
(2004) 12 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : LPA (OW) No's. 54, 63, 68, 69 and 72 of 2004 and LPA 118 of 2004

State of Jammu & Kashmir and Others

APPELLANT

Vs

Vikas Jandial and Others

RESPONDENT

Date of Decision : 21-12-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 47
Jammu and Kashmir Excise Rules — Rule 15

Citation : (2005) 2 JKJ 451

Hon'ble Judges : Y.P. Nargotra, J;V.K. Jhanji, J

Bench : Division Bench

Advocate : A.H. Naik, General, Kailash Vasdev, A.V. Gupta, Deepika Mahajan, Y.E. Tak, K.S. Johal and Sunil Hali, for the Appellant; Z.A. Shah, D.C. Raina, Irfan Noor, Dinesh Verma, R.K. Gupta, Wasim Sadiq Nargal, Sonia Gupta and Puneet Gupta, for the Respondent

Judgement

V.K. Jhanji, J.—By this common order we propose to dispose of LPA(OW) Nos. 63/2004, 68/2004, 72/2004, 54/2004, 69/2004 and

APLPA 96/2004, as common question of law and facts are involved in all the appeals.

2. The appellants are aggrieved of order/judgment dated 10.6.2004 passed by the leded Single Judge in OWP No. 199/2004, titled, Vikas

Jandial v. State of J&K, and Ors. connected petitions.

3. For the sake of convenience, reference to 'appellants' hereafter in the judgment, is appellants in LPA (OW) No. 63/2004.

4. Vide the impugned judgment, the learned Single Judge has quashed Notification No. EC/STS/108/2004-05/1944-45 dated 27.02.2004 along

with all consequential actions of appellants for selection of prospective licensees by draw of lots. The appellants, however, have been left with

liberty to conduct fresh exercise and consider the applications received in respect of 89 notified locations; and further invite applications in respect of 116 additional locations, for which the applications had not been invited for grant of JKEL-2 licences, after following the procedure and adopting the methodology in accordance with Excise Act and Rules framed thereunder, and in terms of the Excise Policy announced, promulgated and formulated by the State Government vide Government Order No. 99-F of 2003 dated 07.04.2003 and amended vide Government Order No. 156-F of 2003 dated 22.07.2003.

5. In brief, the facts are that the trade of liquor in the State of Jammu & Kashmir is regulated like other States and the State enjoys the exclusive

privilege for the manufacture and sale thereof. The Jammu & Kashmir Excise Act, 1958 and the Rules, known as J&K Liquor Licence & Sales

Rules, 1984, govern the trade of liquor and intoxicating drugs in the State. The State was adopting dual system to regulate the trade of liquor, viz.,

(i) relating to Indian Made Foreign Liquor (hereinafter referred to as IMFL) through separate retail vends on a fixed annual licence fee and, (ii)

relating to Country Liquor sold exclusively through identified vends with the privilege of trading granted in open auction conducted yearly and/or

through departmental operations as per the provisions of J&K Excise Act and the Rules made thereunder.

6. For opening of a vend for the purposes of sale of IMFL, a person desirous of trading in the commodity is required to apply to the Excise

Commissioner, who has the competence/authority to grant a licence after the applicant fulfills the requisite formalities and the Excise Commissioner

satisfies himself about the need for the grant of licence to the person/premises.

7. During the year 1996 the grant of licences to liquor shops by the State Government became the subject matter of controversy and the same was

raised through the medium of various writ petitions, i.e., PIL Nos. 7/1999, 70/1999 and 136/1999. The said petitions were filed by residents of

the area where the liquor vends had been opened and were likely to be opened. The challenge in the said Public Interest Litigations was common

to the effect that the State was under an obligation under Article 47 of the Constitution to impose prohibition for the consumption of liquor. It was

averred that the State was bound to impose the prohibition and discourage the

policy of grant of licences for opening of liquor vends in the State of

Jammu & Kashmir but, instead of doing so, the State was proliferating the trade of liquor by granting fresh licences to liquor vends. The said writ

petitions were disposed of by a common order of the Division Bench, where directions were issued to declare the policy in regard to licensing of

liquor vends. The Government took a policy decision and issued Government Order No. 112-F of 2001 dated 3.4.2001, whereby the

Government laid down the following policy for the year 2001-2002:

i. The Government does not recognize sale of liquor as a normal trade activity but one which requires to be kept under restrictions and strictly

confined within the parameters of laws and rules framed on the subject.

ii. Requests for issuing of licences for manufacturing, stocking, sales (wholesale, retail, bars etc.) shall be generally denied and any fresh licences

issued only if justified by exceptional circumstances.

iii. Even when such exceptions are made, fresh licences shall strictly conform to the provisions of the Act and the Rules which govern issue of such

licences and due regard shall also be given to the public sensitivities as also to the factors like public nuisance, environmental pollution etc.

8. The State Government after formulating the aforementioned Policy placed it on the record of LPA No. 145/99, titled ""Residents of Kunjwani v.

State of Jammu & Kashmir"". However, before fresh licences could be issued under the Policy for the year 2001-02, another PIL No. 803/2001,

titled, ""Vaid Vishnu Dutt v. State of J&K"" came to be filed, which was disposed of on 30.5.2003 by observing that the grievance made in the

petition is the one which was raised in the earlier Public Interest Litigations and the grievance already stands redressed when the Court in the earlier

Public Interest Litigations directed the Government to formulate a policy and in pursuance of said directions, the Government formulated a policy

and a Government Order No. 112-F of 2001 dated 3.4.2001 was issued in this regard.

9. Because of the pendency of Public Interest Litigation, no fresh licence could be issued till 2003. On expiry of the Policy for the year 2001-02,

the Government notified the Excise Policy for the year 2003 vide Order No. 99-F of 2003 dated 7.4.2003 read with Order No. 156-F of 2003

dated 22.7.2003. The policy recognized the need for restrictive and regulative

trade in the liquor till the time it was considered appropriate to bring about a total prohibition. Under the policy it was decided that in processing the requests for grant of retail licences, consideration of un-serviced areas arresting the menace of bootlegging, the demand potential and the relevance from tourist point of view shall be of paramount importance. The Policy further provided that a clear precedence shall be drawn in processing the applications with priority consideration for educated unemployed youth and ex-servicemen.

10. In regard to the disposal of applications, which had already been received, the policy provided that such applications would be treated as a class and processed along with other new applications, as may be received by the Government within the time prescribed. In accordance with the policy decisions, the department identified the locations for which it could consider grant of licences. In this regard the Excise Department issued a public notice on 22.7.2003 giving a tentative list of areas/places. Simultaneously, a Committee was constituted to make survey of unserved/under-served areas and also the areas requiring the facility from tourist point of view. Based on the recommendations of Committee, 89 locations were finally put to notice by the department vide No. EC/STS/207/2003-04/1027-31 dated 22.9.2003 inviting applications from the individuals, societies/partnerships for consideration of their cases. In the notices it was specifically made clear that the applicants, who had previously applied to the department, should also submit their bio-data with documentary proof of having applied earlier. It appears that in consequence of the notices so issued, the department received 7781 applications for 89 locations.

11. Before the applications could be processed or licences could be issued, the Government of India convened a meeting of Excise Commissioners of all the States to discuss, inter alia, the broad strategies about the trade of liquor in the States. Based on the experience of the States, a consensus was evolved for doing away with the system of public auction for granting licences. It was felt that the prevalent auction system has led to creation of mafias in different states, seriously prejudicing the revenue interests of the States. As a sequel to the consensus arrived at the national level, the State of Jammu & Kashmir also decided to do away with the dual system of sale of liquor trade in the State. It was decided that

the sale of country liquor shall be abolished and, instead, IMFL of the same strength, degree and essence would be provided to the consumers of country liquor. For this purpose, it was provided that the existing country liquor vends would be converted into IMFL vends, through which, apart from other brands of IMFL, the liquor of the strength, degree and essence of erstwhile country liquor, to be branded as JK-Desi Whisky, shall be allowed to be sold as a branded product on a fixed fee. The shift in discarding the system of sale of country liquor and replacing it by branded liquor, known as JK-Desi Whisky, involved a major policy decision which was announced by the Government as a part of budgetary measure for the year 2004-05 in the State Legislature. The decision was formally communicated after the legislature accorded its approval to the budget proposals for the year 2004-05.

12. Because of the shift in the policy of sale of IMFL and country liquor, apart from 89 locations already notified, need was felt to issue licences for 170 erstwhile country liquor vends also. Since 54 country liquor vends were already operating in 89 locations notified for grant of IMFL licences, the actual number of locations for which the licences were required to be issued came to 205.

13. As already indicated, in response to the notice issued for grant of licences for 89 locations, the Excise Commissioner received more than seven thousand applications. For the additional vends, numbering 116, the State decided to make selection out of the applicants who had already applied. A question arose as to how should the Excise Commissioner make selection when there are large number of applications for the limited number of vends. The Excise Commissioner suggested the short listing of the applicants for a vend through the procedure of draw of lots. The Government considered the proposal of Excise Commissioner and accorded approval to the suggestion and Notification No. ET/E/5/2004 dated 25.02.2004 was issued in this regard.

14. In all there were 7334 aspirants for the grant of OFF-Licences for retail sale of liquor for 89 locations notified by the department. The said applicants were also considered for 116 additional vends as well. In the preliminary processing, 447 applications were found to have been received in duplicate, while 759 applicants (educated unemployed youth - 438,

ex-servicemen - 27 and general - 294 = 759) had not applied for

specific locations notified by the Government. Since as per the Excise Policy for the year 2003-04 preferential treatment was to be given to

educated unemployed youth and ex-servicemen, applications were categorized and a break-up of the various categories was as under:

General : 2192

Educated unemployed youth : 4648

Ex-servicemen : 494

15. The procedure to be adopted for draw of lots was that if for a particular location the first candidate happened to be from general category and

second and/or third candidates from the preferential categories, i.e., educated unemployed or ex-servicemen, the candidates from the preferential

categories would be graded as selected and placed above the candidate of general category, who was to be pushed down to the waiting list in

accordance with the preferential treatment laid down in the excise policy. The first candidates was to be graded as selected and the second and

third candidates were to be placed on the waiting list in the order in which they were picked. Two consecutive lucky draws were to be drawn.

First in respect of 89 notified locations. For each of these locations, the draw was to be confined to those who had applied for a particular

location. The second draw was to be amongst the applicants including those who had applied for non-specific locations. Those who were to be

selected in the first draw for 89 locations were to be excluded. All the applicants, who were to be placed in the waiting list for various places in the

first draw, were also to be considered in the second draw. All the applicants, who were to figure in the waiting list of any location in the second

draw, were to be considered for each subsequent location as well. An applicant who figured in the waiting list of a particular location of the first

draw and may subsequently be selected for another location in the second draw, was to forego the selection for the second draw in case he had

been picked up from the waiting list because of the person already selected in the first draw for that specific location being dropped for any reason

including non-fulfilment of formalities. It was also decided that if there were to be a computer error during the draw for a particular location, lots

would be redrawn for the said location immediately. Before actual grant of

licences, applicants were to fulfil conditions under the rules.

16. The Excise Commissioner vide Notice No. ES/STS/108/2004-05/1929 notified that draw of lots for grant of 'OFF-Licences' would be held

on 27.2.2004 at 2 PM and a notice in this regard was published in the news papers. The draw of lots took place on 27.2.2004 and immediately its

result was announced. After the result of draw of lots, the process for determination of final select list was set in motion, but before the same could

be concluded, number of writ petitions came to be filed seeking quashing of selection by way of draw of lots.

17. In some writ petitions challenge was in regard to the process of draw of lots in respect of 116 additional locations on the ground that no public

notice for the said vends was given nor the applications were invited for grant of licences for 116 vends, which earlier were dealing in the sale of

country liquor. The grievance was that only 89 areas had been notified for the purposes of grant of OFF-Licences. As against it, the draw of lots

was for as many as 205 locations. In OWP NO. 204/2004 as many as 19 petitioners challenged the selection for grant of OFF-Licences for retail

of 205 liquor vends, with a grievance that the applications, which had been filed, were in regard to 89 locations and that too only for the sale of

IMFL, but selection has been made by draw of lots for as many as 205 locations for sale of IMFL as well as JK-Desi Whisky. The writ

petitioners averred that in the year 2003 dualistic system of retail sale of liquor was prevalent in the State, i.e., for retail sale of IMFL, the licences

used to be granted/issued in the form known as JKEL-2 on payment of annual licence fee, whereas for retail sale of country liquor, the licences

used to be granted/issued in the form known as JKEL-9 by auction on annual basis or sale through vends owned by the department. The writ

petitioners contended that the areas of operation under the aforesaid two types of licences were totally different and independent of each other.

Those who wanted to deal in retail sale of IMFL used to apply for grant of licences under JKEL-2, and those interested in retail sale of country

liquor used to apply for licence under JKEL-9. The writ petitioners further averred that it was not made known to them that henceforth the sale of

country liquor would be through IMFL vends. In short, their grievance was that if they had known that the Government has made fundamental

changes in the re-structuring of sale of liquor and has introduced a unitary system instead of dual system, they definitely would have applied for the grant of licences. The writ petitioners, thus, called in question the actions of Excise Commissioner for grant of licences for 205 locations by draw of lots without giving notice of the same to the general public including the writ petitioners.

18. The State as well as selectees filed detailed objections to the writ petitions. They questioned the maintainability of writ petitions on the ground

that no fundamental and legal rights of writ petitioners have been violated as the trade of liquor is a restricted trade and is not covered under

fundamental rights. Their further submission was that for 205 specific locations, 7334 aspirants were considered which in no case can be termed as

discriminatory or arbitrary or not covered under rules, regulations and the policy provisions; that the process of draw of lots for issuance of liquor

licences pertains to a policy matter of the State relating to its privilege and hence cannot be challenged in a writ petition; that the writ petitioners

after having participated in the selection do not have any right to challenge the selection; that the procedure of draw of lots was absolutely

transparent, fair, legal and not discriminatory; that no fundamental change has been made in the sale of liquor, inasmuch as 170 vends were already

operating in the country liquor sector which have been changed to IMFL vends; that only 35 fresh locations (22 in Jammu Division and 13 in

Kashmir Division) have been added; that country liquor is not altogether different from IMFL, only a brand of liquor has been changed from

country liquor to that of JK-Desi Whisky and with the change in nomenclature it has to be sold in the premises of JKEL-2 licences. This change

has not increased the number of liquor consumers in the State. The respondents also denied that the general public was not given opportunity to

take part in the issuance of licences. According to the respondents 7334 applicants were considered.

19. All the writ petitions were clubbed together and have been decided by a common order/judgment dated 10.6.2004. As already mentioned

earlier, the selection of prospective licences by draw of lots has been quashed and the State has been left with liberty to conduct fresh exercise and

to consider the applications received in respect of 89 notified locations on merits giving preference to educated unemployed youth and ex-

servicemen and invite fresh applications in respect of additional 116 locations.

20. The learned Single Judge has quashed the selection mainly on the ground that the applications had been invited for the year 2003-04 and the

Excise Policy to be followed by the Excise Commissioner had to be for the year 2003-04 and under the said policy the applications were required

to be considered on merits, but by adopting the procedure of draw of lots, the consideration of the applications on merit was given a complete go-

bye. According to learned Single Judge, the object of the policy for the year 2003-04 had to be achieved by conscious application of mind rather

than by draw of lots leaving the achievement of object to chance. In regard to 116 locations, the learned Single Judge took the view that the

applications had not been invited for grant of JKEL-2 licences for the said locations and, therefore, consideration in regard to those locations could

have been made only after inviting applications in accordance with the procedure, Act, Rules and in terms of the Excise Policy for the year 2003-

04.

21. The State as well as the successful applicants in the draw of lots being aggrieved have come in appeal.

22. The submission of learned counsel for appellants is that the writ petitioners having participated in the draw of lots are precluded from

maintaining any challenge to the procedure adopted or procedure followed or policy framed for the grant of licences. Their further submission is

that the change in procedure for grant of IMFL/country liquor licences on payment of fixed fee is based on the Government policy to curb the

menace of manufacture of spurious liquor, arrest bootlegging, prevent inter-state smuggling, the requirements of tourism and also to prevent the

cornering of business by a cartel. The need to notify the policy was to bring about uniformity and transparency in decision making. The

financial/fiscal policy approved in a money bill is not open to judicial review. Further, according to the learned counsel for appellants, it is open to

the Government to regulate its fiscal policies and procedure to give effect to the fiscal measures. Learned counsel for appellants further submitted

that the learned Single Judge in the impugned judgment has observed to the following:

... the charge of arbitrariness cannot be made and that the Excise Commissioner

in all fairness resorted to the said procedure and, therefore, the action cannot be faulted irrespective of the fact where the draw of lots is an irregularity or mistakes have been committed. I am of the view that draw of lots by itself may eliminate the charge of favouritism or nepotism.

23. It is contended that having taken the aforesaid view, the learned Single Judge erred in entertaining the writ petitions challenging the selection by draw of lots. In short, the submission of learned counsel for appellants is that the method of selection by draw of lots was fair and not discriminatory, arbitrary, irrational or colourable exercise of power.

24. On the other hand, the submission of Mr. Z.A. Shah, learned counsel appearing on behalf of some of the writ petitioners is that his clients had applied and completed all the formalities, like obtaining of No Objection Certificates etc. as required under rules and only were awaiting the orders

of Excise Commissioner for grant of licences, but licences were not granted because of the interim orders passed by the High Court in the Public

Interest Litigations, which were pending in the previous years. Mr. Shah further contended that it is in this background that the Government

amended the policy on 22.7.2003 and made a separate provision for such applicants. Further, according to him, under the policy such applicants

constituted a separate class and their cases had to be considered on merits. According to learned counsel, the procedure of draw of lots cannot be

said to be consideration on merits. Mr. Shah further contended that after the Government had taken a decision that the cases of applicants, who

had earlier applied, would be considered on merits, the Excise Commissioner had no other option but to consider their cases on merits. Mr. Shah

also contended that the approval dated 25.2.2004 of the Government was in respect of draft excise policy of 2004-05 and such approval did not

constitute alternation or modification of the Excise Policy of 2003-04 and so the procedure for identifying the prospective licensees by draw of lots

was not in terms of the excise policy notified on 7.4.2003. His other contention is that the procedure relating to draw of lots was not publically

notified and the policy notified on 7.4.2003 provided sustenance to unemployed youth and ex-servicemen, which could be achieved by application

of mind by consciously choosing among the various applicants on merits, but resorting to draw of lots cannot be said to be decision on merit.

According to him, it was not fair, apart from being without jurisdiction. In regard to the submission of appellants that the writ petitioners have no

locus-standi to file the writ petition as having participated in the selection, Mr. Shah submitted that draw of lots does not involve participation.

Finally, Mr. Shah contended that the applications were invited only for retail vendes of IMFL and the decision to put the country liquor on the same

network was taken after the applications had already been received and that too without corresponding amendment in the Rules or the Policy.

25. Mr. R.K. Gupta, learned counsel appearing on behalf of some of writ petitioners contended that with the change in the system for distribution

and sale of liquor as brought out in the new budget, whereby all vendes having licences under JKEL-2 have been authorized to sell on retail basis all

kinds of liquor including country liquor as well as IMFL, the State ought to have informed the general public so as to give a chance to all interested.

According to him, the Excise Commissioner acted erroneously in confining draw of lots only to those applicants who had applied for grant of

IMFL licences for 89 locations. Further, according to him, the Government ought to have notified that IMFL and country liquor, to be known as

JK-Desi Whisky, would be sold through a common vend so as to enable all dealing in the trade of country liquor to apply for the licences.

26. We have heard learned counsel for the parties and have carefully gone through the record of this case.

27. The question to be considered in the appeal is whether the Excise Commissioner acted erroneously in not following the procedure to process

the applications on merits and making selection by draw of lots.

28. Before dealing with this question, it is imperative to take notice of events preceding the decision to make selection by draw of lots. First Excise

Policy came to be notified on 3.4.2001 in pursuance of the directions given in LPA No. 145/99. Before any licence could be granted under the

said policy, fresh Policy came to be notified on 7.4.2003 by the Government vide Order No. 99-F of 2003. Subsequently, vide Govt. Order No.

156-F of 2003 dated 22.7.2003 amendment was made in the Excise Policy dated 7.4.2003. Under this policy a highly restrictive approach was to

be pursued for issuance of OFF-Licences and in processing the requests for grant of OFF-Licences, the consideration of unserved area,

arresting the menace of bootlegging, the demand potential and relevance from tourism point of view was to be of paramount importance. The policy provided priority consideration for educated unemployed youth and ex-servicemen. All applications, complete in all respects, pending consideration as on the date of issuance of policy, were to be considered on merits subject to rules and regulations along with new applications to be received within the prescribed time. Vide Notification dated 3.9.2003, 89 locations were notified for grant of OFF-Licences. On 5.9.2003 the Excise Commissioners' Conference was held in New Delhi, where a consensus was evolved to do away with the policy of auctioning the liquor vends. The State decided to do away with the dual system of sale of liquor. On 13.2.2004 budget meeting was held with regard to restructuring of sale of liquor in the State. On 20.2.2004 budget was announced in the State Legislature, in which it was proposed that the existing country liquor vends would be converted into IMFL vends, through which, apart from other brands of IMFL, the liquor of the strength, degree and essence of the erstwhile country liquor, would be sold as a branded product on payment of fixed annual fee. After the Legislature accorded its approval to the budget proposal for the year 2004-05, the decision to do away with the dual system of sale of liquor was announced. As the process for grant of IMFL licences, for which the applications had already been received in response to the notices issued earlier, had not concluded, the Excise Commissioner felt that according to the new decision, apart from 89 locations already notified, licences were also required to be issued for 116 erstwhile country liquor vends. Out of 116 erstwhile country liquor vends, 54 liquor vends were operating in 89 locations already notified. The total locations for which the licences were required to be issued came to 205, for which more than seven thousands applications had been received. It is in this background that the Excise Commissioner sent proposal to the Government for adopting the procedure of draw of lots for grant of OFF-Licences for retail sale of liquor. In his communication No. EC/STS/108/2003-04/1924 dated 22.2.2004 he sought approval from the Government to make selection by draw of lots so that the liquor vends could become functional by 1st April, 2004 in accordance with the new Excise Policy announced in the Budget 2004-05. The procedure for draw of lots was notified on 25.2.2004 and draw of lots took place on

27.2.2004 for making the liquor vends functional by 1.4.2004.

29. As noticed above, the learned Single Judge has quashed the selection by draw of lots solely on the ground that for the year 2003-04 such a procedure had not been provided for.

30. In our considered view the learned Single Judge has failed to appreciate the distinction between Govt. Order No. 99-F of 2003 dated

7.4.2003 read with Govt. Order No. 156-F of 2003 dated 22.7.2003 and re-structuring of sale of liquor in the State, to be effected from the

financial year 2004-05. The re-structuring of liquor trade, announced in the budgetary measure for the year 2004-05, provided for doing away

with the dual system of sale of liquor. The vends which were to become functional with effect from 1.4.2004, apart from selling IMFL, were also

to sell country liquor, branded as JK-Desi Whisky. The Policy for the year 2003-04 was not issued under any Rules, Regulations or Statutes.

Moreover, a policy once formulated is not good forever. It is perfectly within the competence of Government to change it, re-change it, adjust it

and re-adjust it according to the compulsions of circumstances. The Government being the only authority competent to regulate the sale of liquor in

the State, it was within its competence to change the policy to regulate the sale of liquor. The Supreme Court has time and again said that if the

Government is satisfied that change in policy is necessary in public interest, it would be entitled to revise the policy and lay down a new policy. The

Court would dissuade itself from entering into a field, which solely belongs to the executive.

31. In State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., , the Supreme Court not only opined that the right of State to change its

policy from time to time under the changing circumstances is neither challengeable nor can it be challenged, but also observed:

It is not normally within the domain of any court to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or

equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is

arbitrary or violative of any constitutional, statutory or any other provision of law. When government forms its policy, it is based on a number of

circumstances on facts, law including constraints based on its resources. It is

also based on expert opinion. It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The court would dissuade itself from entering into this realm which belongs to the executive.

32. In *P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others*, the Supreme Court while considering the question whether an applicant has any vested right to claim licence in terms of the previous policy, opined:

An applicant has no vested right to have export or import licences in terms of the policies in force at the date of his making application. For

obvious reasons, granting of licences depends upon the policy prevailing on the date of the grant of the licence or permit. The authority concerned

may be in a better position to have the overall picture of diverse factors to grant permit or refuse to grant permission to import or export goods.

The decision, therefore, would be taken from diverse economic perspectives which the executive is in a better informed position unless, the refusal

is mala fide or is an abuse of the power in which even it is for the applicant to plead and prove to the satisfaction of the court that the refusal was

vitiating by the above factors. The court, therefore, would not bind the Government with a policy which was existing on the date of application as

per previous policy.

33. The Supreme Court further opined:

The power to lay policy by executive decision or by legislation includes power to withdraw the same unless in the former case, it is by mala fide

exercise of power or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate

authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice

within the executive or legislative power. In matters of economic policy, it is a settled law that the court gives a large leeway to the executive and

the legislature. Granting licences for import or export is by executive or legislative policy. Government would take diverse factors for formulating

the policy for import or export of the goods granting relatively greater priorities to various items in the overall larger interest of the economy of the

country. It is, therefore, by exercise of the power given to the executive or as the

case may be, the legislature is at liberty to evolve such policies. A prior decision would not bind the Government for all times to come. When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilization of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved.

34. The change in procedure for grant of IMFL-cum-country liquor (JK-Desi whisky) licence was based on Government policy to address the menace of manufacture of spurious liquor, arrest bootlegging, prevent inter-state smuggling and also to prevent cornering of the business by a cartel. The need for following the procedure for making selection by draw of lots was to bring about uniformity and transparency in giving effect to the policy of Government. The procedure adopted for draw of lots also took care of educated unemployed youth and ex-servicemen. It provided that if for a particular location the first candidate happened to be from general category and second and/or third candidate from the preferential categories, i.e., educated unemployed or ex-servicemen, the candidate from preferential category would be graded as selected and placed above the candidate of general category, who was to be pushed down and granted licence in accordance with the preferential treatment laid down in the excise policy.

35. As noticed earlier, more than seven thousands applications had been received in respect of 89 notified locations. In absence of any guidelines or criterion provided by the Government, it became impossible for the-Excise Commissioner to accord consideration on merits. It was for this reason that the Excise Commissioner suggested the short-listing of applicants through the procedure of draw of lots but, at the same time, providing preferential treatment to educated unemployed youth and ex-servicemen. Learned counsel for the parties were also not able to point out how the Excise Commissioner was to judge on merits one ex-serviceman vis-'-vis another ex-serviceman and one educated unemployed youth vis-'-vis

another educated unemployed youth. The selection was not for any post or to any service where eligibility conditions, such as qualification, age etc.

could be laid down. More so, neither the Act nor the Rules provide any procedure governing the grant of licence. Rule 15 simply says that all

applications for grant of licences, which require the orders of the Excise Commissioner, should be received through proper channel before end of

October each year. The Rules, however, do not define 'proper channel'. In this view of the matter, we are of the considered view that the Excise

Commissioner was well within his jurisdiction to follow the procedure of draw of lots. We also do not subscribe the view of learned Single Judge

that the cases of those applicants, who had applied for grant of licences before 31.7.2003, had to be considered on the basis of policy of 2003

and that too on merits. This is for the reason that such applicants did not have any vested right to have licences in terms of the policy in force at the

time of making of the applications. The grant of licence depended upon the policy prevailing on date of selection. In this case, on the date of

selection two changes had been brought about in the excise policy of the year 2003, i.e.,

i. the licences for the vends, which were to become functional with effect from 1.4.2004, were not only for the sale of IMFL, but also for sale of

country liquor, branded as JK-Desi Whisky; and

ii. the selection was to be made by draw of lots, but yet providing preferential treatment to educated unemployed youth and ex-servicemen.

36. We may also add that there is no allegation by any of the writ petitioner that aforementioned change in the policy is vitiated by mala fide or

abuse of power and is unfair, unreasonable or arbitrary. In absence of allegation in this regard or proof, this Court would not bind the Government

to its previous policy by invoking the doctrine of legitimate expectations. The order of learned Single Judge quashing the action of appellants for

selection of prospective licensees by draw of lots thus is not sustainable and is set aside.

37. The next question which arises for consideration is how far learned Single Judge is justified in directing the appellants to conduct exercise

afresh and consider the applications received for grant of licence for retail sale of liquor, on merits in respect of 89 notified locations; and further

invite applications in respect of additional 116 locations, for which the applications had not been invited for grant of JKEL-2 licence in terms of the Excise Policy of the year 2003.

38. It is now well settled law that there is no fundamental right in a citizen of this Country to do trade or business in intoxicating liquors. It is open to the State to permit dealings in intoxicants on such terms as the State may deem expedient. However, while doing so, the Government cannot ignore the mandate of Article 14 of the Constitution.

39. In *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, , the Supreme Court held that the manufacture and sale of liquor is not a fundamental right, but the State Government cannot ignore the requirement of Article 14. The Supreme Court observed:

There is no fundamental right in a citizen to carry on trade or business in liquor. The State under its regulatory power has the power to prohibit

absolute every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. 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 the rigour of Article

14. It cannot act arbitrarily or as its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of

manufacturing or selling liquor. It is, therefore, not possible to uphold the contention that Article 14 can have no application in a case where the

licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that

Article.

40. In *Rashbihari Panda etc. Vs. State of Orissa*, , the trade of kendu leaves in the State of Orissa was regulated by an Act and that created

monopoly in favour of the State so far as purchase of kendu leaves from growers and pluckers was concerned. The Government first evolved a

scheme under which it offered to renew the licences of those traders who in its view had worked satisfactorily in the previous year and had

regularly paid the amounts due from them. The scheme was challenged and realizing that it might be struck down, the Government withdrew the

scheme and instead, decided to invite tenders for advance purchases of kendu leaves but restricted the invitation to those individuals who had carried out contracts in the previous year without default and to the satisfaction of the Government. This action of the Government was challenged being violative of Articles 14 and 19(1)(g). The High Court negated the challenge, but in appeal to the Supreme Court the action was held to be violative of Articles 14 and 19(1)(g) of the Constitution of India because it gave rise to a monopoly in the trade of kendu leaves to certain traders and singled out other traders for discriminatory treatment. The Supreme Court observed that the action of the Government in restricting the invitation to make offers to those traders who had carried out their contracts in the previous year without default and to the satisfaction of the Government was also objectionable, since the right to make tenders for the purchase of kendu leaves being restricted to a limited class of persons, it effectively shut out all other persons carrying on trade in kendu leaves and also the new entrants into that business and hence it was ex-facie discriminatory and imposed unreasonable restrictions upon the right of persons other than the existing contractors to carry on business.

41. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, the Supreme Court objected the action of the

International Airport Authority in entering into a contract for running a cafeteria at the Airport with a person who did not fulfil the conditions

mentioned in the notice inviting tenders. The Supreme Court observed:

...It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into

contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private

individual, deal with any person it pleased, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant.

The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc., must be

confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in

any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the

departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

42. In *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*,

, the Supreme Court once again explained that there were two limitations imposed by law on government's discretion to deal with the public

whether by way of giving jobs or entering into contracts or granting other forms of largess. The first was on the terms on which largess might be

granted and the second in regard to the persons who might be recipients of such largess.

43. In *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, , the Supreme Court in the context of Government contracts

observed to the following:

In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which

non-arbitrariness is a significant facet. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and

give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision. Whether the expectation of the

claimant is reasonable or legitimate is a question of fact in each case. Whenever the question arises, it is to be determined not according to the

claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the

legitimate expectation of the claimant. A bona fide decision of the public authority reached in the manner would satisfy the requirement of non-

arbitrariness and withstand judicial scrutiny.

44. In *Tata Cellular Vs. Union of India*, , the Supreme Court pointed out that judicial review is not concerned with the merits of the decision but is

concerned with how that decision has been made. The Supreme Court held that judicial review will essentially deal with (a) questions of legality;

(b) rationality; (c) procedural propriety. Rationality means that it must be free from arbitrariness, bias or mala fide. In the said case tender of Tata

Cellular suffered from some clerical/typographical mistakes but the tenderer had later declared unequivocally that it would comply with all tender

conditions, the exclusion of the tender without giving an opportunity to him to

say why it should not be excluded made the government's action

suspect. The Supreme Court therefore ordered that Tata Cellular's claim ought to be considered.

45. In the present case, as already noticed that vide public notices the Excise Commissioner invited applications for grant of licence in respect of

89 notified locations and the last date for receipt of applications was 6.10.2003. Before the applications could be processed, budget meeting of

the State Legislature took place on 13.2.2004 and a decision regarding restructuring of the sale of liquor in the State was taken. On 20.2.2004

budget was announced in the State Legislature and decision dispensing with the system of sale of country liquor by auction and replacing it by

branded liquor, known as JK-Desi Whisky, to be sold on the same network of IMFL, was formally communicated when the Legislature accorded

its approval to the budget proposal for the year 2004-05. On 22.2.2004 the Government approved the suggestion of Excise Commissioner in

regard to the short-listing of the applicants through the procedure of draw of lots. On 25.2.2004 proposal for draw of lots was notified. The draw

of lots took place on 27.2.2004, which was not limited to only 89 locations already notified, but for additional 116 locations as well, which had not

been notified. In this background, we find merit in the submission of Mr. R.K. Gupta, learned counsel appearing for some of the writ petitioners,

that the decision of the Government with regard to putting of country liquor, to be branded as JK-Desi Whisky, on IMFL network was not given

wide publicity, and for this reason not only the persons carrying on the trade of country liquor, but the new entrants, who may have been interested

into the business of sale of IMFL-cum-country liquor, branded as JK-Desi Whisky, were shut out. In our view, the change in policy not only

should have been made known to all concerned, but the appellants ought to have invited applications afresh in terms of the change brought out in

the previous policy. The action of the appellants in restricting the selection amongst the applicants who had applied before the policy came to be

changed, was clearly unfair, unreasonable and discriminatory. Such an action cannot be sustained being violative of Article 14 of the Constitution of

India.

46. Resultantly, the order of learned Single Judge, whereby learned Single Judge

has quashed Notification No. EC/STS/108/2004-05/1944-45

dated 27.2.2004 along with all consequential actions of appellants for selection of prospective licensees by draw of lots, is set aside.

47. Instead, we hold that the procedure of draw of lots adopted by the Excise Commissioner was legal.

48. We further set aside the order of learned Single Judge, whereby the learned Single Judge has directed the appellants to conduct exercise afresh

and consider applications already received on merits in respect of 89 notified locations, and further invite fresh applications in respect of 116

locations for which the applications had not been invited for grant of JKEL-2 licence.

49. Instead, we direct that the appellants shall initiate the exercise afresh for identification of the locations/areas and notify the same in all leading newspapers.

50. The appellants, thereafter, shall invite fresh applications, which shall be restricted only to identified locations. They shall be at liberty to make

selection of prospective licensees by resorting to draw of lots in accordance with the procedure already approved by the Government vide order

dated 22.2.2004. In the Notice Inviting Applications, the appellants shall make it clear in unambiguous terms that mere invitation of applications

would not confer any right or claim for the grant of licence, and each selectee shall have to fulfil the formalities prescribed under the Act and Rules

before the licence is granted. The State Government, however, shall be at liberty to change or modify the policy in public interest. The appeals

stand disposed of in the terms indicated above.