Act read with Rule 4 of the 1975 Rules to grant the licence applied for. The High Court, in our view, cannot direct the State Government to part with its exclusive privilege. At best, it can direct consideration of an application for licence. If the High Court feels, in spite of its direction, the application has not been properly considered or arbitrarily rejected, the High Court is not powerless to deal with such a situation that does not mean that the High Court can bend or break the law. Granting liquor licence is not like granting licence to drive a cab or parking a vehicle or issuing a municipal licence to set up a grocery or a fruit shop. Before issuing a writ of mandamus, the High Court should have, at the back of its mind, the legislative scheme, its object and purpose, the subject-matter, the evil sought to be remedied, the State's exclusive privilege, etc. and not to be carried away by the idiosyncrasies or the

ipse dixit of an officer who authored the order challenged. Majesty of law is to be upheld not by bending or breaking the law but by strengthening the law."

xx xx xx xx

"Discretionary order - Article 14

32. Discretionary power leaves the donee of the power free to use or not to use it at his discretion. 17 (Refer *Drigraj Kuer v. Amar Krishna Narain Singh*.) Law is well settled that the exercise of statutory discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or caprice anathema to the rule of law envisaged in Article 14 of the Constitution. It is trite law that, though, no citizen has a legal right to claim a distillery licence as a matter of right and the Commissioner or the State Government is entitled to either not to entertain or reject the application, they cannot enter into a relationship by arbitrarily choosing any person they like or discriminate between persons similarly circumscribed. The State Government, when decides to grant the right or privilege to others, of course, cannot escape of the rigour of Article 14, in the sense that it can act arbitrarily. In such a situation, it is for the party who complains to establish that a discriminatory treatment has been meted out to him as against similarly placed persons but cannot demand a licence for establishing a distillery unit, as a matter of right.

33. In *State of M.P. v. Nandlal Jaiswal*, this Court held that: (SCC p. 604, para 33)

"33. ... No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape [from] the rigour of Article 14 [of the Constitution,] it cannot act arbitrarily or at its sweet will."

34. We have noticed that the application preferred by M/s. Kandath Distilleries (respondent herein) in the year 1987 was for establishing a distillery unit in Palakkad District. So also the applications submitted by M/s. Amrut Distilleries, Bangalore and M/s. Empee Distilleries, Madras and licences were granted to them for establishing the distillery units in Palakkad District. However, the respondent's application was not considered. The Commissioner or the State Government has to take an independent decision in each application based on its eligibility and there cannot be any common decision. As held in *Nandlal Jaiswal*: (SCC p. 610, para 38)

"38. ... when the State Government is granting licence for putting up a new industry, it is not at all necessary that it should advertise and invite offers for putting up such industry. The State Government is entitled to negotiate with those who have come up with an offer to set up such industry."

The State Government cannot grant the privilege to all those who have applied for such a licence in a particular district for a host of reasons. The State

Government could restrict the number of distillery licences in a particular district by two and it can also grant a third licence in a particular district as well, but an applicant cannot claim a licence as a matter of right."

12. With due respect to the aforesaid decision, it is observed that Article 47 empowers the State to take measures for people's welfare and it has got absolute domain to declare the prohibition policy except use of the same for medicinal purposes. Apart from this, it is clear that a citizen has no fundamental right to trade or business in liquor as beverage and State can also impose restriction on trade and business of liquor as beverage. On the other hand the State have the power to determine the policy to regulate the trade or business of liquor.

13. Now adverting to the present case, we have perused the excise policy, excise duty, fee structure and guidelines for the year 2015-16. In the introduction, the object has been well described in the following manner:

"2. Opium, Indian hemp and other narcotic drugs and narcotics.

Taxation of alcoholic beverages should be viewed in the context of establishing a balance between economic, ethical and social considerations. Consumption of alcoholic beverages has considerable adverse effects on health, affecting the long term productivity of the consuming individuals as well as the society. The Excise duties on intoxicants and narcotics are meant to play a restraining role on consumption since it is recognized universally as a demerit good. States also find it an attractive source of revenue as higher tax rates lead to both higher revenues and lower consumption.

Designing a suitable tax structure for this should consider the health costs. Both personal and social. Low tax rates would encourage consumption and lower tax revenues. Excessively high rates would discourage consumption but may also lead to tax evasion and flight of the tax base to neighbouring states, as well as shift to lower quality products. Both the consumption reducing effect and the revenue increasing effect depend on the elasticity of demand and the relevant tax rates. A suitable Excise policy would need to balance these conflicting objectives."

14. From the above paragraph, it is clear that the main object of the excise policy is to raise the revenue and to discourage consumption inasmuch as by increasing the Excise duties of the intoxicants and narcotics it would restrict the consumption but at the same time will earn good revenue for the State. Of course the object of the excise policy is in consonance with Article 47 of the Constitution of India inasmuch as Article 47 directs that State has got right to formulate the Excise policy with the object of prohibition or to regulate the trade or business in liquor by imposing restriction while granting license. The impugned Clause 4.2.2. of the Excise Policy 2015-16 does not elaborate as to how the conversion of beer parlour to IMFL "ON" shop restaurant/hotels will increase the revenue and reduce consumption. If there would be beer parlour converted to

IMFL "ON" shop restaurant, more people will be attracted to consume foreign liquor by sitting in the restaurant and taking food and it will increase consumption which is against the Constitutional provision and the object of Excise policy 2015-16.

15. The Bihar and Orissa Excise Act, 1915 (hereinafter called "the Act") and the Rules framed thereunder do not provide free trade or business in liquor or intoxicants. There is no such provision in the Act and the Rules made thereunder about conversion of the beer parlour to IMFL "ON" shop restaurant/hotels. There is provision for imposing restriction on granting license to the manufacturer or seller of IMFL/Beer/O.S. liquor and C.S. liquor, but the present restriction as to close down of the shop in the event of petitioners not converting the beer parlour to IMFL "ON" shop and restaurant is anathema to the present provisions in the Act and the Rules.

16. Learned Counsel for the State Government has urged that the impugned Clause 4.2.2 has been retained as the beer parlour licence has been misused by the petitioner by allowing the customers to consume the IMFL supplied by the petitioner unauthorisedly and causing huge loss to the revenue. When there are adequate provisions in the Act and Rule made thereunder to regulate the license holders the plea of the State Government appears to be frivolous and unjust.

There is a clause 4.2.11 in Annexure-1 which describes hereunder:

"4.2.11 Model wine shop

It is proposed to allow Model Wine Shops attached to Star Hotel & in Luxury Hotels/Shopping Malls & Complexes with License Fee as specified. Shops would be permitted to sell wine and Low Strength liquor/Beer below 5% V/V in order to boost up sale of wine and Low Strength drinks in the State compared to hard drinks."

17. From the aforesaid provision of Excise policy it is revealed that the State Government have also decided to open Model Wine shops in the Star Hotels and Luxury Hotels where low strength liquor/beer are to be sold to boost the sale of wine or to reduce the consumption of hard drinks. The definition "beer" means any liquor prepared from malt or grain as per section 2(b) of the Act. Similarly, Section 2(u) spells out that "liquor" means an intoxicating liquor and includes- (i) spirits of wine, rectified spirits, wine, beer, tari, pochwai, fermented liquor made from mohua or molasses, plain spirit made from materials recognised as country spirit base and every liquor consisting or containing alcohol; and (ii) any other intoxicating substance which the State Government may, by notification, declare to be liquor for the purposes of this Act.

17.1. Similarly, as per the definition of Section 2(p) foreign liquor means every liquor imported into India, other, than India made foreign liquor and country liquor and such other intoxicants as may be declared by the State Government to be foreign liquor. There is no definition of wine under the Act or the Rules made

thereunder. From the Excise policy 2015-16 it appears that beer has got low strength, whereas wine and other liquor have got high strength of alcohol. When the definition "beer" also includes liquor and definition of "liquor" includes wine and Clause 4.2.11 directs for sale of wine in Model wine shop to be opened in the Star hotels and luxury hotel to supply low strength wine to the customers, it is not conceived as to how beer having very low strength alcohol after being converted to IMFL "ON" shop with restaurant facility will supply the low strength "beer" including liquor to the customers. If star/luxury hotel owners have got scope of opening Morden wine shop for selling beer/wine of low strength, it will discriminate if Beer parlour which has got low investment are forced to convert same to IMFL "On" shop with restaurant/hotels. Thus, the impugned Clause 4.2.2 is also not compatible with the proposal made vide Clause 4.2.11 of Excise Policy 2015-16.

18. Every policy must have some reasons and rationality. While testing the Excise Policy Clause 4.2.2. as discussed above, we do not find such clause to have passed any test of reasonability or rationality. Moreover, when there is IMFL "OFF" shop in the same locality, there are IMFL "ON" shop in the nearby area and there is proposal for opening model wine shop, there is no logic for opening a beer parlour converted to the IMFL "ON" shop with restaurant facility. Conversely, imposing of restriction i.e. closing down of the beer parlour in the event of refusal by the petitioner to convert the beer parlour to IMFL "ON" shop restaurant will not only cause discrimination, but also will cause loss to other IMFL and simple restaurant license holders. We are, therefore, of the view that the impugned clause being against the object of other provision of Excise Policy 2015-16 duly communicated by the Commissioner of Excise being discriminatory, unjust and unreasonable, the fundamental right as enshrined under Article 14 of the Constitution is violated by the presence of Clause 4.2.2.

19. A policy of the State Government must be clear to take a call and must pass all tests of their constitutionality and constitutional value. A similar issue was raised before this Court in the judgment in Pradeep Kumar Sahoo v. State of Orissa in W.P.(C) No. 25913 of 2013 etc. where the Bench led by the then Hon"ble Chief Justice had occasion to examine the excise policy of the excise department as to issue of IMFL ON/OFF shop licence within 50 meters along the national highway. Their Lordships were pleased to rely on the decision in Kadnath Distilleries (supra) and held as under:

"12. xx xx whether licence fee already collected is to be refunded to the extent of curtailing the period of licence or option to shift the shops to any other location, subject to the procedure being followed and subject to such location being allowed in accordance with the norms, ought to be given. In the present case, clear decision has not been taken to review the policy by a proper procedure and to implement the same in a fair and uniform manner. This may call for interference by this Court. Fairness in decision making is hallmark of a democratic government committed to rule of law. This is the mandate of Article

14 of the Constitution even in dealing with liquor trade by duly licenced traders. Even so, this Court cannot close its eyes to the consideration of public safety and mechanically direct quashing of the order which may be deficient for want of fair procedure. Closing of liquor shops on the Government land and on the National Highways cannot be interfered with resulting in unauthorized encroachment of public land or ignoring the perceived endangering of security on highways by sale of liquor. On these issues, the policy makers have to take a call.

13. In absence of formal and clear Government policy, the Excise Commissioner cannot order closure of shops but at the same time, Court may not interfere without Government taking a policy decision on the issue. Moreover, consequential policy matter of claims for refund of fee or time bound permission to dispose of stock or shift location has also to be dealt with by the State.

14. In the case of *State of Kerala and Others Vs. Kandath Distilleries*, it was observed "24. Article 47 is one of the directive principles of State policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. The State has, therefore, the exclusive right or privilege in respect of potable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are *res extra commercium*, cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are *res commercium*. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni and Others Vs. Smt. Shamrao Tukaram Power and Others*, *P.N. Kaushal and Others Vs. Union of India (UOI) and Others*, *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.*, and *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, .

15. It will, thus, be just and fair to direct the State to take decision on need to review its policy on the issues which have arisen. In case of licences already granted, if the same have to be discontinued, clear provision may be made about the consequences on the licence fee."

20. In the aforesaid decision, Their Lordships having not found any clear reasoning and basis for the decision of the Government to formulate such policy thereunder, they directed for taking decision by revisiting the policy and Constitutional provisions. We are, therefore, in terms of the aforesaid decision

found that the impugned clause 4.2.2 of excise policy 2015-16 is ambiguous, unjust being contrary to the object of Excise policy and Constitutional provisions. Moreover, we are of the further opinion that basing on the ambiguous policy, restriction imposed as to close down the beer parlours of the petitioners is discriminatory being violative of Article 14 of the Constitution of India. We have gone through the decision in W.P.(C) No. 5627 of 2010 (supra) submitted by the opp. Parties, but the same also resolves that Government policy can be interfered if it is unjust, arbitrary and against Constitutional provisions. We, therefore, have no hesitation to hold that the impugned clause 4.2.2 issued by the State Government to implement the same being dehors to the constitutional provision and law made thereunder is illegal, arbitrary, unjust and improper.

Issue No. A is answered accordingly.

POINT NO.B

21. We have already observed in the aforesaid paragraph that the State Government have got absolute power under Article 47 of the Constitution of India to formulate policy for distribution of nutrition of drinks which are not injurious to health. At the same time we also observe that the State Government have got right to impose restriction while granting license and petitioners have no fundamental right for trade or business in liquor. We are also of the view that the restriction by the State Government must be rational and reasonable. When Clause 4.2.2. of the Excise policy 2015-16 being conveyed by the Excise Commissioner to implement the same and the same clause is found to be arbitrary, unjust, illegal and discriminatory, we are of the view that such clause in the Excise Policy 2015-16 is liable to be quashed being not sustainable in law. It requires revisit by the State Government. Point No. B is answered accordingly.

CONCLUSION:

22. In view of our observation in Point Nos. A and B, relying upon the case of Kandath Distilleries (supra) and Pradeep Kumar Sahu (supra), the impugned Clause 4.2.2. supported by letter dated 3.3.2015 and consequent letter of respective Superintendent of Excise to petitioners being dehors to the Constitutional provision and the principles of law as discussed above cannot be sustained in law, we hereby quash Clause 4.2.2 in the excise Policy 2015-16, supporting letter dated 3.3.2015 of State Government and other concerned letter of Superintendent of excise to respective petitioners as discussed above. We further direct the State Government to relook to the Clause 4.2.2. and issue fresh policy in this regard if so advised.

The writ petition is disposed of accordingly.

I. Mahanty, J.

I agree.