

(2002) 11 GUJ CK 0023
In the Gujarat High Court

Case No : Special Civil Application No's. 7190, 7238, 7318 to 7375, 7409, 7411, 7435, 7447, 7572, 7573, 7586, 7587, 7730, 7732, 7738, 8507, 8631, 8818, 8819, 8820, 8822 to 8828, 9165, 9166, 9169, 9171, 9172, 9194, 9197, 9433, 9435, 9436, 9438, 9455, 9566 to 9573,

Shrijee Trading Company		APPELLANT
	Vs	
State of Gujarat		RESPONDENT

Date of Decision : 28-11-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 19(6)
Essential Commodities Act, 1955 — Section 5

Citation : (2003) 4 GLR 3718

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : J.S. Yadav, Dipak Sanchela, Kavita J. Yadav, R.M. Chhaya and Pranav V. Shah, in Special Civil application No. 7190 of 2002, for the Appellant; Kamal Trivedi, Ld. Addl. A.G. and A.D. Oza, Government Pleader in Special Civil Application No. 7190 of 2002, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Patel, J.—In all these petitions, common question arises for the consideration is regarding the legality and validity of the amendment made in the Gujarat Essential Articles (Licensing, Control and Stock Declaration) Order, 1981 ("Control Order" or "Order of 81" for short) and its effect.

2. The short facts of the case are that the petitioners are the persons who are functioning as wholesale dealers in PDS kerosene, but they are not the authorised dealers of the manufacturing Oil Company. There is no dispute on the point that the PDS kerosene is one of the notified essential commodities. The supply of PDS kerosene ("Kerosene" for short) is regulated in the Gujarat State by the aforesaid Control Order. It is the case of the State Govt that earlier, on account of policy decision taken by the State Govt to abolish the system of functioning by wholesale dealers who are not company agents, instructions were

issued to the Licensing authority empowered to grant licence under the Control Order to the effect that if the person is not authorised agent of the Oil manufacturing company("Company agent" for short) the licence for dealership should not be renewed. There are various instructions issued, from time to time, by various circulars, dated 30.7.1988, 4.10.1990, 3.4.1995, 6.1.1997, 29.8.1997, 22.1.1999, 5.2.01, 19.6.01 etc. The aforesaid instructions issued to the Licensing Authority were challenged by some of the wholesale dealers of Kerosene who are not company agents by preferring petition before this court being Spl.C.A.No.10976/98 and allied matters. The learned single judge of this court, as per common order, dated 15.9.2000, 19.1.2001 and 20.1.01 upheld the validity of the said circulars issued by the authority to the licensing authority and rejected the said special civil applications. The wholesale agents who are dealing in Kerosene who were the petitioners before the learned single judge carried the matters before the Division Bench of this court by preferring L.P.A Nos 538/01 and allied appeals and ultimately on 1.8.01 the Division Bench of this court (coram: D.M.Dharmadhikari, CJ(as his Lordship then was) and K.R.Vyas,J) took the view that the wholesale agents dealing in Kerosene have a fundamental right to run the business and as per the provisions of Article 19(6) of the Constitution of India, if such right is to be curtailed or restriction is to be put upon such right, there must be a valid legislation for such purpose and such curtailment or restriction can not be imposed by instructions and therefore the Division Bench of this court found that the circulars issued are unwarranted and therefore the said circulars were quashed. At the relevant point of time, applications of wholesale dealers in Kerosene who are not company agents were pending, but the Division Bench, while disposing the appeals, did not give any mandatory direction to decide the applications within a stipulated time limit or otherwise and made no further observations on the said aspect. Of course, it is the case of the petitioners herein that it was obligatory on the part of the authority concerned to consider the applications for renewal of licence even in the absence of mandatory directions of this court, but the fact remains that no mandamus was issued by the Division Bench to the authority concerned in respect of the aspect of taking decision upon the applications for renewal of licence.

3. It appears that thereafter the State Govt in exercise of powers under Clause 28 of the Control Order declared by amendment that the existing licences of PDS kerosene which expire on 31.12.01 of wholesale Kerosene dealers who are company agents shall be renewed for a further period of three months upto 31.3.02 and thereafter further extended upto 30.6.02. The aforesaid amendment came to be made on 31.12.01 and the legality and validity of the aforesaid amendment was challenged by the wholesale dealers who are not company agents by preferring Spl.C.A.No.3492/02 and allied matters. In the said group of petitions, the learned single judge of this court (Coram:D.A.Mehta,J) as per judgment dated 10.7.02 observed, interalia, that clause 5 of the Control Order does not envisage situation where licence can be granted for a period of less than five years and it is not possible to read the plain language of the said clause

in any manner. The learned single judge further observed that clause 28 of the Control Order provides for a limited power of suspension and there is no power of amendment granted by the said clause on a plain reading of the provision. Therefore, consequently, the learned single judge found that the notification issued is illegal and contrary to the provisions of Control Order and the learned single judge also set aside the same. However, the learned single judge kept the question open as to whether the impugned orders by way of notification are violative of Articles 14 or 19(1)(g) of the Constitution of India. In the ultimate operative order after quashing the notification dated 31.12.2001 and 30.3.02 the learned single judge observed that the licensing authority shall act strictly in accordance with the provisions of clause 5 of the Order of 1981 without being fettered in any manner whatsoever by way of impugned orders and decide the applications for grant or renewal of licence in accordance with law. However, in the said judgment also the learned single judge while giving directions to the licensing authority to consider the applications for grant or renewal of licences did not pass any order for taking decision by the authority within a stipulated period of time limit, and on the correct interpretation of the judgment of the learned single judge, it appears that the learned single judge wanted to convey that while taking decision upon the applications for grant or renewal of licence, the notifications, dated 31.12.01 and 30.3.02 which were challenged in the petitions are not to be taken into consideration at all. A statement is also made at the Bar that since after hearing of the SCA No.3492/02 and allied matters as the matter was kept CAV, it was agreed by the learned GP that licence shall stand renewed for a further period of one month and accordingly the notification also came to be issued by the State Govt and as a result thereof the position remained the same as it was earlier upto 31.7.02.

4. It appears that on 31.7.02 the State Govt has amended the Control Order of 1981 itself by passing the Gujarat Essential Articles (Licensing, Control and Stock Declaration)(Amendment) Order, 2002 ("Control Order of 2002" for short) whereby new Sub-clause (18A) is inserted in clause 2 of the Control Order, 1981 which reads as under:

"(18A) PDS Kerosene wholesale dealer means a dealer appointed by any of the oil companies engaged in marketing of PDS kerosene as per the authorisation from the Govt.of India." It has been recorded in the said order that the same is with the prior concurrence of the Central Govt, Ministry of Petroleum & Natural Gas vide its letter No.P-11013/8/2002-Dist, dated 31.7.02. It appears that on the very day, i.e. on 31.7.02 the circular is also issued by the State Govt on the basis of the aforesaid amendment order of the Govt to the effect that those wholesale dealers who are not company agents but their licences are in operation after 1.8.02 shall be given notice and appropriate action may be taken and it is further mentioned in the said circular that as per the new distribution system quota of retail kerosene shall be allotted to all company agents/dealers. It is under these circumstances, the present petitioners who are wholesale dealers but not company agents have approached this court challenging the legality and

validity of the impugned Amendment Order of 2002 and also the circular dated 31.7.02 issued on the basis of Amendment Order, of 2002.

5. Before I deal with the contentions raised on behalf of the petitioners, as well as on behalf of the respondents, it is necessary to mention that the various petitioners are comprising of three categories, i.e. the Ist Group is the petitioners who are holding valid licence as on the date of amendment and their licences have yet not expired, the IInd Group is wholesale dealers who applied for licence or for renewal of licence and no decision, whatsoever, is taken either upon their application for grant or renewal of licence, the IIIRD category is, of course, forming Ist and IInd category, but they are those persons, more particularly, the wholesale dealers of Baroda District who preferred civil suits initially and subsequently the said civil suits have been withdrawn and petitions are preferred before this court. Mr.Yadav, learned advocate for such petitioners of Baroda District has declared before this court that the suit have been withdrawn and the petitioners are only pursuing the remedy by way of the present petitions preferred before this court. In that view of the matter, the said group of Baroda stands included in respective first and second category and now there are two groups only, i.e. (i) holding valid licence on the date of amendment order and (ii) who made applications for grant or renewal of licence but no decision is rendered by the authority on such applications.

6. On behalf of the petitioners, Mr.N.D.Nanavaty, Ld.Counsel appearing with Mr.Yadav, in the majority of matters, have made submissions, which shall be dealt hereafter. However, it is necessary to note that so far as other respective advocates, appearing on behalf of petitioners, namely, M/s.Vakharia, R.C.Jani and others have adopted the submissions made by Mr.Nanavaty on behalf of the petitioners comprising of both the aforesaid categories.

7. Mr.Nanavaty mainly raised the contention that the Amendment Order of 2002 is putting unreasonable restrictions upon the constitutional rights of the petitioners as guaranteed under Article 19(1)(g) of the Constitution. He also submitted that such restriction brought about by the impugned amendment results into creating monopoly in favour of company dealers or company agents and since the petitioners who are wholesale dealers and not company agents are totally kept away from the system of distribution of PDS kerosene. Mr.Nanavaty has also submitted that assuming for the sake of argument that the amendment order which is a subordinate legislation was made by the State Govt, then also there can be no power to pass the subordinate legislation with retrospective effect. In furtherance of his submission, it has been contended that once the valid licence is in existence, or that the licence is renewed, which is for the period even after the amendment in the control order a right can be said to have been created in favour of petitioners to function as wholesale dealers of PDS kerosene. In the present case, subsequent instructions issued issued on the very day, i.e. 31.7.02 show that the amendment is interpreted so as to foreclose even the existing rights of those persons holding valid licence and it is also having

retrospective effect. So far as the petitioners who are not having licence but have applied for grant or renewal of licence are concerned, it was obligatory on the party of the licensing authority to render the decision as per the scheme of the Control Order and unless time limit is prescribed it can be construed that it is required to be decided within a reasonable time. It has been submitted that there is a right conferred upon those second category of petitioners to have their applications decided on the basis law which is in existence. It is also alternatively submitted that on one hand no decision is taken upon the application inspite of above referred two judgments of this court as well as the Division Bench of this court and also another judgment rendered by the learned single judge of this court and thereafter to bring out an amendment and to rescind the applications would mean that the action is arbitrary and the State Govt or the licensing authority can not be allowed to take the benefit of their own wrong and therefore it has been submitted that even on the basis of principles of legitimate expectations the application of the second category of dealers are also required to be decided on the basis of law then existing. Therefore, Mr.Nanavaty submitted that since the subordinate legislation is made with a view to take away the existing right of the petitioners of both the categories which is having retrospectivity and the same is not permitted so far as the subordinate legislation is concerned. Therefore, it has been submitted that the such subordinate legislation for amendment of Control Order of 2002 is without there being any authority. It has also been submitted that the concurrence of the competent authority and the Central Govt is not obtained. The contention on behalf of the petitioner is that the Ministry of Food & Civil Supplies, Central Govt is only the competent authority to give concurrence and not the Ministry Petroleum whose concurrence is sought and referred in the Amendment Order. Therefore, it has been submitted that since there is no prior concurrence of the Central Govt the amendment order is without mandatory requirement and hence bad in law.

8. Mr.Nanavaty also has contended that on the principles of legitimate expectation every citizen has legitimate expectation that they shall be treated fairly without discrimination. In his submission the fair treatment could only if some hearing is given or inviting objections from the public at large is made by the State and then decision is taken. He submitted that the petitioners who are in business since last about 20/30 years must be given some breathing time before they are called upon or asked to close down their business.It has been pointed out that merely on the basis of application the State Govt has taken decision of abolishing or eliminating the wholesale dealers who are not company agents in the system of PDS kerosene and is without there being any proper material and in his submission there are number of instances of adulteration and committing breach of Control Order by the company agents are more in comparison to the wholesale dealers who are not company agents. Therefore, he submitted that the grounds are non existent and they are caused only with a view to support the illegal exercise of power.

9. On behalf of respondent-State authorities, Ld.Addl.A.G.Mr.Kamal Trivedi

appearing with the Ld.GP Mr.Oza has submitted that the State has right to put restriction upon the right to carry on business or profession in the larger public interest. Similarly, it is not an absolute right when the State wanted to put the restriction with a view to eliminate wholesale dealers who are not company agents by way of instruction the Division Bench of this court took a view that there must be a valid law and therefore he submitted that the Division Bench has not observed that there can not be such restriction. What has been held by the Division Bench is that in the absence of any valid piece of legislation such restriction can not be put by instruction. The Ld.Addl.AG has also submitted that there is other subsequent judgment of the learned single judge of this court and there also the court found that there is no authority on the part of the State Govt to issue the order in exercise of power under clause 28 of the Control Order, 1981 and therefore the said action of the State Govt is struck down but he submitted that even at that time the question is kept open by the learned single judge. The contention on behalf of the State Govt is that now after obtaining concurrence from the Central Govt, the State has come with subordinate legislation and therefore the said action can not be set at naught on the alleged ground that it results into contravening with the earlier judgment of the Division Bench as well as of the learned single judge or it nullifies the effect of above two referred judgments of this court. The Ld.Addl.AG submitted that, as a matter of fact, there is no attempt on the part of the State Govt to nullify the effect of the judgments of this court and in his submission this court in the earlier judgments has never observed on the point that such restriction can not be put by the State by legislation. He submitted that it had come on the record of the State Govt that the wholesale dealers who are not company agents are supposed to sell kerosene at a fixed price and they are getting meagre commission therefrom which in his submission runs from Rs.500/- to Rs.1200/-p.m. He submitted that it is practically impossible for any wholesale dealer or any businessman to survive with such income and it is shown that the wholesale dealers are receiving something more while participating in the system of distribution than the money officially received. He also submitted that it had also come on record of the State Govt that on account of aforesaid and even otherwise also the wholesale dealers who are not company agents have been found to have been indulging into the activities of adulteration of PDS kerosene and on account of large number of complaints received and after careful consideration it was found that to eliminate the participation of wholesale dealers in the chain of supply who are not company agents and to have a retail distribution system directly from the wholesale dealers who are company agents because the Oil companies are manufacturers and they are directly supplying to their authorised dealers and the authorised dealers in turn will supply to the retailers and therefore the additional commission of small amount is sought to be abolished so far as the system of distribution of PDS kerosene is concerned. The contention raised on behalf of the State Govt is that the Ministry of Petroleum is the only concerned department of Govt of India which has given concurrence and it can not be said that the order has been made without there being concurrence of the Central Govt. It has also

been submitted that as such no concurrence of the Central Govt was required since the present amendment is not falling in the category of the items or the steps required for the purpose of concurrence as per order dated 30.11.74 of the Govt.of India. Still, however, the concurrence is obtained and the order has been passed. It has also been submitted that when the State Govt in larger public interest has taken decision to eliminate the system of distribution through wholesale dealers who are not company agents it can not be said that such a restriction is unreasonable or it is not warranted under law. It has submitted that merely because the wholesale dealers who are not company agents are kept away from the system of distribution it can not be said that any monopoly is created and as such in his submission nothing prevents the present wholesale dealers to get the agency from the oil company and to get the licence. On the question of retrospectivity it has been submitted that merely because the order takes in its sweep all those who are in the system of distribution of PDS kerosene it can not be said that the subordinate legislation or the Control Order is retrospective in nature. The Ld.Addl.AG also submitted that so far as the 2nd category of persons who have made application for grant of licence or renewal of licence are concerned there is only a right to apply and no vested right can be said to have been created in their favour. So far as the first category is concerned, it has been submitted on behalf of the State Govt that merely because there is a valid licence no right can be said to have been created to deal in business of PDS kerosene. The Ld.Addl.AG submitted that when the licence is granted which is subject to other provisions of Control Order and when the provisions of Control Order itself are amended, it can not be asserted as of a right that the person shall continue to do the business of wholesaler in PDS kerosene even if there was any prohibition under the Control Order after the amendment. It has been submitted that since it can not be said that there is any vested right or any right is sought to be taken away by the present amendment of the order, it is in reality not retrospective in nature and it applies prospectively. It has been submitted that merely because the Control Order itself continues the activity of functioning as wholesaler to both categories, it can not be said to be applied retrospectively and what is prohibited is the functioning for specific category as the wholesaler. The Addl.AG has also stated before this court that there is no 100% ban to function as kerosene dealer. However, he submitted that there are two categories of kerosene, i.e. (i) White Kerosene and (ii) PDS kerosene which is popularly known as Blue kerosene. In his submission White kerosene is free in open market but is subject to condition of licence that it is mainly for industrial use and it can not be used for fuel purpose. Therefore, he submitted that if the petitioners are desirous they can do business as wholesale dealers in White kerosene subject to fulfilling conditions of control order that they have authority for such purpose pursuant to said order. The Ld.Addl.AG also submitted that since there can not be any principles of legitimate expectation against power of the State Govt. to make subordinate legislation such consequences normally happen affecting the business in every case when the power is exercised or sought to put restrictions in the larger public interest and

therefore he submitted that the amendment made is legal and valid.

10. So far as instructions issued by the notification dated 31.7.02 are concerned when it was put to the Ld.Addl.AG that if ultimately after issuance of notification the valid licences are also to be cancelled then what purpose would be served of giving notice or observing principles of natural justice unless the stand is made clear on the part of the State Govt that such discretion is left to the licensing authority even to continue the licence in peculiar facts and circumstances of the case. In response thereto, Ld.Addl.AG has submitted that the licensing authority can not travel beyond the control order and more particularly the amendment of 2002 and therefore there will be no option but to cancel the licence and therefore he clearly submitted that the procedure of giving notice would be meaningless and no useful purpose would be served by allowing the authority to undertake the procedure of issuing notice and to take decision. Therefore, keeping in view the aforesaid submissions of the State Govt, the matter is required to be examined so far as Govt instruction, dtd 31.7.2002 is concerned.

11. In view of the above, I am of the opinion that what is first required to be examined is: Whether the Amendment Order of 2002 has been issued by the State Govt after obtaining prior concurrence from the Govt.of India? The petitioners in these petitions firstly have not joined the Govt.of India as party respondents and therefore naturally no material would be there so far as the stand of Govt.of India is concerned. As such, on account of nonjoinder of necessary parties on the part of petitioners they can hardly contend that the proper department of the Govt.of India has not given the concurrence. Had it been the case of no concurrence, whatsoever, the matter would have been different. In the present, the concurrence is obtained but the contention is that the Ministry of Petroleum of Govt.of India is not proper or concerned department of Govt.of India and therefore the court should take it as no concurrence of the Govt.of India. In my view, the presumption would be that when the Ministry of Petroleum, Govt.of India had granted concurrence, it would be presumed that they are authorised for giving such concurrence. It is for the Govt of India to render concurrence through its one ministry or another and there are internal arrangements of different departments of Govt.of India. No authenticated material is produced by the petitioners before this court showing the business rules or otherwise that there is no authority with the Ministry of Petroleum of Govt.of India to accord such concurrence and in the absence of same the presumption is that the concurrence is granted by the proper authority and such presumption is attracted in view of peculiar facts and circumstances of the case that the petitioners have chosen not to join the Govt.of India as party respondent. In the absence of any material since the grant of concurrence is an official act on the part of the Govt.of India it is presumed that the same is granted by proper authority and therefore there is no substance in the contention raised on behalf of petitioners that the amendment order has been issued without concurrence of the Govt.of India. Since in the present case the concurrence is obtained from the Govt.of India I do not find it necessary to

examine the other contentions raised on behalf of the State Govt that no such concurrence was required in view of the order dated 30.11.1974 delegating the power to the State Govt u/s 5 of the Essential Commodities Act and the said question is kept open.

12. Before the question is examined on the aspect of unreasonableness or unreasonable restriction put by the Control Order of 2002 it would be necessary to examine the scope of judicial scrutiny to any subordinate legislation. There is no dispute on the point that the Amendment Order of 2002 bringing about amendment in the Control Order of 1981 is a subordinate legislation. In case of *Indian Express Newspapers (Bombay) Pvt.Ltd vs Union of India* reported in (1985) SCC 641 75 the Apex Court observed as under:

"75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary."

Further at para 78 of the aforesaid judgment the Apex Court has observed as under:

"That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in *The Tulsipur Sugar Co. Ltd. v. The Notified Area Committee, Tulsipur(I)*, *Rameshchandra Kachardas Porwal & Ors. v. State of Maharashtra & Ors.* etc(1). and in *Bates v. Lord Hailsham of St Marylebone & Ors*(2). A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, nonapplication of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc. etc. On the facts and circumstances of a case, a subordinate legislation be may struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it doe- not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken n into account relevant circumstances which the Court considers relevant."

13. In my view while undertaking the judicial scrutiny to a subordinate legislation what is required to be considered is whether it has any nexus to the object to be achieved by the parent Act and whether it is ultravires the parent Act or is ultravires the Constitution. So far as meeting with the test of Article 14 is concerned, the subordinate legislation can not be questioned on the ground of violation of principles of natural justice or on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the court considers reasonable. Technically, in other words, it will not be for the court to substitute its own reasons for the purpose of testing the aspect of reasonableness while undertaking the judicial scrutiny to a subordinate legislation nor it would be for the court to undertake the microscopic examination while weighing the evidence on one side and to compare it with the other evidence on the other side or that certain material is not taken into consideration. What is required to be considered is the general view or the object with which the subordinate legislation is made. Whether it meets with the reasons or not is not to be looked into in detail. But, in my view the broad reasons are required to be considered keeping in view the scope and ambit of the parent Act. In any event, on the question of breach of principles of natural justice, the subordinate legislation can not be assailed and therefore Mr.Nanavaty is not right in contending that since no objections are invited from the public at large or the views of public at large are not considered, the impugned Order of 2002 is in breach of principles of legitimate expectation. The principles of legitimate expectation, in my view, can not be stretched to the extent that even giving breathing time to the existing persons who are to be affected therefrom. It may be that in a given case the legislature or the State may find that in view of larger public interest in view of extreme urgency and in view of peculiar facts and circumstances of the case the legislation must be made immediately then such legislation would not fail on the ground that either public hearing or the objections are not invited from the public at large or the breathing time is not given. In my view that such a method and manner of exercising power while making legislation are left to the Parliament or the State Govt, as the case may be, and there can not be any mandatory requirement. It may be in a given case the State might find that it is necessary to invite objections and thereafter to take decision or the State may find that breathing time is required to be given before considering the nature of the effect of amendment or the legislation, but it is difficult to hold that merely because breathing time is not given or public hearing is not given or the objections are not invited before making subordinate legislation and therefore such subordinate legislation would be bad in law. Therefore, said contention of Mr.Nanavaty fails.

14. The aforesaid takes me to examine the broad and large question as to whether Amendment order of 2002 meets with the test of Article 14 or it has put unreasonable restriction to the petitioners in doing the business of wholesale kerosene. As such, any citizen as per Article 19(1)(g) of the Constitution has right to do business or profession, but at the same time, the said right is not an

absolute right but is subject to restriction as may be put by law for the purpose of public interest or public at large. The Essential Commodities Act, 1955 itself has put up a restriction upon the right to have the business in essential commodities. Since the object of the Act is to regulate supply of essential commodities to the public at large, it can hardly be said that such a restriction can not be put by law. If any citizen is desirous to undertake the business, may be in Kerosene or anyother essential commodity, then he or she is required to do the business in the manner as regulated by the Essential Commodities Act, 1955 read with relevant Control Order. If the Control Order of 1981 is by way of restriction upon the right to do business under Article 19(1)(g) the amendment made therein is required to be examined keeping in view the scope and ambit of object behind enacting the Control Order, 1981 itself. It can not be said nor it has been contended on behalf of the petitioners that the Control Order, 1981 itself is an unreasonable restriction on the right guaranteed under Article 19(1)(g) and on the contrary the petitioners are claiming or asserting their right on the basis of Control Order, 1981 then in existence prior to amendment. Therefore, what is required to be examined is whether such amendment is in the larger public interest or not. As per the stand as demonstrated by the State Govt, it appears that in the system of distribution of PDS kerosene the consumers prior to amendment were getting supply from the wholesalers either they may be company agents or they may not be company agents and such wholesalers who are company agents were directly getting supply from oil companies whereas the wholesalers like the petitioners who are not company agents were getting supply from the company agents. Therefore, in the system of distribution of PDS kerosene after the kerosene is manufactured by the oil company it was being sold to wholesale dealer by the oil company and such wholesale dealers further may supply directly to retailers or they may supply to another wholesaler who in turn will supply to the retailer. Therefore, the Ld.Addl.AG is right in his submission that there was one chain participation of those persons who are wholesaler but not company agents. If the State has taken decision to eliminate such class of wholesalers who are not authorised by the Govt with a view to see that the kerosene is supplied directly by the authorised dealers to the retailers, it can hardly be said that such a decision is not in the public interest. As such, in what manner the system of distribution should be made with a view to ensure that the ultimate consumer gets the better quality and maximum supply of essential items, is for the State to decide and if some middlemen like petitioners are sought to be eliminated in the chain of supply, it can not be said that such a decision of the State is not in larger public interest. It is well accepted that the intervention or participation of middlemen in the system of distribution would change the supply itself and normally it is only on account of such middlemen supply is being delayed. It may be that sometimes intervention or participation of the middle agency may be helpful to the distribution of essential articles, but in what manner and how the supply is to be made is for the State to decide but the court would not substitute its own reasons for the same. Therefore, the decision taken for eliminating the middlemen like the petitioners can not be said

to be ultravires the object of Control Order, 1981 or the Essential Commodities Act not it can be said that the same is de-hose the power conferred under Essential Commodities Act, 1955. In my view, if the State has made law, may be by subordinate legislation for laudable purpose to ensure that the consumer gets better supply of essential commodities by eliminating class of middlemen, it can not be said to be against public interest nor can it be said to be unreasonable restriction or beyond the scope of Article 19(6) of the Constitution. The reliance was placed by the petitioner upon the judgment of the Apex Court in the matter of Mannalal Jain Vs. The State of Assam and Others, . The said decision is of no help to the petitioners because in the case before the Apex Court it was a matter of issuing instructions for giving preference to the Cooperative Societies while giving licence. The aforesaid decision is subsequently considered by the Apex Court in the matter of Sarkari Sasta Anaj Vikreta Sangh Tahsil Bemetra and Others Vs. State of Madhya Pradesh and Others, . In the said judgment at para 12 the Apex Court observed interalia that in case of Mannalal Jain vs State of Assam the court was examining the case of Control Order that was not found to be wrong but its administrative instructions. After extracting the relevant observations of the Apex Court in the case of Mannalal vs State of Assam (supra) at page 392 the Apex Court concluded that under the provisions of Control Order itself the system of appointing retailers can be substituted by giving fair price shops to the consumer cooperative societies and no monopoly can be said to have been created nor it can be said to be discriminatory. Therefore, in my view the observations of the Apex Court in the case of Mannalal Jain(supra) are of no help to the petitioners, more particularly, in view of subsequent judgment of the Apex Court in the matter of Sarkari Sastha Anaja Vikret Sangh(Supra).

15. The aforesaid takes to me to further examine the question raised by Mr.Nanavaty that it would be unreasonable because the monopoly is sought to be created in favour of authorised company agents by creating a class amongst the class. So far as class of wholesalers holding licences is concerned, it can be said that there is one class. However, those wholesalers who are authorised company agents can not be 100% equated with the wholesalers who are not company agents. The company agents or authorised dealers are directly getting supply from the manufacturers which is not the case so far as the petitioners are concerned. Not only that, but the control while functioning as dealer of manufacturer and while functioning as wholesaler without there being agency of the oil company would be different in as much as in the former case the authorisation is subject to control of the Govt.of India and even the same is subject to control of oil company during the course of supply and so far as the later is concerned no such authorisation is required from the Govt of India nor they are under direct control of manufacturer or the oil company. Even the accountability is more in the case of company agents in comparison to the petitioners who are not company agents. Therefore, it can not be said that the petitioners are similarly situated at par with wholesalers who are company agents. If the State Govt has allowed the intervention or participation in the

chain of supply of essential commodities of those persons who are having direct authority from the manufacturer or oil company it can not be said that any discriminatory treatment is given nor can it be said that it has no object to be achieved, whatsoever. If a legislation is made to create a monopoly in favour of a particular class or with a create a monopoly it can possibly be examined that such is not an object of Essential Commodities Act or the Control Order. In my view no monopoly can be said to have been created merely because the State in its wisdom has taken the decision to allow participation or intervention of authorised person of a manufacturer who is more accountable in comparison to petitioners. Therefore, Mr.Nanavaty is not right in his submission that on account of Amendment order of 2002 monopoly is created and therefore it violates Article 14 of the Constitution of India. Even otherwise also, no monopoly can be said to have been created because there is no prohibition on the part of petitioners to become authorised dealer of the company and to participate by getting licence for the supply of essential commodities. Therefore, said contention raised on behalf of petitioners fails.

16. The contention raised on behalf of the petitioners that the subordinate legislation which is Control Order, 2002 can not be made retrospective deserves consideration. While examining the said aspects, it will have to be examined as to whether any right of the petitioners is created, and if yes, to what extent, and what is the effect of the present subordinate legislation, which is the subject matter of these petitions, upon the so called rights of the petitioners. The Ld.Addl.AG has submitted that the Control Order of 2002 whereby the amendment is brought out in the Control Order of 1981 is not a subordinate legislation giving any retrospective effect. It has been submitted that the effect of the Control Order of 2002 is retro-active in nature. However, since it has been submitted on behalf of the State Govt that by amendment of 2002 all persons holding valid licences are also included in its sweep for the purpose of continuing themselves as the authorised wholesale dealers in kerosene, the aspects regarding the true and correct effect of the subordinate legislation will have to be examined.

17. As such, law is settled on the point that there can not be a subordinate legislation giving retrospective effect. Subordinate legislation can be made with retrospective effect only if there is a specific delegation by the parent body on such delegatee. The notification, dated 30.11.1974 on the basis of which the power has been exercised by the State Govt has as delegatee of the Central Govt does not provide any enabling power to the State Govt to make a Control Order having or by giving retrospective effect. Therefore, in view of the fact that there is no authority assigned by the Central Govt under Essential Commodities Act it has got to be concluded that the State Govt has no power to make Control Order or make any amendment in the Control Order with retrospective effect. Even the perusal of the Control Order of 2002 also shows that the same is sought to be given effect at once. The language reads as "IT SHALL COME INTO FORCE AT ONCE". Saying in other words, there is no intention made in the subordinate

legislation to give retrospective effect to the Amendment of 2002. In view of the fact that there is no specific delegation of power by the Central Govt to the State for making Control Order under Essential Commodities Act with retrospective effect and in view of specific language of the amendment itself as referred to hereinabove, it has got to be concluded that the Amendment of 2002 is having prospective effect only and it is not at all retrospective, in any manner.

18. I would have rejected the contention raised by the Ld.Addl.AG, at the outset, on the interpretation to Amendment of 2002 had there not been Govt instructions dated 31.7.02. The perusal of the Govt instructions and the submissions made on behalf of the State Govt by the Ld.Addl.AG clearly go to show that there is intention on the part of the authority including the State Govt to terminate the licences of those whole sale dealers who are holding valid licences on the date of amendment. As recorded above, the Ld.Addl.AG also has made the stand clear that as per interpretation of State Govt of Control Order of 2002, all those persons holding valid licences and persons whose applications for grant or renewal of licences were pending on the date of amendment of Control Order are covered by the amendment and it has also been stated that on account of the amendment in the Control Order of 1981, no person can function as a wholesale dealer unless he is a company agent. In view of such stand taken on behalf of the authority, true and correct effect of the Control Order of 2002 and the legality and validity of instructions, dated 31.7.02 deserve to be examined. As observed earlier, since the Amendment of 2002 is only prospective in nature, the rights which are already accrued on account of earlier Control Order can not be altered since it is having retrospective effect. A perusal of the scheme of Control Order shows that the Clause 2(11) which is a definition clause provides that "licence" means a licence issued under this Order. Clause 2(25) provides that "wholesaler" means a dealer who sells essential articles to retailers, other dealers or bulk consumers and holds a wholesaler's licence issued under this Order. Clause 4(2) provides for "issue of licence" in the form B. Form B provides "licence for purchase/sale/storage for sale of essential articles in capacity of retailer/hawker/wholesaler/commission agent/producer. The condition No.1 of the licence in Form B provides that "subject to the provisions of the Gujarat Essential Articles (Licensing, Control and Stock Declaration) Order, 1981, the person is authorised to carry on business of the essential articles." In my view, on correct interpretation of said condition No.1, it transpires that the authorised dealer or a person holding licence has to act in accordance with the provisions of Control Order, 1981 other than in the manner and method and confirmation of the licence given to him to function as a licenseeholder. In view of the plain reading of condition No.1 I can not accept the contention of the Ld.Addl.AG that since one of the conditions is subject to the provisions of the Control Order, 1981 if the amendment is made in the Control Order of 1981 in respect to the eligibility criteria of getting licence it would also apply to a person holding valid licence or right thereto to function as wholesaler will automatically be vanished or taken away. In my view if the Control Order of 1981 is considered

as a whole it can easily be said that when a person is given licence to deal in essential articles a vested right is created in favour of person holding licence. The only obligation upon him is to strictly comply with the terms and conditions of licence which may also include the other provisions of Control Order in touching other than the eligibility criteria of getting licence. By insertion of amendment of 2002 the eligibility criteria of getting licence as wholesaler in kerosene is sought to be altered. Earlier, a person who is not even a company agent could apply for licence as a wholesaler. By the amendment of 2002 definition of "wholesaler" qua the licence of kerosene is made restricted to only company agent. Therefore, when the amendment of 2002 touches the eligibility criteria of getting licence as a wholesaler it can not be made applicable to the persons who are already holding licences on the date of amendment, because, as observed earlier, granting of licence or holding of licence creates a right in favour of person having a valid licence and if such right is sought to be taken away or altered or to be prejudiced, in any manner, there must be a legislation having retrospective effect. As observed earlier, though at the outset the Ld.Addl.AG submitted that the legislation is not giving retrospective effect, but since the interpretation as sought to be canvassed on behalf of the State Govt is to give retrospective effect so far as they relate to persons holding valid licence on the date of amendment, and such intention is further demonstrated by the Govt instructions dated 31.7.02. I am of the opinion that such an action on the part of the State Govt is ultravires the authority under Control Order, 2002. When the amendment itself is prospective in nature, it can not be given effect so as to take away the vested and existing right of a person holding a valid licence to work as a wholesaler in kerosene. If the contention of the Ld.Addl.AG is accepted of interpreting the amendment of 2002 so far as it relates to persons holding valid licence, in substance, it would result into giving retrospective effect to the amendment which is not even intended in the legislation. Therefore, I am of the view that the action on the part of State Govt to issue notice to the persons holding valid licence on the date of amendment for cancellation thereof is without there being any authority and bad in law.

19. The next question for the consideration of this court is what is the effect of amendment upon the persons whose applications for grant and/or renewal of licences were pending on the date of amendment. The scheme of Control Order shows that every citizen or a person who fulfills the eligibility criteria has right to apply for licence. Right to apply and consideration of application are, in my view, the procedural aspects of law and it can not be equated with the persons who are already granted licence. It is well settled that the procedural laws are not creating any substantive right in favour of person who has applied for such purpose, but what is relevant is the date on which the application is considered and decision is rendered on such application. Therefore, to that extent, the contention of the Ld.Addl.AG deserves to be accepted that so far as the applications of the persons for grant and/or renewal of licence are concerned, the amendment is retro-active in nature. It does not take away the right of a person

to be considered but when it is being considered the same will be as per the existing laws. In my view, "retrospective" means looking at back way and contemplating what is not passed and take away the rights which already accrued whereas "retro-active" means a statute creates a new obligation of consideration of already existing provisions. The effect of amendment of 2002 is creating an obligation upon the licensing authority to take into consideration of specific definition of PDS kerosene wholesale dealer and therefore in view of amendment of 2002 so far as PDS kerosene wholesale dealers are concerned a specific provision is made in the eligibility criteria to apply for whole licence of PDS kerosene. Since on the date of amendment the applications were neither considered nor the decision is rendered in any manner of granting licence, in my view an obligation is created upon the licensing authority by the amendment of 2002 taking into consideration the new definition of eligibility criteria for the purpose of deciding the applications for grant and/or renewal of licence. Since that obligation has already come into force from 31.7.02 it applies to all pending applications and therefore in that sense the said subordinate legislation is retro-active in nature. Therefore, Mr.Nanavaty is not right in submitting that since the amendment is to alter the rights of persons whose applications are pending for grant and/or renewal of licence it is having retrospective effect. Even otherwise also, as observed above, making of applications and consideration thereof are the procedural laws which do not create any vested right to the person concerned. Even otherwise also this court would not issue mandamus to the authority to consider the applications on the basis of law which is not prevailing and by ignoring or not giving effect to the intention of the legislation. Therefore, in my view, even if the amendment of 2002 is to apply prospectively, but since it is retroactive in nature and since no right can be said to have been created in favour of persons whose applications were pending on the date of amendment the third paragraph of instructions dated 31.7.02 so far as it relates not to grant licence and or to renew licence of persons who are not authorised dealers of the company is just and proper and is rather in consonance with the amendment of 2002.

20. In view of the above discussion, I am inclined to hold as under:

- (i) The Amendment of 2002 in Control Order, 1981 is not retrospective and is prospective in nature, but it is also retro-active.
- (ii) The rights of persons holding valid licence to continue as wholesale dealers in kerosene on the date of amendment are neither taken away nor altered on account of amendment of 2002 until the expiry of the date of validity of licence.
- (iii) The persons whose applications for grant and/or renewal of licence were pending on the date of amendment would not be entitled to get licence on account of Amendment of 2002 unless and until they acquire the status of company agent or authorised dealer of the company.
- (iv) By Amendment of 2002 no monopoly can be said to have been created in

favour of persons who are company agents and the restriction made by the amendment is a reasonable restriction and within the power of the State Govt and is not violative of Article 14 and is also not ultravires of Article 19(6) of Constitution of India.

21. In view of the aforesaid conclusions, the petitioners are not entitled to the relief of declaring the Amendment of 2002 in Control Order, 1981 as unconstitutional and/or void since the said Amendment of 2002 is constitutional and valid. However, so far as the petitioners who are holding valid licence on the date of amendment are concerned, they shall be entitled to continue to work as wholesale dealers in PDS kerosene until the date of expiry of valid licence and the officers of the respondent-State shall not create any obstruction or interference in their functioning on account of the Amendment of 2002 or decision for cancellation of said licences on account of Amendment of 2002. The petitioners whose applications for grant/renewal of licences were pending on the date of amendment are covered by the Amendment of 2002 and therefore they would be entitled to any of the reliefs, and therefore their petitions are dismissed in toto. Whereas petitions of the petitioners who were holding valid licences on the date of amendment are allowed as indicated earlier. The Govt instructions, dated 31.7.02 so far as they relate to cancellation of licence of licences of persons who were holding valid licences on the date of amendment is quashed.

22. Rule is made absolute to the aforesaid extent in each petition of the petitioners who were holding licence on the date of amendment. Rule is discharged in each petition of the petitioners whose applications for grant/renewal of licences are pending on the date of amendment.

23. Mr.Gori, Ld.AGP with Mr.K.B.Trivedi, Ld.Addl.AG after pronouncement of judgment requests that the operation of the order may be suspended for some time so as enable the State Govt to carry the matter before the higher forum. Said request is opposed by the learned advocates for the petitioners because it has been submitted that short time is left for the purpose of continuing to function as wholesale dealers in PDS kerosene. Since the petitioners are holding valid licence and as this court has only interpreted the Amendment of 2002 of the Control Order, 1981 and since the interpretation of Control Order, 1981 made by the State Govt is not accepted, in my view the said request can not be accepted since it would create irreversible situation and hence the said request is rejected.