
(1979) 04 MAD CK 0032
In the Madras High Court

The Sirsilk Limited

APPELLANT

Vs

The Distillery Officer and Others

RESPONDENT

Date of Decision : 03-04-1979

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1979) 2 MLJ 216

Hon'ble Judges : A. Varadarajan, J

Bench : Division Bench

Judgement

A. Varadarajan, J

1. These Writ Petitions filed under Article 226 of the Constitution of India are, for the issue of writs of certiorari of any other appropriate writs and orders calling for the records in Order No. F.64 of 1975 dated 2nd April 1975, of the Distillery Officer, Tiruchira-palli, the first respondent and quashing the same.

2. Messrs. Trichy Distilleries and Chemicals Limited, Madras, the petitioners in W.P. No. 5172 of 1975 and third respondent in W.P. No. 3377 of 1975, hereinafter referred to as the Trichy Distilleries, are producers of Commercial Ethyl alcohol, also called as rectified spirit or industrial alcohol. Messrs. Sirsilk Limited, Kaghaznagar, Andhra Pradesh, the petitioners in W P No. 3377 of 1975 and third respondent in W.P. No. 5172 of 1975, hereinafter referred to as Sirsilk, are the importers of rectified spirit produced by Trichy Distilleries.

3. According to the affidavit of the Managing Director of Trichy Distilleries filed in support of W.P. No. 51/2 of 1975, the Government of Tamil Nadu, the second respondent in both the Writ Petitions, issued orders in Memo No 1954/IF/74-1, dated 12th November, 1974, Industries and Commerce Department, to release rectified spirit from the several distilleries, including the. Trichy Distilleries in Tamil Nadu. The quantity to be supplied by the Trichy Distilleries was 16 lakh litres and the Trichy Distilleries were asked by another Memo. No 1954-/IB/74-B, dated 12th November, 1974, to supply 15,35,000 litres of rectified spirit to

Sirsilk. Sirsilk obtained the necessary import and export permits from the concerned authorities. The Trichy Distilleries obtained the necessary export permit for exporting 3,00,000 bulk litres of rectified spirit to Sirsilk. The price fixed for supply of 3,00,000 litres of rectified spirit was 86 paise per bulk litre ex-distillery. The excise duty and gallonage fee were 50 and 25 paise respectively per litre and the Central Sales Tax payable was 3 per cent. It was agreed between the Trichy Distilleries and Sirsilk that the latter shall accept the quantity and quality of the rectified spirit, as recorded by the Excise Officer of the former, as final in respect of each consignment, that the responsibility of the former shall cease as soon as the product is loaded to the tanker wagons, that any losses in transit over and above 0.5 per cent. fixed by the Government of Tamil Nadu, the second respondent, shall be to the account of Sirsilk and that any excise duty or other penalty leviable by the second respondent shall be borne by Sirsilk and it should indemnify Trichy Distilleries against all such penalties. Two consignments of rectified spirit of 1,50,000 litres each were despatched through railway wagons on 14th December, 1974, and 19th December, 1974, by the Trichy Distilleries from their Distillery to Sirsilk and they were received at the destination on four days, namely, 29th December, 1974, to 1st January, 1975, after the wagons, had been exposed to sun's heat for 12 to 16 days with consequent loss due to evaporation. When the verification certificate was received from Sirsilk, it was found that there was a transit loss in excess of the limit permitted under Rule 42 of the Tamil Nadu Distillery Rules, 1960, in all the consignments. The verification certificates were forwarded to the first respondent's Distillery Officer. The first respondent thereafter served on the Trichy Distilleries a demand notice calling for payment of 5 00,990.80 at duty at the tariff rate for excess transit wastage of rectified spirit within 7 days of the receipt thereof. The contention of the Trichy Distilleries was that the demand was liable to be quashed for the following reasons:

1. The State Legislature has no power to legislate on rectified spirits.
2. Rule 42 of the Tamil Nadu Distillery Rules, 1960 is ultra vires of the Constitution of India. Even if the State Legislature has power to legislate on rectified spirits, under Entry 51, List II of the Seventh Schedule to the Constitution of India, the State Government can levy only excise duty or countervailing duty and not duty at the tariff rate.
3. Even if the State Government can levy duty on rectified spirit, it cannot be confiscatory in nature. Rule 42 is violative of Article 19 (1)(f) and (g) of the Constitution of India.
4. Rule 42 of the Tamil Nadu Distillery Rules, 1960, is ultra vires of the Prohibition Act of 1937.
5. If the duty is construed as a penalty" Rule 42 is illegal, in so far as it does not require the first respondent, while levying penalty, to prove the contumacious conduct of the distiller but throws the burden on the distiller to prove his

innocence.

6. By adopting the tariff rate as the rate of the duty to be levied, the State Legislator has become guilty of abdicating its legislative power.

7. Rule 42 of the Tamil Nadu Distillery Rules, 1960, is unreasonable in so far as it allows wastage only at 0.5 per cent. whatever the distance to which the rectified spirit is transported from the Distillery.

8. Rule 42 will be attracted only when the transport is by the distiller and the alleged penalty can be levied only against the person committing the offence.

9. It is reasonable to assume that Rule 42 of the Tamil Nadu Distillery Rules, 1960, has been framed by inadvertence or misconception.

10. The order of the second respondent is illegal in so far as no opportunity was given to the Trichy Distilleries before levying duty at the tariff rate.

4. In the affidavit of the representative of Sirsilk filed in support of WP. No. 3377 of 1975, it is alleged that Sirsilk manufactures synthetic fabric for which rectified spirit is one of the raw materials. Sirsilk obtained import permit from the Government of Andhra Pradesh for the import of 3 lakh litres of rectified spirit from Trichy Distilleries, which had obtained the corresponding export permit from the Government of Tamil Nadu. Sirsilk paid to Trichy Distilleries a sum of Rs. 5,57,490 for the value of 3 lakh litres of rectified spirit, railway freight and tax. The permit issued to Trichy Distilleries by the Government of Tamil Nadu was subject to the condition that the rectified spirit should be moved only in railway wagons. The rectified spirit was accordingly consigned to Sirsilk in Railway tanker wagons to its factory at Kaghaznagar in Andhra Pradesh. At the destination, the Excise Inspector examined the consignment and certified that there was a wastage of 7,590.77 proof litres of rectified spirit over and above the permissible limit of 0.5 per cent. in all the 12 consignments. The Trichy Distilleries had executed a bond for Rs. 1,00,000 in favour of the President of India undertaking to pay duty at the tariff rate on all losses in transit by leakage and evaporation in excess of 0.5 per cent. Sirsilk being only purchasers from Trichy Distilleries, the liability under the bond cannot in any event be transferred to Sirsilk. The Railway Authorities have issued Certificate Nos. 007753 to 007755 dated (sic) January, 1975 in respect of these three consignments to the effect that though the three tanker wagons were with the seals intact, the contents were found leaking through the bottom valves. The shortage was thus due to leaky valves of the tanker wagons and not to any act of commission or omission on the part of Sirsilk. Those verification certifications were forwarded to Trichy Distilleries on 13th March, 1975. The Distillery Officer, the first respondent had demanded a sum of Rs. 5,00,990.80 from the Trichy Distilleries by letter No. F. 64 of 1975 dated 2nd April, 1975 on the basis of the aforesaid bond. The Trichy Distilleries sent a copy of the demand to Sirsilk on 9th April, 1975 seeking to transfer that liability on Sirsilk, taking advantage of a counter indemnity furnished by Sirsilk to them. A sum of Rs. 2,82,382 pre-paid by Sirsilk to Trichy Distilleries for further

supplies is held in deposit by Trichy Distilleries and they are refusing to make further supplies on the ground that the Distillery Officer was not permitting them to supply the balance unless the demand made by him is satisfied by them. Sirsilk is, therefore, vitally interested in the demand made by the Distillery Officer on the Trichy Distilleries. Sirsilk contends that the demand is illegal, ultra vires and liable to be struck down for the following reasons:

(1) Section 18-A of the Madras Prohibition Act, 1937, enables the State Government to levy excise duty by notification from time to time on all liquors (a) imported, (b) exported, (c) transported, (d) manufactured, and (e) issued from a manufactory in one or more of the ways prescribed under the rules made under that Act. Though there is a right to levy duty on the transport of excisable commodity, there is no right for the State to levy duty on the leakage of the commodity in transit. No bond can be relied upon for claiming such a levy.

(2) What is authorised by Rule 42 of the Tamil Nadu Distillery Rules, 1960, is nothing but penalty. Rule 42 is, therefore, ultra vires.

(3) The duty demanded at the tariff rate is illegal and confiscatory in nature. The duty at the tariff rate is Rs. 66 per litre, while the price of the commodity is 89 paise per bulk litre. Rule 42, which empowers the authorities to levy such a penal rate of duty is highly arbitrary and liable to be struck down as illegal.

(4) The intention and purpose of the Madras Prohibition Act, 1937, is to prohibit production, manufacture, possession, export, import, transport, purchase, sale and consumption of intoxicating liquors. The levy of duty at penal rate on wastage in transit is inconsistent with the intention and purpose of the Madras Prohibition Act and, therefore, Rule 42 providing for a levy of duty in the nature of penalty is ultra vires of the rule-making power.

(5) Rule 42 of the Distillery Rules, 1960 is destructive of the provisions of the Madras Prohibition Act inasmuch as it impose penal duty on goods lost in transit.

(6) Under Rule 38, execution of a bond is necessary only in cases where duty is not paid. But in the instant case duty has already been paid by Trichy Distilleries. Trichy Distilleries should not, therefore, have been called upon to execute the bond."

(7) Rule 42 is ultra vires the Constitution and goes beyond the rule making power inasmuch as it empowered the authorities to collect the penal duty without first determining the liability to duty.

(8) Normally, penalty, is levied only in cases where there, is escapement from assessment to duty in the present case and, therefore, no duty could be levied on the goods lost in transit.

5. The second respondent has filed a common counter-affidavit in both the writ petitions contending that the Trichy Distilleries were allowed to export 3 lakh bulk litres of rectified spirit to Sirsilk by the Board's reference dated 11th December,

1974. Trichy Distilleries despatched the first consignment of six wagons carrying 1,50,000 litres on 14th December, 1974 and the second consignment of six wagons carrying a similar quantity on 19th December, 1974. The Distillery Officer had obtained an indemnity bond for a sum of Rs. 1,00 000 from the Trichy Distilleries for paying duty at the tariff rate on the excess loss in transit. It was reported that three wagons carrying 25,000 litres each were found to be leaky on arrival. There was no excess loss in transit in respect of the remaining nine wagons. The excess transit loss was worked out as 7,590.77 bulk litres out of a total loss of 10,082.27 bulk litres and the tariff rate was applied on the excess wastage of 7,590.77 bulk litres.

6. The Trichy Distilleries have undertaken in the application for the grant of licence to abide by the conditions of the licence as well as by the Tamil Nadu Prohibition Act, 1937, and the rules and regulations made thereunder. The licence granted to them contains provisions for the licensee being bound by the Tamil Nadu Prohibition Act, 1937, and the notifications, rules and orders made thereunder, and also the Madras Distillery Rules, 1960, and to observe such rules as may be prescribed by the State Government and such instructions and orders as may be issued by the Commissioner from time to time in regard to the control of the manufacture, possession and sale or issue of rectified spirit and denatured spirit. Under Rule 36 of the Distillery rules rectified spirit can be removed only under bond for export to any other State specially permitted by the Commissioner. Under Rule 37, when spirits are removed on concessional rates of duty, the distiller is bound to execute a bond for payment of duty at the tariff rate less the amount of duty, if any, already paid, in case he failed to account for the commodity. The export in the present case was to Andhra Pradesh and at the concessional rate of duty. According to Rule 42 of the Distillery Rules, loss in transit by leakage and evaporation shall not exceed 0.5 per cent. The Distillery Officer took proper action with reference to the mandatory provisions of the Distillery Rules.

7. The rules do not provide for any accountability or liability on the part of the purchaser of rectified spirit. The contention of Trichy Distilleries that any loss in transit is not the concern of the State of Tamil Nadu on the ground that it has not suffered any loss of revenue, is untenable in the background of the total prohibition introduced in the State of Tamil Nadu. It is not so much the loss of money, but it is the un-accounted loss of alcohol which is the primary concern in the present case. It has not been alleged nor is it possible to ascertain that the excess loss occurred only in Andhra Pradesh and not in Tamil Nadu. The very large unaccounted loss of 10,082.27 bulk litres is too serious a matter about which no lenient view could be taken. Therefore, the penalty imposed was proper and in accordance with the Rules.

8. The contention of Trichy Distilleries that under Rule 35 of the Distillery Rules export to other States in the Indian Union should have been permitted without payment of duty under bond and that when rectified spirit is exported the State

Government has no authority to levy any fee or duty is untenable. So far as export is concerned, Rule 35 (a)(1)(ii) alone will apply. Sub-rule (1) relates to transport or export to another distillery or bonded manufactory, while Sub-rules (2) and (3) refer to supplies to licensees, officers and institutions of Government. Sub-rule (ii) of Rule 35 (a)(1) alone applies to export specially permitted by the Commissioner and it is necessarily to be covered by a bond and the bond was, therefore, taken from the distilleries in the present case. Under Rule 37, the distiller shall execute a bond when spirits are removed from the distilleries without payment of duty or on payment of duty at concessional rates.

9. The contention of Trichy Distilleries that rectified spirit is not liquor for human consumption and that the State Government, cannot levy excise duty with reference to Entry 84 under List I is baseless and devoid of merits.

10. The tariff rate is based on proper enquiries made by competent authorities and revised from time to time in accordance with the provisions of the Indian Tariff Act. There is no abdication of the legislative powers by adopting the rate which is properly applicable and relevant.

11. A State which foregoes a large amount of revenue in implementing prohibition for giving effect to directive principles has necessarily to adopt strict standards on unaccounted losses. It is neither alleged- nor proved that the excess loss in transit has occurred only outside the limits of Tamil Nadu. The Distillery Officer has, therefore, acted in accordance with the rules. The Trichy Distilleries and Sirsilk are not entitled to any relief.

12. M/s. Trichy Distilleries are manufacturers of Ethyl Alcohol which is also called "rectified spirit" or "Industrial Alcohol" and will hereinafter be referred to as "rectified spirit". The Sirsilk limited are importers of rectified spirit manufactured by Trichy Distilleries. Trichy Distilleries obtained an export permit from the Government of Tamil Nadu for exporting 3 lakhs litres of rectified spirit to Sirsilk which obtained the necessary import permit from the Government of Andhra Pradesh. There is no dispute that the price fixed for the supply of 3 lakhs litres of rectified spirit was 86 paise per litres, that the excise duty and gallonage fee payable were 50 paise and 25 paise respectively per litre and that the Central Sales Tax payable was 3 per cent.

13. Rule 35 of the Madras Distillery Rules" 1960, which provides for removal of spirits from distillery reads thus:

(a) Rectified spirit shall be removed--

(1) under bond;

(i) for transport or export to another distillery or to a bonded manufactory established under the medicinal and Toilet Preparations (Excise Duties) Rules, 1966, within the State for the manufacture of medicinal or toilet preparations or to the licensed premises of a licensee for the manufacture in bulk of culinary, aerated waters and other flavouring essences, extracts and colouring, and

(ii) for export to any other State in the Indian Union when specially permitted by the Commissioner;

(2) On payment of the prescribed fee and duty if sold to licensees in the State or to any person or institution specially authorised to receive supply from the distillery; and

(3) without bond and without payment of any fee or duty if sold to prescribed officers and institutions of the State or Central Government and without duty if sold to officers and institutions who are specifically exempted from payment of duty alone.

(b)....

14. Rule 38 provides for the removals under bond and reads thus:

Removals under bond--When spirits are removed from a distillery without payment of duty, the distiller shall execute a bond for the payment of duty on them at the tariff rate in case of his failure to account for them to the satisfaction of the Collector.

Rule 42 provides for allowance for wastage in transit, and reads:

(a) Transport of rectified spirits shall only be in metallic receptacles. The use of wooden receptacles is prohibited. Loss in transit by leakage and evaporation shall not exceed one half of one per cent. The allowance to be made under this rule shall be determined by deducting from the quantity of spirits despatched from the distillery, the quantity received at the place of destination, both quantities being stated in terms of London proof gallons and shall be calculated on the quantity consigned in each receptacle comprised in a consignment. If the report of the officer by whom a consignment of spirits transported or exported under bond or duty free has been gauged and proved on arrival at its destination shows that loss has occurred in transit to a greater extent than that prescribed, the distiller shall pay duty at the tariff rate, on so much of the deficiency as is in excess of the allowance so prescribed:

Provided that, if it is proved to the satisfaction of the Commissioner that such deficiency could have been prevented by the exercise of proper care and precaution and that the spirits could not have passed into consumption the duty levied on such deficiency shall be refunded.

(b) Any wastage of denatured spirit in transit, that is not properly accounted for shall be charged with gallonage fee together with such penalty not exceeding the gallonage fee leviable thereon as the Commissioner may deem fit.

(c) The Commissioner's decision on any question arising under the rule shall be final.

15. The Trichy Distilleries executed the bond as required by Rule 33. It was agreed between Trichy Distilleries and Sirsilk that the latter shall accept the

quantity and quality of the rectified spirit, as recorded by the Excise Officer of the former, as final in respect of each consignment, that the responsibility of the former shall cease as soon as the product is loaded into tanker wagons, that any loss in transit over and above 0.5 per cent. fixed by the Government of Tamil Nadu shall be to the account of Sirsilk and that any excise duty or other penalty leviable by the second respondent, shall be borne by Sirsilk and it should indemnify Trichy Distilleries against all such penalties. Subsequently two consignments of rectified spirit of 1,50,000 litres each were despatched through railway wagons on 14th December, 1974 and 19th December, 1974 from their Distillery to Sirsilk and they were rereceived at the destination on four days, namely 29th December, 1974 to 1st January, 1975 According to Trichy Distilleries, the Railway authorities at the station of destination, had issued certificates in respect of three wagons to the effect that though the tanker wagons were received with the seals intact, the contents were found leaking through the bottom valves. It is the admitted case that Trichy Distilleries had executed an indemnity bond for a sum of Rs. 1,00 000 as directed by the Distillery Officer for paying the duty at the tariff rate on the excess loss in transit. "It has also been admitted in the counter affidavit of the second respondent that it was reported that three wagons each with 25,000 litres were found to be leaking on arrival that there was no excess loss in transit in respect of the remaining nine wagons, that the excess loss in transit, in respect of three wagons, was worked out as 7590.77 bulk litres and that the tariff rate was applied on that excess wastage of 7590.77 bulk litres.

16. The first respondent thereafter served on Trichy Distilleries a demand notice F No. 64/75 dated 2nd April, 1975 calling for payment of Rs. 5,00,990.80 towards the duty at the tariff rate for the excess transit wastage of rectified spirit within seven days of the receipt thereof. Sirsilk had paid to Trichy Distilleries a sum of Rs 5,57,490 for the value of 3 lakh litres of rectified spirit, railway freight and tax. In view of the counter indemnity bond executed by Sirsilk in favour of Trichy Distilleries, the latter sent a copy of the said demand for Rs. 5,00,990.80 made by the Distillery Officer on Trichy Distilleries to Sirsilk. Sirsilk had pre-paid a sum of Rs. 2,82,382 to Trichy Distilleries for further supplies. It is the case of Sirsilk that Trichy Distilleries are holding that amount and refusing to make further supplies on the ground that the Distillery Officer was not permitting them to supply the balance unless the demand for the payment of the sum of Rs. 5,00,990.80 is satisfied. There is no dispute between the parties regarding the facts mentioned above. It is in these circumstances that Trichy Distilleries have filed Writ Petition No. 5172 of 1975 for the issue of a writ of certiorari or any other appropriate writ calling for the records in Order No. F.64/75 dated 2nd April, 1975, of the first respondent and quashing the same, and the Sirsilk have filled Writ Petition No. 3377 of 1975, as the person aggrieved, for the issue of a writ of certiorari quashing the same order dated 2nd April, 1975 of the first respondent.

17. The contentions of the parties have been set out above. Though several

grounds have been mentioned in the affidavit filed in support of Writ Petition No. 5172 of 1975, only nine grounds were urged before me by Mrs. Nalini Chidambaram, learned Counsel for the Trichy Distilleries. The first ground is that the State Legislature has no power to legislate on rectified spirits. Article 265 of the Constitution of India lays down that no tax shall be levied or collected except by authority of law. Rule 42 (a) extracted above casts a liability on the person, transporting rectified spirits, to pay duty at the tariff rate, on so much of the deficiency as is in excess of the allowance prescribed namely 0.5 per cent.

Government thinks it expedient to do so. The objects to be taxed so long as they appertain to be within the legislative competence of the Legislature can be taxed by the Legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Article 19 Courts would naturally be circumspect and cautious. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the Legislature for achieving its confiscatory purposes.

Government's power to levy duties of excise reads thus:

"Duties of excise on tobacco and other goods manufactured or produced in India except--

(a) alcoholic liquors for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substances included in sub-paragraph (b) of this entry-

18. The learned Counsel for the petitioner in W.P. No. 5172 of 1975 submitted that rectified spirit is not alcoholic liquor for human consumption and that the State Legislature cannot therefore legislate in regard to that Commodity, The learned Counsel further submitted that on a combined reading of entry 51 in List II and entry 84 of List I, it will be clear that the State Legislature can legislate only in respect of (a) alcoholic liquors for human consumption, and (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 entry 51, and that the Government of India can legislate on tobacco and other goods manufactured or produced in India except (a) alcoholic liquors for human consumption and (b) Opium, Indian hemp and other narcotic

drugs and narcotics. But including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of entry 84. It was submitted that rectified spirit is not alcoholic liquor for human consumption and that therefore the State Government cannot legislate in regard to that, commodity by way Rule 42 of the Distillery Rules, 1960 which has been framed in exercise of the power conferred by Sections 21 and 54 of the Madras Prohibition Act, 1937. In support of the contention that rectified spirit is not alcoholic liquor for human consumption and that therefore the State Legislature cannot legislate on it, the, learned Counsel for Trichy Distilleries relied upon the judgment of the Allahabad High Court in SA. No. 177 of 1970 dated 29th March, 1973. The question for consideration before the division Bench of the Allahabad High Court in that case was whether excise duty could be levied on rectified spirit under the Uttar Pradesh Excise Act, 1910. The learned Judges have observed in their judgment in that case that rectified spirit is not to be made available to the common man for human consumption, that the mere fact that some misguided persons, after obtaining rectified spirit surreptitiously drink it after diluting it with water, will not alter the fact that rectified spirit is not an article meant for human consumption and that the capability of conversion into alcoholic liquor for human consumption will not make the rectified spirit itself an alcoholic liquor for human consumption, and before conversion it cannot be said to be an alcoholic liquor for human consumption. The learned Judges have held, following the decision of the Division Bench of the Madhya Pradesh High Court in Suneeta Laboratories v. State of Madhya Pradesh (1972) J.L.J. 360 : (1972) M.P.L.J. 565 : (1972) that the State Legislature has no right to impose any excise duty on rectified spirit. The Supreme Court in S.L P. (Civil) No. 287 of 1975, has, by order dated 27th February, 1975 declined to grant special leave to file an appeal against the said decision of the Allahabad High Court in S.A. No. 177 of 1970.

19. The learned Advocate-General did not advance any argument specifically regarding this ground. But he submitted in the course of his argument relating to ground number four that rectified spirit can be converted into liquor fit for human consumption. As stated earlier that submission has been found to be not acceptable by the Division Bench of the Allahabad High Court in the above said S.A. No. 177 of 1970. In these circumstances I agree with the learned Counsel for Trichy Distilleries that rectified spirit is not alcoholic liquor for human consumption falling within entry 51 of List II in Schedule VII of the Constitution of India and that it falls within entry 84 of List I of that Schedule and that the State Legislature has no power to legislate on it by way of Rule 42 of the Madras Distilleries Rules, 1960, framed in exercise of the power conferred by Sections 21 and 54 of the Madras Prohibition Act, 1937. I find accordingly and hold that the levy made under Rule 42 is invalid in law.

20. The second ground urged by the learned Counsel for the petitioner in W.P. No. 5172 of 1975 is that Rule 42 of Tamil Nadu Distillery Rules, 1960 is ultra vires of Article 265 of the Constitution of India which lays down, as already stated, that no tax shall be levied or collected except by authority of law. It was

submitted that even if duty can be levied under Entry 51 of List II of Schedule VII of the Constitution of India, only excise duty and countervailing duty can be levied and not any penalty on the loss or wastage in transit in excess of the permissible limit of 0.5 per cent.

21. Rule 54 (2)(a) of the Prohibition Act, 1937 enables rules to be framed for the issue of licences and permits and the enforcement of the conditions thereof. Rule 54 (2)(bb) enables rules to be framed prescribing the way in which the duty u/s 18-A of that Act may be levied. As already stated, Rule 42 of the Madras Distillery Rules, 1960, has been framed in exercise of the powers conferred by Sections 21 and 54 of the Prohibition Act, 1937. It was submitted by the learned Counsel for Trichy Distilleries that the levy on the excess loss in transit is neither excise duty nor countervailing duty and that therefore Rule 42 is ultra vires of Article 265 of the Constitution of India. Though, as stated earlier in paragraph 5 of the common counteraffidavit, it has been contended that the penalty imposed is proper and in accordance with the Rules, what has been levied is only duty under Rule 42 (a) of the Madras Distillery Rules, 1960. It has been levied not on any goods manufactured or produced in the States, but only on the loss of such goods in transit in excess of the permissible limit of 0.5 per cent, in respect of goods which has already been subjected to duty. Therefore I agree with the learned Counsel for Trichy Distilleries that the levy is neither duty nor countervailing duty and that Rule 42 of the Madras Distillery Rules, 1960 is ultra vires of Articles 265 of the Constitution of India. It may be stated here that no argument was advanced specifically with regard to ground number two by the learned Advocate-General.

22. The third ground urged before me by the learned Counsel for Trichy Distilleries is that the levy under Rule 42 of Madras Distillery Rules, 1960, is confiscatory in nature and violative of Articles 19 (1)(f) and 19 (1)(g) of the Constitution of India. Article 19 (1)(g) lays down that all citizens shall have the right to acquire, hold and dispose of property Article 19 (1)(g) lays down that all citizens shall have the right to practise any profession or to carry on any occupation, trade or business. The learned Counsel for Trichy Distilleries submitted that the price of three bulk litres of rectified spirit exported by Trichy Distilleries to Sirsilk, inclusive of excise duty etc., comes to Rs. 5,57,490 and that the penalty levied in respect of the excess loss of 7590 77 bulk litres is Rs. 5,00,990 80, and Trichy Distilleries cannot pay this amount except by disposing of their property and therefore Article 19 (1)(f) of the Constitution of India is offended. It was also submitted for Trichy Distilleries that if the demand like the one made in the present case is to be complied with, that concern cannot carry on its trade and therefore Article 19 (1)(g) of the Constitution of India is offended. In this connection reliance was placed by the learned Counsel for Trichy Distilleries on the decision of a Division Bench of this Court in A.M. Sali Maricar and Another Vs. Income Tax Officer and Another, wherein at page 126, the learned Judges have observed that "the provision for confiscation of property for non-payment of tax arrears could not be sustained as a provision ancillary or

incidental for enforcement of payment and therefore, a reasonable restriction under Clause (5) of Article 19 of the Constitution, and that even as a punishment for failure to pay the tax within time, the legislation could not be sustained from the attack of Article 19 (1)(f). The learned Judges have further observed:

The learned Counsel for the revenue sought to sustain Section 140-A (3) of the Act (income tax Act, 1961) on the ground that is a provision enabling coercive process for enforcement or effectuating the recovery of the tax. We are unable to see how this provision could be considered to be a provision for enforcement or recovery of the tax payable. The provision has no rational or Intelligent connection with the recovery of the tax itself. Actually the tax itself does not provide for the issue of a demand notice u/s 156 of the Act. If it is intended to be a coercive process, it must be to recover the debt itself but not to enhance it. The provision, far from enabling to recover the debt imposes an additional burden. It would be a contradiction to say "you are trying to enforce and recover by imposing additional or new debt". Far from effectuating recovery, the levy of penalty may even frustrate the very object. How could an additional burden help a person who is not able to pay?

In another part of that judgment, the learned Judges have observed that "every citizen is entitled to retain his income ascertained after deduction of the taxes payable under the Income Tax Act " ..." In *The Check Post Officer and Others Vs. K.P. Abdulla and Bros.*, the Supreme Court held that Section 42 (3) of the Tamil Nadu General Sales Tax Act, 1959, which empowers the Check Post Officers to confiscate goods and levy penalty in lieu of confiscation without inspection of the goods found in a vehicle when the driver of the vehicle was not carrying with him the documents specified in the section, is not a provision which is ancillary or incidental to the power to tax sale of goods under Entry 54 of List II of the Seventh Schedule to the Constitution, approving the decision of this Court in *K.P. Abdulla and Bros. and Another Vs. Check Post Officer, Kandaigoundanchavadi and Others*, ... Though the Supreme Court was concerned with the legislative competency of a State Legislature under Entry 54 of List II of the seventh Schedule to the Constitution the ratio of that judgment, in our opinion, is that a provision for confiscation or levy of penalty is not a provision for enforcement of payment of tax. Thus the provision for confiscation of property for nonpayment of tax arrears could not be sustained as a provision ancillary or incidental for enforcement of payment and, therefore, a reasonable restriction under Clause (5) of Article 19 of the Constitution. Even as a punishment for failure to pay the tax within time, the legislation could not be sustained from the attack of Article 19 (1)(f).

23. There is considerable weight in the argument of the learned Counsel for Trichy Distilleries that the duty of Rs. 5 00,990.80 levied on the excess loss in transit could not be paid by Trichy Distilleries except by disposing of their properties to the extent necessary for the complying with the demand and therefore Article 19 (1)(f) of the Constitution of India is offended, that if the demands,

like the present one, are to be complied with, persons like Trichy Distilleries cannot carry on their business and that therefore the right guaranteed to a citizen under Article 19(1)(g) of the Constitution of India is offended. I find accordingly. It may be stated here that the learned Advocate-General did not advance argument on this ground.

24 The fourth ground urged by the learned Counsel for Trichy Distilleries is that Rule 42 of the Madras Distillery Rules, 1960, is ultra vires of the Madras Prohibition Act, 1937. The contention of respondents 1 and 2 in paragraph 5 of their common counter-affidavit is, as already stated, that the penalty imposed, is in accordance with the Rules in view of the introduction of total prohibition in Tamil Nadu. Section 5 of the Madras Prohibition Act, 1937 provides for punishment to any person who renders or attempts to render fit for human consumption any spirit, whether manufactured in India or not, which has been denatured or any preparation containing such spirit, or has in his possession, any spirit or preparation containing spirit in respect of which he knows or has reason to believe that any attempt has been made. This section provides for minimum punishment to the extent of imprisonment for six months and a fine of seven hundred and fifty rupees for a first offence; imprisonment for nine months and a fine of one thousand rupees for a second offences, and imprisonment for one year and a fine of one thousand five hundred rupees for a third and subsequent offences.

25. The learned Counsel for Trichy Distilleries submitted that even if the quantity of rectified spirit, found to have been lost in transit in excess of the permissible limit of 0.5 per cent. had been converted into alcoholic liquor for human consumption, for which there is no proof, penalty cannot be levied at the abnormal rate as has been done in the present case by the subordinate legislation in the form of Rule 42 of the Madras Distillery Rules, 1960. It was further submitted that the levy of such a high penalty is not authorised by the Madras Distillery Rules, 1960 and is ultra vires of the provisions of that Act. Reliance is placed, in this connection, on the decision of a Bench of this Court in *Solar Works Vs. Employees' State Insurance Corporation and Another*, In that case an application was filed u/s 75(2) of the Employees' State Insurance Act, 1948, by the Employees' State Insurance Corporation to recover contribution due from the employer, namely, the Solar Works before the Employees' Insurance Court for the period between March, 1957 to November, 1958, on 21st June, 1959. The Act does not prescribe any period of limitation within which such an application could be filed. But Rule 17 of the rules framed by the Madras State Government prescribed a period of 12 months from the date on which the cause of action arose or the claim became due. There is a proviso to the effect that the Court may entertain an application after the said period of 12 months, if it is satisfied that the applicant had sufficient reason for not making the application within the said period. The Employees' State Insurance Corporation invoked the benefit of that proviso in that application stating that the Corporation became aware of the liability of the employer only on 16th February, 1959, when the

Insurance Inspector inspected the records of the employer. The employer opposed the claim as being barred by limitation and urged that no satisfactory reason had been adduced for excusing the delay.

26. Dealing with the question whether Rule 17 is valid or ultra vires the learned Judges have observed in their judgment that "where an Act itself does not provide for limitation with reference to a particular matter and the delegation of power to make rules is conferred by a section of the Act which does not, expressly or impliedly, relate to the power to prescribe time, the authority to which the power is delegated, namely the State in this case, cannot make a rule prescribing limitation. This is because, even under the Constitution Article 145 (1) (c), where the Supreme Court is authorised to make rules for the practice and procedure of the Court, there is specific reference to a power to prescribe limitation for applications to Court. As the learned Advocate General rightly stresses, in the Government of India Act, 1935, List 3, Entry 4, the power to prescribe limitation was included as part of the Civil Procedure, but a significant departure appears in List 3, Entry 13 of the 7th Schedule to the Constitution where the power to prescribe limitation has been segregated". The learned Advocate General was also at pains to furnish us with a table of Central and State Acts, all the particulars of which need not be reproduced here, which definitely proves that, where the rule making power is conferred by a section of the Act, and it is contemplated that the rule-making authority might also prescribe limitation, there is a specific reference to the power to prescribe time, in some form or another, in the section concerned. It is sufficient for us to point out that there is an impressive list of the Central Acts exhibiting this uniform feature, as well as at least ten or more Madras Acts, also having the same characteristic.

When we turn to the matter actually in issue before us, we find further difficulties in adopting the view that the rule-making power generally conferred in the present case u/s 96 (5) namely, the power to make rules with regard to "the procedure to be followed in proceedings before such Courts and the execution of orders made by such Courts" will, by necessary implication, include the power to prescribe limitation.... Hence we agree with Venkataraman, J., that Rule 17, as it stands, is ultra vires of the rule-making power of the State, and that, in the present case, the application by the Employees of the State Insurance Corporation is not time-barred in any sense, and needs no condonation". Rule 42 of the Madras Distillery Rules provides for the levy of duty on the excess loss in transit and is not in consonance with Section 5 of the Madras Prohibition Act, 1937. The learned Advocate-General invited my attention to the preamble to the Madras Prohibition Act which reads thus": Whereas it is expedient as early as possible.

to bring about the prohibition except for medicinal, scientific, industrial or such like purposes, of the production, manufacture, possession, export, import, transport, purchase, sale, and consumption of intoxicating liquors and drugs in

the Province of Madras;

And whereas it is desirable to give effect to the above-mentioned policy by introducing it in certain selected areas in the said Province and utilizing the experience gained therein for extending it to the other areas thereof;

It is hereby enacted as follows:

The learned Advocate-General submitted that Section 54 of the Madras Prohibition Act empowers the State Government to make rules for the purpose of carrying into effect the provisions of the Act and that Section 54 (2)(bb) empowers the State Government to prescribe the ways in which the duty u/s 18 A may be levied. While conceding that rectified spirit as such, is not fit for human consumption, the learned Advocate-General submitted that it can be converted into liquor fit for human consumption and that the excess wastage could have gone into the market in bottles, and the proviso to Rule 42 enables the distiller to satisfy the department that the excess loss was caused by some reason for which he was not responsible and the distiller could have taken advantage of the proviso and could have explained and avoided the writ petition. Though the argument of the learned Advocate-General proceeds on the basis that rectified (Spirit could be converted into liquor fit for human consumption, it has been found above that rectified spirit, as such, is not liquor fit for human consumption. As rightly submitted by the learned Counsel for Trichy Distilleries, there is no proof that the rectified spirit lost in transit in excess of the permissible limit, has been converted into liquor fit for human consumption, and even if there is any such proof, levy of duty or penalty under Rule 42 of the Madras Distillery Rules, 1960 which provides for the levy of duty at an abnormal rate in ultra vires of the Madras Prohibition Act. I find accordingly.

27. As stated earlier in paragraph 5 of the common counter affidavit, respondents 1 and 2 have contended that penalty has been levied in accordance with the rules. The fifth ground urged by the learned Counsel for Trichy Distilleries is that even if the duty is construed as a penalty, Rule 42 is illegal in so far as it does not require the department while levying the penalty to prove any constumacious conduct of the distiller but throws the burden on the distiller to prove his innocence. It was submitted that before levying penalty, respondents 1 and 2 should prove that the rectified spirit lost in transit in excess of the permissible limit has illegally gone into human consumption. It was argued that the levy has been made on mere surmise and is illegal.

28. The contention of Sirsilk in the affidavit filed in support of their Writ Petition No. 3377 of 1975 is that the excess loss in transit had occurred in respect of three consignments in which though the tanker wagons arrived at the station of destination with the seals intact, the contents were found leaking through the bottom valves. Even in the counter-affidavit of the second respondent, it is stated that it was reported that three wagons carrying 25,000 litres each were found to be leaking on arrival, that in respect of the remaining nine wagons no

loss in excess transit loss was worked out as 7590.77 bulk litres out of the total wastage of 10,082.27 bulk litres, and the tariff rate was applied only on the excess wastage of 7590.77 bulk litres. Thus, it is common ground that the excess loss has occurred as a result of three tanker wagons leaking through the bottom valves, though those three wagons carrying 25,000 bulk litres each of rectified spirit arrived at the station of destination with the seals intact. The Trichy Distilleries had no control over the consignment after it was put in the tanker wagons at the station of origin. Therefore they cannot be held responsible for the excess loss in transit which has occurred by the three wagons leaking through the bottom valves. They had not been called upon to offer their explanation for the excess loss in transit, and even if they had denied their liability for the same, the Department should have established that the excess loss in transit had occurred due to some act of omission or commission on the part of Trichy Distilleries and that the quantity of rectified spirit found to be missing in excess of the permissible limit of 0.5 per cent has gone into the open market in the form of liquor fit for human consumption.

29 In *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, The Supreme Court has observed:

The first point which falls for determination is whether the imposition of penalty is in the nature of a penal provision. The determination of question of burden of proof will depend largely on the penalty proceeding being penal in nature or being merely meant for imposition of an additional tax, the liability to pay such tax having been designated as penalty u/s 28 of the Income Tax Act, 1922. One line of argument which has prevailed particularly with the Allahabad High Court in *LAL CHAND GOPAL DAS Vs. COMMISSIONER OF Income Tax, U.P. AND V.P., Uttar Pradesh* is that there was no essential difference between tax and penalty because the liability for payment of both was imposed as a part of the machinery of assessment and the penalty was merely an additional tax imposed in certain circumstances on account of the assessee's conduct. The justification of this view was founded on certain observations in *C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, It is true that penalty proceedings u/s 28 are included in the expression "assessment" and the true nature of penalty has been held to be additional tax. But one of the principal objects in enacting Section 28 is to provide a deterrent against recurrence of default on the part of the assessee. The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. It is significant that in *C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, this Court was not called upon to determine whether penalty proceedings were penal or of quasi-penal nature and the observations made with regard to penalty being an additional tax were made in a different context and for a different purpose.

It appears to have been taken as settled by now in the sales tax law that an

order imposing penalty is the result of quasi-criminal proceedings....

The next question is that when proceedings u/s 28 are penal in character what would be the nature of the burden upon the department for establishing that the assessee is liable to payment of penalty.... As has been rightly observed by Chagala C J., in Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas, the gist of the offence u/s 28 (1)(c) is that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and, therefore, the department must establish that the receipt of the amount in dispute, constitutes income of the assessee. If there is no evidence, on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income.

30. In the present case, no explanation has been called for regarding the loss in transit and therefore no inference that the quantity lost in excess of the permissible limit of 0.5 per cent has gone into open market, can be drawn in the absence of any evidence in that regard. The learned Advocate-General merely contended that no burden is thrown on the Trichy Distilleries, the licensees and that if there is any excess wastage in transit, a duty is cast on the licensee to explain the same. It is not possible to agree with this submission. I agree with the learned Counsel for Trichy Distilleries" that in so far as Rule 42 does not require the department to prove that the quantity which had not been received at the station of destination in excess of the permissible limit of 05 per cent, has gone into the open market by any act or omission on the part of Trichy Distilleries, the consignors, is illegal to the extent it authorises the levy of duty without proving any contumacious conduct of the distiller, exporter. I find accordingly.

31. The sixth ground urged by the learned Counsel for Trichy Distilleries is that by adopting the tariff rate as the rate of duty to be levied on the excess loss in transit, the State Legislature had abdicated its legislative power. The Indian Tariff Act, 1934 has been passed to consolidate the law relating to customs duties on goods imported or exported by land. Import duty is levied so as to prevent import of goods into the Indian Union. The learned Counsel for the Trichy Distilleries submitted that to adopt such a table for imposing duty on rectified spirit is wholly unrelated to the object of the Distillery Rules, 1960. Item 22 (4) of the first schedule to the Indian Tariff Act, 1934 provides for the levy of excise duty in the nature of revenue at Rs. 80.00 per litre or 270 per cent, ad valorem whichever is higher on spirits (other than denatured spirit), namely Brandy, gin, whisky and other sorts of spirits not otherwise specified including wines containing more than 42 per cent. of proof spirit Rule 2(k) of the Madras Distillery Rules, 1960 says that "tariff rate" means the rate of import, duty prescribed under the Indian Tariff Act, 1934 or any other law for the time being in force relating to the duties of customs on goods imported into the Indian Union The learned Counsel for Trichy Distilleries submitted that the Tariff Act,

1934 remains constant, but the table of rates in the first schedule is changed from time to time and that the State Legislature by subordinate legislation has adopted that table of rates without applying its mind to the rate of duty and has thereby abdicated its legislative power. The learned Counsel for Trichy Distilleries relied on the decisions of the Supreme Court in *B. Shama Rao Vs. The Union Territory of Pondicherry*, and *Delhi Municipality v. B.C.S. & W. Mills* (1069) 1 S.C.J. 621 : (1968) 2 S.C.R. 251 : A.I.R The first of these two decisions relates to Pondicherry General Sales Tax Act X of 1965. The administration of Pondicherry became vested in the Government of India on 16th August, 1962 by virtue of de jure transfer. The Pondicherry Administration Act XLII of 1962 constituted that territory as a separate centrally administered unit, and under the Union Territories Act XX of 1963 a legislative assembly was set up for that area. The Assembly under that act acquired the power of enacting laws in respect of items in Lists II and III of the Seventh Schedule to the Constitution. The Assembly thereafter passed the Pondicherry General Sales Tax Act X of 1965. Section 1(2) of that Act provided that the Act would come into force on such date as the Government by notification appoint. Section 2(1) provided that:

The Madras General Sales Tax Act, 1959 as in force in the State of Madras, immediately before the commencement of this Act shall extend to and come into force in the Union Territory of Pondicherry subject to the following modifications and adaptations....

The assessee in that case was a merchant carrying on business in liquor and a dealer within the meaning of the Madras Act. Upto March, 1966, he was liable and was paying certain taxes similar to the sales tax under the French regulations till then in force in Pondicherry. With the coming into force of the Pondicherry General Sales Tax Act, 1965, he was served with a notice to register himself as a dealer. Thereupon he filed a writ petition challenging the validity of the principal Act, namely Pondicherry General Sales Tax Act, 1965. The question for consideration in that case was whether in extending the Madras Act in the manner and to the extent it did u/s 2(1) of the Pondicherry General Sales Tax Act, 1965, the Pondicherry legislature abdicated its legislative power in favour of the Madras legislature. The Supreme Court has observed:

It is manifest that the Assembly refused to perform its legislative function entrusted under the Act constituting it. It may be that a mere refusal may not amount to abdication if the legislature instead of going through the full formality of the legislation applies its mind to an existing statute enacted by another legislature for another jurisdiction, adopts such an Act and enacts to extend it to the territory under its jurisdiction. In doing so, it may perhaps be said that it has laid down a policy to extend such an Act and directs the executive to apply and implement such an Act. But when it not only adopts such an Act but also provides that the Act applicable to its territory shall be the Act amended in future by the other legislature, there is nothing for it to predicate what the amended Act would be. Such a case would be clearly one of non-application of mind and

one of refusal to discharge the function entrusted to it by the Instrument constituting it. It is difficult to see how such a case is not one of abdication or effacement in favour of another legislature at least in regard to that particular matter....

In the present case, it is clear that the Pondicherry legislature not only adopted the Madras Act as it stood at the date when it passed the principal Act (Pondicherry General Sales Tax Act, 1965) but also enacted that if the Madras Legislature were to amend its act prior to the date when the Pondicherry Government would issue its notification, it would be the amended act which would apply. The legislature at that stage could not anticipate that the Madras act would not be amended nor could it predicate what amendment or amendments would be carried out or whether they would be of a sweeping character or whether they would be suitable in Pondicherry. In point of fact the Madras act was amended and by reason of Section 2(1) read with Section 1(2) of the Principal Act it was the amended Act which was brought into operation in Pondicherry. The result was that the Pondicherry legislature accepted the amended Act though it was not and could not be aware what the provisions of the amended Act would be. There was in these circumstances a total surrender in the matter of sales tax legislation by the Pondicherry Assembly in favour of the Madras legislature and for that reason we must agree with Mr. Desai that the Act was void or as is often said "still-born".

32. In the Delhi Municipal Corporation case, it is observed by the Supreme Court that "the question as to the limits of permissible delegation of legislative power by a legislature to a subordinate authority has come before this Court in a number of cases and the law as laid down by this Court is not in doubt now. Considering the complexity of modern life it is recognised on all hands that the legislature cannot possibly have time to legislate in every minute detail. That is why it has been recognised that it is open to the legislature to delegate to subordinate authorities the power to make ancillary rules for the purpose of carrying out the intention of the legislature indicated in the law which gives power to frame such ancillary rules. The matter came before this Court for the first time in *Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950*, and it was held in that case that it could not be said that an unlimited right of delegation was inherent in the legislative power itself. This was not warranted by the provisions of the Constitution, which vested the power of legislation either in Parliament or State Legislatures and the legitimacy of delegation depended upon its being used as an ancillary measure which the legislature considered to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative function. Exactly what constituted "essential legislative function", it was held further, was difficult to define in general terms, but this much was clear that the essential legislative function must at least consist of the determination of the legislative policy and its formulation as a binding rule of conduct.

33. The learned Advocate-General contended that there is no abdication of legislative power and the case is one of legislation by reference to another legislation. Rule 42 which is in the nature of subordinate legislation provides for levy of duty on the excess loss in transit at the tariff rate. It was not disputed by the learned Advocate General that the Tariff Act, 1934 remains constant and that the table of rates of duty is varied from time to time. In so far as Rule 42 adopts the tariff rate without applying its mind to the rate though the tariff rate is varying from time to time under the provisions of the Tariff Act, 1934, there is a clear case of abdication of the legislative power by the State Legislature. Therefore I agree with the learned Counsel for Trichy Distilleries and hold that by adopting the tariff rate as the rate of duty to be levied, the State Legislature has abdicated its legislative power and that it is not a case of legislation by reference to another legislation

34. The seventh ground urged by the learned Counsel for the Trichy Distilleries is that Rule 42 of the Madras Distillery Rules, 1960 is unreasonable in so far as it allows wastage only 0.5 per cent whatever the distance to which the rectified spirit is transported from the Distillery. It was submitted by the learned Counsel for Trichy Distilleries that in the rules framed in 1932 under the provisions of the Madras Abkari Act (I of 1886) different rates of allowance were given for wastage in transit depending upon the time taken and the distance over which rectified spirit was transported. Rule 51 of those rules had allowed two to seven and half per cent for duration of journey not exceeding 2 days and to journey not exceeding 15 days. But under the Madras Distillery Rules, 1960, the percentage allowed is only 0.5 per cent. In the present case the actual wastage in transit works out to 3 per cent in respect of the three lakhs bulk litres. Therefore it was submitted that providing only 0.5 per cent for the loss in transit irrespective of the distance and the time taken, is unreasonable. The Supreme Court has observed in *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad*, that even tax statutes have to satisfy the test of reasonableness prescribed by Clause 6 of Article 19 of the Constitution. In *Kanti Lal Babulal Vs. H.C. Patel*, Section 12 A (4) of the Bombay Sales Tax Act, 1946, was extracted and It reads as follows:

(4) If any person collects any amount by way of tax in contravention of the provisions of Sub-section (1) or (2) or if any registered dealer collects any amounts by way of tax in excess of the amount payable by him under this Act, the amounts so collected shall, without prejudice to any prosecution that may be instituted against such person or dealer for an offence under this Act, be forfeited to the State Government and such person or dealer, as the case may be, shall within the prescribed period, pay such amount into a Government treasury and in default of such payment, the amount shall be recovered as an arrear of land revenue.

The Supreme Court held that Section 12-A (4) is unreasonable. In that case the appellants before the Supreme Court were dealers registered under the Bombay Sales Tax Act carrying on business in art silk etc., During the period 26th

January, 1950 to 31st March, 1950, they effected various sales outside the State of Bombay. Those sales being protected by Article 286 (1)(a) of the Constitution of India, were outside the reach of the Act. However, the Sales Tax Officer assessed the turnover relating to those sales and levied tax of Rs. 4,494-3 9. In appeal, the order of the Sales Tax Officer was affirmed by the Assistant Collector of Sales Tax. But the Additional Collector of Sales Tax, in revision, revised the levy to some extent and ordered a refund of Rs. 2,238-0-6 which was paid to the assessee. Not being satisfied with the order of the Additional Collector of Sales Tax, the appellants took up the matter in revision to the Sales Tax Appellate Tribunal. But even before they moved the Tribunal in revision, the Additional Collector of Sales Tax, by his letter dated 17th May, 1958. informed the appellants that unless they furnished to the Sales Tax Officer, proof of their having refunded the amount paid to them in pursuance of his order to the purchasers within a period of three months from the date of that notice, the same would be liable to be forfeited u/s 12-A (4) of the Act. The Tribunal by its order dated 26th November, 1958, allowed the claim of the appellants in full and directed the refund of an additional sum of Rs. 2,256-2-6. The Supreme Court held that "the forfeiture provided for in Section 12-A (4) prima facie infringes Article 19 (1)(f). Therefore it is for the department to satisfy the Court that the impugned provision is a restriction imposed in the interest of the general public. The learned Judges held further that "the power conferred u/s 12-A (4) is unguided, uncanalised and uncontrolled and therefore arbitrary." In the present case, the allowance made for wastage in transit is 0.5 per cent irrespective of the time taken and the distance over which the rectified spirit was taken from the place of despatch whereas under the corresponding Rule 54 of the rules framed under the Madras Abkari Act, 1886 different rates varying from 2 to 7 1/2 per cent had been allowed having regard to the time taken for the rectified spirit to reach the station of destination from the station of origin.

35 Rectified spirit is a commodity which is liable to waste if it is exposed to weather and put in transit. It is needless to say that providing only 0 5 per cent. for wastage irrespective of the distance over which the rectified spirit is taken or the time during which it is taken from the place of despatch to the place of destination is unreasonable. The learned Advocate-General submitted that in the old Rules, Rule 54 (1) and (2) applied only to transport on wooden receptacles, but the present Rule 42 does not contemplate transport in wooden receptacles. This does not in any way meet the argument of the learned Counsel for the Trichy Distilleries. I therefore agree with the learned Counsel for Trichy Distilleries and hold that Rule 42 of the Madras Distillery Rules, 1960, in so far as it allows only 0. 5 per cent. irrespective of the distance to which the rectified spirit is transported, is unreasonable.

36 The eighth ground urged by the learned Counsel for the Trichy Distilleries is that no notice has been given to the Trichy Distilleries to show cause why penalty should not be levied, that Rule 42, as it now stands, does not contemplate any such notice and that therefore there is violation of the principles of natural

justice. The learned Advocate-General conceded that notice should have been given to the Trichy Distilleries and stated that if such a notice had been given, the Trichy Distilleries might have taken advantage of the proviso to Rule 42. He requested that the matter may be sent back to the Department for issuing such notice and taking further proceedings. But the learned Counsel for Trichy Distilleries is not agreeable to this course and she submitted that when Trichy Distilleries are attacking the very validity of Rule 42, there is no question of the matter going back to the Department for further proceedings being taken after the issue of a show cause notice.

37 One of the pleas advanced before the Supreme Court in the *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, was that the appellant-company in that case was not entitled to take proceedings praying for the issue of prerogative writs under Article 226 as it had adequate alternative remedy under the impugned Act by way of appeal or revision. The learned Judges have observed that.

the answer to this plea is short and simple, the remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself ultra vires and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is ultra vires the Legislature which enacted it and as such void and prays for appropriate relief under Article 226.

In that view, the Supreme Court has held that the High Court.

was not right in holding that the petition under Article 226 was misconceived or was not maintainable. The Full Bench of the Gujarat High Court has observed in *Ahmedabad Cotton Manufacturing Co., Ltd. v. Union of India*.

Therefore, the principle which emerges from these decisions is that when the petitioner is to be asked to exhaust his alternative remedies provided under the Act before entertaining the writ petition, this distinction in *Ahmedabad Cotton Manufacturing Co., Ltd. v. Union of India* (1977) 18 Guj. L.R. 714 : AIR 1977 Guj.-113 would always be material where the order is a nullity as being ex facie without jurisdiction or in non-compliance with the provisions of the act or the essential principles of justice or on any other ground as explained in *Union of India (UOI) Vs. Tarachand Gupta and Bros*, or *Bhopal Sugar Industries v. Sales Tax Officer or Bhopal Sugar Industries Ltd., Madhya Pradesh Vs. D.P. Dube, Sales Tax Officer, Bhopal Region, Bhopal*, and is, therefore, a purported order or a nullity. In such a context the alternative remedy would be a futile remedy because it did not affect the inherent nullity in the challenged decision, which would result in material distinction that the party may appeal against such decision but he was not bound to do so.

As pointed out in *Dana Nathu v. Sub-Divisional Magistrate, Rajkot* 1958 S.C.J. 242 : 1958 SCR. 595 : (1958) M.L.J 197 : AIR 1958 S C 86 it the order of the

executive authority is an ultra vires order, it would be a nullity and even if an appeal is filed, the order confirmed in appeal would also be a nullity. Therefore, in such cases where the challenge is on the ground that the order is an ultra vires order, the question of exhausting alternative remedy could hardly arise as the petitioner could straightaway seek remedy of judicial review.

The Supreme Court has held in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, that:

Where the petitioner invoking the jurisdiction under Article 226 of the Constitution alleged in his application that the taxing provisions are ultra vires and there was violation of the principles of natural justice, the High Court would not be justified in summarily dismissing the writ petition on the ground that the petitioner had an alternative remedy of a statutory appeal.

In these circumstances, I agree with the learned Counsel for the Trichy Distilleries and find that the duty or penalty has been levied in this case without issuing any notice to show cause against such action being taken and it is in violation of the principles of natural justice and that since the writ petitioners in [these writ petitions are attacking the validity of Rule 42 of the Madras Distillery Rules under which levy has been made, it is open to them to file these writ petitions without taking recourse to the proviso to Rule 42 (a) of those Rules.

38. The last ground urged by the learned Counsel for the Trichy Distilleries is that it is reasonable to assume that Rule 42 has been framed by inadvertence. This is really not a ground of attack. The levy cannot be attacked if otherwise valid merely on the ground that Rule 42 has been framed by inadvertence even if that was the case.

39. The learned Advocate General submitted that Sirsilk are the purchasers of the rectified spirit from Trichy Distilleries and that they are strangers to the department and therefore cannot question the validity of Rule 42 of the Madras Distillery Rules, 1960. But Mr. Lukose, the learned Counsel for Trichy Distilleries in other respects submitted that having regard to the fact that the Trichy Distilleries has executed a bond in favour of the first respondent as required by Rule 35 or Rule 38 of the Madras Distillery Rules, 1960 and Trichy Distilleries have in turn obtained an indemnity bond from Sirsilk and declined to make further supply notwithstanding the fact that Sirsilk had prepaid a sum of Rs. 2,82,383 to Trichy Distilleries so long as the demand made on the Trichy Distilleries by the first respondent is not complied with by Sirsilk in pursuance of the indemnity bond executed by them in favour of Trichy Distilleries, Sirsilk, are aggrieved persons entitled to file the writ petition under Article 226 of the Constitution of India questioning the validity of the levy of duty under Rule 42 of the Madras Distillery Rules, 1960. In this connection, the learned Counsel for Sirsilk relied upon the decision of the Saurashtra High Court in Chhaganlal v. Asst. Custodian Evacuee Property AIR 1956 Sau. 47 In that case Chhaganlal Nanji Premji and others, appellants before the Saurashtra High Court, had

obtained a money decree for Rs. 40,000 odd inclusive of costs against Kadarbhai, an evacuee, from the Court of the Civil Judge, Senior Division, Jamnagar on 30th April, 1951. The Assistant Custodian, Evacuee Property, Jamnagar, was impleaded as a party to the suit on the ground that the property of Kadarbhai was taken possession of as evacuee property and the sale proceeds thereof were held by the Collector of Jamnagar. The Assistant Custodian pleaded that Kadarbhai had not then been declared an evacuee. Thereupon the Assistant Custodian's name was struck off from the suit. The order of the Assistant Custodian, which was impugned mentions that a notice was issued against Kadarbhai on 8th June, 1951. But it was admitted before the High Court that the notice had not been served on Kadarbhai and that it was merely affixed on the notice board of the Office of the Assistant Custodian. One of the objections taken before the High Court was that a petition for a writ under Article 226 of the Constitution can lie only at the instance of a person whose right has been infringed and that in that case the appellants being merely money decree-holders, they have no right to Kadarbhai's property. The learned Judges have observed:

Now here although the appellants may not have a direct right to the property in question they are nevertheless aggrieved parties inasmuch as they hold a decree against Kadarbhai to realise which they have a right to proceed against Kadarbhai's property, that is to say, to attach the amount lying with the Collector, but this remedy is denied to them by the Assistant Custodian's order and their interests are thus injuriously affected That order therefore does involve direct injury to the appellants' interests and as a party affected they are entitled to apply for a writ.

40. In *Swami Motor Transport (Private) Ltd. Vs. Raman and Raman (Private) Ltd. and Others*, the learned Judges have extracted the following observations of Earl of Reading, C.J. made in *Rex v. Richmond Confirming Authority Ex partes Howitt*: (1921) 1 K.B 248

The applicant does not in my opinion stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in this subject-matter, and nothing can better show this than the fact that he incurred the expenses of instructing counsel to secure, if he could, the refusal of the confirmation and to contend that the confirming authority had no jurisdiction. Bearing in mind that the applicant is a person who was entitled to appear and object as having this interest that he was carrying on business as the licensee of premises in Richmond, I think the case comes within the decision of *Rex v. Groom Ex-parte Cobbold*. (1901) 2 KB 157

The learned Chief Justice quoted the following from the judgment of Lord Alverstone, C.J., in that case:

It is sufficient if they have a real interest in the decision of the justices and they

have in this case. They took the point now raised before the Justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too strong to say that they had not a sufficient interest in the matter to enable them to apply for the rule. "The true principle is to determine whether the applicant has an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered.

In the present case, Sirsilk have the general interest in the law being now wrongly administered. They have a special interest in seeing that the duty levied by the first respondent on the excess loss in transit is not recovered from the Trichy Distilleries in exercise of the power conferred by Rule 42 of the Madras Distillery Rules, 1960, for if the amount is recovered from the Trichy Distilleries, they would have to make good the same to the Trichy Distilleries in whose favour they have executed an indemnity bond in respect of the very same transaction. Therefore I agree with the learned Counsel for Sirsilk and hold that Sirsilk are aggrieved persons and that they are entitled to file Writ Petition No. 337/ of 1975.

41. For the reasons mentioned above, both the writ petitions are allowed with costs. Advocate's fee Rs. 500 in W.P. No. 5172 of 1975 and Rs. 250 in W.P. No. 3377 of 1975.