

**(2014) 08 GUJ CK 0088**

**In the Gujarat High Court**

**Case No : Special Civil Application No. 8894 of 2011**

Vallabhbhai Parshottambhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

**Date of Decision : 26-08-2014**

**Acts Referred:**

Bombay Prohibition Act, 1949 — Section 2(39A), 64  
Constitution of India, 1950 — Article 14, 16, 19(1)(g), 301, 304  
Essential Commodities Act, 1955 — Section 3  
Food Safety and Standards Act, 2006 — Section 2(zx), 51, 97  
Land Acquisition Act, 1894 — Section 11

**Citation : (2014) 3 GLH 562**

**Hon'ble Judges : J.B. Pardiwala, J; Akil Abdul Hamid Kureshi, J**

**Bench : Division Bench**

**Advocate : Ketty A. Mehta and Manan A. Shah, Advocate for the Appellant;  
Kamal Trivedi, Advocate Gen., S.K. Vishen, AGP and H.L. Jani, Incharge Govt.  
Pleader, Advocate for the Respondent**

## **Judgement**

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Akil Abdul Hamid Kureshi, J.—The petitioners have challenged vires of amended Section 2(39-A) of the Bombay Prohibition Act, 1949 amended by Gujarat Act, No. 27 of 2003. Brief facts are as under:-

1.1 The petitioners are agriculturists mainly engaged in growing sugarcane. They are manufacturing gur from such sugarcane. Sugarcane harvesting season is between November and March. Once the sugarcane crop is harvested, it could be used either for manufacture of sugar or for gur. Much of the business of manufacturing sugar is in the hands of sugar co-operatives. If a farmer is not a member of sugar co-operative, he would not be able to sale his sugarcane to the sugar factory. The petitioners being small farmers and not being members of any sugar co-operatives, are engaged in manufacturing of gur from their own sugarcane. The petitioners point out that like them in the State, there are approximately 1115 crushers, who are engaged in manufacture of gur from

sugarcane. Annually they produce around 60,000 tonnes of gur by utilizing approximately 6 lacs tonnes of sugarcane. Around 23,000 families of agriculturists and labourers depend on this business.

2. The Bombay Prohibition Act, 1949 pertains to consolidation of the law relating to the promotion, enforcement of and carrying into effect the policy of prohibition. Various provisions have been made in the Bombay Prohibition Act, 1949 for implementing the State's prohibition policy. Section 2(39-A) of the Bombay Prohibition Act, 1949 defines the term "rotten gur". Until 29.09.2003, Section 2(39-A) defining rotten gur read as under:--

"2(39-A). "rotten gur" means the article known as gur, gul, jiggery, palmyra jiggery or rab and other intermediary product prepared by boiling or processing juice pressed out of sugarcane or extracted from palmyra palm, date palm, sago palm, prabpalm or coconut palm, with or without admixture of molasses, and which is in a liquid form or a semi-liquid or viscous form and which has a dark brown or a black colour or which, inspite of being a solid liquid, semi-liquid or viscous form, is unfit for human consumption owing to its becoming filthy, putrid, disgusting or decomposed;]"

3. Section 64 of the Bombay Prohibition Act, 1949, in turn, provides that no person shall have in his possession, except under a permit granted by an officer empowered by the Government, any quantity of rotten gur in excess of such quantity as may be specified by the Government by notification published in official gazette. Section 64A of the Bombay Prohibition Act, 1949 further provides that no person shall manufacture, use or consume rotten gur except under the Authority, and in accordance with the terms and conditions of, a license, : permit, pass or authorization granted by an officer empowered by the Government.

4. Vires of said Section 2(39-A) as it stood prior to 29.09.2003 came to be challenged before this Court in case of M/s. Kantilal & co. v. State of Gujarat and anr. reported in 1980 2 GLR 260. The High Court, upheld the constitutionality of the said provisions. The challenge was carried in appeal before the Supreme Court. It was argued that the State Legislature did not have competence and also that the field was already occupied by the Union Legislature. The Supreme Court in case of Razakbhai Issakbhai Mansuri and Others Vs. State of Gujarat and Others, repelled such challenge. It was held that the State Legislature had the necessary competence to enact such a provision. It was observed that there was no restriction on carrying the business in gur or rotten gur. All that was required was to obtain a permit for dealing in the business of rotten gur.

5. By amending Gujarat Act, 27 of 2003, following portion was added to the definition of term "rotten gur" contained in Section 2(39-A) of the Bombay Prohibition Act, 1949.

"[and shall include on chemical analysis if it contains-

(i) total sugar (expressed as invert sugar) less than 90 percent and sucrose less

than 60 percent., or

(ii) extraneous matter insoluble in water more than 2 percent., or

(iii) total ash more than 6 percent., or

(iv) ash insoluble in by hydrochloric acid (HCL) more than 0.5 percent., or

(v) more than 10 percent of moisture, or

(vi) sulphur dioxide in concentration exceeding 70 parts per million;]"

6. It is this addition by way of amendment which is under challenge before us in the present petition. Case of the petitioners is that such provision is ultra vires the Constitution. The petitioners contend that the prescription of minimum sugar content requirement of 90% and of sucrose of 60% is wholly unachievable and unattainable standards. These standards have no scientific basis. It is further contended that there is no rational to categorize gur which does not fulfill such criteria as rotten gur. It is also contended that in order to categorize gur as rotten gur, both parts of the definition must be simultaneously applied and only if the sample fails both the tests, can the gur to be classified as rotten gur for the purpose of Bombay Prohibition Act, 1949.

7. Appearing for the petitioners, learned Counsel Mrs. Mehta raised following contentions in support of the challenge:-

(i) Under G.R. Dated 03.04.1968, the Central Government issued an order in exercise of powers under Section 3 of the Essential Commodities Act, 1955 which lays down the parameters for identifying gur as containing total sucrose ranging from 70-95%. Thus, the field was occupied by the Central Legislation and the State Legislature, therefore, did not have the competence to lay down any criteria different from those contained in the said order. Section 2(39-A) of the Bombay Prohibition Act in its original form contained sufficient clarity and parameters for ascertaining whether a particular quantity of gur was rotten gur or not. It was, thereafter not necessary to lay down any further criteria as was done by way of impugned amendment.

(ii) It was strenuously urged that the criteria laid down under the amended Section 2(39-A) defining form "rotten gur" was extremely stringent. Counsel relied on literature from various sources to contend that such stringent standards were impossible to attain. She submitted that even recognized and authorized sources permitted gur to carry sugar contents in the range of 70-90%. Merely because in some cases the sugar content fall below 90%, to treat such gur as rotten gur was thus wholly impermissible and arbitrary.

iii) She contended that the amended definition was, therefore, violative of Articles 14, 19(1)(g) and 301 of the Constitution of India and would put unreasonable restriction on the petitioners and other small manufacturers of gur to carry on their trader or business.

8. On the other hand, learned Advocate General, Mr. Kamal Trivedi appearing for the respondents opposed the petition contending that:-

(i) The decision of the Supreme Court in case of Razakbhai Issakbhai Mansuri and ors v. State of Gujarat and ors. (supra) completely answers the question of legislative competence of the State Legislature to enact the said provision. He relied on the said decision also for the purpose of canvassing that the State Legislature could as well have provided more scientific definition of rotten gur. This is precisely what was done in the present case.

(ii) The Essential Commodities Act, 1955 operate in a different field. It was concerned with providing in the interests of the general public, for control of the production, supply and distribution of, and trade and commerce, in certain commodities. The Bombay Prohibition Act, 1949, on the other hand was, enacted for the purpose of implementing the State's prohibition policy. The two legislations thus, were operating in entirely different fields and therefore, any definition of gur contained in an order issued under the Essential Commodities Act, 1955, would not prevent the State from providing a definition of the said term.

(iii) He further contended that the order dated 03.04.1968 on which the petitioners rely and which was issued under the Essential Commodities Act, 1955 stands repealed by virtue of Schedule II Item 8 to the Food Safety and Standards Act, 2006 and the notification dated 04.08.2011 issued by the Central Government. The question of repugnancy, therefore, no longer survives. He further submitted that the standards specified under the amended Section 2(39-A) of the Bombay Prohibition Act, 1949 are not different from those provided under the Prevention of Food Adulteration Act, 1954 and thereafter, under the Food Safety and Standards Act, 2006. He pointed out that under Clause A.07.05 contained in Appendix B of the Prevention of Food Adulteration Rules, 1955 the term "jaggery" or "gur" required that the same must contain total sugar not less than 90% and sucrose not less than 60%. He further pointed out that such prescription was maintained in the later enactment viz. the Food Safety and Standards Act, 2006, where, under Regulation 2.8.4 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 term "jaggery" or "gur" contained similar prescription.

(iv) Learned Advocate General relied on the decision of the Supreme Court in case of State of M.P. Vs. Rakesh Kohli and Another, to contend that a statute framed by the Central or the State Legislature can be declared unconstitutional only on limited grounds of legislative incompetence or being opposed to the fundamental rights or any other provision of the Constitution. Basing reliance on such decision, he submitted that the classification prescribed under Section 2(39-A) of the Bombay Prohibition Act is reasonable.

9. It is by now well settled that a legislation framed by the Union or the State Legislature can be declared unconstitutional only on two grounds viz. that it

suffers from legislative incompetence or that it is opposed to any of the fundamental rights contained in Part III of the Constitution or opposed to any other provision of the Constitution. It is also well settled that such legislation carries presumption of constitutionality. It is for one who contends that the same is unconstitutional to lead proper material to establish that it suffers from any of the constitutional infirmities. In case of *Katira Construction Ltd. Vs. Union of India and Others*, , a Division Bench of this Court referred to various decisions on these issues and noted as under:-

"14. It is now well settled that there is always a presumption of constitutionality whenever a legislation enacted by the Parliament or the State Legislature is questioned on the ground of unconstitutionality and the burden is on the petitioner bringing such a challenge. In the case of *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, , a Constitution Bench of the Supreme Court, observed that there is always a presumption in favour of the constitutionality of an enactment and the burden is on him who attacks it to show that there has been a clear transgression of the constitutional principles. It was observed as under:--

"24. This submission is erroneous in its formulation of a legal proposition governing onus of proof and it is unjustified in the charge that the record discloses no evidence to show the necessity of the new rule. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles, *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, . A rule cannot be struck down as discriminatory on any a priori reasoning. "That where a party seeks to impeach the validity of a rule made by a Competent Authority on the ground that the rules offend Art. 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration." The burden thus is on the respondents to set out facts necessary to sustain the plea of discrimination and to adduce "cogent and convincing evidence" to prove those facts for "there is a presumption that every factor which is relevant or material has been taken into account in formulating the classifications" *State of Uttar Pradesh Vs. Kartar Singh*, . In *Govind Dattatray Kelkar and Others Vs. Chief Controller of Imports and Exports and Others*, , Subba Rao C.J. speaking for the Court has cited three other decisions of the Court in support of the proposition that "unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by placing the necessary material before the Court that the said classification is unreasonable and violative of Art. 16 of the Constitution.

25. Thus, it is no part of the appellants' burden to justify the classification or to establish its constitutionality. Formal education may not always produce excellence but a classification founded on variant educational qualifications is, for purposes of promotion to the post of Executive Engineer, to say the least, not unjust on the face of it and the onus therefore cannot shift from where it

originally lay."

In case of State of Madhya Pradesh v. Rakesh Kohli and another (supra), the Apex Court observed that:--

"This Court has repeatedly stated that legislative enactment can be struck down by a Court only on two grounds, namely (i) that the appropriate legislature does not have the competence to make the law, and (ii) that it does not take away or abridge any of the fundamental rights enumerated in part III of the Constitution or any other constitutional provisions."

17. The Apex Court in case of State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., , observed that:--

"In India, the position is similar to the United States of America. The power of the Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by the Parliament or the Legislature can be struck down by Courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground."

The Apex Court thereafter explaining the previous decision in case of State of Tamil Nadu and Others Vs. Ananthi Ammal and Others, observed that:--

"The use of the word "arbitrary" in Para 7 was used in the sense of being discriminatory, as the reading of the very paragraph in its entirety discloses. The provisions of the Tamil Nadu Act were contrasted with the provision of the Land Acquisition Act and ultimately it was found that Section 11 insofar as it provided for payment of compensation in instalments was invalid. The ground of invalidation is clearly one of discrimination. It must be remembered that an Act which is discriminatory is liable to be labelled as arbitrary. It is in this sense that the expression "arbitrary" was used in Para 7."

In the case of State of A.P. v. McDowell & Co., (supra), it was observed.--

"No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. Parliament and the legislatures composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom."

17. It is, thus, undoubtedly true that the Parliament has power not only to legislate with respect to the subject matter on hand, but also with retrospective effect, if so found necessary. So much so was not even seriously disputed. It is also now sufficiently clear that in the field of taxation, the Parliament enjoys considerable latitude in framing and implementing the policies. It is often stated that the wisdom of the Parliament in enacting a statute cannot be questioned in

a Court of law. With this background in mind, we may consider the contentions of the petitioners."

10. In this background, we may take note of the provision under challenge. Prior to its amendment w.e.f. 29.09.2003, Section 2(39-A) of the Bombay Prohibition Act already contained a definition of term "rotten gur". Such provision came up for consideration before the Supreme Court in the case of Razakbhai Issakbhai Mansuri and ors. v. State of Gujarat and ors. (supra). While upholding the Legislative competence, the Supreme Court also dealt with the contention of the petitioners that such definition was too wide and that it should have been in more precise terms. It was pointed that the Bombay Prohibition Act, 1949 which applied to the State of Maharashtra contained more precise definition where the gur containing less than 70% of sugar was considered not fit for human consumption. The Supreme Court, however, held that the provision was made for implementation of the policy of prohibition and was aimed at preventing use of rotten gur for manufacture of illicit liquor. The contention that the item itself was possible of quick deterioration and that therefore, the provision was possible of unintended harm or application, was also turned down. It was observed that by whatever reason it may be, the article which was harmless is converted quickly into the form in which it acquires the potentiality of being misused for the purpose of preparing intoxicating liquor, if such mischief is not taken care of, it will become difficult to effectively implement the policy of prohibition.

11. Thus, the competence of the Legislature in laying down the definition of rotten gur is not seriously in question before us. Even prescription of a certain percentage of sugar contents which would provide a more precise and scientific definition of rotten gur distinguishing it from gur or the gur which is fit for human consumption is also not disputable. The only question is, does the prescription contained in the amended provision of Section 2(39-A) of the Bombay Prohibition Act, 1949 prescribe a limit which is so unreasonable or unattainable as to be wholly arbitrary. Limits of scrutiny of a legislation framed by Parliament or State Legislature are well-known and well laid down. In the case of State of Madhya Pradesh v. Rakesh Kohli and anr. (supra) the Supreme Court observed as under:-

"32. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the Court must have regard to the following principles:--

(i), there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature.

(ii), no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found.

(iii), the Court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence

(iv), hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law and

(v), in the field of taxation, the Legislature enjoys greater latitude for classification."

12. Barring Clause (v) of para 32 noted above, all other observations would apply to any statute framed by the Parliament or the State Legislature even if it is not in the field of taxation.

13. The sole question therefore needs to be answered is, whether prescription of minimum 90% sugar contents in gur contained under the amended Section 2(39-A) of the Bombay Prohibition Act being simply unattainable, would be violative of Articles 14 and 19(1)(g) of the Constitution. In other words, if the prescription is so unreasonable and wholly unattainable, as canvassed by the petitioners, the same would amount to total restriction on manufacture and sale of gur and would therefore be opposed to Article 19(1)(g) of the Constitution preventing a person from carrying out trade of industry of his choice by imposing a restriction which is not otherwise reasonable.

14. In this context, learned Counsel for the petitioner placed heavy reliance on certain literature. Such literature included an article by M/s. PVK Jagannadia Rao, Madhusweta Das & S.K. Das of the Department of Agriculture and Food Engineering, Indian Institute of Technology, Kharagpur. In such article, titled as "Jaggery - A Traditional Indian Sweetener". The authors tressed the various facets of gur such as its production and consumption patterns, its nutritive and caloric values etc. It is suggested that 100 gms of jaggery in liquid form would contain 40-60 gms of sucrose and 15-25 gms of invert sugar. It was clarified that composition per 100 gm of granular jaggery is 80-90 gms of sucrose and 5-9 gms of reducing sugar. Further, reliance is placed on the contents of Wikipedia which explain jaggery as a traditional unrefined non-centrifugal whole cane sugar consumed in Asia, Africa, Latin America and the Caribbean. It contains upto 50% sucrose and upto 20% invert sugar. Reliance is also placed on the answers given by Sugarcane Breeding Institution to the question raised by the petitioners, in which it is stated that jaggery contains approximately 65-86% sucrose and 9-15% reducing sugars i.e. invert sugars. Jaggery containing sucrose of minimum 80% on dry mass basis is categorized as Grade I and that containing minimum 70% is categorized as Grade II.

15. On the basis of such literature, it was strenuously urged before us that the prescription of minimum 90% of sugar contained under Section 2(39-A) was completely artificial.

16. Besides the Bombay Prohibition Act, 1949 there are other statutes which also, as we have noted, prescribe the parameter of gur. As pointed out by the respondents, under the Prevention of Food Adulteration Rules, 1955, term "gur" or "jaggery" was defined as under:--



"A.07.05-GUR OR JAGGERY means the product obtained by boiling or processing juice pressed out of sugarcane or extracted from palmyra palm, date palm or coconut palm. It shall be free from substances deleterious to health and shall conform to the following analytical standards on dry weight basis:--

Gur or jaggery other than that of the liquid or semi liquid variety shall not contain more than 10 per cent moisture. The product may contain food additives permitted in Appendix C."

This said definition was applicable w.e.f. 14.07.1956.

17. Parliament framed the Food and Safety Standards Act, 2006. Preamble to the said Act provides that the Act was framed to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith. Section 97 of the Food and Safety Standards Act, 2006 pertains to repeal and savings. Sub-Section (1) thereof provides that with effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed. Item No. 1 in Second Schedule pertains to Prevention of Food Adulteration Act, 1954. Item No. 8 thereof pertains to any other order issued under the Essential Commodities Act, 1955 relating to food. We notice that vide notification dated 04.08.2011, Government of India, Ministry of Health and Family Welfare, in exercise of powers under Sub-Section (1) of Section 97 of the Food Safety and Standards Act, 2006 repealed the enactment and orders in the Second Schedule to the said Act w.e.f. 05.08.2011.

18. We further notice that under the Food Safety and Standards Act, 2006 also term "jaggery" or "gur" has been defined under Regulation 2.8.4 of the Foods Safety and Standards (Food Products Standards and Food Additives) Regulation, 2011. Such definition reads as under:--

#### "2.8.4 Gur or Jaggery

1. "Gur or Jaggery" means the product obtained by boiling or processing juice pressed out of sugarcane or extracted from palmyra palm, date palm or coconut palm. It shall be free from substances deleterious to health and shall conform to the following analytical standards, on dry weight basis:--

Gur or jaggery other than that of the liquid or semi-liquid variety shall not contain more than 10% moisture.

The product may contain food additives permitted in these Regulations and Appendices.

Sodium bicarbonate, used for clarification purposes, shall be of food grade quality."

19. From the above, it can be seen that right from the year 1956, the term "gur" or "jaggery" contained a certain definition initially for the purpose of Prevention of Food Adulteration Act and, thereafter, upon repeal of the said Act, for the purpose of Food Safety and Standards Act, 2006. Both these definitions contained a minimum requirement of sugar expressed as invert sugar not less than 90% and sucrose not less than 60%. The addition made under Section 2(39-A) of the Bombay Prohibition Act with which we are concerned, is worded verbatim. In other words, the impugned definition of gur under Section 2(39-A) of the Bombay Prohibition Act makes identical prescriptions as those contained in the definition provided under the Prevention of Food Adulteration Rules for the purpose of Food Adulteration Act and contained in the Regulations framed under the Food Safety and Standards Act, 2006. It, therefore, cannot be argued that the requirement contained in Section 2(39-A) is so high or so unattainable as to make the definition wholly unworkable or arbitrary. We may also notice the fall out of any preparation in the form of gur which does not fulfill such requirements. Section 2(zx) of the Food Safety and Standards Act, 2006 contains the definition of the term "sub-standard" and reads as under:-

"(zx) "sub-standard"- an article of food shall be deemed to be sub-standard if it does not meet the specified standards but not so as to render the article of food unsafe;"

20. Section 51 of the Food Safety and Standards Act, 2006 prescribes Penalty for substandard food and reads as under:--

"51. Penalty for sub-standard food.- Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is sub-standard, shall be liable to a penalty which may extend to five lakh rupees;"

21. Combined effect of the said statutory provisions would be that if a person who manufactures for sale or stores or sells or distributes any gur which does not meet with such specifications any gur for human consumption would expose himself to penalty under the Food Safety and Standards Act, 2006. Previously, such an offender would have been dealt with under the Prevention of Food Adulteration Act.

22. Under the circumstances, when the State Legislature has laid down prescription which is contained in the Central Legislations which have been in existence since several decades, it is not possible for us to accept the contention of the petitioners that such requirements are so artificial, so unreasonable and so unattainable as to make the provision itself wholly arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India merely on the basis of some literature sought to be relied upon by the petitioners. These are matters of great technical and scientific complexities. The Legislature be the State or the Central Legislature, is supposed to be aware of all requirements. When after scientific study, the two union legislations have provided certain formula to separate gur

from adulterated gur or sub-standard gur, the State Legislature borrowing the same prescription and laying down the formula which would provide for a scientific for a more precise distinction between gur and rotten gur, in our opinion, such definition cannot be struck down as arbitrary.

23. Only few periphery issues remain. We are not convinced that the Essential Commodities Act having provided a different formula, one being central legislation, it was not open for the State legislature to provide for a different or a more stringent definition of the term "gur". The Essential Commodities Act is an Act, enacted in the interests of the general public, for control of the production, supply and distribution of, and trade and commerce, in certain commodities. The Gur (Regulation of use) Order, 1968 issued in exercise of powers under Section 3 of the Essential Commodities Act, 1955 does contain prescription for categorizing a substance as gur as one where total sugar has percentage of dissolved solids ranging from 70-95%. However, such definition order is for the purpose of control of the movement and storage of the commodity. This definition has nothing to do with the quality control of the substance. For example, Regulation 3 of the said order provides that, no person shall use gur for any purpose other than for the purpose of consumption in form of gur; or preparation of any article not being alcoholic liquor used as food or drink or medicine for human consumption or cattle feed. Regulation 4 entrusted the authorized officer with power of search and seizure with a view to securing compliance with the said order or to satisfy himself and that this order has been complied with. Different Clauses of Regulation 4 would clarify that such powers had to be exercised in order to ensure compliance with Regulation 3. Such order was, thus, issued to ensure that the substance contained therein including gur or jaggery would be used only for the prescribed purposes and no other. The Essential Commodities Act, 1955, thus, operated entirely in different field. The Gur (Regulation of use) Order 1968 also had an entirely different purpose and objective to achieve. The Bombay Prohibition Act, 1949, on the other hand, operates in the field of prohibition policy of the State. Prescription of term "rotten gur" is, in furtherance of such policy in order to ensure that the gur, which is otherwise not fit for human consumption, is not manufactured and sold since it has the high potential of being used for preparation of alcoholic drinks or illicit liquor.

24. The contention, that while ascertaining whether the gur is rotten gur or not both the parts of the definition contained in Section 2(39-A) of the Bombay Prohibition Act must be simultaneously examined and applied, needs to be recorded only for rejection. The definition, as noted above, is contained in two parts. The main body of the definition defines the term "rotten gur" as one which in liquid semi-liquid or viscous form is unfit for human consumption owing to its becoming filthy, putrid, disgusting or decomposed. The later portion of the definition which was added by way of impugned amendment contains an inclusion part and provides that such term "rotten gur" will include, if, on chemical analysis, it was found that it contains inter alia total sugar expressed as invert sugar less than 90% and sucrose less than 60%. In plain terms therefore,

if a substance falls within this scientific prescription viz gur which contains total sugar less than 90% and sucrose less than 60% it would fall within the definition of term rotten gur by virtue of inclusive portion of the definition and such substance would not have to be tested on the parameters of the main body of the definition to ascertain whether it is otherwise unfit for human consumption owing to its being filthy, putrid, disgusting and decomposed. The two parts of the definition are separate and independent and in either case where a substance falls whether in main body of the Section or in the inclusive portion, it would be termed as rotten gur.

25. The contention that such legislation infringes the petitioners' right to free trade, commerce and intercourse through out the territory of India under Article 301 of the Constitution was considered at length by Division Bench of this Court in case of *M/s. Kantilal & co. v. State of Gujarat and anr.* (supra) [which was affirmed in appeal by the Supreme Court in case of *Razakbhai Issakbhai Mansuri and ors v. State of Gujarat and ors.* (supra)]. The Court noted the contention of the petitioners in the said case in the following manner:--

"12. Bearing these aspects in mind, we now turn to the first and the second contentions raised on behalf of the petitioners. According to Mr. Nanavaty, secs. 64 and 64A are in the nature of restrictions on freedom of trade and intercourse guaranteed by Art. 301. Art. 301 reads as follows:--

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

He has argued that control on possession, manufacture, use and consumption of gur places a restriction upon the freedom of trade, commerce and intercourse in that commodity. Secondly, he has argued that clause (b) of Art. 304 does not protect secs. 64 and 64A of the Bombay Prohibition Act, 1949....."

Referring to various decisions of the Supreme Court on Article 301 of the Constitution, the Court concluded as under:--

"31. The principle which has been well settled in several decisions to which we have referred is that a legislation which directly or immediately restricts the freedom of trade, commerce and intercourse attracts the provisions of Art. 301 and that the legislation which incidentally regulates trade, commerce or intercourse does not attract the provisions of Art. 301.

32. So far as the impugned legislation is concerned, it does not directly or immediately restrict the free flow of trade, commerce and intercourse. The primary object of the impugned legislation is to prevent rotten gur from being diverted to the channels of illicit distillation of liquor. It has been enacted with the object of tightening the prohibition policy in the State and enforcing it rigorously and effectively. It is a policy envisaged by Art. 47 of the Constitution and the impugned legislation was held as in 1951, lawful and valid. In order to achieve this principal object of plugging the loopholes in the prohibition policy of the

State that the impugned legislation has been enacted. Incidentally it regulates freedom of trade, commerce and intercourse in rotten gur. We will not go to the extent of saying that the rotten gur is extra commercium trade, commerce and intercourse can be regulated incidentally by a legislation which has been enacted for serving a greater and higher object of enforcing the prohibition policy in the State. Therefore, in our opinion, the impugned legislation does not attract Art. 301. Therefore, the question whether it is protected by Art. 304(b) does not arise. In that view of the matter, it was not necessary for the State Government to obtain the President's sanction as contemplated by proviso to clause (b) of Art. 304."

To our mind, this portion of the decision of our Court in case of M/s. Kantilal & co. v. State of Gujarat and anr. (supra) would answer the contention of the petitioners. We are conscious that the decision in case of M/s. Kantilal & co. v. State of Gujarat and anr. (supra) was rendered in the background of unamended Section 2(39-A) of the Bombay Prohibition Act. However, by virtue of addition by the Amending Act 27 of 2003, the position has not materially altered. If the "Gur" manufactured by a particular manufacture fails to meet the required standards prescribed under the Food Safety and Standard Act, 2006 which are the same as those prescribed under the impugned amendment of Section 2(39-A) of the Bombay Prohibition Act, in any case the manufacturer would expose himself to penalty. No such "Gur" could otherwise also be freely traded or transported.

26. Under the circumstances, we find no merits in the petition. The same is, therefore, dismissed. Rule is discharged. Interim relief stands vacated. At the request of learned Counsel for the petitioners, which was opposed by the respondents, this order shall stand stayed upto 30.09.2014.