
(2011) 03 AHC CK 0374

In the Allahabad High Court

Case No : Writ Petition No's. 11959, 3991, 4343, 4344, 4421, 4493, 4494, 4518, 4759, 4832, 5086, 6285, 6407, 6499, 7115, 7424, 7502, 8318, (MB) of 2009, 897 (MB) of 2010

Triveni Engineering and Industries Ltd. and Another

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4
Constitution of India, 1950 — Article 14, 19(1), 245, 246, 248(1)
Industries (Development and Regulation) Act, 1951 — Section 18G
Sales of Goods Act, 1930 — Section 11, 17, 22, 3, 4
Uttar Pradesh Molasses Advisory Committee Rules, 1965 — Rule 3
Uttar Pradesh Sheera Niyamtran Adhiniyam, 1964 — Section 10, 10(1), 11, 12, 13
Uttar Pradesh Sheera Niyamtran Niyamawali, 1974 — Rule 12, 14, 23, 23, 25

Citation : (2011) 4 ADJ 436

Hon'ble Judges : Satish Chandra, J;Rajiv Sharma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Heard S/Sri Bharat ji Agarwal & R.N. Trivedi, Senior Advocates assisted by Dr R.K. Srivastava, Akhilesh Kalra, Dhruv Mathur on behalf of the Petitioners and Sri J.N. Mathur, Addl. Advocate General assisted by Sri H.P. Srivastava, Addl. Chief Standing Counsel on behalf of the Respondents-State.

2. Petitioners are the Public Limited Companies in terms of Companies Act, 1956 and are engaged in the business of manufacturing sugar by Vacuum Pan Process and to sugar factories, distilleries are also attached. Molasses, is the bye-product of the sugar mill owned by the Petitioners' company which is the raw-material for distilleries and is utilized at the distilleries for captive/own consumption.

3. In all the afore-captioned writ petitions, the Petitioners have questioned the validity of Clause 2(d-1), 8(4) and 8(5) of the U.P. Sheera Niyamtran Adhiniyam [hereinafter referred to as the "impugned Act" for the sake of brevity] as

amended by the U.P. Act No. 10 of 2009, therefore, all the writ petitions have been clubbed together and are being disposed of by this common judgment. By these petitions, the Petitioners have assailed the levy of "Administrative Charges" on the molasses, which is carried outside the premises of the Sugar factories, maybe for own distilleries located at distinct places.

4. According to Petitioners, the following amendments have been made in the principal Act, i.e. U.P. Sheera Niyantaran Adhiniyam, 1964:

(i) A new Clause (d) (i) "molasses for captive consumption" has been added in Section 2 of the U. P. Sheera Niyantaran Adhiniyam, 1964. The impugned Act seeks to restrict the meaning of the expression "molasses for captive consumption" to mean and include only such transfer of molasses by an occupier of the sugar factory to a distillery or to industrial unit having the same ownership provided the distillery or industrial unit is situated within the same premises or where it is in such "contiguous vicinity" of the sugar factory so that the transfer or transportation of such molasses outside the premises or the gate of the sugar factory is not required to be effected by a vehicle.

(ii) Section 8 of the Act has also been amended and by the said impugned amendment in Sub-section (1) of Section 8 of the Principal Act, the words "sell or supply" have been substituted by the words "transfer or sell or supply" and in Sub-sections (4) and (5) of the Section 8 of the Principal Act, the words "sold or supplied" have been substituted by the words "transferred or sold or supplied."

5. Therefore, it has been strenuously argued that the effect of these amendments is that the sugar factory will be required to pay administrative charges even on molasses, which is transferred to its own distillery, although it does not involve any sale or commercial transaction and the molasses is required for captive consumption.

6. According to learned Counsel for the Petitioners, the storage, gradation and control of molasses produced by the sugar factories in Uttar Pradesh including regulation of its supply and distribution is governed by the provisions of 1964 Adhiniyam. In the statutory scheme so laid in the Adhiniyam of 1964, a person requiring molasses for his distillery or for any purposes of industrial development is obliged to apply to the Controller of Molasses in terms of Section 7-A of the Adhiniyam of 1964. Sub-section (4) of Section 8 provides that occupier of a factory shall be liable to pay to the State Government administrative charges on the molasses "sold or supplied" by him. The administrative charges are intended to be levied only in the circumstances where there is a sale or supply by the sugar factory to some other legal entity by transfer of title for valuable consideration as enshrined in the Constitution of India.

7. Every year, the Excise Commissioner and Controller of Molasses issues a Molasses Policy with regard to supply and sale of molasses by the sugar factories. Accordingly, the Molasses Policy for the year 2008-09 was issued by the Respondent No. 2 vide order dated 31.1.2009. As per this policy, the sugar

factories are required to supply 30% of molasses produced by them to the distilleries for the manufacture of country liquor. Prior to the year 2007-08, the Molasses Policy used to provide that sugar factories were liable to supply molasses to the distilleries engaged in the manufacture of country liquor, irrespective of their own need. This controversy has been set at rest by the Supreme Court vide its judgment dated 24.9.2007 in the case of Dhampur Sugar Mills Ltd. Vs. State of U.P. and Others,

8. It has been vehemently argued on behalf of the Petitioners that with an avowed view to negate the directions contained in the aforesaid decision of the Apex Court, the State Government brought in the legislation to amend the U.P. Sheera Niyamtran Adhiniyam, 1964 and impugned Act was promulgated which is against the pronouncement of the Apex Court made in S.R. Bhagwat and others, Vs. State of Mysore, that it is now well settled by a catena of decisions of this Court that a binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting a provision which in substance over-rules such judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment.

9. It is submitted by the Counsel for the Petitioners that the State by amending the impugned Act seeks to nullify the decision of the Apex Court. Pursuant to the impugned amendment in the Act, the Respondents have issued draft rules, namely, Uttar Pradesh Sheera Niyamtran (Fifth Amendment) Niyamavali, 2009. Under the general presumption and understanding of law, the "captive consumption" means "self consumption". Significantly this was also the meaning of the captive consumption as per the provisions of the U. P. Sheera Niyamtran Adhiniyam, 1964. The State Government cannot vary from the exact meaning of the said definition, which is beyond the scope of the U.P. Sheera Niyamtran Adhiniyam, 1964. Further, the definition of "molasses for captive consumption" under the new Section 2(d)(i) is contrary to the general principle of law and understood by the Apex Court in catena of judgments.

10. According to Counsels for the Petitioners, the definition of "molasses for captive consumption" as sought to be introduced is clearly discriminatory and violative of Article 14 of the Constitution of India and the impugned Act is nothing but a colourable exercise of power by the State. The classification of units or distilleries within the same premises or in contiguous vicinity of the sugar factory is not a reasonable classification. The words "captive consumption" clearly mean that anything which is manufactured or produced would not go out of the hands of the manufacturer but would be consumed for his own purpose. Viewed in the light of the above, it is clear that the distance of the unit to which the molasses is dispatched is clearly immaterial and irrelevant. The impugned amendments have a direct immediate effect and impact impeding the freedom of trade and commerce guaranteed under the Constitution of India and thus is in serious violation of the Constitution of India.

11. Elaborating their arguments, it has been urged by the Petitioners' Counsel

that in view of the provisions of the Constitution of India, the State Legislature is only empowered to impose tax on sale or purchase of goods (molasses) and not on the transfer of such goods (molasses) as the same does not resemble the character of "sale" as recognized by general law and/or defined in Sales of Goods Act, 1930. In such circumstance, since the State Legislature is empowered to impose tax only on sale and purchase of goods other than newspapers, therefore, the impugned amendment imposing tax (administrative charges) on such transfer of molasses is not only arbitrary and illegal but ultra vires to the Constitution of India and thus unsustainable.

12. The next contention of the Petitioner's Counsel is that the power of the State to impose a tax stands enshrined in Entries 52-62 of List II of the Seventh Schedule to the Constitution of India; a perusal of the aforementioned entries clearly establishes that none of them could be read as empowering the State to levy a tax on stock transfer or captive consumption. The provisions of Article 366(29A) of the Constitution of India are also not attracted. A stock transfer of molasses or captive consumption thereof is neither a sale nor a purchase of goods and therefore, the State clearly lacks the legislative competence to subject the administrative charges to tax.

13. The administrative charges levied under the Act is not in the nature of a regulatory fee but is clearly a tax as has been held by the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Lucknow, U.P. Vs. Chhata Sugar Co. Ltd., and, therefore, the said judgment places an unimpeachable embargo on the State levying such a tax on stock transfers. Admittedly, the captive consumption or a stock transfer of molasses involves no sale or supply to another unit; the impost of administrative charges, therefore, on the same is in pith and substance a tax on manufacture; it therefore partakes the nature of a duty of excise and therefore, also is beyond the legislative competence of the State.

14. Narrating the background, it has been submitted by the learned Counsel for the Petitioners that before the aforesaid amendment in Section 2, companies having more than one sugar factory and a distillery either in the premises of the sugar factory or situated at a distance, were not required to supply reserved quantity of molasses for country liquor, in view of Supreme Court judgment dated 24.9.2007 in Dhampur Sugar Mills Ltd. Vs. State of U.P. and Others, . By the impugned amendment, the State Government has negated the judgment of the Supreme Court. The Petitioners submit that the premise on which the State proceeded to promulgate the impugned Act is clearly fallacious and basically illegal and unconstitutional. The Supreme Court was merely dealing with the question of whether a sugar factory could be compelled to supply molasses to distilleries other than its own despite its own needs. In this sense, the impugned enactment neither removes the basis upon which the judgment was rendered nor is valedictory in nature.

15. It has been vehemently argued that the words "captive consumption" cannot

be given a restrictive meaning of being consumed within the factory premises. What is really necessary and essential is that the articles must be utilized by the entity/company itself as distinct from a sale or transfer for a consideration. The factory premises within which the goods are so consumed has no nexus or correlation to, nor does not it restrict the meaning of the words "captive consumption". This was the intent of the Supreme Court decision, which is purported to be negated by the said amendment and is, therefore, constitutionally invalid.

16. The definition "molasses for captive consumption" is also clearly discriminatory and violative of Articles 14, 19(1)(g), and 300-A of the Constitution of India, inasmuch as there is no rational basis for differentiating between (i) a distillery which may be situated in the same premises as the sugar factory and a distillery which may be situated in different premises as the sugar factory and a distillery outside the premises of a sugar factory, but under the same ownership and management, i.e. belonging to one and same company. Secondly, the words sold or supplied clearly did not envisage levy of administrative charge on self-consumption and rightly so, and if the same were deemed to include transfer for captive consumption, it would have clearly transgressed the legislative competence of the State.

17. The administrative charge is a tax, as held by the Hon"ble Apex Court in the case of Commissioner of Central Excise, Lucknow, U.P. Vs. Chhata Sugar Co. Ltd., is sought to be levied on molasses transferred or captively consumed in the distillery belonging to the same company/person, owning the sugar factory as well. Undisputedly, a sugar factory and a distillery are two units of one juristic personality i.e. the company. Therefore, the administrative charge becomes a tax on the company and is thus beyond the legislative competence of the State. Undisputedly, the Administrative charges under Sections 8 (4) and 8 (5) which provide for levy of administrative charges read with Rule 23, is a tax as held by the Hon"ble Apex Court in the case of M/s Chhatta Sugar Company Limited (supra) and as such, the said tax is referable only to Entry 54 List II of 7th Schedule of the Constitution of India which authorizes the State to levy tax on the sale or purchase of goods other than newspapers. In this regard reliance on paragraphs 53, 54 and 56 Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, has been placed. Paragraphs 53, 54 and 56 read as under:

53. Article 245 of the Constitution of India vests the parliament with power of legislation on all matters enumerated in List and also the matters enumerated in List III of the Seventh Schedule of the Constitution of India. The State Legislature, however, has the exclusive right to legislate matters specified in the Entries contained in List II.

54. Various entries in the three Lists provide for the fields of legislation. They are, therefore, required to be given a liberal construction inspired by a broad and generalize spirit and not in a pedantic manner. A clear distinction is provided for

in the scheme of the lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for purposes of legislative competence vis-a-vis the general entries. Clauses (1) and (2) of Article 248 of the Constitution of India also manifest the aforementioned nature of the entries of the List, and, thus, the matter relating to taxation has been separately set out. The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power. In List II, entries 1 to 44 form one group providing for the legislative competence of the State on subjects specified therein, whereas entries 45 to 63 form another group dealing with taxation..."

56. A bare perusal of Entry 53 of List II and Entry 38 of List III, however, clearly suggests that they are meant to operate in different fields.

18. In the backdrop of the aforesaid facts, it has been argued that the impugned amendment i.e. provisions of Sections 2(d-1), 8(4) and 8(5) of the Act insofar as it purports to levy tax, namely, administrative charges on the supply/transfer of molasses from the sugar factory to the distillery owned by the same person in Section 8 is bad in the eyes of law being inoperative and unworkable as the levy of such administrative charges u/s 8 (4) has to be made "in the manner prescribed" in the Rule 23 of the U. P. Sheera Niyamtran Niyamavali, 1964 which does not include any transfer. The provisions of Rule 23 are as follows:

Every occupier of a sugar factory shall deposit the amount of administrative charges payable on molasses sold or supplied by him in the treasury or sub-treasury of the district in which the sugar factory is situated and produce the treasury challan as evidence of such payment "to Excise Officer-in-charge of the sugar factory before making the actual delivery of the molasses to the purchaser.

19. As regards the imposition of tax as per provisions of the Constitution of India, the State Legislature is only empowered to impose tax on sale or purchase of goods and not on the transfer of such goods as the same does not resemble the character of "sale" as recognized by general law and/or Sales of Goods Act, 1930. In such circumstances, since the State Legislature is empowered to impose tax only on sale and purchase of goods other than newspapers, therefore, the impugned amendment imposing the tax (administrative charges) on such transfer of molasses is not only arbitrary and illegal but ultra vires to the provisions of Constitution of India and are unsustainable. For convenience relevant provisions of Section 8 of the U. P. Sheera Niyamtran Adhiniyam, 1964 prior and after the impugned amendment are reproduced here-in-below:

SECTION 8 -PRIOR TO AMENDMENT

8. Sale and supply of molasses.--(1) The Controller may by order require the occupier of any sugar factory to sell or supply, in the prescribed manner such quantity of molasses to such person, may be specified in the order, and the occupier shall, notwithstanding any contract, comply with the order.

(2) ...

(3) ...

(4) The occupier of a sugar factory shall be liable to pay to the State Government, in the manner prescribed, administrative charges at such rate, not exceeding five rupees per quintal as the State Government may from time to time notify, on the molasses sold or supplied by him.

(5) The occupier shall be entitled to recover from the person to whom the molasses is sold or supplied an amount equivalent to the amount of such administrative charges, in addition to the price of molasses.

Section 8-After Amendment

8. Sale and supply of molasses.--(1) The Controller may by order require the occupier of any sugar factory to transfer or sell or supply in the prescribed manner such quantity of molasses to such person, may be specified in the order, and the occupier shall, notwithstanding any contract, comply with the order.

(2) ...

(3) ...

(4) The occupier of a sugar factory shall be liable to the State Government, in the manner prescribed, administrative charges at such rate, not exceeding five rupees per quintal as the State Government may from time to time notify, on the molasses transferred or sold or supplied by him.

(5) The occupier shall be entitled to recover from the person to whom the molasses is transferred or sold or supplied an amount equivalent to the amount of such administrative charges, in addition to the price of molasses.

20. The impugned Act seeks to amend the provisions of the Uttar Pradesh Sheera Niyantran Adhiniyam, 1964 which had received the assent of the President of India on 17.10.1964 under the provisions of Article 254 of the Constitution of India. The background for seeking the assent of the President of India appears to have been motivated by the fact that sugar industry is a "Scheduled Industry", the control of which was taken over by the Union, being expedient in the public interest. The sugar industry finds mention at item No. 25 in the First Schedule to the Industries (Development and Regulation) Act, 1951 likewise molasses comes under Item No. 26 in the same First Schedule. The sugar industry and its products as well as raw material are covered under the Essential Commodities Act, 1955, Sugar Control Order, 1966 and Sugarcane Control Order, 1966. Being conscious of the aforesaid facts, it appears that the said Act was reserved for and received the assent of the President of India. However, the impugned Amendment Act of 2009 has not been reserved nor it has received the assent of the President of India and is thus Constitutionally invalid.

21. According to learned Counsel for the Petitioners the word "Sale" and

"Purchase" having not been defined in Section 2 of the U.P. Sheera Niyam Adhiniyam, one has to go to definition of sale as provided in Section 4 of the Sale of Goods Act, which provides transfer of property from one person to another person for valuable consideration. There is no dispute that both the sugar mill and distillery are owned by the same persons, namely, by the same juristic persons i.e. the Petitioners, hence there is no transfer of property from one person to another for any price or valuable consideration, which are necessary ingredient for sale by one person and purchase by another person. In support of this contention reliance has been placed on Vam Organics Limited and Anr. v. State of U.P. and Anr. 1997 UPTC 624, U.P. State Cement Corporation Limited v. CST 1978 UPTC 653 . State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, and Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, wherein it has been observed that on any transaction, which is not a purchase or sale, no tax can be imposed. Thus, it has been asserted that the impugned amendments in the Act are clearly arbitrary and the State clearly lacks legislative competence to enforce the amendments contained in the impugned Act.

22. Lastly, it has been informed that after the impugned amendment, the Respondents have issued an order dated 23.3.2009 to all the Excise Inspectors directing them to charge administrative charges from all the sugar factories on transfer of molasses. In compliance of this order issued by the Excise Commissioner, the Excise Inspectors have started issuing notice to the sugar factories for payment of administrative charges on molasses transferred/supplied for captive consumption.

23. On the other hand, Sri J.N. Mathur, Addl. Advocate General has submitted that U.P. Sheera Niyam Adhiniyam 1964 amended by U.P. Act No. 10 of 2009 has been enacted in public interest for the control of storage, gradation and price of molasses produced by sugar factories in the State and for the regulation of supply and distribution thereof. Thus the Adhiniyam is clearly referable to Entry No. 33 of List III of the Seventh Schedule to the Constitution of India. The U.P. Act No. 10 of 2009 is also squarely covered by the legislative field as provided under the aforesaid Entry No. 33. Thus allegation of lack of legislative competence as alleged by the Petitioners is wholly baseless and without substance.

24. Scheme of Adhiniyam would reveal that the Adhiniyam provides for regulation of supply and distribution of molasses to distilleries and other industrial establishment and all the regulatory measures are for the benefits of distilleries and industries in public interest. The regulatory nature of the Adhiniyam would be evident from reading of the relevant provisions of the said Adhiniyam, which are as under:

(i) Section 3 of the Adhiniyam provides for constitution of Advisory Committee to advice on matters relating to the control of storage, preservation, gradation, price, supply and distribution of molasses. Rule 3 of the Uttar Pradesh Molasses

Advisory Committee Rules, 1965 provides for the Chairman and the Members of the Advisory Committee which consist of representative of concerned department, representatives of distilleries and Alcohol Based Industries and Mouldering and Foundry Industries in U. P.

(ii) Section 4 provides for appointment of Controller of Molasses by the State Government for exercising powers and performing the duties of Controller of Molasses under the Adhiniyam and the Rules.

(iii) Section 5 requires every occupier of a sugar factory to make provision of molasses and to take adequate safeguards against leakage, seepage, overflow or any other accident likely to damage the quantity of molasses stored in the factory; and to make adequate arrangements to prevent the mixing up of water or old deteriorated molasses and to provide adequate facilities for handling of molasses etc. Contravention to this provision renders the occupier of sugar factory to penalties u/s 11.

(iv) Section 6 provides for preservation against adulteration.

(v) Section 7 provides for removal of adulterated molasses. This provision directly benefit the distilleries and industries and industries using molasses so as to get quality molasses and to remove possibility of distribution or supply of adulterated molasses.

(vi) Section 7 A of the Adhiniyam enables any person who requires molasses for his distillery or for any purpose of industrial development to apply in the prescribed manner to the Controller of Molasses specifying the purpose for which it is required and on receipt of the application the Controller of Molasses may make an order u/s 8 of the Adhiniyam considering the availability of molasses, various requirements of molasses, better utilization to which molasses may be put in the public interest, genuineness of requirement etc.

(vii) Section 8 provides that Controller of Molasses may, with the prior approval of the State Government, by order require the occupier of any sugar factory to transfer, sell or supply in the prescribed manner such quantity of molasses to such persons, as may be specified in the order and the occupier shall, notwithstanding any contract, comply with the order. Sub-section (4) requires the occupier of a sugar factory to recover administrative charges at the time of transfer, sell or supply and deposit the same with the State Government.

(viii) Sections 11 to 16 deals with offences and penalties, search and seizure and compounding of offences.

(ix) Section 17 mandatorily requires the maintenance of accounts and furnishing of return by the occupier of the sugar factories and the person to whom the molasses is transferred and supplied.

(x) Section 22 empowers the State Government to frame rules.

25. As regards control of Sugar Industry, it has been submitted that the "Sugar

Industry" has been included in the First Schedule of the Industries (Development & Regulation) Act, 1951. The Sugar Mills produce the molasses as a by-product. Distilleries/Chemical units buy molasses from the sugar-factories and use it as a raw material for production of rectified spirit and other organic products. The molasses and the alcohol policies affect the farmers, who supply sugarcane and get its price from the sugar factories. The State Government has to examine the accounts of all these factories pertaining to the production including the production of molasses in a given year as well. The field of Sugar Industry is having been covered within the purview of Clause (a) of the Entry 33 of List III of the VII Schedule.

26. Under chapter III-B of the Industries (Development and Regulation) Act, 1951, the provisions of control of supply, distribution and price of certain articles are given in Section 18-G of the Act, which reads as under-

18-G Power of Control, Supply, Distribution, Price etc. of certain articles.--(1) The Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability at fair price of any article or class of articles relatable to any scheduled industry, may notwithstanding anything contained in any other provision of this Act, by notified order, provided for regulating the supply and distribution thereof and trade and commerce therein.

27. Section 26 empowers the Central Government to issue appropriate directions to the State Government and it reads as under:

The Central Government may give directions to any State Government as to the carrying into execution in the State of any of the provisions of this act or of any order or direction made there under.

28. According to State Counsel, Entry-33 of the Concurrent List covers the field of trade and commerce in, and the production, supply and distribution of the products of any industry where the control of such industry by the Union is declared by the Parliament by law to be expedient in the public interest and imported goods of the same kind products. There is no law enacted by the Union Government under this field and as such the notification issued by the State Government for the administrative charges on molasses is not repugnant to the law made by the Union Government. Moreover, a Full Bench of this Court in the case of *Shriram Industrial Enterprises Ltd. v. Union of India and Ors.*; 1996 ALJ 468, while considering the question of legislative competence and the provision of Section 18-G of the Industries (Development & Regulation) Act, 1951 observed in paragraph 69 as under:

69. The result of the aforesaid discussion is that Section 18-G of the Industries (Development & Regulation) Act, 1951 enacted by the Parliament being a legislation under Entry 33 of List III has not denuded the power of the State Legislature to legislate on regulating supply, distribution, and price of molasses-a product of the sugar industry. The said legislation being on a concurrent field, the

State Legislature was competent to enact Sections 7, 8 and 10 of the U.P. Sheera Niyam Adhiniyam, 1964 subject to assent of the President of India in terms of Article 254 of the Constitution. Since the Adhiniyam has assent of the President of India, Sections 7, 8 and 10 of the Adhiniyam are the valid piece of legislation.

29. As regards legislative competence of the State Government, the State Counsel has placed reliance on Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, and M/s. SIEL Ltd. and Others Vs. Union of India and Others, In Tika Ramji's case (supra), the Apex Court observed in paragraph 34 of the report as under:

... Even assuming that Sugarcane was an article or class of articles relatable to the sugar industry within the meaning of Section 18-G of Act LXV of 1951, it is to be noted that no order was issued by the Central Government in exercise of the powers vested in it under that section and no question of repugnancy could ever arise because, as has been noted above, repugnancy must exist in fact and not depend merely on a possibility. The possibility of an order u/s 18-G being issued by the Central Government would not be enough. The existence of such an order would be the essential prerequisite before any repugnancy could ever arise....

30. Relevant paragraphs of SIEL Ltd. and Ors. (supra), i.e. 21, 24 and 25 are reproduced hereunder:

21. In this connection our attention was drawn to the observations of this Court in Ch. Tika Ramji's case (supra). The Court in that case was concerned with the legislative competence of the State Government to legislate in respect of sugarcane in the light of Section 18G of the Industries (Development and Regulation) Act, 1951. This Court observed (at page 432) that even assuming that sugarcane was an article relatable to the sugar industry within the meaning of Section 18G, no order had been issued by the Central Government in exercise of the powers vested in it under that Section. Hence no question of repugnancy would arise. Repugnancy must exist in fact and not depend merely on a possibility. Ch. Tika Ramji's case (supra) has been cited with approval in the more recent case of Indian Aluminium Company Limited and another Vs. Karnataka Electricity Board and others, where this Court again held that in the absence of any notification u/s 18G of the Industries (Development and Regulation) Act there was no question of any repugnancy on the score of tariff of electricity fixed by the State Amending Act. Section 18G per se did not take away the State's right also to legislate under Entry 33 of List III. This Court also noted the provisions of Article 254(2) of the Constitution in this connection.

24. The Respondents have pointed out that the U.P. Sheera Niyam Adhiniyam, 1964 has also received President's assent under Article 254(2). In any event, looking to the fact that the Molasses Control Order of 1961 passed by the Central Government in exercise of powers conferred by Section 18G was not extended at any point of time to the State of UP. or the State of Bihar, the question of repugnancy between the Molasses Control Order, 1961 and the U.P. Sheera

Niyantaran Adhiniyam, 1964 does not arise. In fact, the present litigation has commenced after the Molasses Control Order, 1961 of the Central Government has been rescinded and the only legislation which holds the field is the UP. Sheera Niyantaran Adhiniyam of 1964 which is in legitimate exercise of power of legislation under Entry 33 of List III.

25. In the premises the UP. Sheera Niyantaran Adhiniyam of 1964 is within the legislative competence of the State Government.

31. As regards Chhatta Sugar's case (supra), on which reliance has been placed by the Petitioners, the State Counsel has submitted that this case is not applicable in the instant matter, as the controversy involved in Chhatta Sugar's case was with regard to non-inclusion of administrative charges in the value of goods u/s 4 of the Central Excise Act, 1944. He has also pointed out, in Chhatta sugar's case, the State Government was not a party and as such, factual aspects of rendering of services could not be noticed by the Apex Court. Further, the interpretation of law relating to admissibility or otherwise of a deduction under the Central Excise Act, 1944 has to be confined to that Act alone and cannot be applied to the UP. Sheera Niyantaran Adhiniyam which altogether is a different statute book. Similarly, Petitioners cannot derive any benefit of the judgment rendered in Dhampur Sugar Mills Ltd. Vs. State of U.P. and Others, as UP. Sheera Niyantaran Adhiniyam has been amended by U. P. Act No. 10 of 2009, which is well within the legislative competence of the State Government and the amendment made therein, for the reasons discussed above, cannot be said to be violative of any provision of the Constitution of India.

32. State Counsel has also submitted that in public interest and for proper control of storage, gradation and regulation of transfer, supply and distribution of molasses, which mainly and directly benefits the distilleries and industries requiring molasses, one Sub Inspector, Excise alongwith One Head Constable of Excise are posted in each and every sugar factory. There are around 157 sugar factories in the State of Uttar Pradesh. Merely, the salary and incident of pensionary benefits on such Sub Inspectors, Excise and Head Constables, the burden of expenditure comes to about Rs. 11 crores per annum. This expenditure is directly and exclusively referable to the services being rendered by the State Government for regulation of molasses mainly for the benefits of distilleries and industries in public interest. Besides above, there is an exclusive team of officers and staff posted at Headquarter of Controller of Molasses, who are exclusively devoted to the regulatory services being rendered by the State Government in relation to molasses. Also, laboratories have been set up by the Excise Department for proper regulation of quality of molasses in the interest of distillers and industries. Thus, it is imminently clear that the State incurs huge expenditure on salary of officers, technicians and staff related to the laboratories and further incurs huge expenditure on equipment, maintenance of building, electricity and chemicals.

33. From the circumstances mentioned above, the administrative charges u/s

8(4) of the Adhiniyam are in the nature of regulatory fee and has direct correlation between the fee and services rendered by the State Government to the beneficiaries i.e. the distilleries and industries requiring molasses. The occupier of sugar factories has been required to deposit the administrative charges, which is a convenient mode of realization of the regulatory fee from the distilleries and industries requiring molasses. The administrative charges being a regulatory fee, quid pro quo is not required to be proved as per settled law. Thus the administrative charges being regulatory fee, the same is payable by distilleries and industries even if molasses is transferred at a distant place by an occupier of sugar factory to a distillery or industry under the ownership of the same company.

34. Clarifying the position regarding "distillery" and the "sugar factory, it has been strongly argued that both are separate units. The "sugar factory" is a separate legal unit licenced under the Industries (Development & Regulation) Act, 1951 and is controlled by the occupier of the factory whereas the distillery is controlled by the distiller holding PD-2 licence under the provisions of U.P. Excise Act, 1910. The condition Nos. 1 and 9 of the licence [Form PD-2], which are relevant in the present context read as under:

1. The licence shall be subject to--

(1) rules relating to import, export and transport of spirit contained in Chapter VII and VIII of the Excise Manual Vol.1:

Such other rules as may, from time to time, be made by the Excise Commissioner and the Government for security of Excise Revenue and for regulating the manufacture, sale, supply and prices of Indian Made Foreign Liquor including rectified spirit, denatured spirit, power and fuel alcohols.

(9). Any contravention of the rules or conditions herein before enumerated shall involve cancellation of the license in addition to such other penalties as may be prescribed under the U.P. Excise Act.

35. As the Petitioner's distillery is established under PD-2 licence and as such in view of the terms of licence, it is under an obligation to follow the terms and conditions of the licence.

36. Apart from the conditions of licence, Rule 23 of the U.P. Sheera Niyamtran Niyamawali, 1974 have provisions regarding "administrative charges" which provides that every occupier of the sugar factory shall deposit the amount of administrative charges payable on molasses transferred, sold or supplied by him in the treasury or sub-treasury of district in which the sugar factory is situated.

37. Prior to the year 2007-08, the Molasses Policy used to provide that sugar factories were liable to supply molasses to the distilleries engaged in the manufacture of country liquor, irrespective of their own need. However, the controversy was set at rest by the Supreme Court vide its judgment dated 24th September 2007 in the case of Dhampur Sugar Mills Ltd. Vs. State of U.P. and

Others, whereby it has been held that reservation applies only to the excess stock of molasses, i.e. molasses which is in excess of and not used for own consumption by the sugar mill and reservation would not apply in case there is no balance stock of molasses with any sugar mill.

38. The sugar factories including the Petitioners' company, are required to maintain the above ratio of 3:7 and are not at liberty to dispose of the molasses of the unreserved quantity at their discretion and are placed at a great disadvantage for the following reasons:

(1) The sugar factories have to maintain high stock of molasses, as a result of which their cash flow position is adversely affected and the sale proceeds what they could have realized by selling molasses of the unreserved quantity is not available to them and their cane price payment to the growers is delayed, besides non-availability of funds of their other requirements.

(2) The sugar factories are forced to sell molasses to the distilleries at much lower prices than the market price.

(3) Maintaining high stock of molasses, at time results in overflow of molasses during the season, which causes pollution problem.

(4) The storage of molasses beyond January, 2010 in the sugar units of the Petitioner company will result in closure of the sugar mills as a result of non-lifting or dispatch of the produced molasses.

39. In our opinion, thirty percent reservation has been made in clear violation of the statutory provision enshrined in Section 7-A and Section 8 of the Adhiniyam of 1964 and Niyamavali framed there under, which does not empower the State Government to reserve a certain percentage of molasses in favour of the distilleries for the manufacture of country liquor. Section 7-A and Section 8 of Adhiniyam of 1964 envisages the making of individual orders by the Respondent No. 2 upon receipt of application from a distillery requiring molasses. Therefore, the order impugned in the writ petitions is wholly arbitrary and violative of the rights of the Petitioners guaranteed under Articles 14 and 19(1)(g) of the Constitution of India and ultra vires the provisions of the Adhiniyam and Rules made there under.

40. It is also relevant to point out that the provision in the policy regarding allotment of left over molasses meant for country liquor to manufacture India Made Foreign Liquor (IMFL) is impermissible and unjustified and is a back door method of giving advantage to the distilleries making IMFL to utilize the molasses received by them against the reserved quota for country liquor. There is no justification whatsoever for allotting the molasses meant for country liquor, for the manufacture of IMFL, which is completely free, and there is no control of any kind on its manufacture and sale. The Reservation Policy is only meant for reserving molasses for country liquor. IMFL cannot fall under this category at all. Therefore, permitting the distilleries to use molasses meant for country liquor for

the manufacture of IMFL is totally unjustified and malicious exercise of powers on extraneous considerations.

41. U.P. Sheera Niyamtran Adhiniyam was enacted by the State of U. P. with the object to control the storage, gradation and price of molasses produced by the sugar factories in the State of Uttar Pradesh and the regulation of supply and distribution thereof. Section 2 is the definition clause. Section 2 (b) defines "distillery" which means the premises license under the provisions of the United Provinces Excise Act, 1910, for the manufacture of power, portable or industrial alcohol; Section 2(d) defines "molasses" and it means the heavy, dark coloured viscous liquid produced in the final stage of manufacture of sugar by vacuum pan from sugarcane or gur, when the liquid as such or in any form or admixture contains sugar; Section 2 (3) defines "occupier in relation to a sugar factory" and it means the person, who has ultimate control over the affairs of the factory and includes a managing agent of the factory;

42. Section 2 (h) deals with "sugar factory" or "factory" and it means any premises including the precincts thereof, whereon, twenty or more workers are working or were working on any day of the preceding twelve months and in any part of which a manufacturing process connected with the production of sugar by means of vacuum pans is being carried on or is ordinarily carried on with the aid of power.

43. Section 7-A (1) deals with the application for molasses and it reads as under:

Any person who requires molasses for his distillery or for any purpose of industrial development may apply in the prescribed manner to the Controller specifying the purpose for which it is required.

44. Section 8 deals with sale and supply of molasses which reads as under:

8. Sale and supply of molasses.--(1) The Controller may by order require the occupier of any sugar factory to transfer or sell or supply in the prescribed manner such quantity of molasses to such person, may be specified in the order, and the occupier shall, notwithstanding any contract, comply with the order.

(2) The order under Sub-section (1)--

(a) shall require supply to be made only to a person who requires it for his distillery or for any purpose of industrial development.

(aa) may require the person referred to in Clause (a) to utilise the molasses supplied to him under an order made under this section for the purpose specified in the application made by him under Sub-section (1) of Section 7- A and to observe all such restrictions and conditions as may be prescribed.

(b) may be for the entire quantity of molasses in stock or to be produced during the year or for any portion thereof, but the proportion of molasses to be supplied from each sugar factory to its estimated total produce of molasses during the year shall be the same throughout the State save where, in the opinion of the

Controller a variation is necessitated by any of the following factors:

(i) the requirements of distilleries within the area in which molasses may be transported from the sugar factory at a reasonable cost;

(ii) the requirements for other purposes of industrial development within such area; and

(iii) the availability of transport facilities in the area.

(3) The controller may make such modification in the order under Sub-section (1) as may be necessary to correct any error or omission or to meet a subsequent change in any of the factors mentioned in Clause (b) of Sub-section (2).

(4) The occupier of a sugar factory shall be liable to the State Government, in the manner prescribed, administrative charges at such rate, not exceeding five rupees per quintal as the State Government may from time to time notify, on the molasses transferred or sold or supplied by him.

(5) The occupier shall be entitled to recover from the person to whom the molasses is transferred or sold or supplied an amount equivalent to the amount of such administrative charges, in addition to the price of molasses.

45. Section 10(1) deals with the provision for selling of molasses by a sugar factory which reads as under:

The occupier of a sugar factory-shall sell molasses in respect of which an order u/s 8 has been made.

Provided that the distilleries of potable alcohol which have been granted licence for wholesale contract supply of country liquor shall continue to be supplied molasses in respect of which an order u/s 8 has been made at a price not exceeding that for the time being prescribed in the Schedule till March 31, 1998.

46. In Chapter v. of the Act, there are miscellaneous provisions and Section 17 deals with the maintenance of accounts and furnishing of returns, which reads as under:

17. Every occupier of a sugar factory and every person to whom molasses is supplied by such occupier shall be bound--

(a) to maintain such registers, records, accounts, instruments and reagents as may be prescribed;

(b) to furnish all such information and return relating to the production and disposal of molasses in such manner, to such persons and by such dates as may, by order, be prescribed by the Controller;

(c) to produce, on demand by an excise officer not below the rank of Sub-Inspector (Excise), registers, records, documents, instruments and chemical re-

agents which he is required to maintain under the provisions of this Act or the rules or orders made there under.

47. In exercise of powers u/s 22 of the U.P. Sheera Niyamtran Adhiniyam, rules were framed known as U. P. Sheera Niyamtran Niyamavali, 1974. Word "allottee" has been defined under Rule 2-b which reads as under:

Allottee" means a person in whose favour an order u/s 8 of the Act has been made for purposes of purchase of molasses from the occupier of a sugar factory.

48. Chapter III of the Rules deals with the supply and distribution. Rules 12 requires the Occupier of the sugar factory to submit estimate of molasses to be produced in sugar factory, whereas Rule 14 requires submission of consolidated statement before the Advisory Committee. The relevant provisions of Rules 12 and 14 are reproduced as under:

12. The occupier of every sugar factory shall submit to the Controller by August 31st each molasses year a statement in Form M.F.9 specifying an approximate estimate of the quantity of molasses to be produced in a sugar factory during the molasses year following, alongwith such other information as is required under the Form."

"14. A consolidated statement of the estimated availability of molasses will be drawn up and placed before the Advisory Committee, constituted u/s 3(1) of the Act by the Controller who may make orders regarding the sale or supply of molasses in accordance with the provisions of Section 8 of the Act.

49. Rule 23 deals with the administrative charges and it says as under:

23. Every occupier of a sugar factory shall deposit the amount of administrative charges payable on molasses sold or supplied by him in the treasury or sub-treasury of the district in which the sugar factory is situate and produce the treasury challan as evidence of such payment to the excise officer in charge of the sugar factory before making actual delivery of the molasses to the purchaser.

50. Rule 25 deals with the removal of molasses from sugar factory and it reads as under:

25 (1) No molasses shall be removed from the premises of a sugar factory until it has been weighed or measures and a pass in Form M.F.4 has been issued. This pass shall be issued in pent plicate by the occupier of the factory or by an officer authorized by the Controller in this behalf. One copy of the pass shall remain with the occupier of the sugar factory, one copy shall be handed over to the Sub-Inspector of Excise posted at the sugar factory before the removal of the molasses from the premises of the sugar factory, one copy shall be sent to the Controller, and one shall be sent to the Excise Inspector of the Circle in which the Sugar factory is situate.

(2) Verification of the receipt of consignment - On receipt of the consignment, the consignee shall verify the quantities received and note them on the back of

the pass and return it to the occupier of the sugar factory concerned. The consignee shall take adequate safeguard to see that the wastage or deficiency in transit does not exceed one per cent. In case the wastage or deficiency exceeds one per cent the consignee shall be liable to punishment imposed under the Act for the contravention of the rule:

Provided that it is proved to the satisfaction of the Controller that wastage or deficiency in excess of the prescribed limit has been caused by accident or any other unavoidable cause the consignee shall not be liable to punishment.

(3) Officers authorized for verification - Consignment destined for use in distilleries in Uttar Pradesh shall be verified by the Excise Inspector incharge of the distillery concerned or any other person authorized by the Controller in this behalf in the presence of the distilleries or their representative and result noted on the back of the pass.

51. Rule 31 deals with the price and molasses by the distilleries, which reads as under:

31 (1) The rate for payment of the price of molasses by a distillery to the occupier of a sugar factory shall be based on the grade of molasses as follows:

(a) When molasses are transported by rail, the grade shall be the grade as determined at the distillery under Rule 29 (3).

(b) When the transport of molasses is by road the grade shall be the grade as determined by the occupier of the sugar factory and recorded in the gate pass in Form M.F.4.

(2) The Distillery shall have to pay the price and other levies on Molasses to the Occupier of the Sugar Factory immediately at the time of taking delivery of Molasses. If the Sugar Mill delays or causes other hindrances in delivery of Molasses after payment of its price by the Distillery, the Occupier of the Sugar Factory shall be liable for penal action for breach of rules.

52. By U. P. Act No. 10 of 2009 U.P. Sheera Niyam Adhiniyam, 1964 was amended which received the assent of the Governor on 27.2.2009. The statement and objects of U.P. Sheera Niyam (Amendment) Act, 2009 reads as under:

In Civil Appeal No. 4466/2007 Dhampur Sugar Mills Ltd. v. State of U.P. and Ors., the Appellant has stated before the Hon"ble Supreme Court, that the molasses produced in his sugar mill is not sufficient for his own consumption in his distilleries and he has to purchase molasses from other sugar mills. Hence the reservation on molasses should not be imposed on them. The Hon"ble Supreme Court in the aforesaid petition has allowed the appeal and passed the direction that reservation on molasses shall not be imposed on those sugar mills that utilize their produce (molasses) for their own purpose. Meaning thereby reservation cannot be imposed on such sugar mills as have their own distilleries

and consume molasses in their own distilleries. The sugar mills have also obtained stay order from the Hon''ble Courts on the administrative charges, that is charged on the sale of molasses stating that they are not selling molasses but are using it for their own purpose. There are 30 such cases pending in Hon''ble Courts and around Rs. 23 crores has accrued as arrears so far which will increase in future. These sugar mills could get this benefit because there is no clear cut provisions in Molasses Uttar Pradesh Sheera Niyantaran Adhiniyam, 1964 and the rules made there under regarding Captive Consumption (own use). In view of this, option was sought from expert lawyers who advised for modification in the said Act. According to them "Captive Consumption" means goods not sold but consumed within factory. With the definition of captive consumption to be incorporated in the said Act and the rules only those sugar mills which have distilleries in the same campus shall be entitled for exemption from reservation/administrative charges, whereas other sugar mills of such groups shall not fall in the ambit of captive consumption. Hence reservation and administrative charges may be imposed on production of molasses in such sugar mills.

It has, therefore, been decided to amend the said Act (a) to define the words "molasses for captive consumption "supply" and transfer":

(b) to impose the Controller to require by order, the occupier of any sugar factory to transfer such quantity of molasses to such person, as may be specified in the order;

(c) to authorize a police officer or an Excise Officer to seize every animal cart, vessel, container or other conveyance used in carrying receptacle or package.

53. By the aforesaid amendment, following amendments have been inserted:

1. This Act may be called the Uttar Pradesh Sheera Niyantaran (Sanshodhan)Adhiniyam, 2009.

2. In Section 3 of the Uttar Pradesh Sheera Niyantaran Adhiniyam 1964, hereinafter referred to as the principal Act, -

(d-1) Molasses for captive consumption means the molasses transferred by an occupier of a sugar factory to a distillery or to industrial unit having the same ownership as that of sugar factory, and is situated within the same premises or in such a contiguous vicinity of the sugar factory so that the transfer or transportation of such molasses outside the premises or gates of the sugar factory, by a vehicle, is not required.

(b) after Clause (h) the following clauses shall be inserted, namely -

(i) Supply shall include transfer of molasses by an occupier of a sugar factory to any distillery or industrial unit.

(j) Transfer shall include transfer of molasses by an occupier of a sugar factory to any distillery or industrial unit by way of stock transfer or for captive consumption.

3. In Section 8 of the principal Act -

(a) in Sub-section (1) for the words "sell or supply" the words "transfer or sell or supply" shall be substituted.

(b) in Sub-sections (4) and (5) for the words "sold or supplied" the words "transferred or sold or supplied" shall be substituted.

4. In Section 14 of the principal Act, in Sub-section (1) after Clause (b) the following clause shall be inserted, namely, -

(bb) seize every animal cart, vessel, container or other conveyance used in carrying such receptacle or package.

5. In Section 17 of the principal Act for the words "molasses is supplied" the words "molasses is transferred or supplied" shall be substituted.

54. Production, supply and distribution of goods are no doubt within the exclusive sphere of the State Legislature but it was subject to the provisions of Entry 33 of List III which gave concurrent powers of legislation to the Union as well as the States in the matter of trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union was declared by Parliament by law to be expedient in the public interest.

55. The controlled industries were relegated to Entry 52 of List I which was the exclusive province of Parliament leaving the other industries within Entry 24 of List 2 which was the exclusive province of the State Legislature. The products of industries which were comprised in Entry 24 of List 2 were dealt with by the State Legislatures which had under Entry 27 of that list. Power to legislate in regard to the production, supply and distribution of goods, goods according to the definition contained in Article 366(12) including all raw materials, commodities and articles.

55-A. It will also not be out of place to mention that prior to the impugned amendment, the Respondents sought to levy administrative charges even on stock transfer of molasses. Aggrieved by the aforesaid action of the Respondents, the Petitioner had filed a Writ Petition No. 9457 (MB) of 2008 in this Court on which interim order dated 21.10.2008 was passed providing that the Respondents shall not compel the Petitioner to pay administrative charges in respect of the supply of molasses from own sugar mill to its distillery unit.

56. Entry 33 of the List III of Seventh Schedule to the Constitution of India deals with the subject of trade and commerce and the provision of supply and distribution of the product of an Industry, the control of which has been taken over by the Union by an appropriate declaration. Entry 33 of the List III of Seventh Schedule to the Constitution of India does not empower nor is it repository of the power of the State Government to levy a tax. It is for this reason that U.P Act No. 10 of 2009 insofar as it seeks to impose a tax on captive

consumption is not protected nor referable to Entry 33. The original power to levy an administrative charge is, infact, referable only to Entry 54 of List II of the Seventh Schedule to the Constitution of India and thus restricted to a sale or purchase of molasses. For this reason, the Petitioner had questioned the competence of the State to levy and collect administrative charges on captive consumption under the provisions of Adhiniyam of 1964 as it stood prior to its amendment by the impugned enactment.

57. As averred above, Entry 33 of list III speaks of trade and commerce in, and production, and supply and distribution of the products of any industry where the control of such industry by the Union is declared by the Parliament by law to be expedient in the public interest. By upholding the constitutional validity of the Act, it cannot be presumed that the taxing authority of the State Government under the said entry has also been upheld by the Apex Court. The general entry cannot be read for imposition of tax or introducing the incidence of tax and its realization. A tax can be imposed and realized only if it falls within a given entry and there is power to legislate and make any enactment for the imposition of such a tax. This distinction has been clearly considered by the Apex Court in the following cases, where in it has been held that for imposing a tax, the general entry given in list III would not be sufficient to confer this power upon the State Government.

58. In the case of Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, the Apex Court held as under:

76. It is equally well settled that the various entries in the three lists are not "powers" of legislation, but "fields" of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the center's power of price control.

59. In the case of Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, the Apex Court held as under:

55. Various entries in the three Lists provide for the fields of legislation. They are, therefore, required to be given a liberal construction inspired by a broad and generalize spirit and not in a pedantic manner. A clear distinction is provided for in the scheme of the Lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for purposes of legislative competence vis-a-vis the general entries. Clauses (1) and (2) of Article 248 of the Constitution of India also manifests the aforementioned nature of the entries of the List, and, thus, the matter relating to taxation has been separately set out. The power to impose

tax ordinarily would not be deduced from a general entry as an ancillary power. In List II, entries 1 to 44 form one group providing for the legislative competence of the State on subjects specified therein, whereas entries 45 to 63 form another group dealing with taxation. We, however, do not mean to suggest that in regard to the validity of a taxation statute, the same, by itself, would be a determinative factor as in a case where the Parliament may legislate an enactment under several entries, one of them being a tax entry.

60. It appears that the main object of the amendment of Section 2(d-1) is to make molasses available for manufacture of country liquor instead of being made available for own consumption by the Distillery owned by the same company for the purpose of over coming the judgment of Apex Court in the Dhampur Sugar Mills Limited (supra). The last part of Section 2(d-1) which defines molasses for "captive consumption" excludes transportation of molasses by vehicle but if it is transported through Pipe line then it is covered by definition of "captive consumption". The provision regarding mode of transportation whether by pipe line from the sugar factory to the Distillery or by Tanker/Vehicle from the Sugar mill to the Distillery does not change the characteristic of captive consumption and it is wholly arbitrary and unreasonable. The affect of this amendment is that the Petitioner Company shall be required to pay administrative charges even on the molasses which are transferred to its own distillery although it does not involve any sale or commercial transaction and molasses is required for own captive consumption.

61. The place of the Distillery in same premises or at different places is wholly irrelevant and unreasonable for the purpose of deciding the captive consumption/self-consumption of the molasses as was held by the Apex Court in Dhampur Sugar Mills (supra). In Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, the Apex Court observed as under:

We now take the example of a producer trader who is an agriculturist and produces paddy in his own field but owns a rice mill also in the same market area. He mills the paddy grown by him into rice and sells it as such. It is plain that in his case no market fee can be charged on paddy because there is no transaction of sale and purchase of paddy.

62. In Vam Organic Chemicals Ltd. and Anr. v. State of U.P. and Ors., 1997 UPTC 624, a Division Bench of this Court observed as under:

We quite agree with the view taken by the learned Single Judge in M/s U. P. State Cement Corporation Ltd. (Supra). There is nothing to indicate in the charging Section 3(1)(C) of the Act of 1939 that the requirement that there should be two parties for the transaction of sale and purchase is dispensed with. In the case at hand admittedly the distillery as well as the chemical factory are owned by the Petitioner company and the entire industrial alcohol manufactured in the distillery is being admittedly consumed captively in the manufacture of chemical, preparations and, therefore, there is no transfer of goods by the

Petitioner to any other entity.

63. Moreover, mere defining of words "distillery" and "sugar factory" independently under the provisions of 1964 Adhiniyam or required of obtaining separate licence under the different Statutes would not mean that both are different personality. In other words, it would not clothe them with a separate juristic personality. Therefore, the assertions of the State Counsel that they are separate legal units or juristic personality, is not acceptable. Sugar and Alcohol industries are governed by the provisions of IDAR Act, 1951. The sugar is listed at Entry-25 whereas Alcohol is at Entry 26 of the Schedule of IDAR Act. By virtue of the said provisions, the units/Petitioners are required to obtain separate licence under the provision of IDAR Act. They are bound to take license under various State Excise Act purely for the purposes of meeting statutory requirement prescribed by the State Excise Laws. The Karnataka High Court in T. Mohindra v. Additional Commissioner Commercial Taxes (103) STC 345, observed that holding of two type of licence under the Excise Act in respect of two units does not make any difference and transfer of stock from one unit to another holding two different type of license does not amount to sale. Similarly, in KCP Limited v. State of Andhra Pradesh 1993 (88) STC 374, the Andhra Pradesh High Court took the view that transfer of cement by the Cement unit to the Sugar factory and Engineering unit cannot be treated as sale since each unit is part of the company. The unit as such cannot be treated as legal entity capable of transferring the goods to another person. Administrative charges, admittedly, are a tax which can be justified under Entry 54 of List II of the 7th Schedule of the Constitution, hence for the purposes of justifying the liability for payment of administrative charges as tax, there has to be two different persons as contemplated u/s 4 of the Sales of Goods Act. Moreover, mere issuance of bill or charging price by one unit to another unit would not amount to any sale as it is for the purposes of accounting and this method of accounting cannot alter the true character of the transaction.

64. It is not disputed that the State can charge only such tax as is permissible under law. The Constitution Bench of Hon'ble Supreme Court in the case of State of Kerala and Others Vs. P.J. Joseph, has held as under:

Imposition of tax which is not supported by the law, is violative of Article 265 of the Constitution of India and such an imposition could not be said to be supported by law even if it was by means of endorsement made by Government or a reference made to by the Board of Revenue; the levy of duty which has not been published Gazette.

65. As regard to the plea that the aforesaid tax is also covered by entry 54 of list II, we may look to the entry aforesaid as under:

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92-A of List I.

66. At this juncture, it is relevant to add that the legislative competence of a

State to tax sales or purchases of goods is derived from Entry 54 of List-II of Seventh Schedule of the Constitution. The term "sale" or "sale or purchase of goods" was not defined in the Constitution. The Parliament, therefore, inserted Clause 29-A, defining the expression "tax" on the sale or purchase of goods" in Article 366 of the Constitution. Clause 29-A reads as under:

29-A. tax on the sale or purchase of goods includes

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods(whether as goods or in some other form) involved in the execution of a works contract;
- (c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

67. A careful reading of Clause 29-A shows that it is an inclusive definition and has two limbs. The first limb says that tax on the sale or purchase of goods includes a tax on transactions specified in Sub-cause (a) to (f) thereof. The second limb provides that such transfer, delivery or supply of any goods referred to in the first limb shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and the purchase of those goods by the person to whom such transfer, delivery or supply is made. To constitute a transaction of sale, the three essential components are (i) an agreement to transfer title (ii) support by consideration, and (iii) an actual transfer of title in the goods. In the absence of any one of these elements, there will be no sale.

68. Here, Article 366(29-A) is not applicable for justifying the imposition of administrative charges on the transfer of molasses from sugar units to the Distillery unit owned by the same company for self consumption. In our opinion, in spite of Article 366(29-A) which is the only enabling provisions, no tax; i.e. the

administrative charges can be legally realized since it does not fall in any of clauses of 29-A. The State has wrongly relied upon Clause (f) of Article 366(29-A) which also contemplates the supply of goods being food or any other article for human consumption or any drink from one person to another person for cash deferred payment or for other valuable consideration.

69. In. Tamil Nadu Kalyana Mandapmam am Assn. Vs. Union of India (UOI) and Others, the Apex Court in paragraphs 43 and 44 of the report held as under:

43...it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. The legislature cannot enlarge the definite of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case on hand:

1. J.K. Jute Mills Co. Ltd. v. State of U.P
2. Gannon Dunkerley and Co. v. State of Rajasthan
3. State of Madras v. Gannon Dunkerley and Co.
4. STO v. Budh Prakash Jai Prakash
5. George Oakes (P) Ltd. v. State of Madras.

44. In regard to the submission made on Article 366(29-A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of goods and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be sale of those goods.". In other words, the operative words of the said sub-article are supply of goods and it is only supply of goods and drinks and other articles for human consumption that is deemed to be sale or purchase of goods.

70. Thus, sale or purchase of goods has a different connotation in law which cannot be effected unless there are two or more persons as there cannot be a sale or purchase of goods by one person. It is not disputed that it is one company which owns the sugar mill as well as distillery though they are granted separate licenses and may be different units but whether a transfer of molasses from such sugar mill to its own distillery would constitute a sale, is a matter which requires consideration. Therefore, it can easily be inferred that the imposition of administrative charges on transfer of molasses by the sugar mill to its own distillery cannot be protected under entry 33 of list III nor it is governed by entry 54 of list II and is also not referable to Article 366(29-A) of Constitution which is only an enabling provision and in the absence of any valid law having been enacted in this regard, the said provision cannot in itself be applied for

imposition of tax or for realization thereof.

71. The aforesaid discussions leads us to an irresistible conclusion that such a transfer cannot amount to sale as it is a company which is a person who owns both the units and that "transfer" and "sale" cannot be interchanged, nor "transfer" can be read as "sale". The impugned legislation is also bad in law as Article 265 of the Constitution of India prohibits the imposition of tax and says that no tax shall be levied or collected except by authority of law.

72. It is not in dispute that the molasses is a by-product generated in the course of manufacture of sugar by its factory and is used by its own distillery for manufacture of various other industrial products. Undoubtedly, as referred to above, the Entry 33 of List III of the Seventh Schedule to the Constitution, the State has a right to regulate trade and commerce in the product of an Industry. However, in the garb of the said power, the State is not conferred with the power to levy a tax on either captive consumption or a supply of a products of an Industry other than by way of sale. In order to have the legislative competence to levy a tax, specific entries are incorporated in the three lists placed in the Seventh Schedule. A general entry empowering the State to regulate trade and commerce is not and cannot be construed as conferring authority to levy a tax.

73. In the case of Commissioner of Central Excise, Meerut Vs. M/s Kisan Sahkari Chinni Mills Ltd., the Apex Court has held that administrative charges levied by the State of U.P. under the provisions of UP. Sheera Niyantran Adhiniyam, 1964, on the sale and purchase of molasses is a tax. The Apex Court reiterated the above view in Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, and held that the imposition of administrative charges is a tax and not a fee. In CCE v. Chhata Sugar Co. Limited (supra) the question for consideration before the Apex Court was whether administrative charges collected by the sugar factory for molasses sold from the buyers/allottees on behalf of the State Government in terms of Section 8(5) of the U.P. Sheera Niyantran Adhiniyam, 1964 constituted a duty or impost in the nature of a tax. The Apex Court after analyzing Central Excise Act, 1944 and U. P. Sheera Niyantram Adhiniyam, 1964, UP. Sheera Niyantran Niyamavali, 1974 and other provisions came to the conclusion that the administrative charge under the U. P. Act is a tax and not a fee. Paragraphs 13 and 14 of the report, Hon"ble S.H. Kapadia [now Hon"ble the Chief Justice of India] speaking for the Bench observed as under:

Before dealing with the foregoing issue, it may be noted that in this case, we are concerned with identification of the nature of levy of administrative charges u/s 8(4) and Section 8(5) of the UP. Act. As stated above, the UP. Act has been enacted with the object of regulating supply and equal distribution of molasses to distilleries and other industrial establishments. u/s 8(4) of the UP. Act, every sugar factory is made liable to pay to the Government administrative charges at the specified rate on sale or supply of molasses to the distillery. u/s 8(5), every sugar factory is entitled to recover from the buyer administrative charges in addition to the prices of molasses. u/s 10(1) of the U.P. Act, the sugar factory

has to sell molasses at a price not exceeding that prescribed in the Schedule. Therefore, the levy of administrative charges is on production for sale of molasses. In the case of *Chhotabhai Jethabhai Patel and Co. v. Union of India*, the question before this Court was the nature and character of the duty of excise. It was held that the duty of excise was a tax or duty not intended by the taxing authority to be borne by the person on whom it is imposed and from whom it is collected but it is indented to be passed on those who purchased the goods on which the duty was collected. That excise duty is a tax as it is imposed in respect of some dealing with the commodities, such as their import or sale, or production for sale. It has been further held that going by the general tendency of a tax, it is capable of being passed on the consumer or the buyer. In our view, the above test is important because tax is capable of being passed on to the consumer or the buyer whereas a fee is a counter payment by the buyer who receives the benefit of the services for which he is charged and such fees are not capable of being passed on as fees to the consumer or the buyer. The above point of distinction is applicable to the facts of this case. In the present matter, as stated above, levy of administrative charges u/s 8(4) of the U.P. Act is on the producer of molasses; it is imposed on production of molasses for sale and u/s 8(5) the same is passed on the buyer distillery. In the circumstances, levy of administrative charges under the U.P. Act is a tax. There is one more circumstance which indicates that the levy of administrative charges under the U.P. Act is a tax. In the case of *Matthews v. Chicory Marketing Board (Victoria)* it has been held that customs and excise duties are indirect taxes as they are additions of definite amounts to the prices at which the goods upon which they are imposes are, in the ordinary course of business, sold by persons who have paid the duties. This test is also applicable to the present case. u/s 8(5) of the U.P. Act, administrative charges are in addition to the prices at which goods are sold in the ordinary course of business by the sugar factory (Producer of molasses). Moreover, the predominant object of the U.P. Act is to maximize the revenue by way of tax which regulating storage and supply of molasses. The beneficiary under the said Act is the distillery. It is the distillery, which provides important source of revenue to the State. In our view, the said levy of administrative charges is in the nature of tax.

14. We can look at the problem from another viewpoint. One of the tests to decide whether a levy is a tax or fee is that while tax is a compulsory exaction, fee relates to the principle of *quid pro quo*. This test can usefully be applied to the facts of the present case. As stated above, the beneficiary of the U.P. Act is the distillery (Buyer). All regulatory measures are for the benefit of the said buyer. The sugar factory is merely a collecting agent of administrative charges for the State Government. The administrative charge is not a component of the consideration received by the sugar factory. This is clear from the provisions of Section 8(5) which state that the administrative charges shall be collected in addition to the price of the molasses from the buyer distillery. The said administrative charges do not form part of the revenue of the sugar factory. The

said administrative charges cannot be appropriated to the revenue account of the sugar factory. Therefore, there is no element of quid pro quo as far as the administrative charges in the hand of the sugar factory are concerned. On the other hand, u/s 8(4) of the U.P. Act read with Rule 23 of the said U.P. Rules, every sugar factory is required to deposit administrative charges on the molasses sold/supplied before actual delivery to the distillery (buyer), which brings in the principle of compulsory exaction. Hence, administrative charge under the U.P. Act is tax and not a fee.

(emphasis supplied by us)

74. It may be noted that in the instant matter, it has been argued on behalf of the State by Sri J.N. Mathur, Addl. Advocate General that the case of Commissioner of Central Excise v. Chatta Sugar (supra) cannot be applied in the facts and circumstances of the present case and that too when the State was not the party in the said matter but the same Counsel in SAF Yeast Co. Private Limited v. State of U.P. and Anr., VSTI 2008 Vol. III December Part-23, has taken a different stand. It would be useful to reproduce the relevant extract of paragraph 5 of said judgment, which reads as under:

5. Sri J.N. Mathur, learned Additional General appearing on behalf of the opposite parties submitted that the U.P. Sheera Niyantaran Adhiniyam, 1964 is a special enactment for the control of storage gradation and price of molasses produced by Sugar Factories in Uttar Pradesh and the regulation of supply and distribution thereof. He fairly conceded that in view of the law declared by Hon"ble the Supreme Court in the cases of Commissioner of Central Excise, Meerut v. Kisan Sahkari Chinni Mills Ltd. (Supra) and Commissioner of Central Excise, Lucknow, U.P. v. Chhata Sugar Co. Ltd. (supra) administrative charges is a tax and not fee.

75. From the above statement of Sri J.N. Mathur it is clear that the State has accepted the verdict given by the Apex Court in Chhata Sugar Mills (supra) and no objections were ever raised.

76. The attempt made on the part of State legislation to impose tax "administrative charges" on the transfer of molasses from Sugar unit to the Distillery unit owned by the same person is totally constitution on the principle of law laid down by Apex Court in the case of State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, wherein the Apex Court observed that any attempt on the part of State to impose by legislation sales tax or purchase tax in respect of what would not be sale or sale of goods under Sale of Goods Act, is unconstitutional. The relevant paragraph reads as under:

47... As any attempt on the part of State to impose by legislation sales tax or purchase tax in respect of what would not be a sale or a sale of goods or goods under the Sales of Goods Act, 1930 is unconstitutional, any attempt by it to do so in the exercise of its power of making subordinate legislation either by way of a rule or notification would be equally unconstitutional; and so would such an act on the part of the authorities under a Sales Tax purporting to be done in exercise

of powers conferred by that Act or any rules made or notification issued....

77. Even at the cost of repetition, we may point out, as averred above, that the Apex Court in *Chhata Sugar Mills* (supra) after examining various provisions of the *Adhiniyam* of 1964 held that the administrative charges levied under the Act is not in the nature of a regulatory fee but is clearly a tax. The said judgment of the Apex Court has a binding effect and this Court is not permitted under law to take a view contrary to it merely on the assertion of the Respondents that they were not party in the aforesaid decision rendered by the Apex Court. In the event, the Respondents were aggrieved by the decision of the Apex Court either directly or indirectly, they should have approached the Apex Court. Moreover, the Respondents are estopped from raising such a plea when in earlier writ petition, their stand is altogether different. It may be clarified that the Petitioners have not questioned the validity of U.P. *Sheera Niyamtran Adhiniyam* but have only questioned the validity of the provisions of Section 2(d-1), 8(4) and 8(5) insofar as it purports to levy tax namely, Administrative Charges on the supply/transfer of molasses from the Sugar factory to the distillery owned by the same, hence neither Entry-33 is relevant. Therefore, the judgment of this Court in the case of *Shriram Industrial Enterprises Limited* (supra) nor that of Apex Court in the case of *SIEL Limited* (supra) declares or recognizes a power enuring the State Government to levy a tax on captive consumption and is of no help.

78. The Constitution confers a power and imposes a duty on the legislature to make law. The essential legislative function is the determination of a legislative policy and its formulation as a rule of conduct. In other words, the State Government in exercise of its legislative powers is free to frame laws in consonance with the basic framework of the Constitution but it cannot travel beyond the power conferred upon it under the Constitution of India. In other words, a statutory rule must be made in consonance with constitutional scheme. A rule must not be arbitrary. It must be reasonable, be it substantive or a subordinate legislation. While defining the word "captive consumption" the State Government cannot assume to itself the power to levy a tax. Taxing entries are specifically mentioned and enumerated in List III. Unless the tax is in respect of a subject, which stands enumerated in the "taxing specific entries", no levy/fees/charges can be imposed in the name of tax by the State Government. In these circumstances, various case laws relied by the State Counsel are of no avail to them. Needless to say that a taxing statute, must be made in consonance with Article 265 of the Constitution.

79. In view of the above, we are of the considered opinion that the provisions of Sections 2(d-1), Section 8(4) and 8(5) of the U.P. *Sheera Niyamtran Adhiniyam* amended by U. P. Act No. 10 of 2009, reproduced hereinabove, suffer from callous exercise of power and it can safely be concluded that the State has overstepped its limit of power.

80. Before concluding, we would like to point out that this Court while admitting the writ petition No. 4343 (MB) of 2009 alongwith other connected matters,

passed an ad interim order dated 22.5.2009 providing therein that the Petitioners' sugar mills shall maintain an account of molasses transferred to their own distillery and in case their petitions fail, they will deposit the amount within 30 days alongwith interest. As the amending provisions have been held to be invalid and the writ petitions are being allowed, there is no occasion for deposit of any administrative tax. However, it is provided that in case any of the Petitioners had deposited the amount under the aforesaid head with the Respondents, same shall be remitted to them forthwith.

81. Accordingly, all the writ petitions are allowed and the aforesaid provisions are declared invalid. Consequently, any proceedings undertaken under the amended provisions by the authorities against the Petitioners are declared illegal and are set-aside.