

**(2003) 11 SC CK 0014**

**In the Supreme Court Of India**

**Case No :** Civil Appeal No's. 3017 of 1997 and 2696-2697 of 2003

State of Punjab and Another

APPELLANT

Vs

Devans Modern Breweries Ltd. and Another

RESPONDENT

**Date of Decision :** 20-11-2003

**Acts Referred:**

Constitution of India, 1950 — Article 13, 14, 19(1), 19(6), 226  
Government of India Act, 1935 — Section 297  
Kerala Abkari Act, 1902 — Section 17  
Kerala Abkari Act, 1977 — Section 11, 12, 14, 17, 18<

**Citation :** (2003) 10 JT 485 : (2003) 10 SCALE 202 : (2004) 11 SCC 26 : (2003) 5 SCR 930 Supp

**Hon'ble Judges :** V. N. Khare, C.J;S. B. Sinha, J;R. C. Lahoti, J;B. N. Agrawal, J;AR. Lakshmanan, J

**Bench :** Full Bench

**Advocate :** A.M. Singhvi, P.N. Misra, Ashok H. Desai, R.F. Nariman, R. Venkataramani and T.L.V. Iyer, H.M. Singh, Anil Hooda, Kaushal Yadav, R.S. Suri, Rajeev Kumar Sharma, Pallav Shishodia, George Poonthatham, R. Yoshod Vardhan, Nanjunda Reddy, Nagendra Naidu, S. Sukumaran, M.P. vinod, Diya Nair, Vikram Mehta, Padmalakshmi Nigam, Mohan Jain, Sanjiv Sen, Neeraj Sethi, Nandini Gore, Ramesh Babu M.R. and E.M.S. Anam, for the appearing parties, for the Appellant;

**Final Decision :** Allowed

## Judgement

A.C. Lakshmanan, J.—I have had the privilege of perusing the judgment proposed by my learned Brother Justice B.N. Agrawal. However, with respect, I express my inability to agree with the same and I propose to write a separate judgment in the following terms.

2. As facts and provisions of the relevant law have been set out in the judgment of my learned Brother Justice B.N. Agrawal, I do not propose to extract again.

3. civil Appeal No. 3017 of 1997 was filed by the State of Punjab against the judgment of the Division Bench of the Punjab & Haryana High Court dated

17.01.1997 in Writ Petition (Civil) No. 5358 of 1996. The said writ petition was filed by Respondent No. 1 in this appeal, namely, M/s. Devans Modern Brewaries Ltd., Ludhiana praying for issuance of a writ in the nature of certiorari quashing the imposition of import fee on Beer vide Order 1-D(iii) of the Punjab Excise Fiscal Orders, 1932, amended from time to time, latest being notification dated 27.03.1996 which is impugned in the writ petition and for other consequential prayers.

4. civil Appeal Nos. 2696 and 2697 of 2003 were filed by Penguin Alcohols (P) Ltd. and Another etc. against the State of Kerala and Others against the common judgment of the High Court of Kerala dated 06.04.2001 in Writ Appeal Nos. 3 and 10 of 2001 dismissing the appeal filed by them.

5. The original petitions were filed by appellants herein against Exhibit P1 notification issued by the State of Kerala enhancing the rate of import fee from Rs. 2/- per proof litre to Rs. 5/- on Indian Made Foreign Liquor (hereinafter referred to as "IMFL"). The import fee was initially levied under Government Order, G.O.(MS) No. 57/92/TD dated 31.12.1992. The learned Single Judge upheld the levy holding that it is a fee and regulatory in nature. The appellants preferred writ appeals, which were dismissed by the Division Bench by the impugned common order in Writ Appeal Nos. 3 and 10 of 2001.

6. In both the appeals, common questions arise for consideration and hence they have been heard together and are being disposed of by this common judgment.

7. The points for consideration in both the appeals are:

a) Whether the import fee levied is the price for parting with the privilege given to the respondent to import liquor into the State and, therefore, the same is within the competence of the State to impose import fee;

b) Whether the imposition of import fee does not, in any way, restrict trade, commerce and intercourse among the States.

8. It is well settled by a catena of decisions that the trade in liquor is not a fundamental right. It is a privilege of the State. The State parts with this privilege for revenue consideration. In Punjab, the Excise Policy of the State is formulated every year. It is also made known to the licensees much before their licenses for the year comes to an end. It is also a matter of fact that the licensees have paid the fee on demand. The fee was first levied in the year 1992. The licensee, in the Punjab case, had been holding the licence all through this period and never challenged or protested against levy of the fee. The licensees having paid the fee without any protest all through is not entitled to challenge the same, which does not suit them. The licensee cannot approbate and reprobate. In Punjab, the grant of licences are governed by the Punjab Excise Act, 1914 (for short "the Act") and various rules and orders framed under it. In the Punjab case, the challenge of the appellant is limited to the imposition of import fee in addition to the countervailing duty on Beer. It is not disputed by the

appellant that the State is competent and is entitled to impose excise duty or countervailing duty besides there is no bar on the State to charge any other fee on account of consideration of the privilege provided to the licensee to provide them the right to trade in liquor. A perusal of the impugned notification shows that the State Government substituted the existing provision with regard to import fee and increased the rate of this fee. It is part of the privilege price i.e. consideration amount on account of which the licence was granted to the licensee. Further, the licensee had an option to opt out of the business field if such levies were detrimental to their interest or were to their disadvantage.

9. The respondent in civil Appeal No. 3017 of 1997 carries on wholesale trade in the State of Punjab. Under the rules, the licensee is required to obtain a licence in Form L-1, which is valid for one year. In addition to this under the Punjab Excise Fiscal Orders, 1932, the respondents is liable to pay duty/fee at the rates mentioned therein. As a result of this, the respondent has to pay excise duty/import fee as the case may be. Over and above this, there is an import fee which is levied by the State Government in exercise of its powers u/s 58 of the Act. According to learned counsel for the State of Punjab all these charges and levies are really a price for the privilege of carrying on the trade under the L-1 licence as far as the privilege of importing alcohol into the State of Punjab. The impugned levy is under the Punjab Excise Act, 1914, which is a pre-Constitution Act. It is this Act which provides that no intoxicant shall be imported, exported or transported except after the payment of duty to which it may be liable under the Act. The words "duty to which it may be liable under this Act" were substituted by the words "duty of customs or excise to which it may be liable". This change was also brought about by the Government of India on adaptation of Indian Laws Order 1937. It was, therefore, argued by the State that the power is conferred u/s 58(2)(b) to regulate the import, export, transport and possession of any intoxicant. therefore, the different imposts have to be construed in this background. There is, therefore, an excise duty so-called which is provided for under Rule 5 of the Punjab Excise Fiscal Orders, 1932, not only on locally produced beer but also on imported beer. The Statutory Authority for this imposition can be found from the provisions including Section 16 read with Section 32 of the Act. In addition to the excise duty under Rule 5, there is also a provision for grant of licence for sale of intoxicants. To carry on the trade in wholesale, a person has to obtain a L-1 licence for which an annual pre-determined sum is payable. Similarly, in addition there are licences for production and for manufacture each of which licence has its own predetermined fee which has to be paid for obtaining such a licence. The modalities of the levy of fees or the quantum of the fees has no bearing on its legal pedigree which is that of consideration for the permission to carry on an activity in the noxious articles. Thus, if a person wants to carry on a wholesale trade in liquor in Punjab, he will have to (a) obtain a L-1 licence for which he would pay the fees in accordance with the policy carried on for the period; (b) On the liquor purchased by him, he will have to pay duty on all purchases irrespective of the source of the

product. This duty is the duty under Rule 5 of the Punjab Excise Fiscal Orders, 1932, in relation to beer read with Rule 1 of the said Orders in case of IMFL.

10. In case, the licensee seeks a permit to bring in imported alcohol, he would have to pay as a condition of the permission to import u/s 16(b) read with Section 19 an import pass fee at such sum fixed by the Government. The respondent in this case/writ petitioner has mixed up these different imposts and has referred to the duty paid under Rule 5 which is an amount equivalent to the excise duty and the fee under Rule 1(d) of Punjab Excise Fiscal Orders, 1932. As already noticed, on imported goods there are two independent imposts, namely, duty equal to the local excise duty under Rule 5 and an import fee under Rule 1(d) of the Punjab Excise Fiscal Orders, 1932.

On 31.01.2002, this Court passed an order which read as under:

"In the course of the argument, it was noticed that the principal argument on behalf of the respondents before the High Court, which was upheld by the High Court, was that the import fee, which is the subject matter of these proceedings, had been imposed by the State of Punjab without authority of law. The response on behalf of the State of Punjab before the High Court was that the right of the respondents to import beer into the State was privilege conferred by the State upon the respondents to which Article 301 had no application because the respondents had no right to trade in liquor de hors that privilege and that the import fee was the price for the privilege. In the course of the argument before us, we asked Mr. K.K. Venugopal, learned counsel for the State, to tell us what the source of power for the imposition of the import fee was. Mr. Venugopal referred in reply to Section 18, 19, 34, 58 and 59 of the Punjab Excise Act, 1914. In other words, the contention of the State before us is that the import fee is a fee and the respondents are required to pay such fee to bring beer into the State."

In compliance with the aforesaid order, a detailed additional affidavit was filed on behalf of the State of Punjab by quoting the relevant provisions of the Punjab Excise Act, 1914, namely, Section 3(9) - "Excise Revenue", Section 3(10) - "Export, Section 3(12) - "Import", Section 16 - "Import, export and transport of intoxicant", Section 17 - "Power of State Government to prohibit import, export and transport of intoxicant", Section 18 - Passes necessary for import, export and transport, Section 19 - Grant of passes for import, export and transport, Section 31 - Duty on excisable articles, Section 32 - Manner in which duty may be levied, Section 33 - Payment for grant of leases. Section 34 - Fees for terms, condition and form of, and duration of licences, permits and passes, Section 35 - Grant of license for sale, Section 58 - Power of State Government to make Rules, Section 59 - Powers of Financial Commissioner to make rules. Along with the additional affidavit, a copy of the Notification No. 5998 called the Punjab Excise Fiscal Orders and prescribed levy of rates of duty etc. was filed and marked as Annexure-A-1. It is seen from the additional affidavit that this notification was republished by the State of Punjab in the year 1965. The State vide notification

dated 24.03.1986 introduced amendment to the Punjab Excise Fiscal Orders, 1986 and as per Clause 5 of the notification, Order 1-D was added after Order 1-C levying an import fee of Rs. 3.20 per proof litre on all imports of IMFL and rectified spirit into the State of Punjab.

11. Vide notification dated 31.03.1992, the Government of Punjab made further amendment in the Fiscal Order and issued Punjab Excise Fiscal (10th amendment) Orders, 1992 and substituted Order 1-D stating that "All imports of liquor and sprit shall be subject to the levy of an import fee as prescribed." By further amendment vide notification dated 27.03.1996, the Punjab Excise Fiscal Orders, 1932 was amended and the Order 1-D item (iii) was substituted. In exercise of powers conferred under the Act, the State Government framed rules which have been marked as Annexure P-2.

12. Thus, it is seen from the Punjab Liquor Import, Export Order, 1932, the State Government is competent and empowered to regulate the import and export of liquor. Under the Punjab Liquor Licence Rules, 1956, there are 21 types of licences which are prescribed and are given. The respondent in this appeal is holding L-1 licence i.e. Wholesale and retail vend of foreign liquor to trade only. The said licence is given on fixed licence fee, which is subject to variation as per excise policy of the Government based on year to year. The State Government has incorporated as one of the terms and conditions on the L-1 holders to pay import fees also at the prescribed rate as per the Punjab Excise Fiscal Order, 1996. The respondent has been accepting the terms and conditions from 1992 onwards and acted on the same, the licence was renewed on yearly basis.

13. Similarly, under the provisions of the Punjab Liquor Permit & Pass Rules, 1932, the State Government issued permit in form L-32, in the case of import and the licensees are liable to pay permit fee at the prescribed rate. As already stated, the respondent has mixed up two different imposts. The respondent has referred to the duty paid under Rule 5 i.e. equivalent to Excise duty and fees under Order (1)(D) of the Punjab Fiscal Orders, 1932. As stated above, on imported goods by L-1 holder, there are two different and independent imposts in the shape of Excise duty under Rule 5 and import fee under Rule (1)(D) of Punjab Excise Fiscal Orders, 1932. In addition he has to pay licence fee under the Punjab Liquor Licence Rules, 1956, which is fixed on yearly basis. Thus, it is seen that as per provisions of Section 58(D) as well as Section 59(D) the State Government, in my opinion, has power to regulate the import and price of any description of bottle and the scale of the fee and the manner of the fee payable by any licensee.

14. It is stated in the additional affidavit that the word "fee" is not used in the strict sense to attract the doctrine of quid pro quo. This is the price or consideration which the State Government charges for parting with this privilege and granting the same to the vendors. therefore, in my opinion, the amount charged is not a fee nor a tax but it is the nature of price of a privilege which the purchaser has to pay in any trading and business in noxious article/goods. The

collection of such amount in the shape of import fee does not form part of the general revenue of the State. As stated above, it is one of the terms and conditions of the Excise Policy applicable to all L-1 holders including the respondents herein. In my view, respondents cannot be permitted to challenge the terms and conditions of the policy if they want to avail the benefit of the same.

15. This Court, in a number of judgments, has held that the State Government has unfettered powers to regulate the Export/Import sale of intoxicants and in exercise of its regulatory powers, the import fee has been incorporated as one of the terms of the Excise Policy on yearly basis. We will refer to the relevant judgments in the later part of this judgment.

16. The learned counsel for the respondent submitted that there is no source of power for imposition of import fee over and above the countervailing duty and that the appellant-State was not able to show that under which Authority or provision of the Punjab Excise Act, 1914, they can impose the import fee over and above the countervailing duty. It is further submitted that a combined reading of Section 33A of the Punjab Excise Act, 1914, Articles 301 and 304 of the Constitution and Entry 51 of List II of Seventh Schedule to the Constitution makes it clear that the State of Punjab has no authority to impose the import fee over and above the countervailing duty. This contention, in my opinion, has no force for the reasons stated and the discussions made in paragraphs supra.

17. In my opinion, Articles 302 and 304A of the Constitution of India are not attracted to the present case as the imposition of import fee does not, in any way, restrict trade commerce and intercourse among the States. In my opinion, the permissive privilege to deal in liquor is not a "right" at all. The levy charged for parting with that privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with the privilege. In this context, we can usefully refer to *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, and *Panna Lal and Ors. v. State of Rajasthan and Ors.* : [1976]1SCR219 . As noticed earlier, dealing in liquor is neither a right nor is the levy a tax or a fee. Articles 301-304 will be rendered inapplicable at the threshold to the activity in question. Further, there is not even a single judgment which upholds the applicability of Articles 301-304 to the liquor trade. On the contrary, numerous judgments expressly hold these Articles to be inapplicable to trade, commerce and intercourse in liquor. We can beneficially refer to the judgments in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, , *Har Shankar's case (supra)*, *Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others*, and *Khoday's case*. The learned counsel for the respondent submitted that Articles 301-304 are violated or transgressed. In view of discussions in paragraphs above, it is clearly demonstrated as to how and why Article 301-304 are inapplicable to liquor trade in any form.

18. We shall now deal with the Kerala matter in civil Appeal Nos. 2696 and 2697 of 2003.

19. The learned counsel for the licensee/appellant in this case also contended that Part XIII of the Constitution interdicts Parliament and State Legislatures from enacting laws containing discriminatory measures/taxation in respect of inter-state trade and commerce and that the said articles in Part XIII impose a constitutional limitation on the power of the Parliament and the Legislatures of the States and that the said Part XIII of the Constitution enshrines a principle of paramount importance that the economic unity of the country cannot be interfered with by economic protectionism and creation of trade barriers, fiscal or otherwise. He would further submit the restriction in Part XIII of the Constitution also apply to Taxation Laws and the provisions of Part XII of the Constitution are subject to the limitations set out in Part XIII and such regulatory measures also do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. He would also urge that Article 303(1) prohibits Parliament and the Legislature of a State from enacting any law giving preference to one State over another or from making any discrimination between one State and another by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule and that the obstructions or impediments to the free flow of trade would be violative of the freedom declared by Article 301. In this context, he referred to the case in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, . It is further submitted that the limitation upon the Legislative power stipulated in Article 303(1) and Article 304A will apply to trade in liquor. It is further contended that the discriminatory levy of import fee is violative of Articles 303(1) and 304A of the Constitution. According to the learned counsel for the appellant/licensee, the power of the State to levy a tax or a fee should be traceable to the entries in the Seventh Schedule to the Constitution. Entry 51 of List II provides for a levy of duty of excise on alcoholic liquor for human consumption manufactured or produced in the State and countervailing duties at the same or lower rates of similar goods manufactured or produced elsewhere in India and, therefore, the State Legislature has no power to levy any countervailing duty on imported liquor in excess of the excise duty on liquor manufactured within the State. The State of Kerala imposes a countervailing duty on imported liquor which is equivalent to the excise duty paid by the manufacturers within the State. The State imposes an import fee in addition to the countervailing duty and the direct and immediate effect of the import fee is to favour local manufacturers by making the imported liquor costlier. He would further contend that Article 303(1) prohibits the State Legislature from taking discriminatory measures and Article 304A also prohibits the State from imposing such discriminatory levies. It is also submitted that the State Legislature has no competence to levy an import fee in addition to countervailing duty.

20. The argument advanced by learned counsel for the licensee was countered by learned senior counsel appearing for the State of Kerala. The learned counsel submitted that the import of liquor into the State of Kerala is prohibited u/s 6 of

the Abkari Act and, therefore, liquor can be imported only after obtaining permission from the Government in the form of permit issued u/s 24 of the Abkari Act. As a matter of fact, it was submitted that the State has not issued any licence to anybody including the Kerala State Beverages Corporation to import liquor. The Kerala State Beverages Corporation has licence only for wholesale and retail of liquor which will not authorise them to import liquor and that the only licence issued to import liquor into the State is the permit issued on payment of the import fee and, therefore, it is seen that the levy of import fee is authorized by Sections 6 and 24 of the Abkari Act, 1977. It is not excise duty or countervailing duty referable to Entry 51 of List II. It is a collection falling under Entry 8 of List II. It is the price paid to the State for parting with its exclusive privilege of dealing in liquor which includes every fact of it including its import. In my view, the State has the right to prohibit every form of activity in relation to intoxicants including its import. Though it is alleged by the appellant that the State has discriminated against, the same has not been substantiated or established by any material. The State, in this case, has granted such permit to the Beverages Corporation on their paying the fee fixed for the purpose as per notification enabling the Corporation to import liquor from the petitioners/ licensees and others. The import fee so paid is passed on to the consumers. Even in the Punjab case, we have already noticed, that the right to import liquor is dependant on the issue of the import permit on payment of the import fee as consideration for parting with the State's exclusive privilege to import the liquor. It is purely a contractual dealing between the State and the importer and, therefore, no question of violation of Article 301 can arise. The imported had no anterior right to import liquor and hence cannot complain of any violation of Article 301 at that stage as right to trade in liquor is not a fundamental right. His right to import is referable to the import permit which he acquired on payment of the import fee. No further impediment has been created in the import of the liquor so that Article 301 is not attracted in relation to the payment of the import fee which was prior to getting his privilege of importing. The appellant/licensee having entered into a contractual relationship with the State obtained the privilege and enjoyed the benefit of it. It is not open to the petitioners to turn round subsequently and repudiate the obligations subject to which they obtained the privilege. Regulation in the interest of public health and order takes the case out of Article 301 and regulation for purpose of Article 301 is not confined to such regulations alone which will facilitate the trade.

21. An affidavit was also filed on behalf of the State of Kerala dated 16.04.2003 stating that the collection of import fee in the State of Kerala while issuing permit to import IMFL is referable to Sections 6 and 24 of the Abkari Act, 1977, and that it is the price payable by the grantee to the State for parting with the privilege of importing IMFL which is exclusively that of the State. Along with the affidavit, Annexure R1 (photocopy of permit issued) and Annexure R2 (year-wise statement showing the amount of import fee collected by the State) was filed. It is not in dispute that the Kerala State Beverage Corporation is the exclusive

wholesale distributor of IMFL within the State of Kerala. Previously, the retail distribution of IMFL in the State was done by 14 shops of the Kerala State Beverages Corporation and 231 shops by private individuals to whom licences were granted by auction conducted every year. However, the scheme has been changed and the retail distribution of IMFL in the State is now being carried on by a few shops of the Kerala State Consumer Federation and the rest of the shops by the Kerala State Beverages Corporation. This is apart from the sales in bars, clubs, etc. under licences issued in relevant Forms under the Foreign Liquor Rules. The Kerala State Beverages Corporation gets its supply of IMFL from distributors within the State as also from manufacturers and distributors outside the State. The Kerala State Beverages Corporation calls for tenders fixing a floor price for the supply with a view to ensure quality as also to prevent unhealthy competition and loss of revenue. Based on these tenders, the Kerala State Beverages Corporation enters into contracts with the manufacturers/distributors. After entering into contracts with the manufacturers/distributors, to enable the import of IMFL to the State, the Kerala State Beverages Corporation applies to the authorized officer for grant of permit for import of specified quantity of IMFL after depositing in advance, the countervailing duty and the import fee payable on the quantity of IMFL sought to be imported. Details of the payments so made are entered in Column No. 6 of the import permit issued. The name of the outside manufacturer/distributor from whom the IMFL is being procured is also mentioned in the permit for identification of the product. The import fee paid by the Kerala State Beverages Corporation is ultimately passed on to the consumers by adding to the final selling price of the product. The State has to deploy its officers at all the check-posts to monitor import of IMFL. Every consignment, on crossing the border has to be escorted till it reaches the warehouse of the Kerala State Beverages Corporation to check diversion and misuse and the State is incurring heavy expenses for regulating import of liquor into the State. therefore, the import fee was increased from Rs. 2/- per proof litre to Rs. 5/- per proof litre in 1995. Even after the increase in the import fee, the import of liquor to the State was steadily increasing till 1999-2000. The affidavit now filed along with the Annexures gives us a clear picture of the levy of import fee while issuing permit to import IMFL. Before the High Court, the learned counsel of the appellants therein have raised only one contention that the imposition of import fee is not in the nature of regulatory fee. It was contended on behalf of the State that the levy is permissible and authorized under Sections 6, 7, 17 and 18 of the Act and that the import fee is the only fee realized from a firm which supplies liquor to the Kerala State Beverages Corporation to be supplied to other licensees in the State and that the levy of import fee is also well founded under the Act basically referable to the legislative Entries 8 and 66 of List III of the Seventh Schedule to the Constitution. The learned Single Judge and also the learned Judges of the Division Bench rejected the contention of the licensee and upheld the levy on import.

22. At the time of hearing, many judgments were cited by both sides in regard of

their respective contentions. I feel it is not necessary to deal with or refer to all the judgments cited, as in my opinion, the real questions in this case as contended by the licensees are that the State has no authority to impose the import fee and that it is violative of Articles 301 and 304 of the Constitution. The real question, in my opinion, is whether Articles 301 and 304 at all apply. In the alternative, it was submitted by learned senior counsel for the State of Punjab that compensatory or regulatory levies have always been held to be valid and permissible under Article 301 and 304. In this context, he referred to the decisions in the case of *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, ; *The Automobile Transport (Rajasthan) Ltd. case (supra)*, *State of Bihar v. Chambers of Commerce (1996) STC 1*, *Godfrey Philips India Ltd. and Another Vs. State of Rajasthan and Another*, . If that be so, it is undeniable that regulations deemed necessary and apposite are liable to be imposed on liquor trade more than any other activity since the former is considered inherent are noxious, pernicious and *res extra commercial*. Regulation is thus the hall-mark of the State action in respect of liquor and that regulation can be and indeed normally is through the mode of imposition of levies which levy is also necessary to regulate by keeping out and excluding persons entering the liquor trade. We have already extracted the provisions of 1914 Act. The contention of the licensee is that once at L-1 wholesale liquor licence is issued to him, the Stat's permissive privilege in respect of liquor stands permanently parted with and thereafter no additional or further levy of any kind even in respect of activities other than wholesale selling under L-1 licence can be raised.

23. This argument, in my opinion, is completely fallacious and ex-facie unsustainable. This contention ignores the well-established legal statutory and operational distinction demarcating and dealing separately with several distinct activities in relation to liquor, namely, manufacture, possession, sale, transport, import, export consumption on premises of hotel/restaurant etc. Each activity is separately defined and separately itemized and separately dealt with in statute as also in the rules and involves a diverse range of separate licences, passes, permits and applications each of differing contained format and ambit. The import fee levied in the instant case is fully authorized by the 1914 Act and delegated legislation thereunder and is clearly *intra vires*. I have already listed in paragraphs above all the provisions authorizing the levy in question in the instant case which is mentioned in the additional affidavit of the State of Punjab. The provisions summarized above confer ample regulatory power upon the excise authority to regulate several activity related with liquor in any reasonable manner and in particular to regulate its import. The regulatory power includes power to levy a monthly fee in that regard such as the impugned import fee. Indeed levy for such fee to exclude and to keep out certain people from the liquor trade and to keep the number of persons participating in this trade within reasonable limits has been recognized by this Court in *Har Shankar's case (supra)* relying upon and quoting American decisions.

24. The statutory provision in question must be interpreted and read broadly and

not narrowly. The approach must be to uphold the validity of the impugned delegated legislation by a process of fair and broad reading of the statutory mandate. Even if the Act does not specifically provide for the levy in question by name to provide statutory authority for its imposition by delegated legislation and the levy is actually imposed by the delegated legislation made under the Statute, the same would be valid and not ultra vires. In the instant case, the levy has been imposed by the Punjab Fiscal Orders as amended from time to time under specific statutory authority to issue such orders under Sections 58 and 59 of the Act, in particular, and other provisions of the Act as itemized in paragraphs supra. Since the rule making power has not been shown to be bad, the Punjab Fiscal Orders, once made have the effect of the Statute itself and become part of the Statute since they have been made under valid rule making power. The statutory provisions of the Punjab Act and the Rules itemized in paragraphs above amply delineate that regulatory power and the impugned import fee is nothing but a facet and manifestation of that regulation by the State. Hence, in my view, the levy in question is valid as a regulatory levy which has consistently been held on the touchstone of Article 304.

25. The conduct of the respondent/licensee in attempting to wriggle out of his contractual obligations is contrary to the clear and unequivocal principle laid down in Har Shankar's case (supra). The issuance of liquor licence constitutes a contract between the parties i.e. between Excise Authorities on the one hand and the individual applicant contractor on the other. The respondent having accepted the contracts/licences, having fully exploited the advantage flowing from the contract to the exclusion of others and having reaped rich commercial benefits from that activity, it is not open to the contractor to wriggle out from the contract by challenging, inter alia, any particular condition of that contract/licence. The respondent herein seeks to do exactly that by challenging the condition requiring him to pay import fee. Har Shankar's case (supra) clearly disentitle the liquor contractor from wriggling out of contractual obligations solemnly undertaken. Likewise, in Panna Lal's case (supra), this Court in the specific context of liquor licence had this to say.

"The licenses in the present case are contracts between the parties. The licensees voluntarily accepted the contracts. They fully exploited to their advantage the contracts to the exclusion of others. The High Court rightly said that it was not open to the appellants to resile from the contracts on the ground that the terms of payment were onerous. The reasons given by the High Court were that the licensees accepted the license by excluding their competitors and it would not be open to the licensees to challenge the terms either on the ground of inconvenient consequence of terms or of harshness of terms."

As a matter of fact, the respondent is the only and the sole challenger of the instant levy of import fee. It is stated that no other liquor contractor or beer manufacturer or importer has challenged the import fee in Punjab at any point of time at any forum. The import fee on IMFL on rectified spirit was levied from the

Year 1986 and at no time the respondent challenged the levy of import fee from 1986 onwards on IMFL and continued to import large quantities of beer and paid large sums of fee as per the prescribed rates. The writ petition was filed only in April, 1996. The respondent accepted the burden of this contract and obviously did so because he enjoyed the benefits flowing from this contract. Having done so, in my view, he cannot and should not be allowed to wriggle out of his contractual and licence obligation.

26. In the case of Government of Maharashtra and Others Vs. Deokar's Distillery, , this Court, in para 32, observed thus:

"The order of the High Court is bad in law. The High Court, in our view, has erred in not appreciating that the impugned demand notice was also in the nature of demanding balance of the price of the exclusive privilege which would become final only on issue of the notification, order under Article 309, the bulk of which has already been recovered in advance, which privilege exclusively vests with the Government considering the effect of provisions especially Section 49 and Section 143 (2)(u) of the Prohibition Act. In our opinion, the establishment charges demanded are in the nature of price for parting with the privilege to permit manufacture and sale of liquor, and the privilege exclusively vests with the Government."

27. Again in para 40, this Court observed thus:

"As pointed out by Y.V. Chandrachud, C.J., as he then was, what the respondents agreed to pay was the price of an exclusive privilege which the State parted with in their favour. They cannot, therefore, avoid their liability by contending that the payment which they were called upon to make is truly in the nature of excise duty and no such duty can be imposed on liquor not lifted or purchased by them. The respondents, in our view, must fail in their contention both on account of the objection to the maintainability of the appeals and on merits concerning the nature of the payment which they are liable to make."

28. In the above case, the power of the State Government u/s 58A to recover cost of supervision was challenged. Per majority, this Court held that the power of the State Government extends to recovering the differential amount consequent to upward revision of pay-scales and allowances with retrospective effect and that such differential amount can be demanded even in exercise of residuary powers of the State Government and that the liquor licensees having given undertaking in the application in Form PLA prescribed under the Rules to abide by the orders made under the Act and the rules could not escape their contractual liability. This Court also further held that the establishment charges demanded are in the nature of price for parting with the privilege to permit manufacture and sale of liquor and the privilege exclusively rests with the Government.

29. The same effect is the judgment of this Court in the case of Assistant Excise Commissioner and Others Vs. Issac Peter and Others, . In the context of a liquor

contract, this Court held as under:

".....We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

30. Kalyani Stores Vs. The State of Orissa and Others, case was heavily relied on by the respondent/licensee. The Constitution Bench has not in that cases adverted to the issue of liquor trade being *res extra commercial* and has simply considered whether Articles 301/304 are violated or not. The case, in my opinion, would have no relevance to the instant case.

31. The following judgments can be usefully referred for the proposition that the rights are vested in the State which it may part with for a consideration.

32. In the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, (paras 44, 46, 47, 50, 51, 53, 55, 57 and 58 dealt with the rights of the State in this regard).

33. In the case of Nashirwar and Others Vs. State of Madhya Pradesh and Others, , this Court held that by virtue of Entry 8 of List II, the Government can hold a public auction to grant lease, the amount representing the consideration for the grant of such right or privilege.

34. In the case of State of Orissa and Others Vs. Harinarayan Jaiswal and Others, , this Court held that the Government is the exclusive owner of the privilege to sell the right to sell liquor, reliance on Article 19(1)(g) or Article 14 of the Constitution becomes irrelevant.

35. In the case of State of Andhra Pradesh Vs. Y. Prabhakara Reddy, held that all rights in regard to manufacture and sale of intoxicants vest in the State and it is

open to the State to part with those rights for a consideration and that the consideration for parting with the privilege of the State is neither excise duty nor licence fee but it is the price of the privilege.

36. In the case of State of Uttar Pradesh and others Vs. Sheopat Rai and others, held that the term 'licence fee' in the context of the U.P. Excise Law connotes the idea of it being the consideration in money received by the Government from a private person by grant of a licence (contract) for parting in such person's favour, its exclusive privilege or right of carrying on certain activities in respect of country liquor or drugs under 'auction system' in public auctions.

37. In the case of State of Haryana and Others Vs. Lal Chand and Others, , this Court has held that the licence fee is a price for acquiring such privilege and one who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid, by a petition under Article 226.

38. State of Punjab Vs. Dial Chand Gian Chand and Company, is also a case arising under the Punjab Intoxicants Licence and Sale Order, 1956. This Court held that the writ jurisdiction of the High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred.

39. In the case of Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, . The Constitution Bench of this Court held that a citizen has no fundamental right to trade or business in liquor as a beverage and that the activities which are res extra commercial cannot be carried on by any citizen and that the State can prohibit completely trade or business in potable liquor since trade or business in liquor as a beverage is res extra commercial and that the State may also create monopoly in itself for trade or business in such liquor. It is further held that the State can further place restrictions and limitations on such trade or business and such restrictions and limitations can be placed by subordinate legislation as well. It is also further held that the State is not precluded from regulating the trade and business in potable liquor merely because it imposes tax or fee on purchase or sale and income is derived from such liquor.

40. In the case of Solomon Antony and Others etc. Vs. State of Kerala and Others, , the contractors are required to pay the consideration payable to the State for sale of liquor for importing designated quantity of rectified spirit in respect of which the consideration payable is equivalent to excise duty. This Court justified the order passed by the High Court in holding that the contractors are bound to pay the amount which is a measured excise duty payable on the designated quantum of rectified spirit in terms of Rule 8 of the Rules and which the contractors had undertaken in the agreements executed by them to pay. This Court further held that the power of the Government to enhance the rate of

excise duty from Rs. 5/- per bulk litre to Rs. 10/- per bulk of arrack could not be assailed.

41. The Division Bench of the Kerala High Court to which I was a member has also taken the same view in *Kerala Distilleries and Allied Products Limited v. Assistant Commissioner (Assessment) (I), Commercial Tax, Special Circle, Kerala Distilleries and Allied Products Limited Vs. Assistant Commissioner (Assessment) (I), Commercial Tax and Others* in the following terms:

"The manufacture and sale of liquor are the exclusive privilege of the State and the State, by the process of licensing, is parting with the said privilege and what is charged by the State is only the privilege price through the process of licensing and it is not excise duty."

"The concept of excise duty on production and manufacture as understood in the Central Excise Act cannot be equated in the case of excise duty under the Abkari Act since the manufacture and the sale of liquor are the exclusive privilege of the State and the State, by the process of licensing, is parting with the said privilege and what is charged by the State is only the privilege price through the process of licensing the price and it is not excise duty."

42. The above rulings are amongst the catena of cases on the point that the rights are vested in the State which it may part with for consideration.

43. I have already dealt with the concept of contractual relationship between the State and the licensee whereunder the licensee having obtained a privilege and enjoyed the benefit of it, it is not open to the licensees to turn round subsequently and repudiate the obligations attaching with the obtained privilege. The following are the cases on the point.

44. In the case of *State of Haryana and Ors. v. Jage Ram and Ors.* AIR 1980 SC 2018, this Court held that the bids in respect of country liquor vends at an annual auctions and the amounts which bidders agree to pay to State Government under auction terms is neither fee nor excise duty on undrawn liquor but price of privilege which State parted in their favour.

45. In the case of *State of Haryana and Others Vs. Lal Chand and Others*, , this Court held that after making bid for grant of exclusive privilege of liquor vend with full knowledge of terms and conditions of auction, the bidder cannot wriggle out of the contractual obligations arising out of acceptance of his bid by filing writ petition.

46. In the case of *State of Punjab Vs. Dial Chand Gian Chand and Company*, , this Court held that a licensee who participates in the auction voluntarily and with full knowledge is bound by the bargain and the writ petition filed under Article 226 by such licensee in an attempt to dictate terms of the licence without paying the licence fee must fail. The highest bidder after acceptance of his bid cannot challenge the second auction on ground of adverse effect on his business.

47. We shall now consider the cases on the freedom guaranteed by Article 301 which is not available to liquor because it is a noxious substance injurious to public health order and morality. The following cases can be usefully referred:

48. In the case of *Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others*, , this Court held that the Ordinance does not infringe any right under Article 19(1)(g) or Article 301 there being no fundamental right to trade in liquor and that the ordinance was both a fiscal measure and one for safeguarding public health and public morals and hence it could validly be made retrospective and that the test of reasonable restrictions has to be judged in the light of the purpose for which the restriction is imposed, that is, as may be required in the public interest and restrictions that may validly be imposed under Article 304(b) are those which seek to protect public health, safety, morals and property within the territory and the present levy under the amended provisions of the Act in its application to Delhi could certainly be said to be one enacted both with the object of regulating the trade or business in intoxicants and with a view to realising the goal fixed in Article 47 of the Constitution.

49. In the case of *The State of Bombay Vs. R.M.D. Chamarbaugwala*, , this Court held as under:

"Gambling activities were in their very nature and essence extra-commercial although they might appear in the trappings of trade. They were considered to be a sinful and pernicious vice by the ancient seers and law-givers of India and have been deprecated by the laws of England, Scotland, United States of America and Australia. The Constitution-makers of India, out to create a welfare State, could never have intended to raise betting and gambling to the status of trade, business, commerce or intercourse.

The petitioners, therefore, had no fundamental right under Article 19(1)(g) or freedom under Article 301 of the Constitution in respect of their prize competitions that could be violated and the validity of the impugned act, in pith and substance an Act relating to gambling, did not fall to be tested by Articles 19(6) and 304 of the Constitution"

50 In the case of *Fatehchand Himmatlal and Others Vs. State of Maharashtra*, , this Court held as follows:

"A meaningful, yet minimal analysis of the Debt Act, read in the light of the times and circumstances which compelled its enactment, will bring out the human setting of the statute. The bulk of the beneficiaries are rural indigents and the rest urban workers. These are weaker sections for whom constitutional concern is shown because institutional credit instrumentalities have ignored them. Money lending may be ancillary to commercial activity and benignant in its effects, but money-lending may also be ghastly when it facilitates no flow of trade, no movement of commerce, no promotion of intercourse, no servicing of business, but merely stagnates rural economy, strangulates the borrowing community and turns malignant in its repercussions. The former may surely be trade, but the

latter - the law may well say - is not trade. This narrow, deleterious pattern of money-lending cannot be classed as 'trade'. Hence Article 301 does not apply."

51. In the case of *B.R. Enterprises Vs. State of U.P. and Others*, , this Court held that this case relates to lottery which is gambling in nature. This Court held that merely because a lottery transaction is run by State itself will not change its character as *res extra commercii* and that merely because lottery tickets are goods, transaction of sale thereof cannot constitute trade and while trade contains skill with no chance, gambling contains the element of chance with no skill and, therefore, ban by any State on the sale of lotteries of other States within its territory does not violate Articles 301 and 303.

52. We have already noticed that the regulation in the interest of public health and order takes the case out of Article 301, and Regulation for the purpose of Article 301 is not confined to regulations which will facilitate the trade.

53. In the case of *Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others*, , this Court in paras 36 and 37 observed as under:

"The word 'free' in Article 301 does not mean freedom from laws or from regulations. Article 301 guarantees freedom of trade, commerce and intercourse throughout the country from any State barriers. It declares that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. The whole object was to bring about the economic unity of the country under a federal structure,, so that the people may feel that they are members of one nation is to guarantee to every citizen the freedom of movement and residence throughout the country. That is achieved by Article 19(1)(d) and (e). No less important is the freedom of movement or passage of commodities from one part of the country to another. The progress of the country as a whole also requires free flow of commerce and intercourse as between different parts, without any barrier. This freedom of trade, commerce and intercourse throughout the country without any 'State barriers' is not confined to inter-State trade as well. In other words, subject to the provisions of Part XIII, no restrictions can be imposed upon the flow of trade, commerce and intercourse, not only between one State and another, but between any two points within the territory of India whether any State border has to be crossed or not.

It is now well settled that the regulatory measures or measures imposing compensatory taxes do not come within the purview of the restrictions contemplated by Article 301. The regulatory measures should, however, be such as do not impede the freedom of trade, commerce and intercourse. It cannot be said that the instructions conveyed by the State Government by the impugned teleprinter message imposing the requirement for the making of an endorsement by the Deputy Marketing Officer or the Senior Marketing Officer or the physical verification of stocks of wheat during the course of transit, are a 'restriction' on the freedom of trade, commerce and intercourse with the country, i.e., across the

State or from one part of the State to another. These are nothing but regulatory measures to ensure that the excess stock of wheat held by a wholesale dealer, commission agent or a retailer is not transported to a place outside the State or from one district to another. Even if these requirements are construed to be a 'restriction' on the inter-State or intra-State trade the limitation so imposed on the enjoyment of the right cannot be considered to be arbitrary or of an excessive nature. Nor can it be said that such restrictions do not satisfy the test of reasonableness."

54. The case of *State of Tamil Nadu Vs. Hind Stone and Others*, relates to non-renewal of mining lease for black granite. It was submitted by the counsel in this case, that the impugned rule offends Articles 301 and 303 of the Constitution. This Court rejected the same as without force. This Court held as under:

".....The Mines & Minerals (Regulation and Development) Act is, without doubt a regulatory measure. Parliament having enacted it for the express purpose of "the regulation of mines and the development of minerals". The Act and the rules properly made thereunder are, therefore, outside the purview of Article 301. Even otherwise, Article 302 which enables Parliament, by law, to impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest also furnishes an answer to the claim based on the alleged contravention of Article 301....."

55. The case of *State of Tamil Nadu and others Vs. M/s. Sanjeetha Trading Co. and others*, relates to prohibition of export of timber outside the State to prevent illicit felling. This Court held that where goods are declared to be essential commodities/articles and export thereof prohibited with a view to effect equitable distribution at a fair price the prohibition in the circumstances would not be an unreasonable restriction. This Court further held as follows:

"The power to impose restrictions conferred on the Parliament under Article 302 is not qualified by the word 'reasonable' while in Article 304(1)(b) which confers such power on the State legislature the expression 'reasonable' precedes 'restrictions' and a further check is provided by the proviso thereto. therefore, before Article 304 comes into play, it has to be held that the prohibition introduced by the amendment on movement and transport of any particular item amounts to a restriction. Any prohibition on movement of any article from one State to another has to be examined with reference to the facts and circumstances of that particular case - whether it amounts to regulation only, taking into consideration the local conditions prevailing, the necessity for such prohibition and what public interest is sought to be served by imposition thereof."

56. In the case of *State of Bihar and Others Vs. Harihar Prasad Debuka and Others*, , this Court observed thus:

"In the instant case what is being insisted is a permit disclosing particulars of the goods to be transported. Article 304(b) clearly permits the State legislature to

impose such a reasonable restriction on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest. The word 'with' involves an element having its sit us in another State. It cannot be therefore said that the insistence on the disclosure in respect of goods entering Bihar from another State if otherwise legitimate would not be protected by Article 304(b)."

57. The High Court of Punjab proceeded to decided the case on a total wrong assumption that the import fee levied is in the nature of duty which cannot be imposed under the Excise Act, 1984 when, in fact, the import fee levied is the price for parting with the privilege given to the licensee to import beer into the State and, therefore, the same is within the competence of the State to impose import fee. I am of the view that the licensee besides the payment of duty etc. is to comply with such conditions as the State Government may impose while formulating the excise policy for the concerned year. The State, in my view, is competent and entitled to impose excise duty or countervailing duty. Besides there is no bar on the State to charge any other fees on account of consideration for the privilege provided to the licensee to trade in liquor which privilege he did not otherwise have. therefore, the licensee is liable to comply with the other conditions imposed by the State Government from time to time. As held in many cases referred to supra the levy in dispute under challenge is an import levy. It is neither duty nor countervailing duty. It is part of the consideration money i.e. the price of the privilege given to the licensees for dealing in liquor. The decision of this Court in the case of Kalyani Stores (supra) is not applicable to the facts of the present case and that the Punjab Excise Act, 1914 is an existing law under Clause 10 of Article 366 of the Constitution of India and its continued application is saved by Article 372 of the Constitution of India. It is also saved by Article 305 of the Constitution from attack under Articles 301 and 303 of the Constitution. It is well within the legislative competence of the State.

58. In the result, civil Appeal No. 3017 of 1997 filed by the State of Punjab is allowed and the judgment of the High Court which is impugned in this civil Appeal stands set aside. Likewise, the appeals filed by the appellants in civil Appeal Nos. 2696 and 2697 are dismissed and the common judgment of the High Court in Writ Appeal Nos. 3 and 10 of 2001 is affirmed. However, there shall be no order as to costs.

B.N. Agrawal. J.

59. The question involved in this batch of appeals, arising out of an order of reference made by a three Judge Bench of this Court is as to whether Article 301 of the Constitution of India (hereinafter referred to as "the Constitution") will have any application in relation to potable liquor the business whereof is said to be res extra commercial; in view of the decisions of this Court in Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, ; The State of Bombay Vs. R.M.D. Chamarbaugwala, ; Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, and Khoday

60. These appeals arise out of judgments and orders passed by Punjab and Haryana High Court and Kerala High Court. The State of Punjab imposed tax on import of potable liquor manufactured in other States. The State of Kerala also imposed a similar levy. The Punjab and Haryana High Court by its judgment dated 17.01.1997 passed in Writ Petition (Civil) No. 5358 of 1996 quashed the notification dated 27.03.1996 imposing levy of import duty by the State of Punjab in exercise of its powers conferred upon it under Sections 31, 32 and 58 of the Punjab Excise Act 1914 (hereinafter referred to as "the Punjab Act") on two grounds viz.; (i) the State has no power to levy such tax under the Punjab Act and (ii) in view of the Constitution Bench decision of this Court in *Kalyani Stores Vs. The State of Orissa and Others*, , the imposition of duty is ultra vires Article 301 of the Constitution.

61. So far as challenge to imposition of import duty on potable liquor by the State of Kerala under Abkari Act, 1077 (hereinafter referred to as "the Abkari Act") is concerned, the Kerala High Court has dismissed the writ application on grounds, inter alia, that such duty, being regulatory in nature, is not ultra vires the Abkari Act. The High Court did not enter into the question of applicability of Article 301 of the Constitution vis-a-vis effect of imposition of such import duty on potable liquor.

62. Mr. P.N. Misra, learned Senior Counsel appearing on behalf of the appellant - State of Punjab in the Punjab matter having regard to several provisions of the Punjab Act submitted that the High Court committed a manifest error in holding that the State has no power to impose such a tax. As regards applicability of Article 301 of the Constitution, the learned counsel contended that as the State has the exclusive privilege to deal in potable liquor in any manner it likes, it has the concomitant requisite power to impose such tax by way of restriction on import. The learned counsel further contended that as no trader can claim any fundamental right in carrying on trade or business in potable liquor, question of applicability of Article 301 of the Constitution would not arise. It may not be out of place to mention that at the stage of reply Dr. A.M. Singhvi, learned Senior Counsel filed written submissions on behalf of the State of Punjab more or less reiterating the contentions raised by Mr. P.N. Misra.

63. Mr. T.L.V. Iyer, the learned senior counsel appearing on behalf of State of Kerala submitted that it is within the province of the State to impose restrictions on import of potable liquor by imposing import duty. According to learned counsel such a duty has not been imposed by the State in exercise of its statutory power conferred upon it in terms of Entry 51, List II of the Seventh Schedule to the Constitution but regulatory powers as envisaged in Entry 8 thereof. In other words, Mr. Iyer contended that the import duty has been levied not as a measure of tax but as a part of regulation on the trade. The learned counsel further contended, although such a stand has not been taken by the State before the High Court, but having regard to the well-settled principle of law

as laid down by this Court and referred to hereinafter, the State can impose such duty as a price for parting with its exclusive privilege.

64. In support of the contentions the learned senior counsel appearing for the State of Punjab and that of Kerala relied upon the decisions of this Court in the cases of *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, , *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, , *State Bank of Haryana and Others Vs. Jage Ram and Others*, , *State of Andhra Pradesh Vs. Y. Prabhakara Reddy*, , *State of Uttar Pradesh and others Vs. Sheopat Rai and others*, , *State of Haryana and Others Vs. Lal Chand and Others*, , *State of Punjab Vs. Dial Chand Gian Chand and Company*, , *Solomon Antony and Others etc. Vs. State of Kerala and Others*, , *Khoday Distilleries Ltd. and Ors. (supra)* and *Government of Maharashtra and Others Vs. Deokar's Distillery*, .

65. Mr. Mohan Jain, learned counsel appearing on behalf of the respondents-licensees of the State of Punjab and Mr. R. Venkataramani, learned Senior Counsel, appearing on behalf of the intervenor, on the other hand, contended that power to impose tax by the State of Punjab is circumscribed by Sub-section 3 of Section 33A of the Punjab Act. It was submitted that power to impose countervailing, duty being statutorily restricted, the State cannot be permitted to achieve the same object indirectly by taking recourse to 'exclusive privilege' theory.

66. Mr. Ashok H. Desai and Mr. R.F. Nariman, learned senior counsel appearing on behalf of the licensees - appellants in the Kerala matter raised the following contentions:

(1) Levy of import duty having been expressly conferred by the statute, the State cannot justify such a levy on the spacious ground of having exclusive privilege of dealing in potable liquor.

(2) The State of Kerala having specifically raised a plea that such a levy was justified by way of a tee and/or as a regulatory measure cannot now turn round and contend that the levy was imposed by way of a price for parting with the exclusive privilege of the State. As the State of Kerala has not granted any licence to the appellants, the question, of parting of any privilege in their favour does not arise. Pointing out to the admitted fact that Kerala State Beverages Corporation has been granted the monopoly to deal in liquor and the appellants and other traders having been selling liquor to the Corporation, the question of rendition of any service by the State of Kerala to the licensees so as to justify imposition of a lee or regulatory tax therefore does not arise.

(3) Any fee regulating trade by grant of a licence would amount to 'tax' within the meaning of Clause (28) of Article 366 of the Constitution. Reliance in this connection has been placed on *D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State of Kerala and Another*, and *Corporation of Calcutta and Another Vs. Liberty Cinema*, .

(4) The applicability of the doctrine of "res extra commercial" and/ Of the concept of privilege theory on the part of the State would be attracted only in a 'no right' situation. Once a right to trade has been Conferred by the State, it cannot take umbrage under the privilege doctrine. Even the State, at the time of grant of licence by way of exclusive privilege, is bound by its own action, which in a given case, may attract the wrath of Article 14 of the Constitution. Reliance in this behalf has been placed on State of M.P. and Others Vs. Nandlal Jaiswal and Others, .

(5) The Constitution Bench of this Court in Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others, having clearly laid down that trade in liquor would come within the purview of Article 19(1)(g) of the Constitution, the State can only impose a reasonable restriction in terms of Clause (6) of Article 19 thereof. In Khoday Distilleries Ltd. (supra), this Court having clearly held that when a licence is granted, persons similarly situated cannot be discriminated against which would clearly lead to the conclusion that not only a fundamental right in terms of Article 14 of the Constitution but also other constitutional rights including those contained in Part XIII of the Constitution are available in relation to trade in liquor.

(6) In H. Anraj Vs. Government of Tamil Nadu, and State of Madhya Pradesh Vs. Bhailal Bhai and Others, this Court having clearly held that Article 301 of the Constitution would be applicable also in relation to obnoxious trade, there is no reason as to why the said decisions shall be departed from.

(7) Keeping in view the decisions of this Court in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, and The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, the purpose of Article 301 of Constitution being to maintain economic unity of the entire country, the State cannot by imposition of a tax infringe upon the provisions contained in Part XIII of the Constitution which is a self-contained part.

(8) The phraseology, used in Article 301 of the Constitution, namely, trade, commerce and intercourse being of wide amplitude, the right to carry on trade and business as envisaged in Article 19(1)(g) or Article 298 of the Constitution cannot restrict the scope and ambit thereof.

67. In view of the rival contentions, as noticed hereinbefore, the following questions arise for consideration:

(i) Whether the impugned notifications issued by the State of Punjab and that of Kerala are illegal being fraud on the Constitution.

(ii) Whether the import duty can be said to have been validly imposed having regard to the doctrine of 'exclusive privilege' of the State to deal in obnoxious matters?

(iii) Whether dealing in liquor which is said to be 'res extra commercial' would nonetheless attract Part XIII of the Constitution?

Re: Question (i)

68. The impugned notifications issued by the State of Punjab and that of Kerala read as under:

I "Government of Punjab Department of Excise and Taxation NOTIFICATION

The 27th March, 1996

No. G.S.R. 28/P.A.I./14/Sections 31, 32 and 58/Amd. (118)/96

In exercise of powers conferred by Sections 31, 32 and 33 of the Punjab Excise Act, 1914 (Punjab Act 1 of 1914) and all other powers enabling him in this behalf, the Governor of Punjab is pleased to make the following order, without previous publication, further to amend the Punjab Excise Fiscal Orders, 1932, namely:-

#### ORDERS

1. (1) These orders may be called the Punjab Excise Fiscal (Second Amendment) Orders, 1996.

(2) They shall come into force on and with effect from the first day of April, 1996.

2. In the Punjab Excise Fiscal Orders, 1932 (hereinafter referred to as the said Orders), in order 1, in the table, under column "Rate of duty per proof litre"-

(a) in item (1), against sub item (c) for the figures "4.00" the figures "3.00" shall be substituted; and

(b) in item (3) against sub-item (b) for the figures "3.50" the figures "3.00" shall be substituted.

3. In the said Orders in order 1-B-

(a) for the words "rupees three" the words "rupees two" shall be substituted; and

(b) for Clause (iii) to the proviso, the following clause shall be substituted namely:-

"(iii) the Indian Made Beer shall be at the rate of thirty-eight paise per bulk litre."

4. In the said orders in order 1-D, for item (iii), the following item shall be substituted namely:-

"(iii) rupees four and sixty paise per bulk litre."

II. "S.R.O. No. 330/96. In exercise of the powers conferred by sections 6, 7, 17 and 18 of the Abkari Act, 1 of 1077 and in modification of notification issued under G.O. (p) No. 24/94/TD dated 3rd March, 1994 and published as S.R.O. No. 256/94 in the Kerala Gazette Extraordinary No. 180 dated 3rd March, 1994, as subsequently amended, the Government of Kerala hereby direct that the import and export fees, the excise duty and luxury tax under the said sections shall be

levied on the following kinds of liquors manufactured in the State and exported outside the State under bond in force or manufactured elsewhere in India and imported into the State by land, air, or sea under bond, at the rates mentioned against each kind of liquor.

The excise duty, import fee or luxury tax on liquor manufactured elsewhere in India and imported into the State by land, air or sea otherwise than under bond shall be equal to the duty to which such liquor manufactured in the State are liable under the Act such as import fee, excise duty or luxury tax namely:-

| Kind of Liquor | Rate of excise duty | Rate of luxury tax | Rate of import fee | Rate of export fee |
|----------------|---------------------|--------------------|--------------------|--------------------|
|----------------|---------------------|--------------------|--------------------|--------------------|

1. Indian Made Foreign Liquor including beer except those consumed by Defence Service.

(1) When exported by distilleries/ Foreign Liquor (compounding, Blending and (Bottling) Units/ Breweries to other State and not re imported into this State, in cases where the following terms and conditions are satisfied namely:-

Rs. 5 (Rupees five only) per proof litre in the case of Indian Made Foreign Liquor and Rs. 2 (Rupees two only) per bulk litre in the case of beer

(i) The export is under bond to cover the duty at the rate of an amount equal to 200 per cent of the value of Indian Made Foreign Liquor and gallonage fee at the rate of Rs. 3 per bulk litre in the case of beer.

(ii) No objection certificate for import certificate from the excise authorities of the importing State is produced by the Distilleries/ Foreign Liquor (Compounding, Blending and Bottling) Units/ breweries.

(iii) Excise duty, luxury tax and export fee paid to Kerala Government before export.

(iv) The verification certificate from the Excise Authorities of the importing State is produced before the Excise officers in charge of the Distilleries/ Foreign Liquor (Compounding, Blending and Bottling) Units/ Breweries within- 42 days of dispatch or within such further time as the Excise Commissioner may allow for sufficient cause.

(v) The duty at the rate of an amount equal to 200 per cent of the value of Indian Made Foreign Liquor and gallonage fee at the rate of Rs. 3 per bulk litre in the case of Beer is paid on all quantities unaccounted for: and

(vi) Export is through air, rail road or ship.

(2) in the case of:- (a) Indian Made Foreign liquor other than beer imported (bond or under bond)

Rs. 5 per proof litre

(b) Beer imported (bond or under bond)

Rs. 2 per bulk litre

(c) wine imported (duty paid or under Bond)

Rs. 2 per bulk litre

(3) In other cases: (a) Indian Made Foreign Liquor (excluding beer and wine) An equal amount to 100 per cent of its value

(b) Beer

Rs. 3 per bulk litre

(c) Wine

Rs. 3 per bulk litre

IV, Medicated wine and similar preparations but not including preparations on which duty is leviable under the Medicinal and toilet preparations (Excise Duties) Act, 1955 Rs. 12 (Rupees twelve only) per proof litre

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Explanation:-Where any liquor is chargeable with duty at a rate depending on the value of the liquor, such value shall be the value at which the Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd., purchases such liquor from the suppliers and in case any such liquor is not purchased by the Kerala State Beverages (Manufacturing and Marketing) Corporation, such value shall be the value fixed by the Commissioner.

This notification shall come into force on 1st day of April, 1996."

69. Before embarking upon the questions raised in these appeals, the relevant provisions of the Punjab Act may be noticed which run thus:-

Section 3.(9) "Excise revenue" means revenue derived or derivable from any payment, duty fee, tax, confiscation, or fine imposed or ordered under the provisions of this Act or of any other law for the time being in force relating to liquor or intoxicating drugs, but does not include a fine imposed by a court of law.

Section 3(12). "Import" (except in the phrase "import into India") means to bring into Punjab and Haryana otherwise than across a custom frontier as defined by the Central Government.

Section 16. Import export and transport of intoxicants:-No such intoxicant shall be imported, exported or transported except -

(a) after payment of any duty to which it may be liable under this Act or execution of a bond for such payment and

(b) in compliance with such condition as the State Government may impose.

Section 17. Power of State Government to prohibit import, export and transport of intoxicants:- The State Government may by notification:-

(a) prohibit the import or export of any intoxicant into or from Punjab, Haryana or any part thereof; or

(b) prohibit the transport of any intoxicant.

Section 18. Pass necessary for import, export and transport:- Except as otherwise provided by any rule made under this Act, no intoxicants exceeding such quantity as the State Government may prescribe by notification shall be imported or transported except under a pass issued under the provision of the next following section;

Provided that in the case of duty paid foreign liquor such passes shall be dispensed with unless the State Government shall by notification otherwise direct

Provided further, that no such conditions as may be determined by the Financial Commissioner, a pass granted under the excise law in force in another State may be deemed to be a pass granted under this Act

Section 19. Grant of passed for import, export and transport-Passes for the import, export and transport of intoxicants may be granted by the Collector.

Provided that passes for the import and export of such intoxicant as the Financial Commissioner may from time to time determine shall be granted only by the Financial Commissioner.

Section 31. Duty on excisable articles:- An excise duty or a countervailing duty as the case may be at such rate or rates as the State Government shall direct, may be imposed either generally or for any specified local area, on any excisable article.

(a) imported, exported or transported in accordance with the provisions of Section 16; or

(b) manufactured , or cultivated under any licence granted u/s 23; or

(c) manufactured in any distillery established or any distillery or brewery licensed u/s 21.

Provided as follows:-

(i) duty shall not to be so imposed on any article which has been imported into India and was liable on importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1878.

Explanation:- Duty may be imposed under this, section at different rates according to the places to which any excisable article is to be removed for consumption, or according to the varying strength and quality of such article.

Section 32. Manner in which duty may be levied:-Subject to such rules regulating

the time, place and manner as the Financial Commissioner may prescribed such duty shall be levied rateably, on the quantity of exciseable article imported, exported, transported, collected or manufactured in or issued from a distillery brewery or warehouse;

Provided that duty may be levied:-

(a) on intoxicating drugs by an acreage rated levied on the cultivation of the hemp plant or by a rate charged on the quantity collected.

(b) On spirit or beer manufactured in any distillery established or any distillery or brewery licensed, under this Act in accordance with such scale of equivalents calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be as the State Government may prescribe.

(c) On tari, by a tax on each tree from which the tari is drawn;

Provided further that where payment is made upon issue of an exciseable article for sale from a warehouse established or licensed u/s 22(a) it shall be made -

(a) If the State Government by notification so directs, at the rate of duty which was in force at the date of import of that article; or

(b) In the absence of such direction by the State Government at the rate of duty which is in force on that article on the date when it is issued from the warehouse.

Section 33. Payment for grant of leases: - Instead of or in addition to any duty leviable under this chapter the State Government may accept payment of a sum in consideration of the lease of any right u/s 27.

Section 33-A. Saving for duties being levied at commencement of the Constitution:- (1) Until provision to the contrary is made by Parliament, the State Government may continue to levy any duty which it was lawfully levying immediately before the commencement of the Constitution under this Chapter as then in force.

(2) The duties to which this section applies are:-

(a) any duty on intoxicants which are not exciseable articles within the meaning of this Act; and

(b) any duty on exciseable article produced outside India and imported into Punjab/Haryana whether across a customs frontier as defined by the Central Government or not.

(3) Nothing in this section shall authorize the levy by the State Government of any duty which as between goods manufactured or produced in the State and similar goods not so manufactured or produced discriminates in favour of the former or which in the case of goods manufactured or produced outside the State discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

Section 34. Fees for terms, conditions and form of, and duration of licence, permit and passes:-(1) Every licence, permit or pass granted under this Act shall be granted:-

- (a) on payment of such fees, if any.
- (b) Subject to such restrictions and on such conditions.
- (c) In such form and containing such particulars,
- (d) For such period,

as the Financial Commissioner may direct.

(2) Any authority granting a licence under this Act may require the licensee to give such security for the observance of the terms of his licence, or to make such deposit in view of security, as such authority may think fit.

Section 58. Power of State Government to make Rules: (1)....

(2) in particular and without prejudice to the generality of the foregoing provision, the State Government may make rules:-

(d) regulating the import, export, transport or possession of any intoxicant or Excise bottle and the transfer, price or use of any type or description of such bottle.

(e) regulating the period and localities for which and the persons or classes of persons to whom licenses, permits and passes for the vend by wholesale or by retail of any intoxicants may be granted and regulating the number of such licences which may be granted in any local area;

(f) prescribing the procedure to be followed and the matters to be ascertained before any licence is granted for the retail vend for consumption on the premises.

Section 59. Powers of Financial Commissioner to make rules:- The Financial Commissioner may by notification make rules:-

(d) prescribing the scale of fees or the manner of fixing the fees, payable in respect of any licence, permit or pass or in respect of the storing of any intoxicant;

70. Apart from provisions of the Punjab Act, it would also be necessary to notice Sections 17 and 18 of the Abkari Act occurring in Chapter V dealing in "Duties, Taxes and Rentals" applicable in the State of Kerala which read thus:

"17. Duty on liquor or intoxicating drugs:- A duty of excise or luxury tax or both shall, if the Government so direct be levied on all liquor and intoxicating drugs:

- (a) permitted to be imported u/s 6; or
- (b) permitted to be exported u/s 7; or

- (c) permitted u/s 11 to be transported; or
- (d) manufactured under any licence granted u/s 12; or
- (e) manufactured at any distillery, brewery, winery or other manufactory established u/s 14; or
- (f) issued from a distillery, brewery, winery or other manufactory or warehouse licensed or established u/s 12 or Section 14; or
- (g) sold in any part of the State;

Provided that no duty or gallonage fee or vend fee or other taxes shall be levied under this Act on rectified spirit including absolute alcohol which is not intended to be used for the manufacture of potable liquor meant for human consumption.

Explanation:- For the purpose of this section and Section 18, the expression "duty of excise", with reference to liquor or intoxicating drugs, include countervailing duty on such goods manufactured or produced elsewhere in India and brought into the State.

18. How duty may be imposed:- (1) Such duty of excise may be levied:

- (a) in the case of spirits or beer, either on the quantity produced in or passed out of a distillery, brewery or warehouse licensed or established u/s 12 or Section 14 as the case may be or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort or on the value of the liquor as the case may be, as the Government may prescribe;
- (b) in the case of intoxicating drugs on the quantity produced or manufactured or issued from a warehouse licensed or established u/s 14;
- (c) xxx
- (d) xxx
- (e) in the case of toddy, or spirits manufactured from toddy, in the form of a tax on each tree from which toddy is drawn, to be paid in such instalments and for such period as the Government may direct: or
- (f) by import, export or transport duties assessed in such manner as the Government may direct; or

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(2) The luxury tax on liquor or intoxicating drugs shall be levied:-

- (i) in the case of any liquor in the form of a fee for licence for the sale of the liquor and in the form of a gallonage fee or vending fee, or in any one of such forms; and;
- (ii) in the case of an intoxicating drug, in the form of a fee for licence for the sale

of the intoxicating drug.

(3) The duty of excise under Sub-section (1) and the luxury tax under Sub-section (2) shall be levied at such rates as may be fixed by the Government from time to time, by notification in the Gazette, not exceeding the rates specified below:-

(1) Duty of excise Maximum rates

(i) Duty of excise on liquors (Indian made) Rs. 200 per proof litre or an amount equal to 200 per cent of the value of the liquor.

(ii) Duty of excise on intoxicating drugs Rs. 1 per gram or Rs. 933.10 per seer.

(iii) Duty of excise in the form of tax on trees tapped for toddy Rs. 50 per tree per half-year or part thereof

(2) Luxury tax:

(a) When levied in the form of a fee for licence for sale of foreign liquor -

(i) For licence for sale of foreign liquor in wholesale Rs. 1 5000 for a year or part thereof

(ii) For licence for sale of foreign liquor in hotels or restaurants Rs. 12000 for a year or part thereof

(iii) For licence for sale of medicated wines Rs. 1000 for a year or part thereof

(iv) For licence for sale of foreign liquor in non-proprietary clubs to members Rs. 1500 for a year or part thereof

(v) Xxxx

(b) When levied in the form of gallonage fee Rs. 10 per bulk litre or Rs. 45.46 per bulk gallon

(c) When levied in the form of a fee for licence for the sale of foreign liquor (Foreign made)

(i) In wholesale Rs. 25,00,000 (Rupees Twenty Five lakhs) for a year or part thereof

(ii) In retail Rs. 10,00,000 (Rupees Ten lakhs) for a year or part thereof

(iii) In hotels or restaurants Rs. 25,00,000 (Rupees Twenty Five lakhs )for a year or part thereof ,

(iv) In non-proprietary clubs to its members Rs. 10,00,000 ? (Rupees Ten lakhs) for a year or part thereof

(v) In Seamen's and Marine Officer's clubs to its members Rs. 10,00,000 (Rupees Ten lakhs) for a year or part thereof

(d) When levied in the form of gallonage fee

(i) Foreign Liquor (Foreign made) other than beer and wine Rs. 200 (Rupees Two hundred) per bulk litre

(ii) For foreign made beer and wine Rs. 25 (Rupees Twenty Five) per bulk litre

Provided that where there is a difference of duty of excise or luxury tax as between two licence periods, such difference may be collected in respect of all stocks of Indian made foreign liquor or intoxicating drugs held by licensees at the close of the former period.

Note: The expression 'Foreign Liquor (Foreign made)' means any liquor produced, manufactured, or blended and compounded abroad and imported into India by land, air or sea.

Explanation:- Where any liquor is chargeable with duty at a rate depending on the value of the liquor, such value shall be the value at which the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited purchases such liquor from the suppliers and in case any such liquor is not purchased by Kerala State Beverages (Manufacturing and Marketing) Corporation limited such value shall be the value fixed by the Commissioner."

71. Provision to grant licence is contained in Chapter VI of the Abkari Act, Section 24 whereof is as under:

"24. Forms and conditions of licenses, etc:-Every license or permit granted under this Act shall be granted:-

(a) on payment of such fees, if any;

(b) for such period;

(c) subject to such restrictions and on such conditions; and

(d) shall be in such form and contain particulars - as the Government may direct either generally, or in any particular instance in this behalf."

72. The State, of Kerala raised a contention that the imposition of levy is referable to Entry 66 of List II of the Seventh Schedule to the Constitution. An additional affidavit was filed before the Kerala High Court wherein it was averred that such a levy has been imposed also by way of a regulatory fee. No plea whatsoever has been raised that such a levy is towards a price or a part of price for parting with exclusive privilege. The High Court accepted plea of the State that the levy is by way of regulatory fee in relation whereunto doctrine of 'quid pro quo' has no application.

73. Before the High Court of Punjab and Haryana although a plea was raised that the impost was by way of a price for parting with the exclusive privilege but in its impugned judgment the High Court rejected the same having regard to the provisions contained in Section 33A of the Punjab Act.

74. The Excise Acts referred to hereinbefore seek to regulate trade and business in liquor. They have their origin before coming into force of the Government of India Act, 1935 or the Constitution and, thus, being pre-constitutional laws, validity thereof and/or any statutory impost levied thereunder would be subject to Articles 372 and 305 of the Constitution vis-à-vis Article 13 thereof. The statutory rights and obligations created by reason of the aforementioned Acts, after coming into force of the Constitution, would, therefore, be subject to the extent saved by the Constitution itself and, thus, the provisions thereof, the rules made thereunder and actions taken must conform to the limitations imposed thereby. The said Acts, therefore, must be construed keeping in view Entries 8 and 51 of List II of the Seventh Schedule to the Constitution. Before dealing with the matter further, it may be noticed that in the instant case I am not concerned with validity or the interpretation of a pre-constitutional law but a post-constitutional one. The impugned levy, therefore, must be justified having regard to the relevant entries made in List II of the Seventh Schedule to the Constitution. Section 6 of the Abkari Act permits import of liquor on payment of duties, taxes, tees and such other sums as are due to the government and Section 7 thereof provides for export. Section 17 provides for levy of a duty of excise or luxury tax or both on liquor permitted to be imported u/s 6 thereof. Section 18 deals with the manner in which such duty should be imposed. Sections 31 and 32 of the Punjab Act are in pari materia with Section 17 and Section 18 respectively of the Abkari Act.

75. A question arises as to what is "excise duty". An excise duty can be imposed on manufacturer of goods only in terms of statute made by the Parliament. An exception thereto has been made in the case of liquor in terms whereof the State Legislature has been empowered to levy excise duty by reason of Entries 8 and 51 of List II of the Seventh Schedule to the Constitution which read thus:

"Entry 8: Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

Entry 51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :-

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in Sub-paragraph (b) of this entry."

76. Legislative competence of the State to levy any fee is, therefore, limited to levy of countervailing duty. In other words, any levy on import can not exceed the excise duty levied on the manufacturers of the State. The State, therefore, cannot levy any duty in addition to the countervailing duty. The notification refers to excise duty and countervailing duty, which in terms of Section 3(6-B) of the Punjab Act mean any such excise duty or countervailing duty as the case may

be, as is mentioned in Entry 51 of List II of the Seventh Schedule to the Constitution. The State, therefore, cannot levy any import fee over and above the excise duty/countervailing duty, having regard to the said definition. Sections 17 and 18 of the Abkari Act which are in pari materia with Sections 31 and 32 of the Punjab Act are referable to Entry 51 alone. As Entry 51 puts an embargo on the State to make a legislation, there cannot be any gainsaying that any levy in terms of Sections 17 and 18 of the Abkari Act would be subject thereto.

77. Can the levy be said to be valid if thereby regulatory licensee fees have been imposed? The answer to the said question must be rendered in the negative.

78. Clause (28) of Article 366 reads as under:

"taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;

79. A regulatory impost would, thus, come within the purview of the tax. A fee in terms of the constitutional schemes may be either a regulatory licence fees or a fee in lieu of rendition of service. When no service is rendered a fee can be justified only by way of licence fees. Such impost, however, would be a tax and, thus, would clearly be referable to Entry 51 of List II to the Constitution and not Entry 66 thereof. (See *Hindustan Times and Others Vs. State of U.P. and Another*, .

80. Indisputably, the State while imposing import duty has exercised its power under the statute. The impugned notifications in no uncertain terms and unequivocally refer to the source of power therefore. The functions of the State to impose a fee or tax in terms of the provisions of the statute is a legislative function. Such legislative function must be attributed to the source of the State's power in terms of Entry 51 of List II to the Constitution and not otherwise. If the legislations in question are found to be unreasonable in nature or fraud on the Constitution, would it still be permissible for the State to turn round and contend that such imposts are not being levied in exercise of its taxation power but attributable to its regulatory power? In other words, can the State turn round and contend that what it sought to do was not in terms of legislative function but merely by way of executive action? Answer to the said question again must be rendered in the negative. It is a well-settled principle of law that a thing which cannot be done directly cannot be done indirectly. (See *M/s. Priyanka Overseas Pvt. Ltd. and another Vs. Union of India and others*, . In relation to an administrative act it is well-settled that a statutory authority is not permitted to support its decision on a ground d'hors the ground stated in the order, (See *Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, . On the same analogy, a legislation which is found to be fraud on the Constitution, cannot, inter alia, be upheld on any other ground. Entry 8 of List II of the Seventh Schedule to the Constitution does not permit the State to levy a fee on import of liquor. It deals only with production, manufacture, possession,

transport, purchase, and sale of intoxicating liquors and nothing else. Entry 8 of List II, thus, does not speak of import or export. Its purpose is to regulate and not impose any statutory impost. The State in exercise of its delegated powers cannot do what would constitutionally be impermissible.

81. A subsidiary question which arises for consideration is as to whether the State of Punjab, having regard to Section 33A of the Punjab Act, could levy such duty. In Sub-section (1) of Section 33A provision has been made permitting the State to continue to levy any duty which it had lawfully been levying immediately before the commencement of the Constitution. The said provision is in tune with Article 305 of the Constitution, therefore, the same calls for a strict construction. Sub-section (3) of Section 33A is couched in negative language by reason whereof power of the State to levy any duty has been taken away in the event thereby any discrimination is made in favour of goods manufactured or produced in the State and similar goods manufactured or produced in another locality. Clearly such a provision is in consonance with Article 304 of the Constitution. If by reason of a statute an embargo has been placed on the State's power to levy any fee it is beyond any cavil of doubt that such a levy cannot be held to be justified by reason of an executive action or otherwise.

82. It is trite that even a term of the contract cannot be in violation of an express provision contained in a statute. By reason of provisions of the Abkari Act or the Punjab Act, no power has been conferred upon the State to impose any import fee over and above the excise duty/countervailing duty. It is not disputed that such countervailing duty has been levied and the licensees pay the same. The power to levy fee and the power to grant licences, permits and passes occur in different chapters of the Acts. The powers under different chapters are required to be exercised for different purposes. One is legislative in character and the other refers to executive action. Furthermore, under the Punjab Act fees for grant of licences, permits and passes are required to be paid on the terms as the Financial Commissioner may direct. Having regard to the fact that the Financial Commissioner is the statutory authority in relation thereto, the State cannot be said to have any jurisdiction thereover, particularly, in the matter of levy of import fee which clearly is referable to Chapter V of the Punjab Act and has nothing to do with grant of licence occurring in Chapter VI.

83. The matter may be considered from another angle. Having regard to Article 265 of the Constitution a tax must be imposed by a statute. Even such impost is impermissible by any bye-law or rule. (See *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, ; *A. Venkata Subba Rao Vs. State of Andhra Pradesh*, and *Attorney General v. Wilts United Dairies (1922) 91 LJB 897* .

84. In *Synthetics and Chemicals Limited and Ors. v. State of UP and Ors.* , a Seven-Judge Bench of this Court has equated excise duty with the price for privileges. In the matter of interpretation of Constitution, the said decision has been referred to with approval in *Welfare Asscn. A.R.P., Maharashtra and Another Vs. Ranjit P. Gohil and Others*, . In the said seven Judge Bench decision,

this Court observed thus:

"On an analysis of the various Abkari Acts and Excise Acts, it appears that various provinces/States reserve to themselves in their respective States the right to transfer exclusive or other privileges only in respect of manufacture and sale of alcohol and not in respect of possession and use. Not all but some of the States have provided such reservation in their favour. The price charged as a consideration for the grant of exclusive and other privileges was generally regarded as an excise duty. In other words, excise duty and price for privileges were regarded as one and the same thing. So-called privilege was reserved by the State mostly in respect of country liquor and not foreign liquor which included denatured spirit."

85. In view of the foregoing discussions, I am of the opinion that the impugned levy cannot be sustained.

Re: Questions (ii) and (in)

What is Res-Extra-commercial:

86. In Black's Law Dictionary, Fifth Edition, 'Res' has been defined as follows:

"By 'res', according to the modern civilians, is meant everything that may form an object of rights, in opposition to 'persona,' which is regarded as a subject of rights. 'Res', therefore, in its general meaning, comprises actions of all kinds; while in its restricted sense it comprehends every object of right, except actions."

87. In Trayner's Latin Maxims, Fourth Edition, 'Extra commercial' is stated as "Beyond Commerce. This is said of things which cannot be bought or sold, such as public roads, rivers, titles of honour, etc."

88. In Words and Phrases, Volume 15 A, it has been stated:

"Property once dedicated to public use is 'extra commercia', and inalienable by seizure and sale under execution against a municipal corporation, unless it is made affirmatively and clearly to appear that its use had been abandoned or lost by nonuser."

89. In Bouvier's Law Dictionary, Volume I, Third Edition, at page 531, it is stated:

"It has been frequently said by the Supreme Court that commerce includes intercourse, though usually the term is qualified as 'commercial intercourse'; Gibbons v. Ogden. 9 Wheat. (U.S.) 1, 6 L. Ed 23; U.S. v. E.C. Knight Co., 156 U.S. 1, 15 Sup. Ct 249, 39 L. Ed. 325; Welton v. Missouri 91 U.S. 275, 280, 23 L.Ed. 347; Pensacola Telegraph Co. v. Western Telegraph Co. 96 U.S. 1, 9, 24 L.Ed. 708; Mobile County v. Kimball 102 U.S. 691, 702, 26 L.Ed. 238 (where the phrase is 'intercourse and traffic'); Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211, 241, 20 Sup. Ct. 96, 44 L.Ed. 136; Lindsay & P. Co. V. Mullen 176 U.S. 126, 20 Sup. Ct. 325, 44 L.Ed.400; Interstate Commerce Commission v. Brimson, 154 U.S. 447, 470, 14 Sup Ct. 1125, 38 L.Ed. 1047; Lottery Case 188 U.S. 321, 346,

23 Sup. Ct 321, 47 L.Ed. 492. The first expression of this was by Marshall, C.J., in *Gibbons v. Ogden*, 9 Wheat (U.S.) 1, 6 L.Ed. 23; quoted by Fuller, C.J., in *U.S. v. Knight Co*, 156 U.S. 1, 15 Sup. Ct 249, 39 L.Ed. 325; and characterized by White, J., as a "luminous definition" in *Northern Securities Co. v. U.S.* 193 U.S. 197, 24 Sup. Ct 436, 48 L.Ed. 679, to the effect that commerce is something more than traffic; "It is intercourse; it describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rates for carrying on that intercourse." This has been practically, if not literally, quoted in all the cases cited. There is nothing in the decisions to define or limit so broad a term as intercourse, except the word commercial, usually attached to it. As it is hardly likely that the courts intended to say that commerce is intercourse in the sense in which it is defined "communication between persons or places"; Cent. Dict.: it is probable that the word was not intended to be used to express more than such intercourse as is connected with traffic and transportation with foreign countries or between the States."

90. Dealing in liquor or for that matter in lottery, tobacco is not prohibited under the Constitution. On the other hand, in the constitutional schemes itself Parliament or the State Legislature has been conferred power to regulate the said trade like any other trade. In fact India has entered into trade agreements to deal in liquor with other sovereign countries. India has entered into International treaties in the matter of foreign investment in liquor. Trade in liquor finds place in World Trade Organization (WTO) and General Agreement on Trade and Tariff (GATT). In terms of the WTO and GATT guidelines have been laid down as regards import and export of potable liquor. India, as a signatory to WTO and GATT, is expected to follow the said guidelines. It is expected to remove all trade barriers subject to the other provisions contained therein. It is also supposed to levy taxes/countervailing duties in terms of such international treaties. No constitutional provision or statute prohibits trade in liquor. Article 47 of the Constitution empowers the State to impose prohibition. Once a prohibition is imposed by any State in exercise of said, powers, indisputably no person will have any right to deal in potable liquor.

91. Applicability of Res-Extra commercial is a judge made law. Constitution does not provide for it. Even if Entries 8, 51 and 54 of List II, on the other hand, lead to the conclusion that the State has the legislative power to make regulatory enactment in the spheres provided for them, the State indisputably may exercise its right to prohibit dealings in liquor either wholly or partially but if it allows trade and business in liquor by parting with its exclusive privilege; a presumption will arise unless contrary" intention is shown in the statute or licence granted therefore that it has not retained unto itself a right to deal with a part of the trade itself or through its agency. As has been noticed in the Kerala matter the State has given the monopoly to trade in liquor in favour of the Kerala State Beverages Corporation. Nowhere it is stated either by way of counter-affidavit or under the statute that the State has reserved unto itself any right in the matter relating to carrying on trade or business in potable liquor. As soon as a licence is

granted upon receipt of a fee fixed by it, the State would be presumed to part with its entire privilege. To say that while exercising its regulatory power for the purpose of controlling the trade and business in potable liquor, it has reserved unto itself a part of its exclusive privilege would not be correct unless the same is explicitly pleaded and proved.

92. Regulatory measures in the matter of trade and business in potable liquor have been taken by reason of a statute. All regulations on the trade, thus, must be governed by the statutes operating in the field and not by way of executive action. The provisions of the statute or the contracts made thereunder must scrupulously be followed by all concerned as they are bound by the same. When a legislation referable to Entries 8, 51 and 66 etc. had occupied the field, the State, in absence of any provision contained in the statute, cannot turn round and contend that it will exercise its power of exclusive privilege even though it had granted licence in terms of the statute. Having regard to the constitutional scheme the power of the State to undertake trade and business is referable to Article 298 of the Constitution. The duties, functions and responsibilities of a Government in a democracy are different from monarchism. Rights and privileges of a monarch cannot be equated with an elected Government in a democratic set-up. If the power of the Government in other words to deal in trade or commerce, be it liquor or any other commodity, can only be traced to Article 298 of the Constitution, it goes without saying that the same would be subject to all constitutional limitations applicable in relation thereto. The State while exercising its constitutional power under Article 298 of the Constitution cannot itself be an extra constitutional authority so as to violate the constitutional provisions. It like any other trader must confine itself within the four corners of the statutes governing the field which are enacted in terms of one entry or the other made in any of the three lists to the Seventh Schedule of the Constitution.

93. A State, therefore, may be entitled to either completely prohibit a trade or business in liquor and create monopoly either in itself or in any other agency and furthermore it can for the purpose of selling the licence adopt any mode with a view to maximize its revenue but while doing so it must, having regard to a large number of decisions of this Court, not act arbitrarily. The State while carrying on business by way of parting with its privilege or distribution of largess must conform to the equality clause enshrined in Article 14 of the Constitution. It has been so held in *Nandlal Jaiswal* (supra) at pages 604-605 in the following terms:

"But, before we do so, we may at this stage conveniently refer to a contention of a preliminary nature advanced on behalf of the State Government and respondents 5 to 11 against the applicability of Article 14 in a case dealing with the grant of liquor licences. The contention was that trade or business in liquor is so inherently pernicious that no one can claim any fundamental right in respect of it and Article 14 cannot therefore be invoked by the petitioners. Now, it is true, and it is well settled by several decisions of this Court including the decision

in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, that 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 absolutely 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 at 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 of the State Government and respondents 5 to 11 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."

94. Privilege, thus, can be claimed by a State in a 'no right' situation, namely, when citizen is not permitted to carry on trade. But once the State takes a decision to part with its privilege, it cannot make any discrimination whatsoever. Dealing in liquor by the persons in whose favour licences have been granted in terms of the statutory enactments derive a right therefore which, cannot be said to be "Res-Extra commercial"

95. Now comes the question as to how far and to what extent, if any, the fundamental and other rights of a citizen could be available in the matter of trade in potable liquor. Article 19(1)(g) guarantees that all citizens shall have the right to practice any profession or to carry on any occupation, trade or business. However, in terms of Article 19(6) this right can be restricted by a statute imposing reasonable restrictions. A combined reading of Clauses (1) and (6) of Article 19 makes it clear that a citizen has a fundamental right to carry on any trade or business and the State can make a law imposing reasonable restrictions on the said right in the interest of the general public. It is, therefore, obvious that unless dealing in liquor is excluded from 'trade or business', a citizen has a fundamental right to deal in that commodity.

96. This right was recognized in the *The State of Bombay and Another Vs. F.N. Balsara*, where Fazl Ali, J., observed at page 717 that "we hold that to the extent to which the prohibition Act prevents the possession, use and consumption of non-beverages and medicinal and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Article 19(1)(f) of the Constitution even if they may be within the legislative competence of the provincial legislature,"

97. But in *Cooverjee B. Bharucha (supra)* a Constitution Bench of this Court held that there is no inherent right in a citizen to sell intoxicating liquors. This decision was rendered relying on *P. Crowley, Chief of Police of the City and County of San Francisco, California v. Henry Christenses* (1890) 34 Law. Ed.620.

98. However, this exclusive privilege theory was rejected by a Constitution Bench of this Court in *Saghir Ahmad Vs. The State of U.P. and Others*, stating that this doctrine has no place under Indian Constitution. It was observed that establishment of a monopoly does not create a reasonable restriction. The observations made in *Cooverjee B. Bharucha* (supra) stating that the general observations occurring in the judgment have to be taken with reference to the facts of that case were duly explained. It was reiterated that the State has a right to prohibit trade which is illegal or immoral or injurious to the health and welfare of the public by taking recourse to regulating legislation contemplated by Article 19(6).

99. The fundamental right to trade in intoxicant liquor was recognized in *State of Kerala and Others Vs. P.J. Joseph*, . There the Government of Travancore and Cochin imposed 20% commission for sanction of extra quota of Foreign Liquor to wholesale licencees. The said impost was challenged before the High Court of Judicature for Travancore Cochin, which was struck down by said High Court. On Appeal by State this Court while upholding the judgment of High Court observed "an impost not authorised by law cannot possibly be regarded as a reasonable restriction and must, therefore, always infringe the right of the respondent to carry on his business which is guaranteed to him by Article 19(1)(g) of the Constitution." It was held that an impost in terms of an executive order having no authority of law would be illegal imposition.

100. This principle has been affirmed by a Constitution Bench of this Court in *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, . After discussing all previous decisions, Subba Rao, C.J., held that "a scrutiny of these decisions does not support the contention that the court held that dealing in liquor was not business or trade. They were only considering the provisions of the various Acts which conferred a restricted right to do business. None of them held that a right to do business in liquor was not a fundamental right". It was observed that "If the activity of a dealer, say, in ghee is business; then how does it cease to be business if it is in liquor. Liquor can be manufactured, brought or sold like any other commodity. It is consumed throughout the World though some countries restrict or prohibit the same on economic or moral grounds". It was further held that "dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make a law imposing reasonable restrictions on the said right, in public interests."

101. In *R.M.D. Chamarbaugwala* (supra) S.R. Das, C.J. observed that the American Congress have no power to control gambling and like spurious transactions under its power over 'inter-State commerce' if they were not held to be 'commerce'.

102. Even in *Har Shankar* (supra) Chandrachud, J. (as the learned Chief Justice then was) held that the right to trade in liquor is not absolute and it is to be treated as a separate class. But therein also it has not been held that despite fulfilling the regulatory measures, the trade would be illegal. The point that arose

for consideration therein was the State's power to prohibit trade. In that case, this Court had no occasion to consider the question involved in the present one.

103. A large number of decisions, as noticed hereinbefore, have been cited at the Bar for the proposition that by reason of grant of licence, the licensee is merely granted a permissive privilege subject to the degree of regulatory control as may be deemed necessary and appropriate having regard to the fact that: nobody has any constitutional right to trade in liquor in view of its inherently pernicious and noxious nature. I may deal with some of the decisions cited at the bar a little later but the principles which emerge from the various decisions of this Court and particularly by Constitution Benches of this Court are:

(i) Trade in liquor is against public morality and thus *res extra commercii*. No citizen has any Fundamental Right to carry on business in liquor. [See *R.M.D. Chamarbaugwala* (supra)]. As there does not exist any right to carry on trade, Article 301 shall not apply.

(ii) Right to trade in liquor is a Fundamental Right within the meaning of Article 19(1)(g) of the Constitution subject, of course, to the reasonable restrictions in terms of Clause (6) of Article 19, [See *Krishna Kumar Narula* (supra)]

(iii) Right of the State to deal exclusively in liquor is its own privilege. It does not matter as to whether such right is restricted while parting with privilege by reason of a statute in terms of Article 19(6) of the Constitution.

(iv) (a) The equality clause even in the matter of carrying on trade is not available. The right of the State to part with its privilege being a superior right, the inferior right of a citizen to carry on trade shall give way to State's superior right,

(b) The State while carrying on any trade or business itself cannot make any discrimination and its acts must be fair and reasonable. [See *Nandlal Jaiswal* (supra)]

(v) The State's right is absolute when a complete prohibition is imposed and at that stage the State can part with its exclusive privilege in any manner it likes and it is also entitled to take any measures for having the best price. [See *Har Shankar* (supra)].

104. In *Khoday Distilleries Ltd.* (supra) at pages 608-609, a Constitution Bench referred to some of the decisions as referred to hereinbefore and summed up its findings [Para 60(a)(b)(e)(f)(g)]:

"(a) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in Clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(a) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by Clauses (2) to

(6) of Article 19 of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and, welfare of the general public, i.e., *res extra commercial*, (outside commerce). There cannot be business in crime.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercial*. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business."

105. The decisions of this Court including those rendered by the Constitution Benches struck different notes. They at times stand poles apart. Inconsistencies and contradictions in the said decisions are galore. Some latter Constitution Bench decisions although took note of the earlier Constitution Bench decisions, but only sought to distinguish the same and not referred the matter to a larger Bench for consideration of correctness of one view or the other. I may, therefore, proceed on the premise that some of the principles in *Khoday* (supra) are correct, although one may have strong reservations even in this behalf. In *Khoday* (supra) expressly or by necessary implication fundamental right to deal in any goods is accepted. Only exception which was made are those commodities, business of which is inherently noxious and pernicious and is condemned by the civilized society. It has sought to lay down the law that there cannot be a business in crime.

106. Dealing in a commodity which is governed by a statute cannot be said to be inherently noxious and pernicious. A society cannot condemn a business nor there exists a presumption in this behalf if such business is permitted to be

carried out under statutory enactments made by the legislature competent therefore. The legislature being the final arbiter as to the morality or otherwise of the civilized society has also to state as to business in which article (s) would be criminal in nature. The society will have no say in the matter. The society might have a say in the matter which could have been considered in a Court of law only under common law right and not when the rights and obligations flow out of statutes operating in the field. Health, safety and welfare of the general public may again be a matter for the legislature to define and prohibit or regulate by legislative enactments. Regulatory statutes are enacted in conformity with Clause (6) of Article 19 of the Constitution to deal with those trades also which are inherently noxious and pernicious in nature and furthermore thereby sufficient measures are to be taken in relation to health, safety and welfare of the general public. The courts while interpreting a statute would not take recourse to such interpretation whereby a person can be said to have committed a crime although the same is not a crime in terms of the statutory enactment. Whether dealing in a commodity by a person constitutes a crime or not can only be subject matter of a statutory enactment.

107. The Excise Acts enacted by the States mandate the licensees to carry on their activities in terms of the conditions of licence and the provisions contained therein. So long as the business activities of the licensees are within the four-corners of the conditions of the licence and the provisions of the Licensing Act, they, without any obstruction whatsoever, are entitled to carry on their trade, business or commerce. They would be liable to be proceeded against for commission of an offence only in the event they violate the statutory provisions wherefor the statute itself provides for imposition of penalty.

108. Thus, when a person has been granted a licence strictly in conformity with the Excise Act to carry on his business activities in terms of the statute operating in the field, the same can neither be termed as pernicious, obnoxious and injurious to health, safety and welfare of the general public. No public interest can be inferred by any court of law by going beyond the statutory provisions. Even monopoly of the State either in itself or in any agency created by it for manufacture, possession, sale and distribution of liquor can be created only by a statute which must conform to the provisions of Clause (6) of Article 19 of the Constitution, i.e., by making a valid law by way of a regulatory legislative enactment.

109. From the analysis of decisions rendered by this Court in *Cooverjee B. Bharucha*, *R.M.D. Chamarbaugwala*, *Har Shankar* or *Khoday Distilleries*, it will appear that a person cannot claim any right to deal in any obnoxious substance on the ground of public morality. The State, therefore, is entitled to completely prohibit any trade or commerce in potable liquor. Such prohibition, however, has not been imposed. Once a licence is granted to carry on any trade or business can it be said that a person is committing a crime in carrying on business in liquor although he strictly complies with the terms and conditions of licence and

the provisions of the statute operating in the field? If the answer to the said question is to be rendered in affirmative it will create havoc and lead to anarchy and judicial vagaries. When it is not a crime to carry on such business having regard to the fact that a person has been permitted to do so by the State in compliance with the provisions of the existing laws, indisputably he acquires a right to carry on business. Even in respect to trade in food articles or other essential commodities either complete prohibition or restrictions are imposed in the matter of carrying on any trade or business, except in terms of a licence granted in that behalf by the authorities specified in that behalf. The distinction between a trade or business being carried out legally or illegally having regard to the restrictions imposed by a statute would have, therefore, to be judged by the fact as to whether such business is being carried out in compliance of the provisions of the statute(s) operating in the field or not. In other words, so long it is not made impermissible to carry on such business by reason of a statute, no crime can be said to have been committed in relation thereto. The doctrine of *res extra commercium*, thus, would not be attracted, whence a person carries on business under a licence granted in terms of the provisions of the regulatory statutes.

110. No case and in particular the decisions relied upon by the learned counsel appearing on behalf of the State of Punjab and that of Kerala had evolved a principle that despite paying a large amount of licence fees and despite fulfillment of terms and conditions of licence and other statutory provisions, the trade or business carried out by the licensee shall be at an eternal peril, which may at any point of time be determined or a new tax imposed or they be proceeded against at the whims or caprice of the executive wing of the State. In our constitutional scheme such a situation is unthinkable. The country is governed by rule of law and despite existence of a valid legislation operating in the field, executive whims or caprice cannot be permitted to have any role to play. Validity of a tax imposed by the State Legislature, thus, must be determined on the constitutional anvil of the legislative competence and not on any other basis. The decisions of this Court which had no occasion to consider these aspects of the matter can be of no assistance and would not constitute binding precedents. [See *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*,

111. The right of the State to carry on trade or business under Article 298 of the Constitution would be subject to the same constitutional limitations in the matter of carrying on trade or business in liquor as in other cases. The distinction being only that the State has a monopoly to do so. Once the State does not exercise the said right and considers it expedient to allow the citizens to carry on the business or trade, it cannot be said that the licensees do not derive any right whatsoever. Even when the State exercises such right by creating a monopoly in itself it would be subject to the same constitutional limitations as envisaged, *inter alia*, under Articles 14 and 301 of the Constitution; Articles 14 and 301 of the Constitution protect from the maladies of discrimination. Such discrimination

may be in between persons and persons, persons and State and State and State.

112. Can a State which exercises its right to create monopoly, prevent another State to export or import its product? If in between two States such discriminations are not possible, a discrimination inter se between licensees of two States would also not be permissible. Such discrimination would also not be permissible between a State and a person carrying on similar trade or commerce in one State vis-à-vis a person or State carrying on business in another State,

113. Once the regulations restricting the right to carry on business in potable liquor is attributed to reasonable restrictions and public interest clause, contained in Clause (6) of Article 19 of the Constitution, the fundamental right to carry on trade under Article 19 is conceded. Once such a right is conceded, it cannot be said that although a person has a Fundamental Right to carry on trade or business for the purpose of Article 19(1)(g), subject to imposition of reasonable restrictions by a law made in terms of Clause (6) of Article 19, he does not have such a right in terms of Article 301 of the Constitution or for that matter Article 14 thereof. Articles 303 and 304 of the Constitution also provide for imposition of restrictions and thus even a freedom guaranteed to a person under Article 301 is not an absolute one, but subject to the constitutional limitations provided therefore. Article 301 confers freedom but not a licence. The protection from discrimination as envisaged in *Khoday Distilleries* (supra) [Para 60(g)] would not only operate against the State which is the licensor but having regard to the constitutional goals to be achieved by the commerce clause contained in Article 301, must be extended to another State which seeks to impose restrictions on import.

114. Let me raise a hypothetical question. If some States intend to exercise their right/ privilege/ monopoly in the trade in potable liquor - can such imposition of tax be still justified? Answer thereto must be rendered in the negative. Now the question is with regard to the applicability of Article 301 of the Constitution in the matter of trade, commerce and intercourse in potable liquor. The preamble to the Constitution speaks of unity and integrity of India in terms whereof India is required to be treated country as a whole. This theory of unity and integrity of India may have to be found out while considering the economic integrity of the country vis-à-vis the economic barriers which may be put by the States. For the purpose of considering the question as regards the interpretation of Article 301, one has to notice the sources thereof. It is now beyond any cavil of doubt that except a part of Part XIII of the Constitution the major part of the concept thereof was borrowed from Sections 92 and 99 of the Australian Constitution as also Section 297 of the Government of India Act, 1935.

115. Clause 17 of the draft as introduced before the Drafting Committee by Sir. B.N. Rau in October, 1947 is in the following terms:

"Subject to the provisions of any Federal Law, trade, commerce and intercourse among the units shall, if between the citizens of the Federation, be free:

Provided that nothing in this section shall prevent any unit from imposing on goods imported from other units any tax to which similar goods manufactured or produced in that unit are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced:

Provided further that no preference shall be given by any regulation of trade, commerce or revenue to one unit over another:

Provided also that nothing in this section shall preclude the Federal Parliament from imposing by Act restrictions on the freedom of trade, commerce and intercourse among the units in the interests of public order, morality or health or in cases of emergency."

116. The marginal note appended to Sir B.N. Rau's Clause 17 to the effect "Freedom of trade, commerce and intercourse among the units" is clearly suggestive of the fact that Section 92 of the Australian Constitution provided for a comparable provision vis-à-vis other Constitutions. It is also beneficial to notice that Sections 92 and 99 of the Australian Constitution confer different rights and the same are independent of each other. Trade, commerce and intercourse as noticed hereinbefore are of wide amplitude. The term "commerce" is wider than trade.

117. In *United States v. Patterson* 55 Fed.Rep. 605, it is held;

"The word "commerce" is undoubtedly, in its usual sense, a larger word than "trade", in its usual sense. Sometimes "commerce" is used to embrace less than "trade", and sometimes "trade" is used to embrace as much as "commerce".

118. An inhibition by Article 301 has been provided to the effect that the Legislature shall not interfere in the commerce between the State and State as also to the effect that the Legislature of a State shall not give any preference to one State over the other. Article 301 of the Constitution in no uncertain terms provides for a freedom in the matter of trade, commerce and intercourse. Such trade, commerce and intercourse are inter-State as also intra-State. By reason of Part XIII of the Constitution, the Constitution makers sought to evolve a high policy. On a comparison made between Section 297 of the Government of India Act, 1935 with Part XIII of the Constitution, it will be found that the latter is wider than the former. The said part of the Constitution is a self-contained part. Several improvements made in Part XIII of the Constitution as compared to Section 297 are worth taking note of. By reason of the said provisions, the entire country has been considered to be one economic unit. It now embraces within its fold both 'commerce and trade' and not 'trade' alone. 'Commerce' was provided for in Entry 27 of List II only under the 1935 Act. Part XIII, however, refers to the relevant entries contained in all the Lists of Seventh Schedule to the Constitution. The limitation of power as regards legislative competence of the State and the Parliament having regard to clause 2 of Article 303 and Sub-clauses (a) and (b) of Clause (1) of Article 304 is clear pointer of the new dimension given to Article 301 of the Constitution. Even if a comparison is made

between the terminologies used in Article 301 on the one hand and Articles 19 and 298 on the other, it would be evident that whereas in the former 'trade, commerce and intercourse' have been used but in the latter only the words 'trade or business' have been used. Such trade, commerce and intercourse is in relation to entire territory of India whether inter-State or intra-State unlike Section 297 of the Government of India Act. Article 301 makes a declaration that 'trade, commerce and intercourse throughout the territory' of India shall be free', which in turn must mean that it shall be free from control of Executive and Legislature, I may, however, hasten to add that by reason thereof although a liberty has been granted but such liberty cannot be equated with a licence inasmuch it would be subject to restrictions. Articles 302 and 303 categorically state that there shall be no discrimination between one State and the other but restrictions inhere in such liberty as would appear from clause 2 of Article 303 of Constitution, if a situation stipulated therein arises for consideration. In other words, discrimination is at the heart of this Chapter. By reason of the said provision, the State is prohibited from imposing a tax without making any discrimination whatsoever so as to impede free flow of inter-State or intrastate trade. The State, however, is entitled to impose reasonable restrictions as also levy tax in public interest. But the same indisputably would be subject to the conditions laid down in Articles 303 and 304 of the Constitution,

119. The precise question which arises for consideration is as to whether a trade in liquor would come within the purview of trade, commerce and intercourse, within the meaning of Article 301 of the Constitution. In the earlier part of this judgment I have considered the difference between a trade to which a citizen has an absolute right and a trade where no such absolute right exists being dangerous or obnoxious; but once such trade is permitted in terms of a regulatory statute, the same cannot be said to be per se illegal. Earlier I have considered the difference between a trade which is not prohibited under any law and a trade carrying whereof although is of dangerous or obnoxious subjects but is permitted in law and subject to the regulatory statute. For the purpose of invoking Part XIII of the Constitution, one may safely proceed on the assumption that a citizen of India may not have a Fundamental Right in terms of Article 19(1) (g) of the Constitution to carry on a trade or business but there could be little difficulty in upholding the right to carry on such trade on the ground that the same has been permitted by the State, although a citizen but for such permission would not have a right to deal in the commodity in question. It may be noticed that in Article 303 of the Constitution the terminology used is "relating to". These words are of wide amplitude. These expressions relate to all entries relating to trade or commerce and not one entry in one of the Lists. It, thus, refers to all such entries which are referable to trade and commerce occurring in any of the three lists.

120. Tobacco is one of the goods which would otherwise come within the purview of the doctrine of "Res extra commercium", if the meaning thereof as judicially defined is held to be good. Dealing in tobacco is regulated by the Tobacco Act, a

Parliamentary Act. It is universally acknowledged that cigarettes cause cancer but having regard to the Tobacco Act and other statutes it cannot be contended that the State can prohibit business in cigarette without any legislation, i.e., only through executive instructions. In terms of Article 303 of the Constitution, Tobacco Act which is made in terms of Entry 52 of List I of the Seventh Schedule to the Constitution would prohibit the States from making any discriminatory legislation. It is, therefore, difficult to understand as to how a prohibition can be imposed in respect of liquor in relation where to also a legislative power has been conferred upon the State specifically in terms of Entries 8 and 51 in List II of the Seventh Schedule to the Constitution.

121. At this juncture, it is useful to refer to the decision of this Court in *Atiabari Tea Company Limited* (supra) wherein this Court in no uncertain terms laid emphasis upon the economic unity of the country. In that case before the Constitution Bench an argument was advanced to the effect that Article 301 is circumscribed by Article 303 but the same was not accepted.

Gajendragadkar, J.

(as he then was) held at pages 843-844 as follows:

"In drafting the relevant Articles of Part XIII the makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal policy which had been adopted by the constitution for the governance of the country. Political freedom which had been won, and political unity which had been accomplished by the Constitution, had to be sustained and strengthened by the bond of economic unity. It was realised that in course of time different political parties believing in different economic theories or ideologies may come in power in the several constituent units of the Union, and that may conceivably give rise to local and regional pulls and pressures in economic matters. Local or regional fears or apprehensions raised by local or regional problems may persuade the State Legislatures to adopt remedial measures intended solely for the protection of regional interests without due regard to their effect on the economy of the nation as a whole. The object of Part XIII was to avoid such a possibility. Free movement and exchange of goods throughout the territory of India is essential for the economy of the nation and for sustaining and improving living standards of the country. The provision contained in Article 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character; it is not also a mere statement of a directive principle of state policy; it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country."

122. In *Automobile Transport (Rajasthan) Ltd.* (supra), the validity of the tax impugned therein was upheld only on the ground that it was compensatory in

nature. There had been a cleavage of opinion amongst the Hon'ble Judges in the said matter; three Hon'ble Judges holding that such impost was ultra vires and three Hon'ble Judges holding the same to be intra vires. Subba Rao, J. upheld the constitutionality of the impost by agreeing with other three Hon'ble Judges on the ground that the impost was compensatory in nature. The Bench not only accepted the constitutional principles laid down by this Court in *Atiabari* (supra) but made a clear distinction between the regulatory measures which can be adopted by a State and imposition of a tax. It further, struck a note of caution that a geographical barrier cannot be set up by a State for the purpose of earning revenue or for the benefit of the people thereof. It was held that Article 301 covers a wide area.

123. Subba Rao, J. elaborated as to what is the nature of a compensatory tax. The learned Judge, further, emphasized the concept of freedom in the following terms at pages 564-565 of the Report-

"(1) Article 301 declares a right of free movement of trade without any obstructions by way of barriers, inter-State, or intra-State or other impediments operating as such barriers. (2) The said freedom is not impeded, but, on the other hand, promoted, by regulations creating conditions for the free movement of trade, such as police regulations, provision for services, maintenance of roads provision for aerodromes, Wharfs etc., with or without compensation. (3) Parliament may by law impose restrictions on such freedom in the public interest; and the said law can be made by virtue of any entry with respect where of Parliament has power to make a law. (4) The State also, in exercise of its legislative power, may impose similar restrictions, subject to the two conditions laid down in Article 304(b) and subject to the proviso mentioned therein. (5) Neither Parliament nor the State Legislature can make a law giving preference to one State over another or making discrimination between one State and another, by virtue of any entry in the Lists, infringing the said freedom. (6) This ban is lifted in the case of Parliament for the purpose of dealing with situations arising out of scarcity of goods in any part of the territory of India and also in the case of a State under Article 304(b), subject to the conditions mentioned therein. And (7) The State can impose a non-discriminatory tax on goods imported from other States or the Union territory to which similar goods manufactured or produced in that State are subject.

124. 'Commerce and intercourse' include trade in all its manifestations, Obstructions or impediments to the free flow of trade would be violative of the freedom declared by Article 301. Subba Rao, J., in the said case held at page 548 as under:

"The next question is, where is it free? The second, expression "throughout the territory of India" demarcates the extensive field of operation of the said freedom. The said intercourse shall be free throughout the territory of India. The use of the words 'territory of India' instead of 'among the several States' found in the American Constitution or "among the States" found in the Australian

Constitution, removes all inter-State or intra-State barriers and brings out the idea that for the purpose of the freedom declared, the whole country is one unit. Trade cannot be free through-out the territory of India, if there are barriers in any part of India, be it inter-State or intra-State. So long as there is impediment to that freedom, its nature or extent is irrelevant. The difference will be in degree and not in quality. The freedom declared under Article 301 may be defined as a right to free movement of persons or things, tangible or intangible, commercial or non-commercial, unobstructed by barriers inter-State or intra-State or any other impediment operating as such barriers. To State it differently all obstructions or impediments whatever shape they may take, to the free flow or movement of trade, or non-commercial intercourse, offend Article 301 of the Constitution except in so far as they are saved by the succeeding provisions,"

125. It is beyond any cavil of doubt that Part XIII of the Constitution contains a principle of importance as regards economic sovereignty and integrity of India by doing away the trade barriers as also an attempt by the State to provide economic protection to the States. Once, it is held that the limitation upon the legislative power stipulated in Article 303(1), 304(a) would apply to trade in liquor, there cannot be any doubt in view of several Constitution Bench decisions of this Court that Article 301 will also apply thereto. [See *Kalyani Stores (supra)*, *H. Anraj (supra)* and *Bhailal Bhai (supra)*].

126. In *A.B. Abdul Kadir and Others Vs. State of Kerala*, , this Court when the validity of a luxury tax (in the nature of excise duty) on tobacco was challenged as violative of Article 304(b), proceeded on the basis that the business was protected by Article 301 but rejected the plea, on the merits, holding that: the restrictions imposed were reasonable and in the public interest.

127. In *Anraj's case (supra)* this Court considered Entry 34 of List II in terms whereof the State Legislature has been conferred power to enact Statutes on gambling. In *Maruthi Agencies Vs. The State of Tamil Nadu and Others*, , it was held that in the event lotteries are organized by a State, sale of tickets thereof cannot be prohibited in other States on the ground that it is gambling and prohibited by List II. If trade in liquor like gambling or betting were not to be regulated by statutes it is difficult to comprehend as to why entries in respect thereof have been made in the Seventh Schedule to the Constitution.

128. The American decisions relied upon before this Court may not be held to have any application having regard to the fact that trade in liquor in the United States of America was completely prohibited at one point of time but the same was modified by reason of Constitution Twenty-first Amendment. Let me now take the case of 21st Amendment in US Constitution. In the Constitution of the United States, an express provision guaranteeing freedom from inter-State trade and commerce does not exist. There only the Congress is empowered to regulate commerce. In the States freedom on trade and commerce clause only provides for a limitation upon the power of the State Legislature but not Congress and the freedom is confined to the inter-State aspect.

129. In *Southern Pacific Co. v. State of Arizona* (1945) 325 US 761, it is stated:

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the State legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests".

It is further stated:

"The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body."

130. In the United States, the inter-State restraint trade as such is prohibited but a State is not denuded of its power imposing general taxes under its taxing power. The state has also the power to regulate such aspects of commerce which do not require a new form of national control, (See *Boblo Excursion Company v. People of the State of Michigan*, (1948) 333 US 28). Furthermore, in United States a complete prohibition was imposed. The said prohibition was sought to be relaxed by 21st Amendment which is in the following terms:

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

131. In the United States of America, the State has the requisite power to impose general taxes. Despite the same, an exemption granted in favour of local manufacturers vis-à-vis the exporters was frowned upon by the American Courts.

132. In *Bacchus Imports, Ltd. v. Herbert H. Dias* 82 L.Ed. 2d 200, the challenge was to the following effect:

"1a. Appellants challenge the constitutionality of the Hawaii liquor tax, which is a 20% excise tax imposed on sales of liquor at wholesale. Specifically at issue are exemptions from the tax for certain locally produced alcoholic beverages. The Supreme Court of Hawaii upheld the tax against challenges based upon the Equal Protection Clause, the Import-Export Clause, and the Commerce Clause. In *re Bacchus Imports, Ltd.*, 65 Haw 566, 656 P2d 724 (1982). We noted probable jurisdiction, 462 US 1130, 77 L.Ed 2d 1365, 103 S Ct 3109 (1983), and now reverse."

133. White, J, speaking for the majority stated the law thus:

"3. A cardinal rule of Commerce Clause jurisprudence is that "no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce...by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v State Tax Comm'n*, 429 US 318, 329, 50 L Ed 2d 514, 97 S Ct 599 (1977)(quoting *Northwestern States Portland Cement Co. v Minnesota*, 358 US 450, 458, 3 L Ed 2d 421, 79 S ct 357, 67 ALR2d 1292 (1959)), Despite the fact that the tax exemption here at issue seems clearly to discriminate on its face against interstate commerce by bestowing a commercial advantage on Okolona and pineapple wine, the State argues - and the Hawaii Supreme Court held - that there is no improper discrimination."

134. The Court noticed:

"(4a, 5) Much of the State's argument centers on its contention that Okolona and pineapple wine do not compete with the other products sold by the wholesalers. The State relies in part on statistics showing that for the years in question sales of Okolona and pineapple wine constituted well under one percent of the total liquor sales in Hawaii. It also relies on the statement by the Hawaii Supreme Court that "we believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii," In *re Bacchus Imports, Ltd.*, 65 Haw 582, n 21, 656 P2d, at 735, n 21, as well as the court's comment that it had "good reason to believe neither Okolona nor pineapple wine is produced elsewhere." *Id.*, at 582, n 20, 656 P 2d, at 735, n 20. However, neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present "competitive threat" to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead, they go only to the extent of such competition. It is well settled that "we need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Marryland v. Louisiana*, 451 US 725, 760, 68 L Ed 2d 576, 101 S Ct 2114 (1981).

The State's position that there is no competition is belied by its purported justification of the exemption in the first place. The legislature originally exempted the locally produced beverages in order to foster the local industries by encouraging increased consumption of their product. Surely one way that the tax exemption might produce that result is that drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the price differential that the exemption will permit. Similarly, nondrinkers, such as the maturing young, might be attracted by the low prices of Okolona and pineapple wine. On the stipulated facts in this case, we are unwilling to conclude that no competition exists between the exempted and the no exempted liquors."

135. As regards the State's right on economic protectionism it was said:

"A finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose, see *Hunt v Washington Apple Advertising Comm'n*, 432 US 333, 352-353, 53 L Ed 2d 383, 97 S Ct 2434, or discriminatory effect see *Philadelphia v New Jersey*, *supra*. See also *Minnesota v Clover Leaf Creamery Co.*, *supra*, at 471, n 15, 66 L Ed 2d 659, 101 S Ct 715. Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce. See *Pike v Bruce Church, Inc.*, 397 US 137, 142, 25 L Ed 2d 174, 90 S Ct 844 (1970). The Hawaii Supreme Court described the legislature's motivation in enacting the exemptions as follows:

"The legislature's reason for exempting 'ti root Okolona' from the 'alcohol tax' was to 'encourage and promote the establishment of a new industry,' S.L.H. 1960, c 26; Sen Stand Comm Rep No. 87, in 1960 Senate Journal, at 224, and the exemption of 'fruit wine manufactured in the State from products grown in the State' was intended 'to help' in stimulating 'the local fruit wine industry'. S.L.H. 1976, c 39; Sen Stand Comm Rep No. 40S-76, in 1976 Senate Journal, at 1056." *In re Bacchus Imports, Ltd.* *supra* at 573-574, 656 P2d, at 730.

Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry. Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect,"

136. The Learned Judge proceeded to observe:

"No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal. One of the fundamental purposes of the Clause "was to insure...against discriminating State legislation." *Welton v Missouri* 91 US 275, 280, 23 L Ed 347. In *Welton*, the Court struck down a Missouri statute that "discriminated in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product or manufacture of other states or countries..." *Id.*, at 277, 23 L Ed 347. Similarly, in *Walling v Michigan* 116 US 446, 455, 29 L Ed 691, 6 S Ct 454 (1886), the Court struck down a law imposing a tax on the sale of alcoholic beverages produced outside the State, declaring:

"A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the

United States."

See also *I.M. Darnell & Son Co. v Memphis*, 208 US 113, 52 L Ed 413, 28 S Ct 247 (1908)."

137. It was held:

"We also find unpersuasive the State's contention that there was no discriminatory intent on the part of the legislature because "the exemptions in question were not enacted to discriminate against foreign products, but rather, to promote a local industry." Brief for Appellee Dias 40. If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other. Consequently, it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers."

138. The learned Judge explained the application of 21st Amendment by posing the question:

"Whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."

and answered the same :

"Approaching the case in this light, we are convinced that Hawaii's discriminatory tax cannot stand. Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. *South-Central Timber, Development, Inc. v Wunnicke*, 467 US 82, 81 L Ed 2d 71. (1934) 104 S Ct 2237; *Hughes v Oklahoma*, 441 US 322, 60 L Ed 2d 250, 99 S Ct 1727; *Baldwin v G.A.F. Seelig, Inc.* 294 US 511, 79 L Ed 1032, 55 S Ct 497, 101 ALR 55 (1935). State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the

purpose was "to promote a local industry." Brief for Appellee Dias 40. Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment."

139. The minority opinion, however, proceeded on the basis that by reason of Twenty-first Amendment, the State has the power to create a monopoly. Such constitutional permissibility is absent from our constitutional scheme.

140. It may be noticed that the same principles as in *Atiabari* (supra) or *Automobile* (supra) have been applied by the Privy Council and the Australian Courts while interpreting Section 92 of the Australian Constitution to hold that even for any purpose for which the State has acted the legislation would not be relevant criteria for declaring it ultra vires if it is found that the same interferes with the right of trade. (See *James v. Commonwealth of Australia* (1936) A.C.578, *North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of New South Wales* (1974) 134 C.L.R. 559, *The Commonwealth and Ors. v. Bank of New South Wales and Ors.* (1949) 79 C.L.R. 497).

141. Mason, J. in *Pilkington v. Frank Hammond Pty. Ltd.* (1974) 131 C.L.R. 124 interpreted Section 92 of the Australian Constitution in the following terms:

"The section does not in terms speak of the private right of the individual to engage in trade, commerce, and intercourse among the States; it refers to trade, commerce and intercourse among the States as an entire and total concept and provides that it is to be 'absolutely free' in the sense in which this expression has been discussed in the decided cases. In saying so much the section protects the right of the individual to engage in inter-State trade, commerce and intercourse but it needs to be recognized that this protection is incidental to, and in a sense consequential upon, the protection which is given to the entire concept of inter-State trade, commerce and intercourse., including the various acts and transactions by which it is constituted."

142. Reference in this connection may also be made to *North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of New South Wales* (1974) 134 C.L.R. 559).

In India, the constitutional guarantee under Article 301 of the Constitution is more extensive than either in United States or Australia. The decisions of United States Supreme Court and Australian Supreme Court as also the Privy Council, as referred to hereinbefore, clearly demonstrate that in these countries, although States have more constitutional freedom but despite the same Commerce Clause received ample protection at the hands of the Judiciary.

143. Subba Rao, J. in *Automobile* case (supra) observed:

"The freedom declared under Article 301 may be defined as a right to free movement of persons or things, tangible or intangible, commercial or noncommercial, unobstructed by barriers, inter-State or intra-State or any other impediment operating as such barriers. To state it differently, all obstructions or

impediments, whatever shape they may take, to the free flow or movement of trade, or non-commercial intercourse, offend Article 301 of the Constitution except in so far as they are saved by the succeeding provisions."

144. The public character theory although is an important, but has a limitation on the individual right which is guaranteed; having regard to the fact that legislative restriction ultimately permits the individual State to go ahead, only subject to the reasonable restriction. The rule against enacting protectionist measures has also been noticed by the High Court of Australia in *Cole v. Whitfield* and *Anr.* (1987) 165 CLR 360, settling a long debate.

145. In *Shree Mahavir Oil Mills and Another Vs. State of Jammu & Kashmir and Others*, , this Court while rejecting an argument of justification of exemption from sales tax of small scale industrial units within the State of J & K on the ground that the commodity produced within the State and that produced in other States and sold in J & K, constitute different classes, has held as under:-

"The States are certainly free to exercise the power to levy taxes on goods imported from other States/Union Territories but this freedom, or power, shall not be so exercised as to bring about a discrimination between the imported goods and the similar goods manufactured or produced in that State. The clause deals only with discrimination by means of taxation; it prohibits it. The prohibition cannot be extended beyond the power of taxation. It means in immediate context that States are free to encourage and promote the establishment and growth of industries within their States by all such means as they think proper but they cannot, in that process, subject the goods imported from other States to a discriminatory rate of taxation, i.e., a higher rate of sales tax vis-a-vis similar goods manufactured/produced within that State and sold within that State. Prohibition is against discriminatory taxation by the States. It matters not how this discrimination is brought about..... We find it difficult to appreciate how can the concept of classification be read into Clause (a) of Article 304 to undo the precise object and purpose underlying the clause. Shri Verma repeatedly stressed that the object underlying the impugned measure is a laudable one and that it seeks to serve and promote the interest of the State of Jammu and Kashmir which is economically and industrially an undeveloped State, besides being a disturbed State. We may agree on this score but then the measures necessary in that behalf have to be taken by the appropriate authority and in the appropriate manner. Part XIII of the Constitution itself contains adequate provisions to remedy such a situation and there is no reason why the necessary measures cannot be taken to protect the edible oil industry in the State in accordance with the provisions of the said Part."

146. It is thus evident that any manner of extension of protection to trade or business within the frontiers of State, at the cost of free inter-State trade or commerce will not stand the test of Article 301. The scheme of compensatory taxes, operate in an entirely different sphere. They cannot be confused with measures which are both in form and substance protectionist impositions.

147. In *Brown v. Maryland* (1827) 12 Wheat 419, the US Supreme Court in the context of the competence of the States to enact and impose a duty on imports or exports has held that the power to regulate inter state commerce in non-discriminatory fashion and "to break down or to eliminate barriers to trade amongst the States" is an essential federal power. It has, therefore, been said that in the absence of such a power "local interest exerting powerful influences in State Legislatures would, in the long run prefer home industries over those that are out of state, establish tariff barriers, or employ other means tending to Balkanize the nation into hostile trade areas," [See also William O. Douglas J; *From Marshall to Mukherjea: Tagore Law Lectures 1956* P. 169].

148. In *James v. Commonwealth of Australia* 1936 AC 578, referring to McArthur's case 28 CLR 530 it was held:

"It is now convenient to examine the actual language of the Constitution so far as relevant, in order to ascertain its true construction. The first question is what is meant by "absolutely free" in s. 92, It may be that the word "absolutely" adds nothing. The trade is either free or it is not free. "Absolutely" may perhaps be regarded as merely inserted to add emphasis. The expression "absolutely free" is generally described as popular or rhetorical. On the other hand, 'absolutely' may have been added with the object of excluding the risk of partial or veiled infringements. In any case, the use of the language involves the fallacy that a word completely general and undefined is most effective. A good draftsman would realize that the mere generality of the word must compel limitation in its interpretation. "Free" in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed out in McArthur's case, Free love, on the contrary, means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject however, to his condition or behavior not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs.

"Free" in Section 92 cannot be limited to freedom in the last mentioned sense. There may at first sight appear to be some plausibility in that idea, because of the starting-point in time specified in the section, because of the sections which surround Section 92, and because the proviso to Section 92 relates to customs duties. But it is clear that much more is included in the term; customs duties and other like matters constitute a merely pecuniary burden; there may be different and perhaps more drastic ways of interfering with freedom, as by restriction or partial or complete prohibition of passing into or out of the State.

Nor does "free" necessarily connote absence of discrimination between inter-State and intra-State trade. No doubt conditions restrictive of freedom of trade among the States will frequently involve a discrimination; but that is not

essential or decisive. An Act may contravene Section 92 though it operates in restriction both of intra-State and of inter-State trade."

149. However, in India Part XIII of the Constitution relates both to inter-State trade and commerce as also intra-State trade.

150. In *Fox v. Robbins* 8 CLR 115, It was held:

"Section 92 of the Constitution does not reframe State Acts by making new affirmative legislation not contemplated by the State Parliament. It prevents adverse discrimination from being lawful; so far as the Act can be effectively worked in conformity with the constitutional requirement it still stands; so far as it cannot it simply ceases to operate."

151. Once it is held that the principle of *res-Extra commercii* is not applicable, the decisions in *Kalyani Stores* (supra), *H. Anraj* (supra) and *Bheilal Bhai* (supra) having been rendered by a Constitution Bench would constitute binding precedents. Once it is held that the Legislature has no power to levy any excise duty on imported liquor in excess of the countervailing duty within the State, having regard to the constitutional limitation imposed in terms of Entry 51, List II of Seventh Schedule to the Constitution, such discriminatory levy must be held to be violative of Article 303(1) and 304(a) of the Constitution. As import fee is an impost thus, levy thereof in addition to countervailing duty would clearly attract the wrath of Article 304(a) of the Constitution. It has not been and could not have been contended that the tax is compensatory in nature as was the case in *Automobile* (supra). I am, therefore, of the opinion that the impugned impost cannot be upheld.

152. Before parting, however, I may notice the submission made by Mr. Iyer on behalf of the State of Kerala that the licensees, having obtained a privilege and enjoyed the benefit out of it, cannot, turn round subsequently and repudiate the obligations subject to which they obtained the privilege. The submission of Mr. Iyer is wholly mis-conceived for more than one reason. The manufacturers of liquor outside the State of Kerala did not obtain any privilege from the State. The decisions relied upon by the learned counsel, namely, *Har Shankar* (supra), *Jage Ram* (supra), *Lal Chand* (supra), *Dial Chand Gian Chand and Company* (supra), thus, cannot be said to have any application in the instant case. The decisions in these cases were rendered in the fact situation obtaining therein. The licensees therein questioned the power of the State to hold auction by the State and/or they refused to comply with the terms and conditions of licence. In *tact* in *Harshankar* (supra) the Court on the factual matrix obtaining therein clearly came to the conclusion that the writ petition was not maintainable as thereby the licensees sought avoidance from compliance of contractual terms and licensing conditions and, thus, they were not entitled to any relief. The writ petitioners before the High Court had not questioned any of the terms and conditions of the licence. In Kerala case they are not even licensees at all. They are manufacturers of potable liquor, licences where for had been granted by other States. The State

of Kerala has not parted any privilege in their favour. Even otherwise when the legislative competence of a State is in question, the same goes to the root of the jurisdiction. Once it is found that the State Legislature has exceeded its jurisdiction in imposing the impugned levy, the same being a fraud on the Constitution cannot be sustained on the procedural doctrine of estoppel or waiver.

153. For the reasons aforementioned. civil Appeal No. 3017 of 1997 is dismissed and impugned judgment rendered by the Punjab and Haryana High Court quashing the Notification impugned before it is upheld. On 23.7.1998 when prayer for grant of interim relief was being considered, a prayer was made by Shri Harish N. Salve, learned Senior Counsel, appearing on behalf of the State of Punjab, to the effect that operation of impugned judgment rendered by the High Court may be stayed as the State was ready to undertake before this Court to refund the amount that would be realized by way of import duty together with interest thereon @ 15% per annum to the respondents in the event of dismissal of State's appeal by this Court and the said prayer having been acceded to, this Court stayed the operation of the judgment rendered by the High Court upon the aforesaid undertaking. In view of this, the State of Punjab is hereby directed to refund the amount that has been realized by it by way of import duty to the respondents together with interest thereon @ 15% per annum from the date of its realization till payment, which must be made within a period of three months.

154. civil Appeal Nos. 2696-2697 are allowed and the Notification impugned before the Kerala High Court is quashed.

155. There shall be no order as to costs.

S.B. Sinha, J.

#### THE REFERENCE:

156. A three-Judge Bench of this Court has made a reference to the Constitution Bench for deciding as to whether, having regard to the decisions of the Constitution Benches of this Court in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, and *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, the principles laid down in *Kalyani Stores v. State of Orissa and Ors.* (1966) 1 SCR 365, wherein Article 301 of the Constitution of India has been held to be applicable to trade in liquor, is correct.

#### PROPOSITIONS OF LAW:

157. The following, questions inter alia are required to be answered for deductions of the propositions of law involved in the matter:

1. Whether the constitutional validity of a statute can be determined on the basis of the interpretation given to the maxim 'res extra commercial'?

2. Whether the freedom to carry on trade or business as envisaged under Article 301 of the Constitution of India can be held to be inapplicable to the trade of

liquor which is permitted by the State itself?

3. If Article 14 of the Constitution of India is applicable in the matter of grant of contract by the State, in exercise of its power under Article 298 of the Constitution, can it be said that another constitutional provision, namely, Article 301 would not be applicable?

4. Whether in interpreting a constitutional provision, the Court should take into consideration international treaties and covenants covering the subject-matter and having regard to the social milieu?

5. Whether Kalyani Stores (supra), having been rendered by a Constitution Bench, is it permissible for another coordinate bench to ignore the said decision relying on or on the basis of subsequent decisions which either had not discussed the said decision nor overruled the same?

158. The Punjab and Haryana High Court applied Kalyani Stores (supra) for striking down the provisions contained in Sections 16 and 31 of the Punjab Act, 1932. The Kerala High Court, however, dismissed the writ petition upholding the validity of Section 17 of the Kerala Abkari Act, 1902 on the sole ground that by reason of the notification impugned in the writ petition a regulatory fee was imposed. The Kerala High Court, therefore, had no occasion to deal with the questions involved herein.

#### LEGISLATIVE COMPETENCE:

159. The Acts are pre-constitutional ones but the impugned amendments thereto and/or notifications issued thereunder are post-constitutional. Such legislative power of the State admittedly must be traceable to any of the three Entries, viz., 8, 51 and 66 of List II of the Seventh Schedule of the Constitution of India, which read as under :

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

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :-

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other, narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.;

66. Fees in respect of any of the matters in this List, but not including fees taken in any court."

160. Laws relating to imposition of duty of excise is within the legislative competence of the Parliament in terms of Entry 84, List I of the Seventh Schedule of the Constitution of India. One of the exceptions to the said field is

imposition of duty on alcoholic liquor for human consumption, which is exclusively within the legislative competence of the State. The States of Punjab and Kerala exercised its constitutional power in enacting the said Act, the sources whereof are referable to Entry 8 or 51 of List II of the Seventh Schedule of the Constitution of India. The validity of the impugned provisions of the said Acts, therefore, revolves round the question as to whether the same fulfil constitutional requirements.

161. Entry 8 of List II does not envisage any control over import. Entry 51 of List II empowers the State to levy countervailing duty at the same or lower rates of excise duty levied on similar goods produced in that State.

162. Entry 8 of List II of the Seventh Schedule of the Constitution of India uses the expression 'that is to say' which is descriptive, enumerative and exhaustive and circumscribes to a great extent the scope of the said entry [See Commissioner of Sales Tax, Madhya Pradesh Vs. M/s. Popular Trading Company, Ujjain, .

163. In Indian Aluminium Company Ltd. Vs. Asstt. Commissioner of Commercial Taxes (Appeals) and Another etc. etc., the expression 'that is to say' both in original Entry 11 and in the new Entry 67 has been held to have clearly indicated that the items mentioned therein were exhaustive.

164. It is, therefore, evident that import of liquor in terms of the licences granted under the provisions of a statute cannot be the subject-matter of regulation within the purview of Entry 8 of List II of the Seventh Schedule of the Constitution of India.

165. Furthermore, on a plain reading of Entry 51 no duty can be imposed on import of liquor over and above the countervailing duty. Ex-facie, therefore, the imposition of import duty on liquor is unconstitutional.

166. For determining the legislative competence reference to Directive Principles contained in Part IV of the Constitution of India may be proper (as was done in Welfare Asscn. A.R.P., Maharashtra and Another Vs. Ranjit P. Gohil and Others, but not when the constitutionality of a taxing statute is in question.

#### RIGHT OF STATE TO CARRY ON BUSINESS:

167. The right of a State to carry on business of liquor as being a part of its exclusive privilege must be traced to Article 298 of the Constitution of India. [See Kapila Hingorani Vs. State of Bihar, .

168. While granting largess or licence in such trade, the State must exercise its functions under Article 298 within the parameters of the constitutional scheme, which would include imposition of such regulation and would not be violative of Article 301 of the Constitution of India.

#### RES EXTRA commercial:

169. In *R.M.D. Chamarbaugwala* (supra), *Har Shankar* (supra) and *Khoday Distilleries Ltd.* (supra), this Court relying on or on the basis of a maxim 'res extra commercial' observed that trade in liquor is not a fundamental right within the meaning of Article 19(1)(g) of the Constitution of India.

170. The Constitution Bench of this Court in those decisions had neither referred to nor discussed the dictionary or legal meaning of 'res extra commercial' which means those things which had been dedicated to the public, such as public roads, rivers, title of owners etc. The question, therefore, is whether the said maxim can be applied in relation to a trade the field whereof is covered by legislative enactments? Answer to the said question, as would appear from the discussions made hereinafter must be rendered in the negative.

171. As a sovereign prior to coming into force of the Constitution of India, the State may have exclusive privilege to do business in liquor but all post-constitutional statutes and actions taken thereunder must relate to a source of power under the Constitution of India. Even if there is no express provision in the Constitution, principles of constitutionalism exist providing that, for the said purpose, the relevant statutes should also be looked into. A statute is enacted by the State Legislature or the Parliament having regard to one or the other entry made in the three lists contained in the Seventh Schedule of the Constitution. The Punjab Excise Act and the Kerala Abkari Act although pre-constitutional Acts, the subsequent amendments which are impugned in these matters must, thus, be referable either to Entry 8 or Entry 51 of List II of the Seventh Schedule of the Constitution of India. When a statute governs the trade in a particular commodity, the provisions contained therein would only regulate the same. The Constitution of India or the State Legislatures do not state that trade in liquor ipso facto is totally prohibited. States of Punjab and Kerala have not adopted any policy of prohibition whether in whole or in part.

172. For imposing total prohibition the State must formulate a policy decision having regard to Article 47 of the Constitution of India, necessitating issuance of a declaration either through legislative process or through executive instructions.

173. For judging the validity of taxing statutes, Part IV of the Constitution or Article 47 will have no role to play. Recourse to Part IV or Part IVA of the Constitution can only be taken as regard interpretation of a legislative enactment for giving effect to objects and purport thereof and not for any other purpose. A statute imposing a levy or tax must not only satisfy the tests of Article 245 of the Constitution but also other provisions of the Constitution.

174. Trade in liquor is regulated by statutes and, thus, if it is carried out within the parameters of the regulatory provisions and subject to observance of the terms and conditions of the licence, it would be legal. All rights and obligations flowing from the grant of such licence being mutual would be binding on the parties.

175. If the Constitution or the relevant statutes do not prohibit carrying out a

trade/business, the courts cannot do so by taking recourse to interpretive process or on the supposed grounds of public morality.

176. Whereas lottery was looked down upon in *Chambarbaugwala* (supra) and *B.R. Enterprises Vs. State of U.P. and Others*, with reference to scriptures which are thousands years old, the Court did not make a similar attempt in case of *Indian Made Foreign Liquor or Imported Liquor* nor considered that sacramental wine has received statutory protection under the laws validly enacted. [As for example see *Bombay Sacramental Wine Manufacturing Rules, 1950* framed under the *Bombay Prohibition Act, 1949*. Sacramental wine refers both to Christian and Hindu tenets.]

177. In *Indian Handicrafts Emporium and Others Vs. Union of India (UOI) and Others*, , a three-Judge Bench of this Court had noticed how education was held to be outside the purview of 'occupation' within the meaning of Article 19(1)(g) of the Constitution of India in *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, but stood overruled by an eleven-Judge Bench of this Court in *T.M.A. Pai Foundation and Others Etc.Etc. Vs. State of Karnataka and Others Etc.Etc.*, a following *Sodan Singh and Others Vs. New Delhi Municipal Committee and Others*, . The said view has been reiterated by a Constitution Bench in *Islamic Academy of Education and Another Vs. State of Karnataka and Others*, .

178. In *Indian Handicrafts Emporium* (supra), this Court pointed out that judicial vagaries should not be permitted to have its play in such matters stating:

"The High Court has referred to the decision in *P. Crowley v. Henry Christensen* (1890) 34 Law. Ed. 620 so as to hold that a citizen has no inherent right to deal in intoxicating liquors. Therein the U.S. Supreme Court was dealing with a federal law imposing restrictions on a person dealing in retail trade in liquor without obtaining a due licence therefore. The law was upheld negating the contention that the restriction was unreasonable. It was not held therein that trade of liquor is impermissible in all situations.

Restriction in trade, therefore, would depend upon the nature of the article and the law governing the field. By reason of judicial vagaries, fundamental right under Article 19(1)(g) of the Constitution cannot be further restricted. (See *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, .

179. With respect, I am of the opinion that constitutionality of a statute could not determined solely relying on or on the basis of the said maxim without any reference to the limitations contained in the Constitution.

CASE LAWS - Analysis of:

(A) Case Laws Where 'Res Extra commercial' was applied:

180. In *Chambarbaugwala* (supra), this Court applied the doctrine of *res extra commercial* having regard to the obnoxious nature of trade but in subsequent

decisions the said principle had been extended mechanically to trade of liquor without tracing the history as to whether Indian Made Foreign Liquor (IMFL) or the other expensive liquors imported from foreign country would fall in that category. No discussions have been made as to in which areas and in relation to which stratas of the society consumption of liquor was looked down upon. The fact that at different ages, at least in respect of liquor in higher echelons of the society drinks became a part of 'culture' was not taken into consideration.

181. For the purpose of determination of the issue, the Courts were required to take into consideration, the history, the social perceptions vis-à-vis the state policy and other relevant factors before arriving at a decision that it is necessarily a 'social evil'. Law is not to be laid down having regard to the perceptions of a Judge but on premises having a solid foundation therefore, both on facts as well as in law.

182. The question is required to be considered in today's scenario (which would be discussed a little later), but it suffices to point out at this stage that what was frowned upon a few decades back, has received the acceptance of society today.

183. In *R.M.D. Chambarbaugwala* (supra), with highest respect, a wrong approach was adopted holding that the Constitution-makers of India, out to create a welfare State, could never have intended to raise betting and gambling to the status of trade, commerce or intercourse without taking into consideration the fact that there exists legislative entries therefore and thus the field is covered by Article 245 of the Constitution.

184. In *Fatehchand Himmatlal and Others Vs. State of Maharashtra*, this Court upheld the validity of the Maharashtra Debt Relief Act, 1976 holding that every systematic, profit-oriented activity, however, sinister, suppressive or socially diabolic, cannot, ipso facto, exalt itself into a trade. The validity of the Act was upheld on the touchstone - of Article 304(b) of the Constitution of India. The binding decision of *Kalyani Stores* (supra), unfortunately was not noticed.

185. In *Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others*, an order contained in a teleprinter message imposing the requirement for making of an endorsement by the Deputy Marketing Officer or the Senior Marketing Officer or the physical verification of stocks of wheat during the course of transit was held to be a restriction on the freedom of trade, commerce and intercourse within the country, i.e., across the State or from one part of the State to another. The same was held to be regulatory measures as compensatory tax was imposed thereby. Such compensatory tax, as is well-settled, is permissible. (See *The State of Himachal Pradesh and Others etc. Vs. Yash Pal Garg (dead) by LRs and Others etc., H.H. Exporters etc. and Jai Mata Rolled Glass Ltd. and Another etc., and Jindal Strips Ltd. and Anr. v. State of Haryana and Ors.* 2003 (8) SCALE 206)

186. It is, however, relevant to note that it was categorically stated therein "The

regulatory measures should, however, be such as do not impede the freedom of trade, commerce and intercourse."

187. The said decision does go to show that validity of these regulatory measures are required to be considered on the constitutional anvil on its own force.

188. In *State of Tamil Nadu Vs. Hind Stone and Others*, validity of rule 8C of the Tamil Nadu Minor Mineral Concession Rules, 1959 came to be questioned. The said rule was made by the State in exercise of its power conferred upon it u/s 15 of the Mines and Minerals (Regulation and Development) Act, 1957. By reason of said rule lease of quarrying in respect of black granite was proposed to be granted only, in favour of any corporation wholly owned by the State. Such a power also exists in the Central Government u/s 17A of the 1957 Act. As the said rule had nothing to do with inter-State trade or commerce, it was held that the same was outside the purview of Article 301 and in any event would come within the purview of Article 305.

189. We are not at all concerned with the said question, as therein the Court was dealing with question of State monopoly created under a statute.

190. We may notice that such monopoly has also been held to be permissible in terms of the provision of Motor Vehicles Act, 1988.

191. In *State of Tamil Nadu and others Vs. M/s. Sanjeetha Trading Co. and others*, , a complete prohibition was issued on export of certain items from the concerned States. The question which arose for consideration of the Court was whether such a complete prohibition on export was permissible. It was held:

"The framers of the Constitution neither wanted to ensure the freedom of trade and commerce on the pattern of the freedom guaranteed by Section 92 of the Australian Constitution nor they thought it proper that the different States should have unfettered and unrestricted power while imposing prohibitions on inter-State trade. In the larger interest of the nation, there must be free flow of trade, commerce and intercourse both inter-State and intra-State but at the same time the regional problems cannot be Ignored altogether. Whenever there is a clash between the national interest and the interest of the State because of which any crisis is created, the Union has power of intervention. According to us, the expression "free trade" cannot be interpreted in an unqualified manner. Any prohibition on movement of any article from one State to another has to be examined with reference to the facts and circumstances of that particular case-whether it amounts to regulation only, taking into consideration the local conditions prevailing, the necessity for such prohibition and what public interest is sought to be served by imposition thereof..."

192. Such prohibition is permissible both under Clause (6) of Article 19 and Article 302 of the Constitution. This decision is again an authority for the proposition that even in relation to essential commodities or goods over which

prohibition is required to be imposed in larger public interest, the question must be tested on the anvil of Articles 19(1)(g) and 301 of the Constitution of India and not on applying an age old maxim.

193. Har Shankar (supra) was rendered in a situation where the licensee wanted to avoid the rigours of the licence. Therein the appellants applied for and accepted licence to vend foreign liquor. Licence granted to them was subject to the provisions of the Punjab Excise Act and the Rules framed thereunder. Although, the parties entered into a concluded contract, the appellant therein filed a writ petition asking for a direction quashing the auction held on March 23, 1968 and secondly, they asked that the respondents be restrained from enforcing the obligations arising under the terms and conditions of the auction.

194. In the aforementioned backdrop, the Court distinguished K.K. Narula (supra) stating:

"It was unnecessary in Krishna Kumar Narula's case (supra) to examine the question from this broader point of view, as the only contention bearing on the constitutional validity of the provision impugned therein was not permitted to be raised as it was not argued in the High Court. The discussion of the question whether a citizen has a fundamental right to do trade or business in liquor proceeded in that case, avowedly, from a desire to clear the confusion arising from the "different views" expressed by the two Judges of High Court. This may explain why the Court restricted its final conclusion to holding that dealing in liquor is business and the citizen has a right to do business in that commodity. The court did not say, though such an implication may arise from its conclusion, that the citizen has a fundamental right to do trade or business in liquor. If we may repeat, Subba Rao, C.J. said :

We, therefore, hold that dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make a law imposing reasonable restrictions on the said right, in public interests.

It is significant that the judgment in Krishna Kumar Narula's case does not negate the right of the State to prohibit absolutely all forms of activities in relation to intoxicants. The wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants on such terms of general application as the State deems expedient."

195. It is relevant to note that in Har Shankar (supra) itself, it was stated.:

"Since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. By Article 298 of the Constitution, the executive power of the State extends to the carrying on of any trade or business and to the making of contracts for any purpose."

196. In State of Bihar and Others Vs. Harihar Prasad Debuka and Others, the question was answered again on the anvil of Article 304(b) of the Constitution of India.

197. Government of Maharashtra and Others Vs. Deokar's Distillery, has no application in the present case. The question which arose for consideration therein was as to whether the exercise of power u/s 58A of the Bombay Prohibition Act, 1949 so as to recover the arrears of salaries of the officers deputed for excise supervision was permissible. It was not a case where an executive action was under challenge on the touchstone of Articles 19(1)(g) and 301 of the Constitution of India. Such a legislation was found to be within the purview of Entry 8, List II of the Seventh Schedule of the Constitution of India stating:

"Under Entry 8 List II in the Seventh Schedule to the Constitution of India and thereby under Sections 49 and 143(2)(V) of the Prohibition Act, the State has the exclusive right/ privilege in respect of potable liquor and the State, in our opinion, can charge any reasonable expenses or even consideration for permitting such activity by grant of licence and that the respondents ought to comply with all reasonable orders, as undertaken by them while obtaining the licence."

198. In B. R. Enterprises (supra), lottery was not held to be a trade as there no skill was involved in the game. It was held that therein there is only an element of chance in contrast to trade and commerce where there is an exchange of goods, production or properties or exchange of any article either by barter or money. The said principle would not apply herein.

199. Even in B.R. Enterprises (supra) lotteries were held to be 'goods' for the purpose of Article 298 being included in the expression 'trade and business'. Despite holding that Articles 301 and 304 of the Constitution of India were not applicable, it having realised that Section 5 of the Lotteries Act was without any guidelines read down the provisions thereof evidently to bring it within the purview of Articles 14 and 246 of the Constitution of India.

200. The reasoning in the aforesaid judgment in the case of B.R. Enterprises v. State of UP (supra) - (2 Hon'ble Judges) is contrary to and in conflict with the earlier decisions in the cases of (i) H. Anraj and Others Vs. State of Maharashtra, (ii) H. Anraj Vs. Government of Tamil Nadu, , (iii) State of Haryana Vs. Suman Enterprises and Others, .

201. The Court noticed that in Krishna Kumar Narula, a Constitution Bench has held that a right to trade in liquor was business but committed a manifest error in jumping to the conclusion that it was reversed in Khoday Distilleries (supra), which was neither in fact done nor could be done as both of the judgments were rendered by coordinate benches. K.K. Narula (supra) was only sought to be explained in Khoday Distilleries (supra).

202. In Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others, the question which arose for consideration was as to whether the Parliament's power to legislate in respect of Union Territory was plenary and unfettered by entries in the Lists of the Seventh Schedule of the Constitution of India having regard to

Entry 97, List I of the Seventh Schedule of the Constitution. It was held :

"Accordingly, if excise or countervailing duty could be levied on country liquor manufactured or imported into Delhi, albeit other conditions for the levy of such duty being fulfilled, Parliament would not lack competence to levy the same only because levy of such duty on alcoholic liquors for human consumption is within the competence of a State. But it must be confessed that as country liquor is not manufactured in Delhi, the Parliament could not under Entry 51 of the State List levy either excise or countervailing duty on it. Merely because Parliament could not levy countervailing duty on country liquor imported into Delhi because country liquor is not manufactured in Delhi, it does not exhaust the power of Parliament to levy some other duty on the import of liquor if it is otherwise constitutionally permissible."

(Emphasis supplied)

203. Thus, in that case also the Parliamentary competence as regard a legislation was considered.

204. The impugned duty therein, therefore, even in that case was tested on the anvil of the constitutional provisions.

205. *Khoday, Distilleries* (supra) is to be read as a whole. It does not say that no right can be claimed by a trader even after grant of licence. Exclusive privilege theory in *Khoday Distilleries* (supra) if read in its entirety would lead to the conclusion that the same had been considered only in a no right situation.

206. In *Khoday Distilleries* (supra) Inter alia validity of rules framed by various States was in question. Sawant, J. analyzing several decisions stated:

"The proposition of law laid down there has to be read in conformity with the proposition laid down in that respect by the other decisions of this Court not only to bring comity in the judicial decisions but also to bring the law in conformity with the provisions of the Constitution. The fundamental rights conferred by our Constitution are not absolute. Article 19 has to be read as a whole. The fundamental rights enumerated under Article 19(1) are subject to the restrictions mentioned in Clauses (2) to (6) of the said article. Hence, the correct way to describe the fundamental, rights under Article 19(1) is to call them qualified fundamental right's. To explain this position in law, we may take the same illustration as is given in *K.K. Narula* case. The citizen has undoubtedly a fundamental right to carry on business in ghee. But he has no fundamental right to do business in adulterated ghee. To expound the theme further, a citizen has no right to trafficking in women or in slaves or in counterfeit coins or to carry on business of exhibiting and publishing pornographic or obscene films and literature. The illustrations can be multiplied. This is so because there are certain activities which are inherently vicious and pernicious and are condemned by all civilised communities. So also, there are goods, articles and services which are obnoxious and injurious to the health, morals, safety and welfare of the general

public. To contend that merely because some activities and trafficking in some goods can be organised as a trade or business, right to carry on trade or business in the same should be considered a fundamental right is to beg the question. The correct interpretation to be placed on the expression "the right to practise any profession, or to carry on any occupation, trade or business" is to interpret it to mean the right to practise any profession or to carry on any occupation, trade or business which can be legitimately pursued in a civilised society being not abhorrent to the generally accepted standards of its morality. Human perversity knows no limits and it is not possible to enumerate all professions, occupations, trades and businesses which may be obnoxious to decency, morals, health, safety and welfare of the society. This is apart from the fact that under our Constitution the implied restrictions on the right to practise any profession or to carry on any occupation, trade or business are made explicit in Clauses (2) to (6) of Article 19 of the Constitution and the State is permitted to make law for imposing the said restrictions. In the present case, it will be Clause (6) of Article 19 which places restrictions on the fundamental right to do business under Article 19(1)(g). These restrictions and limitations on fundamental right are implicit and inherent even in the fundamental rights spelt out in the American Constitution, although they are not explicitly stated as in our Constitution by Clauses (2) to (6) of Article 19. "

207. It was further observed:

"Whether one states as in K.K. Narula case that the citizen has a fundamental right to do business but subject to the State's powers to impose valid restrictions under Clause (6) of Article 19 or one takes the view that a citizen has no fundamental right to do business but he has only a qualified fundamental right to do business, the practical consequence is the same so long as the former view does not deny the State the power to completely prohibit, trade or business in articles and products like liquor as a beverage, or such trafficking as in women and slaves. This Court in K.K. Narula case has not taken such view. "

208. Khoday Distilleries (supra), thus, does not suggest that there is no fundamental right to trade in liquor at all. The Court explaining the doctrine of 'res-Extra commercial' observed:

- (a) There cannot be a business in crime;
- (b) What is res-Extra commercial would be trade or business in liquor when it is completely prohibited;
- (c) The State can create a monopoly to do the business itself or through an agency in terms of Article 19(6) or otherwise;
- (d) Restrictions and limitations on the trade or business in potable liquor can be both under Article 19(6) or otherwise;
- (e) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject

to the limitations, if any, and the State cannot make a discrimination between the citizens who are qualified to carry on the trade or business.

209. The various rights granted in favour of a citizen under the provisions of the Constitution must be considered to be an amalgam of rights. Such rights are required to be given effect to and when a law is enacted or an executive instruction is issued prohibiting or regulating such rights, the conditions precedent therefore under the relevant Constitutional provisions individually and separately are required to be fulfilled. [See *Rustom Cavasjee Cooper Vs. Union of India* (UOI),

(B) Case Laws where the said Doctrine was not applied :

210. In *H. Anraj Vs. Government of Tamil Nadu*, (2 Hon'ble Judges) firstly this Court held (i) lotteries were "goods" in part and could be amenable to levy of Sales Tax; and (ii) quashed and struck down the notification of the State of Tamil Nadu exempting the lotteries organized by the State of Tamil Nadu from levy of sales tax as violative of Articles 14, 301 and 304 since by such discrimination it affected the free flow of trade and commerce. It was held that the lotteries would be covered under Articles 301 to 304 of the Constitution of India.

211. Secondly, this Court in the case of *H. Anraj and Others Vs. State of Maharashtra*, held that the subject "lotteries organized by the Government of India or the Government of State" is carved out the subject "betting and gambling" in Entry 34 List II to the 7th Schedule to the Constitution of India and placed in Entry 40 List 1 to the 7th Schedule of the Constitution of India and as such Parliament alone can make law in respect of lotteries covered by Entry. 40. Thus if the legislative power relating to the lotteries organized by the Government of India or the government of State are especially carved out of the State List to the Union List, then the power is consciously taken away from the States and Parliament alone will have the legislative power on the subject.

212. The Constitution Bench of this Court divided lotteries into five categories laying down the law that the State has no power to ban the sale of lottery tickets.

213. One of us (Dr. AR. Lakshmanan, J.) in *Maruthi Agencies Vs. The State of Tamil Nadu and Others*, tested the validity of a statute holding that in the event lotteries are organized by the State, sale of tickets thereof cannot be prohibited in other States on the ground that the same is gambling having regard to the relevant entries in List II of the Seventh Schedule of the Constitution of India.

214. Tobacco which is as harmful as liquor had also not been brought within the purview of doctrine of *res extra commercial*. It had been given the protection Of the Parliamentary Act, known as Tobacco Act and thus was taken outside the purview of the State legislative competence. Apart from *Kalyani Stores* (supra) and *H. Anraj* (supra), even in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , this Court has clearly held that Article 301 shall be applicable in relation to tobacco holding :

"...There can be no doubt, therefore that even though it is the sale in Madhya Bharat of the imported goods that creates the liability to tax and not the import by itself, the trade and commerce as between Madhya Bharat and other parts of India is directly impeded by this tax..."

(C) Some decisions where this court enforced the rights of a grantee:

215. In *State of Bihar and Others Vs. Industrial Corporation Pvt. Ltd. and Others*, , it was held:

"...Revenue being a subject-matter of legislation in terms of Entry 8 of List II of the Seventh Schedule of the Constitution of India, the recovery thereof must be made in terms of the provisions of a legislative Act enacted pursuant thereto and not by reason of any executive fiat."

216. In *Industrial Corporation Pvt. Ltd. (supra)*, it was further held :

"In the present case, what we find is that before creating a demand of penal duty or penalty, there was no adjudication by any authority as regard to the breach committed by the respondents. We also find that no opportunity of any kind was offered to the respondents before the demand as regard the penal duty was pressed against the respondents. The matter was not even examined as to what was the reason for shortfall in the production of rectified spirit. The Molasses Act does not provide for imposition of such penalty in the event of shortfall of spirit. It must, therefore, necessary be held that the imposition of the impugned penalty being against the principles of natural justice is illegal and void.

The statutory authorities must act within the four-corners of a statute. They could take recourse to the proceedings for levy of penalty and the recovery thereof from the respondents only in the event there existed any agreement or statutory provision therefore. Such a power did not exist in the Commissioner of Excise or the superintendents of Excise who had issued the impugned demand notices."

217. In that case, therefore, it was laid down that the executive authorities of the State in exercise of their purported regulatory power cannot hold the people who are legally carrying on their business in liquor in ransom. They, on the ground of contractual power or otherwise, cannot be permitted to travel beyond the four-corners of a statute by levying any penalty or any other amount which is not contemplated thereunder.

218. The aforementioned decision is also an authority for the proposition that rule of law must prevail. The country is governed by the rule of law and not by whims and caprice of the executive authorities. The court cannot be a party to such whims and caprices.

219. In *State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others*, , this Court while examining the validity of fees levied on denatured spirit noticed that the principles laid down in *Bihar Distillery* were doubted in *Deccan Sugar*

and Abkari Co. Ltd. Vs. Commissioner of Excise, A.P., , and referred to a larger Bench but in its decision dated 13.2.2003 in C.A. No. 4355 of 1985 - Deccan Sugar & Abkari Co. Ltd. v. Commissioner of Excise, A.P., although it followed Synthetics and Chemicals (supra) and State of U.P. and Others Vs. Modi Distillery and Others, the decision in Bihar Distillery was not expressly overruled. The Bench, thus following Synthetics and Chemicals held that the levy of such fee was not justified in terms of Entry 66, List II of the Seventh Schedule of the Constitution of India by striking down the same. It was observed :

"The question is (to borrow the language in Synthetics) whether in the garb of regulations a legislation which is in pith and substance, as we look upon the instant legislation, a fee or levy which has no connection with the cost or expenses administering the regulation, can, be imposed purely as a regulatory measure. Judged by the pith and substance of the impugned legislation, we are definitely of the opinion that these levies cannot be treated as part of regulatory measures..."

220. Yet again in State of U.P. and Others Vs. Jagjeet Singh and Others, a three-Judge Bench of this Court while interpreting Rule 34 of U.P. Excise Licenses (Tender-cum-Auction) Rules, 1991 vis-à-vis Para 179 of the Excise Manual enforced the right of the liquor vendors as regard remission of fee in terms thereof. The said decision is, therefore, an authority for the proposition that the rights contained in the statutory rules can be enforced in a given situation. Thus, it cannot said that the licensees have no enforceable right at all.

221. The statute lays down that the Acts regulating the trade would be lawful, if done in the manner and to the extent provided by the provisions thereof or any rules, regulations or orders made thereunder.

222. As the matter has been discussed by B.N. Agrawal, J. in some details, it is not necessary to notice other judgments herein.

#### APPLICATION OF THE CONSTITUTIONAL PROVISIONS:

223. Part III of the Constitution of India, in general, and Articles 14 and 19, in particular, not only intend to confer very valuable rights to the citizens but also provides for protection from the legislative and executive vagaries. The legislature as also the executive in terms of the provisions of the Constitution of India must not only act within the constitutional parameters but also act reasonably and in public interest. I may, however, hasten to add that the rights under Articles 14 and 19 are not absolute. Article 19 provides for reasonable restrictions.

224. What is the meaning of 'reasonable restriction' is the question. Article 19(1) (g) of the Constitution guarantees to all citizens to practice any profession, or to carry on any occupation, trade or business. Clause (6) of Article 19 empowers the State to make laws imposing reasonable restrictions on the exercise of the right in the interest of general public. Freedom under Article 19(1)(g), however,

can be completely curtailed in certain circumstances but it would depend upon the nature of the mischief which is sought to be remedied. For the aforementioned purpose dealing in liquor, trading in dangerous goods as explosives, trafficking in women, toutism, essential commodities and realisation of tax have been placed in the same category. [See *Har Shankar v. Dy Excise Commer. Of Taxation* (supra), *Cooverjee B. Bharucha v. Excise Commissioner* [1954 SCR 873], *State of Uttar Pradesh and Others Vs. Synthetics and Chemicals Ltd. and Others*, , *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, , *In Re: Phool Din and Others*, , *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, ; *Madhya Bharat Cotton Association Ltd. Vs. Union of India (UOI) and Another*, ; and *Mohd. Hanif Quareshi and Others Vs. The State of Bihar*, .

225. In *Union of India (UOI) and Another Vs. International Trading Co. and Another*, this Court held:

"Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration."

226. Those, however, who fall in exceptional categories in relation to carrying on a business, total prohibition would not be regarded as unreasonable restriction. It is also trite that in such a situation, the greater the restriction, the more would be the need of strict scrutiny by the courts. [See *Narendra Kumar and Ors. v. The Union of India and Ors.* - 1960 (2) SCR 3751.

227. As regard application of strict scrutiny test see also *Saurabh Chaudri and Others Vs. Union of India (UOI) and Others*, .

228. In *Municipal Corporation of the City of Ahmedabad and Others Vs. Jan Mohammed Usmanbhai and Another*, , this court held:

"15. Before proceeding to deal with the points urged on behalf of the appellants it will be appropriate to refer to the well-established principles in the construction of the constitutional provisions. When the validity of a law placing restriction on the exercise of a fundamental right in Article 19(1)(g) is challenged, the onus of proving to the satisfaction of the court that the restriction is reasonable lies upon the State. If the law requires that an act which is inherently dangerous, noxious or injurious to the public interest, health or safety or is likely to prove a nuisance to the community shall be done under a permit or a licence of an executive authority, it is not per se unreasonable and no person may claim a licence or a permit to do that act as of right..."

229. It was observed:

"Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion the law ex facie infringes the fundamental right under Article 19(1)(g). Imposition of restriction

on the exercise of a fundamental right may be in the form of control or prohibition.

"20. The tests of reasonableness have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and in judging their validity, courts must approach the problem from the point of view of furthering the social interest which it is the purpose of the legislation to promote. They are not in these matters functioning in vacuo but as part of society which is trying, by the enacted law, to solve its problems and furthering the moral and material progress of the community as a whole..."

230. The matter has also received the attention of a two-Judge Bench of this Court in B.P. Sharma Vs. Union of India (UOI) and Others, wherein this Court upon noticing a catena of decisions observed :

"...On consideration of a catena of decisions on the point, this Court, in a case reported in , M.R.F. Ltd. v. Inspector, Kerala Government and Ors., has laid certain tests on the basis of which reasonableness of the restriction imposed on exercise of right guaranteed under Article 19(1)(g) can be tested. Speaking for the Court, Saghir Ahmad, J. (as he then was), laid such considerations as follows :

"(1)While considering the reasonableness of the restrictions, the court has to keep in mind the Directive Principles of State Policy.

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

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Clause (6) of Article 19.

(5) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind. (See The State of Uttar Pradesh Vs. Kaushaliya and Others, .

(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise. (See Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, , Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, ."

231. The question has also been considered in Indian Handicrafts Emporium

(supra) wherein this Court held :

"In Narendra Kumar and Others Vs. The Union of India (UOI) and Others, , this Court while interpreting the word 'restrictions' held as follows:

"It is reasonable to think that the makers of the Constitution considered the word "restriction" to be sufficiently wide to save laws "inconsistent" with Article 19(1), or "taking away the rights" conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt therefore that they intended the word "restriction" to include cases of "prohibition" also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted." (See also State of Maharashtra v. Mumbai Upnagar Gramodyog Sang : [1969]2SCR392 .

232. In Saurabh Chaudhri (supra), V.N. Khare, CJI speaking for the majority stated:

"Constitutional interpretation is a difficult task. Its concept varies from statute to statute, fact to fact, situation to situation and subject matter to subject matter.."

233. It was observed:

"...The courts shall all along strive hard for maintaining a balance. While interpreting the Constitution, we must notice the following view of Justice Holmes expressed in Missouri v. Holland 252 US 416 (433) :

"When we are dealing with Words that also are a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism, it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

234. If by reason of judicial interpretation it is held that those trades which are obnoxious in nature would not fall within the purview of Article 19, what was the necessity of extending the meaning of 'reasonable restrictions' to prohibition; and in some cases even with the aid of the provisions contained in the Directive Principles of State Policy in Part IV of the Constitution of India?

235. If matters in relation to such trades which are said to be obnoxious in nature, no provisions of the Constitution of India were to be made applicable, where was the need of enacting statutes prohibiting them either in whole or in part? The Parliament or the State Legislature, it" is trite, do not make legislation in vacuo. The legislations are not enacted in futility. The legislation are not only to be implemented, their constitutionality must also be judged on the touchstone of Part III and other provisions of the Constitution of India. No short-cut can be

adopted to do away therewith.

236. Concededly restrictions of trade in liquor within the meaning of Article 19(1)(g) of the Constitution of India can be extended to prohibition. Such prohibition may not be permissible in other cases, as noticed hereinbefore. The decisions of this Court clearly show that such a prohibition can be imposed by laying down a law only in the event that the trade in relation thereto is noxious ones and not otherwise. The distinction made by this Court in a large number of judgments is to be applied in proper perspective, insofar as the words trade in liquor will carry two different meanings - one in respect of trade which are noxious or pernicious and the others which are not. If it is held that Article 19 of the Constitution of India and for that matter any other provision of the Constitution of India including Article 301 will not have any application in relation to pernicious or obnoxious trade, the State will not be entitled to issue any prohibitory order in relation thereto. The very fact that this Court in no uncertain terms held that the trade in liquor can be prohibited being noxious or pernicious, it implicitly goes to show that prohibition of such a trading activity must be referable to legislations made in terms of Clause (6) of Article 19 of the Constitution of India which is itself an indication of the fact that there exists a right to carry on the trade in terms of Article 19(1)(g) of the Constitution of India. While making such a legislation the Parliament or the State Legislatures, as the case may be, impose prohibition either in whole or in part or may only provide for regulatory measures.

237. There are decisions of this Court which have held that Article 19(1)(g) will not apply so long as the trade in liquor is prohibited. The Constitution Bench of this Court in *Khoday Distilleries (supra)* clearly held that a citizen will have no fundamental right to carry on such trade which is illegal and would lead to commission of penal offences. The logical corollary of the said decision would be that a citizen will have a right including a fundamental right to carry on the said trade or business when the same would not lead to a penal or criminal offence or has not declared the same to be otherwise illegal.

#### REGULATORY POWER OF THE STATE:

238. In *Synthetics and Chemicals Ltd. (supra)*, this Court held:

"76. The State of Bombay and Another Vs. F.N. Balsara, dealt with the question of reasonable restriction on medicinal and toilet preparations. In fact, it can safely be said that it impliedly and sub-silentio clearly held that medicinal and toilet preparations would not fall within the exclusive privilege of the States. If they did there was no question of striking down of Section 12(c) and (d) and Section 13(b) of the Bombay Prohibition Act, 1949 as unreasonable under Article 19(1)(f) of the Constitution because total prohibition of the same would be permissible. In *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, it was held that there was right to do business even in potable liquor. It is not necessary to say whether it is good law or not. But this must be held that the reasoning therein would apply with greater force to industrial alcohol. "

(Emphasis Supplied)

239. Thus, even therein although an occasion had arisen, a Seven-Judge Bench did not expressly over-rule K.K. Narula but applied the principles laid down therein in case of industrial alcohol.

240. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , this Court held:

"...We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privilege set out in Section 22 was not denied. It was also not disputed that these privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate.

It will be seen from these observations that the validity of Clause (6) of the Order dated January 6, 1971 was upheld by this Court on the ground that having regard to the object of holding the auction, namely, to raise revenue, the Government was entitled to reject even the highest bid, if it thought that the price offered was inadequate. The Government was bound to accept the tender of the person who offered the highest amount and if the Government rejected all the bids made at the auction, it did not involve any violation of Article 14 or 19(1) (g). This is a self-evident proposition and we do not see how it can be of any assistance to the respondents."

241. In *Har Shankar and Ors. v. Dy. Excise and Taxation Commissioner (supra)*, this Court held:

"...The state, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. In *American Jurisprudence*", Volume 30 it is stated that while engaging in liquor traffic is not inherently lawful, nevertheless it is a privilege and not a right, subject to governmental control (page 538). This power of control is an incident of the society's right to self-protection and it rests upon the right of the state to care for the health, morals and welfare of the people. Liquor traffic is a source of pauperism and crime (pp. 539, 540, 541)."

242. In order to determine whether total prohibition would be reasonable the Court has to balance the direct impact on the fundamental right of the citizens thereby against the greater public or social interest sought to be ensured. Implementation of Directive Principles contained in Part IV is within the expression of restrictions in the interest of the general public. (See also *Municipal*

Corporation of the City of Ahmedabad and Others Vs. Jan Mohammed Usmanbhai and Another,

243. In *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, , the law is stated in the following terms:

"...If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individuals rights.

We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme. Each freedom has different dimensions..."

244. In certain cases even in relation to the grant of contract in liquor, Article 14 of the Constitution has been held to be applicable. Once it is held that a person, in certain situation is entitled to invoke the equality clause contained in Article 14 of the Constitution of India, there is absolutely no reason as to why Article 301 will not be applicable.

245. A 11-Judge Bench of this Court in *T.M.A. Pai Foundation (supra)*, observed:

"The question of whether there is a fundamental right or not cannot be dependent upon whether it can be made the subject-matter of controls."

246. It is relevant to note that two of the Hon'ble Judges were parties to *Kalyani Stores (supra)* as also to *Krishna Kumar Narula (supra)* which again being a Constitution Bench judgment wherein it has been held that a person has a fundamental right under Article 19(1)(g) to carry on trade or business in liquor. *K.K. Narula (supra)* has not been overruled. The same holds the field. In that view of the matter, we cannot ignore *K.K. Narula (supra)*.

247. Furthermore, there exists a distinction between a fundamental right of a citizen to carry on business in noxious or pernicious trade under Article 19(1)(g) of the Constitution of India and freedom to carry on such trade through out the country without any hindrance or obstruction except in terms of reasonable regulations which may be made under Article 304(b) of the Constitution of India.

ARTICLE 14 - SOME FACETS OF COUNTRY AND FOREIGN LIQUOR, DIFFERENCE BETWEEN:

248. The equality clause contained in Article 14 of the Constitution of India recognizes that reasonable classification is permissible. Article 14 has been held to be applicable at all stages for grant of a contract.

249. It is interesting to note that Rule 39 of the Maharashtra Country Liquor Rules, 1973 and Rule 17 of the Maharashtra Foreign Liquor (Sale on Cash,

Register of Sales etc.) Rules, 1969 prohibits the vendors from selling foreign liquor or the country liquor :

250. Rule 17 of the Maharashtra Foreign Liquor (Sale on Cash, Register of Sales etc.) Rules, 1969 prescribes that no vendor is to sell foreign liquor to the following class of persons :

- ? A Police Officer in uniform;
- ? A Prohibition and Excise Officer on duty;
- ? A Railway servant on duty;
- ? An insane person; or
- ? A person who is intoxicated.

251. Rule 39 of the Maharashtra Country Rules, 1973 provides that a retail license shall not sell country liquor to the following categories of persons, namely :

- ? A lunatic insane person;
- ? Person who is in an intoxicated State;
- ? Person known or suspected to be participating in any rioting or disturbance of peace; and
- ? The Armed Forces of the Union, Member of the Police Force, the Prohibition and the Excise Department, State Transport and Railway Department or driver of a motor vehicle, when on duty or in uniform, or both.

252. The comparison of these two lists reveals that the categories of persons are different for country liquor and foreign liquor. The vendor is not allowed to sell country liquor to certain categories of persons, who are not specified thereunder and whereas Rule 17 of 1969 Rules categories a different list of persons. A vendor can sell foreign liquor to the driver of a vehicle but is prohibited from doing so in respect of country liquor. Foreign liquor can be sold to a railway servant on duty but not country liquor.

253. In *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, and *Harinarayan Jaiswal (supra)*, this Court held that the State has exclusive right to sell liquor and to sell the said right. Both rights are, thus, different and distinct.

#### REGULATION OF THE TRADE IN RELATION TO FOREIGN LIQUOR:

254. In *The State of Bombay and Another Vs. F.N. Balsara*, , this Court held :

- (i) A provision of law, which provided for permitting certain persons to drink and prohibited certain others from drinking, would not violate Article 14, provided such classification was reasonable.

(ii) Permitting the use or consumption of foreign liquor among members of the Military and Naval Officers does not offend Article 14, as the members of such Force could be regarded as a class by themselves, and such classification was reasonable.

(iii) Restrictions, which are imposed for securing the objects, which are enjoined by the Directive Principles of State Policy in the Constitution, may be regarded as reasonable restrictions within the meaning of Clauses (2) and (6) of Article 19 of the Constitution of India.

(iv) When restrictions imposed by a law on the exercise of Fundamental Rights are reasonable in respect of certain items and unreasonable in respect of certain other items, the law as a whole will not be void when the offending provisions are severable; the provisions of the law imposing unreasonable restrictions alone would be void, and those provisions which impose reasonable restrictions will be valid.

(v) Prohibition of possession, consumption, buying or selling of wines by a law is a reasonable restriction upon the right to "acquire, hold and dispose of property" conferred by Article 19(1)(f) having regard to the Directive Principles in Article 47.

255. In *Fatehchand* (supra), also a distinction was made between money-lending amongst commercial community as integral to trade which was held to be trade and a narrow noxious category of money-lending where there is no flow of trade, no movement of commerce, no promotion of intercourse, no servicing of business, but merely stagnates rural economy, strangulates the borrowing community and turns malignant in its repercussions.

[Italics is mine for emphasis]

256. A similar distinction was noticed in *Synthetics and Chemicals Ltd. v. State of UP* in the following terms :

"...In other words, excise duty and price for privileges were regarded as one and the same thing. So-called privilege was reserved by the State mostly in respect of country liquor and not foreign liquor which included denatured spirit."

257. The seven-Judge Bench, therefore, made a distinction between a country liquor and a foreign liquor.

ARTICLE 301:

(A) The Constitutional Assembly Debates:

258. It is trite that in interpreting constitutional provisions, reference to constitutional debates is permissible. [See *T.M.A. Pai Foundation* (supra)]

259. This Article was introduced in its final form by B.R. Ambedkar on 8th September 1949. [See *Constitutional Assembly Debates*, 8th September, 1949, Vol. 9, p. 1124] Ambedkar's esteemed view was not to make interstate

commerce and trade absolutely free. He contemplated a certain amount of legislative restrictions that could be imposed in 'public interest'. While this view was widely supported by T.T. Krishnamachari and Alladi Kuppaswami, it was contested by Pandit Thakur Das Bhargava who advocated several amendments to promote absolute free trade; as well as Dr. P.S. Deshmukh who felt that a policy should be kept very broad, for the Parliament to fill in the details at the relevant time, for the relevant place.

260. Realizing the need for some level of State regulation of trade and commerce, in the interest of the public, Dr. B.R. Ambedkar stated:

"...it is not the intention to make, trade and commerce absolutely free, that is to say, deprive both the Parliament as well as the States of any power to depart from the fundamental provision that trade and commerce...has been made subject to certain limitations which may be imposed by the Parliament or ...the Legislatures of various states subject to the fact that the limitation contained in the power of Parliament to invade the freedom of trade and commerce is confined to cases arising from scarcity of goods in any part of the territory of India and in the case of states, it must be justified on the grounds of public interest...the action of the states in invading the freedom of trade and commerce in the public interest is also made subject to the condition that any Bill affecting the freedom of trade and commerce shall have previous sanction of the President; otherwise the State would not be in a position to undertake such a legislation..."

[See Constitutional Assembly Debates, 8th September, 1949, Vol.9, pp. 1124-25]

261. This point of view was supported by T.T. Krishnamachari who in reply to the strong stand taken by Pandit Bhargava stated that the entire Chapter provides the maximum possible amount of liberty for trade and commerce. It provides the maximum amount, of concession that can be given to maintain consistency with the future economic improvement of the country. But he strongly emphasized that, "the world has well-nigh come to the position when trade and commerce cannot run without control and some kind of direction by the government." He realized that the restrictions cannot be whittled down, if there is to be economic progress, when he stated,

"A certain amount of freedom of trade and commerce has to be permitted. No doubt restrictions by the State have to be prevented so that particular idiosyncrasies of some people in power or narrow provincial policies of certain states should not be allowed to come into play and effect the general economy of the country. That I think is amply covered... certain amount of powers in regard to restriction on trade is necessary and has been provided for. "

[See Constitutional Assembly Debates, 8th September, 1949, Vol.9, p. 1139]

262. He also believed that the State should be given the right and the center should only interfere if the economic and fiscal policy of the center is unduly

interfered with.

263. While justifying why a certain level of restrictions were required, T.T. Krishnamachari drew largely from the Australian experience wherein it was believed that absolute freedom of trade and commerce was running contrary to the purpose of the State and in turn the citizens.

264. However, in sharp contrast to these views, Pandit Thakur Das Bhargava wanted interstate trade and commerce to be almost absolutely free. The only restrictions to this absolute freedom would be in emergencies. Any other restrictions would be considered as derogatory to the very concept of freedom. He further wanted the restrictions to be qualified with the term 'reasonable' so as to enable the judiciary to adjudicate upon the reasonableness of the restrictions in public interest. [See Shiva Rao, B., Supra, p.704]

265. Taking a slightly tangential position, Dr. P.S. Deshmukh stated that, "Trade and commerce are not things which are decided once and for all; they are things that arise and grow from day to day there may be circumstances when the whole thing may have to be revised." He thus advanced the view that amendments be made to give Parliament a completely blank cheque and let them determine the policy, bearing in mind the differential leaves of advancement in various states.

266. However, all the amendments proposed to be inflicted on BR Ambedkar's Draft provisions were negated and the Chapter was passed in its exact form. Thus, the position, as it lies, is to grant the maximum possible freedom of interstate trade and commerce. This is however, subject to a certain level of legislative restrictions in order to ensure that the greater economic interests of the country are not hampered, to make provision for public interest, and to make way in times of emergencies. However, it was the very obvious intent of the Constitutional Framers to place only this minimum level of restrictions on the freedom of trade and business. Any restriction, not falling within these categories will be bad in law and will run contrary to the intention behind its presence in the Constitution.

267. External aids such as the Constitution Assembly Debates are an able guide for discerning the meaning behind a particular provision and in exactly what light their interpretation should take place. The debates in the Constitution Assembly would show how Article 301, on the one hand, is more near the Australian Constitution provisions contained in Sections 92 and 99 and different in material particulars from the American Constitution.

268. Sections 92 and 99 of the Australian Constitution along with Section 297 of the Government of India Act, 1935 served as a source for Article 301. These provisions in the Australian Constitution serve to guarantee an omnibus right of interstate trade and commerce. Being so absolute, they acted as barriers to many measures of economic reform undertaken by the government.

269. The Commerce Clause in the American Constitution is in sharp contrast.

Referred to as the 'dormant' clause it simply states that, "the Congress Shall have power... to regulate commerce among the several states." [See U.S. Constitution, Article 1, p.8 Clause 3].

270. The interpretation of this ambiguous clause has been equally varied. The courts have held that the 'very silence' in these words delimits an implied negative against unduly burdensome or discriminatory state or local interferences with free trade across state lines. [See Tribe, Lawrence H. "Constitutional Choices", p.34]. This was primarily the view taken in *Leisy v. Hardin* [See 135 US 100 at pp 109-110] by Justice Fuller who was in the majority while striking down an Iowa statute prohibiting sale of intoxicating liquor. He said that, "the Congress' silence with respect to an area of interstate commerce-that is, its non-enactment of any law either regulating that area or allowing states to do so -indicates its will that such commerce shall be free and untrammelled."

271. However, the minority did not agree. They read into the silence and inaction precisely the opposite- that Congressional intent that the law shall remain as it had been. [See 135 US at p.160-Gray, J. joined by Justices Harlan and Brewer].

272. Thus, as stated by Thomas Powell Reed in an essay in 1938, "The congress has the power to keep silent. The Congress can regulate interstate commerce simply by just not doing anything about it."

273. State laws in conflict with valid Congressional enactments are inoperative so long as the national legislation remains unchanged. "If the Constitution makes the commerce power of the Congress an exclusive one over subjects for which a single uniform rule is preferable, it must be the Constitution that prohibits the states from exercising any kind of commerce power over that type of commerce as it prohibits the states from taxing the first sale of an import before bulk is broken." (See Powell, Thomas Reed, "Vagaries and Varieties in Constitutional Interpretation", p. 156)

274. The power of the Congress is concurrent with that of the states; the power of the states is concurrent with that of the Congress. The exercise of state power, however, is subject to several restrictions. It must not impose regulation in conflict with regulations of Congress. It must not, even in the absence of conflict, impose regulations if the Congress is deemed to have occupied the field. The states may not tax interstate and foreign commerce (See Powell, Thomas Reed, "Vagaries and Varieties in Constitutional Interpretation", p. 180). There is no *Cooley* law governing state taxation. Marshall, J. in *Brown v. Maryland*, a case involving state tax on selling imported goods wholesale, wherein the tax discriminated against selling goods of foreign origin, but Marshall did not base condemnations on that ground. He held that the Constitutional ban on state taxation of imports keeps the state from subjecting them to a general non-discriminatory tax, so long as they remain imports. (See Powell, Thomas Reed, "Vagaries' and Varieties in Constitutional Interpretation", p. 181)

275. As regard whether state laws regulating commerce could be valid, there

was a series of tests evolved. The first was the dichotomy evolved by Marshall, J. between 'commerce' and 'police' powers. This evolved primarily because states had waged destructive wars on each other. A common diagnosis was that state governments had been too responsive to local economic interests; with the result that interstate economic competition was more through political processes than through the marketplace.

276. So while one set of views asked for complete state freedom to regulate (successors of Marshall), others asked for the Central power instead. Soon evolved a new dichotomy of 'local' and 'national'. This came about in *Cooley v. Board of Wardens of the Port of Philadelphia*, [See 53 US (12 How) 299 (1851).] which claimed that even though the Pennsylvania statute concerned manifestly and predictably affected interstate commerce, the subject being regulated was 'local' and not 'national'.

277. Later the debate moved from here to the test of 'direct' and 'indirect' - State regulations affecting interstate commerce were struck down by the Court if the regulatory impact upon interstate commerce was deemed so substantial to be a 'direct' burden.

278. Thus, from an overview of all the above views in the American and Australian Constitutions one can conclude that the Indian provisions for free trade and commerce are more explicit. While the Australian Constitution failed to expressly define restrictions, the American Constitution defined the clause in an extremely ambiguous manner. The Indian Constitution provides for freedom of trade and commerce, but puts the minimum required restriction in terms of public interest.

279. The upshot of the discussions made hereinbefore would be that whereas in terms of Article 19(6) as also Article 302 of the Constitution of India in relation to a trade which is noxious in nature a complete prohibition would be permissible, the same would not mean that while permitting the trade to go on the State's action whether legislative or executive need not undergo the constitutional tests in terms of Articles 14, 19 or 301 of the Constitution of India. The argument that the relationship between State and the licensee is contractual in nature but the same would not mean that any legislative interference thereupon as a result whereof the contract becomes more burdensome would not be a subject-matter of challenge. There is no estoppel, against statute. There cannot be any waiver of fundamental right.

#### (B) Freedom of Trade and Commerce: A very ' brief Trace of History

280. Freedom of trade was the established practice in India during the reign of the British. There were no existing inter provincial duties or trade barriers. However, with the advent of provincial autonomy, it was considered necessary to have a statutory basis. Accordingly, Section 297 of the Government of India Act, 1935 prohibited Provincial governments from imposing barriers on trade within the country. They also could not levy tax, cess, toll or other due which

discriminated between goods manufactured in one locality and similar goods manufactured elsewhere. [See Shiva Rao, B. "The Framing of India's Constitution", p.699].

281. This trend of thought prevailed even at the stage of the framing of the Constitution. In the historical backdrop of the formation of an All-India Union, it was felt that such a Union would be meaningless and devoid of purpose if trade and commerce throughout India were not free.

282. Thus, from a single glance at the documents and debates that went into the framing of the Constitution, one can discern that this strand of thought was still extremely prevalent during the drafting of the Constitution. However, it was met with a worthy and able opponent- one that warned of the danger behind the taking such and absolute view.

#### (C) Constitutional Intent Behind Article 301:

283. Article 301 of the Constitution of India provides that trade, commerce and intercourse throughout India shall be free and subject only to the provisions of Part XIII of the Constitution. This Article seeks to limit the legislative powers of the State in matters relating to interstate commerce, trade and intercourse.

284. The object behind Article 301 is to ensure that the economic unity of India may not be broken up by internal barriers. [See *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, Further, unlike the Fundamental right provided to citizens only under Article 19(1)(g), Article 301 seeks to extend its benefits to all individuals.

285. This is the basis of operation of Article 301. The essence of Article 301 is a right of free movement of trade without any barrier whether inter-State or intra-State. It is also not in dispute that the taxes which have direct impact on the flow of trade and commerce constitute a violation of Article 301 unless the legislation is brought within the scope of Article 302, 304 and 305. [See *Jindal Stripe Ltd. and Others Vs. State of Haryana and Others*, .

#### LEVY OF TAXES :

286. Imposition of tax is a constitutional function. No tax can be levied except in terms of Article 265 of the Constitution of India. It is one thing to say that tax levied is constitutionally valid but it is another thing to say that tax although levied in exercise of its constituent power by a State Legislature, it need not undergo the test of constitutional requirement at all. The latter proposition, with utmost respect, would be totally against the letter and spirit of the Constitution of India as also constitutionalism.

287. In *Saghir Ahmad Vs. The State of U.P. and Others*, , B.K. Mukherjea, J. speaking for the Constitution Bench noticed that after the Constitution Amendment Act, 1951 in terms of Article 19(6) a three-fold provision by way of exception to or limitation upon Clause (1)(g) of the Article 19 was made stating:

"In the first place it empowers the State to impose reasonable restrictions upon the freedom of trade, business, occupation or profession in the interests of the general public. In the second place it empowers the State to prescribe the professional and technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. Thirdly, and this is the result of the Constitution (First) Amendment Act of 1951 - it enables the State to carry on any trade or business either by itself or through a corporation owned or controlled by the State to the exclusion of private citizens wholly or in part."

288. It was observed:

"As has been held by this Court in the case of Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, whether the restrictions are reasonable or not would depend to a large extent on the nature of the trade and the conditions prevalent in it."

289. It was categorically held:

"With regard to the second point also we do not think that the learned Judges have approached the question from the proper stand point. There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in Clause (6) of the article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of Clause (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community. "

290. The Court clearly held that impost not authorized by law cannot be a reasonable regulation.

291. The submission of Mr. P.N. Mishra and Mr. Iyer could have been appreciated had the State in terms of Article 47 of the Constitution of India imposed a total prohibition or even a partial prohibition. The State of Punjab and Kerala have not only imposed no prohibition, they, not only, with a view to encourage industrial development had been encouraging establishment of all types of industries including those producing Indian-Made Foreign Liquors. India is also importing liquor manufactured in other countries.

292. It will appear from the order dated 31.1.2002 passed by his Court that on a query made by this Court, Mr. K.K. Venugopal for the State of Punjab categorically stated that the source of power for imposition of the import fee was Sections 18, 19, 34, 58 and 59 of the Punjab Excise Act, 1944. Even before this Court, at that stage, the validity of the said fee was not referred to the right of exclusive privilege irrespective of the provisions of the Punjab Excise Act.

293. It is also undisputed that the State of Karala at no stage took such a stand

at all. Despite the said fact, stand had now been taken that the import duty levied on beer is a part of the exclusive privilege.

294. Revenue is necessary to be raised for development of the State but the same must be done in terms of the Constitution.

295. For raising revenue, the State itself cannot take a stand which would be immoral to some of us, besides being unconstitutional.

296. A taxing statute is either constitutional or unconstitutional.

297. If a statute fails to pass the constitutional test -can it be permitted to succeed on moral or ethical values of some of us?

298. Is there no distinction between an alcohol for industrial or alcohol for human consumption?

299. Can the State be permitted to make any legislation even on industrial alcohol?

300. These are certain questions which are required to be posed and answered.

301. In *S.K. Pattanaik (Dead) Thru Lrs. Vs. State of Orissa and Others*, in which one of us (Hon. CJI) was a member, this Court held:

"Excise duty" and "Countervailing duty" are well-known concepts and are attracted in different situations, "Excise duty" is essentially a duty on manufacture of goods, and the taxable event is the manufacture of the excisable goods. "Countervailing duty", on the other hand, is imposed when excisable articles are imported into the State, in order to counterbalance the excise duty, which is leviable on similar goods if manufactured within the State. So far as countervailing duty is concerned, the incidence of the impost is on the import of the excisable articles, i.e., at the time of entry into the State."

302. In *Aristocrat Agencies, Hyderabad Vs. Excise Superintendent, Hyderabad and Others*, in which Lahoti, J. was a member, this Court held:

"In our opinion, the demand of differential amount of countervailing duty from the appellant, under the circumstances, was perfectly justified since demand was made on the basis of the duty as in force on the date of import of the consignment into the State. The duty was to be assessed and collected as in force at the time of obtaining the permit."

303. The terms "Excise Duty", "Countervailing Duty", "import duty" are not terms of art. They are made part of the interpretation section contained in the respective Excise Acts.

304. Similarly, "License Fee" and "Fixed Fee" are also defined. Each term must be held to have been used by the Legislature with a view to achieve a definite purpose. One term should not be read as supplement to other. In that view of the matter, import duty cannot be held to be a part of exclusive privilege and,

thus, part of a License fee. If this distinction is borne in mind the statutory injunction contained in Article 301 of the Constitution of India as also Section 33A of the Punjab Excise Act can be given an economic, purposive and textual meaning. Import duty which is levied u/s 17 of the Kerala Abkari Act and Section 34 of the Punjab Excise Act cannot be read to be a part of the License fee which is collected at the time of grant of License that is by way of parting of its right of exclusive privilege. (See Harinarayan Jaiswal (supra) and State of Uttar Pradesh and others Vs. Sheopat Rai and others,

#### PRINCIPLES GOVERNING INTERPRETATION OF CONSTITUTION:

305. Constitution being the most important legal document, presents the most trying construction problems. (See Siegan, Bernard H., "Economic Liberties and the Constitution", p.8) "Interpretation of any document, from ordinary real estate contracts to the Constitution, is influenced by the circumstances, mores, conventions, and prevailing notions of contemporary society; and clearly, the meanings given to words may change over the years. That which was reasonable, proper and logical in one century may be unacceptable in another. Many concerns of the yesteryear that prompted certain interpretations have now faded and been replaced with new attitudes. Ideas and feelings about labour, property, producers' and consumers' interests, the environment and human rights do not remain static. Inventions and discoveries have occurred that were beyond the contemplation of those who lived centuries ago. The certainties of one period may appear as mistakes in another. Nonetheless, the nation retains its commitment to a supreme legal document establishing the terms of the relationship between the governor and the governed. (See Siegan, Bernard H., "Economic Liberties and the Constitution", p9)

306. Many believe that the Constitution is a flexible and evolving document, always adaptable to changes in society's conditions and circumstances. Others insist that judges be strictly bound by its words and by the historical record of what the framers of both the original text and the amendments intended.

307. A constitutional provision should always receive a fair, liberal and progressive interpretation so that its true objects might be promoted. By this it can fulfil the aspirations of the people at large.

308. To achieve the above goal, the Organic method of interpretation which is now universally accepted, requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties. The social conditions existing at the time when the Constitution was made may be very different from the present conditions and hence if we interpret the Constitution from the angle of the Constitution makers we may arrive at a completely outdated and unrealistic view. As Justice Marshall observed in *McCulloch v. Maryland*, (1819) 4 Wheat 316 "this provision is made in a Constitution, intended to endure for ages to come, and consequently to be adopted to the various crises of human affairs". So "a Constitutional provision

will not be interpreted in the attitude of a lexicographer, with one eye on the provision and the other on the lexicon. The meaning of the word or expression used in the Constitution often is coloured by the context in which it occurs, the simpler and more common the word or expression, the more meanings and shades of meanings it has, It is the duty of the Court to determine in what particular meaning and particular shade of meaning the word or expression was Used by the Constitution makers and in discharging the duty the Court will take into account the context in which it occurs, the object to serve which in war used, its collocation, the general congruity with the concept or object it was intended to articulate and a host of other consideration.

309. The interpretative changes in the Constitution must not only be considered from its plain language for the purport and object it seeks to achieve but also having regard to the international treaties and conventions but also principles of interpretation governing the same.

310. The necessity of interpretative changes having regard to the changing scenario has recently been noticed by this Court in its several decisions.

311. In order to determine whether total prohibition would be reasonable the Court has to balance the direct impact on the fundamental right of the citizens thereby against the greater public or social interest sought to be ensured. Implementation of Directive Principles contained in Part IV is within the expression of "restrictions in the interest of the general public".

312. In other words, there exists a distinction between a fundamental right of a citizen to carry on trade in obnoxious matters under Article 19(1)(g) of the Constitution of India and freedom to carry on such trade through out the country without any hindrance or obstruction except in terms of reasonable regulations which may be made under Part XIII of the Constitution of India.

#### INTERNATIONAL TREATIES AND COVENANTS:

313. With a view to interpret the constitutional provision, global changes and outlook in trade and commerce would be relevant factors.

314. The impugned notifications not only touch inter-state trade, it affect international trade also. "Import of liquor" envisages liquor imported both from outside the State as also outside India. International treaties and covenants, therefore, would play a significant role.

315. The national policy of globalization of trade leading to WTO has been noticed by a Constitution Bench of this Court in Islamic Academy of Education (supra) stating :

" ...The right of a minority is a human right, so also the right of development. Thus, subject to reasonable restrictions, any unaided institution imparting professional courses may although exercise greater autonomy in the matter of management and determination of the fee structure, it will have a limited right

so far as the right to admit students is concerned. T.M.A. Pai Foundation says that merit shall be the criteria. Right, of development finds place in WTO and GATT. It takes into consideration globalization and opening up of economy. Excellence in professional education must be viewed from the economic interest in the country. In order to compete with the other developed countries, GDP of India should be around 15% instead of present rate of 5%. This can be achieved only by producing students of excellence, which can be achieved only by encouraging institutions of excellence imparting professional education to those who are meritorious. Giving encouragement to the students, having better merit will, thus, have a direct nexus with the economic and consequently the national interests of the country. The right of development from the human right point of view must be construed liberally."

316. It was further observed :

"Having regard to globalization and opening up of the market, the State expects various medical colleges and educational institutions and universities to move in. Under WTO and GATT human development has taken its firm root. A decent life to the persons living in the society in general is perceived."

globalization:

317. globalization as brought a radical change in the economic and social landscape of the country. Its impact on Constitution and constitutionalism is significant. As and when occasion arises the interface between the globalization and constitutionalism whether from economic perspective or human rights perspective is required to be seriously gone into. Often the economic changes in the country relating to regulation of markets brought about competition law leading to substantial erosion of administrative law by private law are matters which eventually would fall for our decisions. The Court will have to take a realistic view in interpretation of Constitution having regard to the changing economic scenario.

318. Can we shut our eyes to the fact that except the State of Gujarat, no other State has imposed a complete prohibition. In fact, the States are encouraging liberalization to such an extent that in the near future alcohol beverages may be allowed to be sold in the small grocery shops. The executive authorities are contemplating to grant permission to open liquor at the Airports. The society has accepted pub culture in the metros. A view in the matter, therefore, is required to be taken having regard to the changing scenario on the basis of ground reality and not on the basis of the centuries' old maxims.

Subsidies and Countervailing Duties:

319. The WTO and GATT, inter alia, provides for subsidies and countervailing duties.

320. What is a countervailing duty?

321. It is defined as, "a duty imposed [on imports] to offset the advantage to foreign producers, derived from a subsidy that their government offers for the production or export of any article taxed." [See Webster's 3rd New International Dictionary, 1993]

322. It has also been defined by Article VI of GATT as, "a special bounty levied for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly, upon the manufacture, production or export of any merchandise." [See WTO in the New Millenium, 5ed., p.123].

323. What is the rationale behind the imposition of a countervailing duty?

324. The economic rationale is very doubtful, as the effect of a countervailing duty is to make the product more expensive in the importing country. However, there has been some level of an explanation provided. Every time a tariff barrier is negotiated and agreed on, WTO members have reasonable expectations that they, can profit from the conditions of competition established in the market of the member, binding its tariff and gain market share. Moreover, members have 'paid' for the binding by promising to open up their market, that is, by binding their own tariffs. WTO members may not frustrate their promises by subsidising their domestic industry producing the product for which a tariff binding, has been previously offered. If this were allowed WTO members might lose the incentive to make concessions in the future. [See "The World Trade Organisation-Law, Practice and Policy" by Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis P.279].

325. We need not go into the question in details as regard the provisions of subsidies as found placed in GATT. But it may be relevant to note the impact of subsidies on international trade. (See Jackson, John J., in "The Jurisprudence of GATT and WTO" pp 434-5.)

#### CHANGING SCENARIO:

326. Socialism might have been a catchword from our history. It may be present in the Preamble of our Constitution. However, due to the liberalization policy adopted by the Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away.

327. Although, the United States is guided by a capitalist philosophy unlike the socialist policy laid down in the Indian Constitution, the very fact that changes in society have to be reflected in the interpretation of the Constitution, while still preserving the core constitutional intent of the Constitutional makers is a factor to be reckoned with. This has never been more important than in the age of globalization when vast changes are taking place both at the social and political levels.

Constitution: How should be interpreted in Present. Day Scenario:

328. Legal history is a good guide for the purpose of appreciating the legal

development across the world particularly in the field of international law.

329. The judiciary cannot cling to age-old notions of any underlying philosophy behind interpretation. It has to move with the times. As Willes CJ once said, "When the nature of things changes, the rules of law must change too". (See *Davies v. Powell* 1737) Willes 46 This is a truism in that the legislature and, within limits, the courts should change rules to keep the law abreast of change. (See *Dias Jurisprudence*, 5th Edition, page 147)

330. In *Francis Bennion Interpretation of Statutes*, Fourth edition at page 771, it is stated:

"Changes in social conditions - Where relevant social conditions have changed since the date of enactment, what was then classed as a social mischief may not be so regarded today. It is very difficult for the court to apply an enactment so as to 'remedy' what is no longer regarded as a mischief. The consequence is an interpretation that minimizes the coercive effect of the enactment and gives great weight to criteria such as the principle against doubtful penalisation."

331. While interpreting such a situation, one must take into consideration the flexibility in law as has been highlighted by this Court in *M.V. Al Quamar Vs. Tsavlis Salvage (International) Ltd. and Others*, wherein it was opined:

'43. The two decisions noted above in our view deal with the situation amply after having considered more or less the entire gamut of judicial precedents. Barker, J's judgment in the New Zealand case (1980) 1 NZLR 104 very lucidly sets out that the court has to approach the modern problem with some amount of flexibility as is now being faced in the modern business trend. Flexibility is the virtue of the law courts as Roscoe Pound puts it. The pedantic approach of the law courts are no longer existing by reason of the global change of outlook in trade and commerce. The observations of Barker, J. and the findings thereon in the New Zealand case (1380) 1 NZLR 104 with the longish narrations as above, depicts our inclination to concur with the same, but since issue is slightly different in the matter under consideration, we, however, leave the issue open, though the two decisions as above cannot be doubted in any way whatsoever and we feel it expedient to record that there exists sufficient reasons and justification in the submission of Mr. Desai as regards the invocation of jurisdiction u/s 44-A of the Code upon reliance on the two decisions of the New Zealand and Australian Courts."

332. There cannot be any doubt whatsoever that a law which was at one point of time was constitutional may be rendered unconstitutional because of passage of time. (See *John Vallamattom and Another Vs. Union of India (UOI)*, .

333. In *R v. Hughes* 12 BHRC 243 = (2002) UKPC 12, the Privy Council observed:

"Under the constitution the people of St. Lucia enjoy certain fundamental rights and freedoms. The supremacy of those constitutional rights and freedoms is secured by Section 120 of the constitution :

"This Constitution is the supreme law of Saint Lucia and, subject to the provisions--of Section 41 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

The constitution controls not only the statute law but any law in force in St. Lucia, including 'any unwritten rule of law' (Section 124). therefore, unless para 10 applies, any law, whether, written or unwritten, which is inconsistent with the constitution is to that extent void.

334. It was further observed :

"Since para 10 introduces these exceptions to the rights and protection which people would otherwise have under the constitution, it must be construed like any other derogation from constitutional guarantees. In *State v. Petrus* [1985] LRC 699 in the Court of Appeal of Botswana, Aguda JA referred to *Corey v Knight* (1957) 150 Cal App 2d 671 and observed that -

"it is another well known principle of construction that exceptions contained in Constitutions are ordinarily to be given strict and narrow, rather than broad, constructions."

In case of doubt, para 10 should therefore be given a strict and narrow, rather than a broad, construction."

335. In *Project Gabcikovo-Nagymaros* (Op. Ind. Weeramantry) the International Court in its judgment dated 25.9.1997 at page 114, albeit in the context of ecology observed:

"As this Court observed in the *Namibia* case, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), *Advisory Opinion*, I.C.J. Reports 1971, p. 31, para 53), and these principles are "not limited to the rules of international - law applicable at the time the treaty was concluded."

336. In *People's Union for civil Liberties (PUCL) and Others Vs. Union of India (UOI) and Another*, it held :

"...It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the court should be to expand the reach and ambit of the fundamental rights by process, of judicial interpretation. The Constitution is required to be kept young, energetic and alive".

Public Policy:

337. The matter is covered by statutory provisions. The court cannot interpret on equality, freedom or commerce clauses of the Constitution in such a manner so

as to take away the rights and obligations created under a statute on the ground of public morality or otherwise. When a statute permits a trade, morality takes a back seat as 'legislature' as contra distinguished from 'judiciary' is supposed to be the authority to consider the morality or otherwise of certain things prevailing in the society.

338. This Court in *Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others*, while dealing with the concept of 'public policy' observed thus:-

"...Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

... The difficulty of discovering what public policy is at any given moment certainly does not absolve the judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hide-bound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The judges are to base their decision on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at the given moment, or what has been termed customary morality. The judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. .. The point is rather this power must be lodged somewhere and under our Constitution and laws, It has been lodged in the Judges and if they have to fulfill their function as Judges, it could hardly be lodged elsewhere.

#### NEED TO HAVE AN ECONOMIC INTERPRETATION :

339. The wave of privatization, multinationals influx into society, etc has lead to a very wide debate on the merits of such a scheme and the judiciary has a very wide role to play in discerning what the current position of the economic trend of the country is, bearing in mind the Constitutional goals of our Founding Fathers. Economic factors were by no means absent during the framing of the Constitution. On the contrary, in several instances economic elements were of considerable importance.

340. However, the very nature of the playing field has changed with the changes taking place in an evolving society. This is true of every society. Thus, can we still say that the same economic interests that the Constitutional Framers sought to achieve exist in the same form even today, bearing in mind the changes that have taken place due to the onslaught of globalization in the last 2 decades? All these factors have to borne in mind while an interpretation of the Constitution has to take place.

341. Opposition will rise to every conceivable change in socio-political-economic

scenarios. Some persons are by nature, conservative in their subconscious evaluation of change. They refuse to acknowledge man's power to make his own history and they explicitly reject the notion that observed institutions of interaction are in themselves, products of intended human action. (See Buchanan, James A., "Sources of Opposition to Constitutional Reform", in McKenzie, Richard B., "Constitutional Economics", at p.22) Thus any change proposed to be made by the lawmakers or the judiciary will meet with a certain level of opposition, but that does not mean that age-old notions are clung to. The impact of changes in society also has to be reflected in the lawmaking process.

342. In interpretation of the provisions of the Constitution especially those provisions dealing with the regulation of economy of the nation must receive such interpretation which fosters economic growth. The stigmatic economy of any nation has a bane for the world economy. Keeping this in view the interpretation, of the Constitution should receive such a treatment which would be in tune with the original intention of the Constitution makers.

343. The ultimate duty to achieve and maintain integrity of the nation vis-à-vis life lies on the Union. It is for this reason though law and order is included in the List II of the Seventh Schedule of the Constitution of India, national security, internal security and policy powers to regulate various aspects of social, political and economic conduct of human beings vested in the Union Parliament. Further by reason of Article 352, it is the parliament which can take over the administration of any state. These are intended to maintain integrity and push economy forward. A growing economy results in more industries and more jobs. When people are employed the purchasing power will go up the per capita income will go up resulting in more payment for goods. This again requires more industries. In the long run, subject to providing congenial atmosphere results in foreign investment.

344. The Court having regard to globalization should take notice of the futuristic thought in developed countries for interpretation of the Constitution in the ascertainment of meaning of the relevant provisions thereof with reference to everything which is logically relevant.

345. In "An Economic Interpretation of the Constitution of the United States" by Charles A. Beard in Chapter VI the Constitution of the United States has been read as an economic document. Referring to Hamilton, it is stated that free trade over a wide range would be reciprocal and would give great diversity to commerce enterprise and will render stagnation less liable for offering more distant markets when local demands fall off.

346. Lawrence. H. Tribe in his constitutional treatise 'American Constitutional Law', 3rd Edition emphasized upon the debate, at page 822, as regards court's new focus on economic activity citing Lopez [514 US at page 566] acknowledging that the determination whether an interstate activity is commercial or noncommercial may in some cases result in legal uncertainty. The learned author

states:

"As long as the Court adheres to the principle that a limitless commerce power is inconsistent with the text and structure of the Constitution and believes that its role is to strike down legislation that exceeds the commerce power (rather than relying on Congress to exercise self-restraint), it will need to apply some sort of administrable test to distinguish among classes of activities. It could seek to limit congressional power through a highly sensitive test for measuring the existence of "substantial effects on commerce," but the interconnectedness of our society and the fact that every act has "economic" consequences combine to suggest that, with respect to almost any activity, one could make a strong argument that its repetition all over the country probably will substantially affect commerce. If any activity can meet the substantial effects test, then the only other possibility may be the one the court pursued: limiting the category of activities that can be aggregated in the first place - for example, by focusing on "commercial" activities as *Lopez* appears to have done. If that proved unworkable in practice, then the Court may find itself unable, after all, to effectuate any substantive limits on Congress' commerce power - unless the Court takes the truly dramatic step of rejecting entirely the substantial effects test and the aggregation principle that is its companion, as Justice Thomas urged in his solo concurrence, advocating the overruling of such foundational landmarks as *Wickard v. Filburn*, *NLRB v. Jones & Laughlin Steel Corp.*, and *Katzenbach v. McClung*."

347. The history of commerce power of the United States vis-à-vis the decisions of the Supreme Court is stated in 'The Oxford Companion to the Supreme Court of the United States' edited by Kermit L. Hall, 1992 edition wherein under the heading 'Commerce Power Today' it is stated:

"Commerce Power Today: During the fifty years following the post-New Deal era Congress expanded national regulation into myriad aspects of the national life, using the Commerce Clause as the constitutional base, all with the Supreme Court's approval. One of the most significant areas of national intervention was that of racial discrimination. In 1964 Congress enacted a civil Rights Act banning racial discrimination in hotels, motels, restaurants, theaters, and motion picture houses throughout the country, now based on the Commerce Clause rather than the Fourteenth Amendment. In *Heart of Atlanta Motel, Inc. v. United States* (1964) and *Katzenbach v. McClung* (1964), the Supreme Court found that racial discrimination had a deleterious effect on interstate commerce and was a proper object for congressional attention.

In *National League of Cities v. Usery* (1976), the Court struck down legislation based on the Commerce Clause for the first time in forty years when it held that the minimum wage-maximum hour requirements of the amended Fair Labor Standards Act of 1938 could not be extended to state and local government employees. Such requirements, said the Court, involved a congressional intrusion into an "attribute of state sovereignty" (p. 845). Less than a decade later the Court overruled the *Usery* case in *Garcia v. San Antonio Metropolitan transit*

Authority (1985). Marshall, Taney and Waite (1937). R.S. Myers, "The Burger Court and the Commerce Clause: An Evaluation of the Role of State Sovereignty," *Notre Dame Law Review* 60 (1985); 1056-1093."

348. In *United States v. Lopez* (1995) 514 US 549 the United States Supreme Court struck down a statute as beyond the Congress' Commerce power on the ground that the activity regulating was neither a part of nor at a substantial fact upon interstate commerce. The decision recognizes a debate as regard Congress' commerce power. Commenting upon *Lopez*, the learned Author States:

"It is by no means certain, of course, that future applications of *Lopez* will turn entirely, or even predominantly, on deciding whether a regulated activity is sufficiently "commercial" to qualify for the "substantial effects" test and the aggregation principle. The *Lopez* Court did not expressly hold that only economic or commercial activities could be regulated by Congress whenever they meet these impact tests. *Lopez* relied ultimately on the more general meta- principle that upholding the Gun-Free School Zones Act as a regulation of activity substantially affecting commerce "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated... This we are unwilling to do."

349. The American decisions are replete with conflicting views taken from time to time from *Gibbons v. Ogden* 22 US (9) Wheat 1 to *NLRB v. Jones & Laughlin Steel Corp.* (1937) [301 US 1 and *Katzenbach v. McClung* (1964) 379 US 294 as to whether the Congress should be the sole authority to control the commerce clause or not. [See 'A Book of Legal Lists' by Bernard Schwartz, 'A History of the Supreme Court' by Bernard Schwartz and 'American Constitutional Law' by Lawrence H. Tribe]

350. In *Joseph Lochner v. People of the State of New York* 1908 US 937 a question arose as to whether a legislation in limiting of employment in bakeries to sixty hours a week and ten hours a day is constitutional. The law was struck down stating:

"It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature."

351. It was observed:

"It was further urged on the argument that restricting the hours of labor in the

case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The state in that case would assume the position of a supervisor, or pater familias, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman."

352. It was held that the legislations although claimed to have been made under the police power or really purported to be for the purpose of protecting the public health and welfare, in reality are passed through other motives.

353. Justice Holmes in his dissenting view, however, resented the economic theory governing the majority judgment.

354. In India even such a debate is necessary having regard to the provisions contained in Part XIII of the Constitution of India in terms whereof the State in relation to certain matters may have a regulatory or taxing power but the same would be subject to the commerce clause.

#### PRECEDENT:

355. Doctrine of precedent is a well-accepted principle. A ruling is generally considered to be binding on lower courts and courts having a smaller Bench structure.

"A precedent influences future decisions. Every decision is pronounced on a specific set of past facts and from the decision on those facts a rule has to be extracted and projected into the future. No one can foresee the precise situation that will arise, so the rule has to be capable of applying to a range of broadly similar situations against a background of changing conditions. It has therefore to be in general terms and 'malleable'... No word has one proper meaning, nor can anyone seek to fix the meaning of words for others, so the interpretation of the rule remains flexible and open-ended. (See Dias Jurisprudence, 5th Edition, page 136)"

356. However, although a decision has neither been reversed nor overruled, it may cease to be 'law' owing to changed conditions and changed law. This is reflected by the principle '*cessante ratione cessat ipsa lex*'.

"...It is not easy to detect when such situations occur, for as long as the traditional theory prevails that judges never make law, but only declare it, two situations need to be carefully distinguished. One is where a case is rejected as being no longer law on the ground that it is now thought never to have represented the law; the other is where a case, which is acknowledged to have

been the law at the time, has ceased to have that character owing to altered circumstances. (See Dias Jurisprudence, 5th Edition, page 146-147)"

357. It is the latter situation which is often of relevance. With changes that are bound to occur in an evolving society, the judiciary must also keep abreast of these changes in order that the law is considered to be good law. This is extremely pertinent especially in the current era of globalization when the entire philosophy of society, on the economic front, is undergoing vast changes.

358. In *M.A. Murthy Vs. State of Karnataka and Others*, , this Court held:

"...The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs."

HAD KALYANI STORES (SUPRA) BEEN RENDERED PER INCURIUM :

359. *Kalyani Stores* (supra) is a Constitution Bench judgment. A Constitution Bench has unequivocally held that Article 301 of the Constitution of India shall apply to trade of liquor. Once this Court comes to the conclusion that doctrine of *res extra commercium* was not applicable, *Kalyani Stores* must be applied in all fours. In any event, the decision of a Constitution Bench cannot be brushed aside as having been passed '*sub silentio*' or on the basis of doctrine of '*per incuriam*'

360. Judicial discipline envisages that a coordinate bench follow the decision of earlier coordinate bench. If a coordinate bench does not agree with the principles of law enunciated by another bench, the matter may be referred only to a larger bench. (See *Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others*, ; followed in *State of Tripura v. Roop Chand Das and Ors.*, But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate bench. *Kalyani Stores* (supra) and *K.K. Narula* (supra) both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority.

361. In *Halsbury's Laws of England* (Fourth Edition) Vol. 26, at pages 297-298, Para 578, it is stated:

" A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow *Young v. Bristol Aeroplane Co. Ltd.* (1944) 1 KB 718 (1944) 2 All ER 293. In *Huddersfield Police Authority v. Waton* (1947) KB 842 : (1947) 2 All ER 193 or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force *Young v. Bristol Aeroplane Co. Ltd* (1944) 1 KB 718 (1944) 2 All ER 293. See also *Lancaster Motor Col. (London Ltd. v. Bremith Ltd.* (1941) 1 KB 675 For a Divisional Court decision disregarded by that court as

being per incuriam, See *Nicholas v. Penny* (1950) 2KB 466, 1950 2 All ER 89. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, *Morville Ltd. v. Wakeling* (1955) 2 QB 379 (1955) 1 ALL ER 708 C. or because the court had not the benefit of the best argument, *Bryers v. Canadian Pacific Steamships Ltd.* (1957) 1 QB 134, (1956) 3 All ER 560 CA Per Singleton LJ, *fad Sub nom. Canadian Pacific Steamship Ltd. v. Bryers* (1958) AC 485, (1957) 3 ALL ER 572. and, as a general rule, the only cases in which decision should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority A. and J. *Mukclow Ltd. v. IRC* (1954) Ch. 615. (1954) 2 All ER 508 CA, *Morville Ltd. v. Wakeling* (1955) 2 QB 379, (1955) 1 All ER 708 CA, See also *Bonsor v. Musicians Union* (1954) Ch. 479 (1954) 1 ALL ER 822 CA, where the per incuriam contention was rejected and on appeal to the house of lords although the House overruled the case which bound the Court of Appeal, the House agreed that court had been bound by it see (1956) AC 104. (1955) 3 All ER 518 HL. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake. *Williams v. Glasbrook Bros Ltd* (1947) 2 All ER 884 CA"

362. In *Dr. Vijay Laxmi Sadho Vs. Jagdish*, it has been observed as follows:

"As the learned Single Judge was not in agreement with the view expressed in *Devilal Case* it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. It is well-settled that if a Bench of coordinate jurisdiction whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs".

363. In *State of Bihar Vs. Kalika Kuer @ Kalika Singh and Others*, , a Bench of this Court upon taking a large number of decisions into consideration observed :

"Looking at the matter, in view of what has been held to mean by per incuriam, we find that such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature, is not the reason indicated by the Full Bench in the impugned judgment, while saying that decision in the case of *Ramkrit Singh* (supra) was rendered per incuriam."

364. It was further opined:

"...The earlier judgment may seem to be not correct yet it will have the binding effect on the letter bench of coordinate jurisdiction. Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways - either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that

earlier decision is not correct on merits."

365. It is also trite that the binding precedents which are authoritative in nature and are meant to be applied should not be ignored on application of the doctrine of sub silentio or per incurium without assigning specific reasons therefore. I, for one, do not as to how Kalyani Stores (supra) and K.K. Narula (supra) read together can be said to have been passed sub silentio or rendered per incurium.

#### CONCLUSION:

366. The propositions of law which emerge from the discussions made hereinbefore are :

(1) The maxim 'res extra commercial' has no role to play in determining the constitutional validity of a statute.

The State, in its discretion having regard to the provisions contained in Article 47 of the Constitution of India may part with its right of exclusive privilege but once it does so, the grant being subject to the terms and conditions of a statute, the common law principle based on the maxim 'res extra commercial' shall have no application in relation thereto.

(2) When the constitutionality of a taxing statute is questioned, the same has to be judged on the touchstone of the constitutional provisions including Article 301 thereof. The freedom guaranteed under Article 301 of the Constitution of India may not be considered in isolation having regard to the expression contained therein that such freedom is subject to Part XIII of the Constitution of India.

(3) The right to carry on trade in liquor is a fundamental right within the meaning of Article 19(1)(g) of the Constitution of India and the State may, however, legislate prohibiting such trade either in whole or in part in terms of Clause (6) of thereof.

(4) Article 14 is applicable in the matter of grant by the State and, thus, there is no reason as to why grantee would not be entitled to invoke the commerce clause contained in Article 301 of the Constitution of India.

(5) In interpreting the constitutional provisions, the court should take into consideration the implication of its decision having regard to the international treaties dealing with countervailing duty, etc.

(6) The decision of Kalyani Stores (supra) being an authoritative pronouncement, the same is binding irrespective of the fact as to whether therein the decisions of this Court in Chamarbaugwala (supra), Har Shankar (supra) and Khoday Distilleries (supra) have been referred to or not, keeping in view the fact that even in K.K. Narula (supra), another Constitution Bench has held that trade in liquor is a fundamental right.

367. Before parting, I may observe that it had been my endeavour not to repeat the reasonings of B.N. Agrawal, J. with whom I respectfully agree and, with

utmost respect, I dissent from the views of the majority.

368. In view of the majority opinion rendered by Hon'ble Dr. Justice AR. Lakshmanan, on behalf of himself, Hon'ble the Chief Justice and Hon'ble Mr. Justice R.C. Lahoti, civil Appeal No. 3017 of 1997 is allowed and civil Appeal Nos. 2696-2697 of 2003 are dismissed. There shall be no order as to cases.