

State of Uttar Pradesh and Others

Vs

M/S. Synthetics and Chemicals Ltd. and Others

Civil Appeals Nos. 1130 of 1976, 2248, 2191-98, 2284 of 1978, 245, 626 of 1979, Writ Petitions Nos. 4663-64, 4501 of 1978 and Special Leave Petitions (Civil) Nos. 6526-28 of 1978 and 125-126, 201 and 2533 of 1979

(A.C. Gupta, P.S. Kailasam JJ)

19.12.1979

JUDGMENT

KAILASAM J. –

1. These batches of civil appeals, writ petitions and special leave petitions raise the same question and can be disposed of by a common judgment.
2. Civil Appeal No. 1130 of 1976 is by the State. The other appeals, writ petitions and special leave petitions are by the aggrieved parties.
3. For the sake of convenience appellants in civil appeals by special leave except the State would be referred as the appellants in this judgment. Similarly the petitioners in writ petitions and special leave petitions will be referred to as petitioners.
4. The appellants in civil appeals by special leave filed writ petitions before the High Court of Allahabad praying for quashing the Excise Commissioner's order dated September 18, 1974 whereby it was provided that the vend fee be continued to be charged for the wholesale licence dealer of denatured spirit. They also prayed for a direction to the Excise Commissioner to refund the vend fee actually paid by the appellants for a period of three years prior to the institution of the institution of the writ petitions.
5. The appellants have licences for the wholesale vend of denatured spirit. It was contended that the State was providing no service to the trade of the denatured spirit and, therefore, the levy of fee is not justified. The State, it was submitted, was not competent to authorise of excise duty or tax as it was within the jurisdiction of the Parliament. On behalf of the State it was contended that in law the State had exclusive privilege to deal with intoxicating liquor which included denatured spirit and the levy of a licence fee and vend fee constituted consideration for permitting the appellants to carry on wholesale trade of the denatured spirit.
6. The main point that was considered by the High Court was whether the imposition of vend fee on denatured spirit for grant of licence for wholesale vend of denatured spirit is within the competence of State Government.

This court in *Nashirwar v. State of M. P.* ((1975) 2 SCR 861 : (1975) 1 SCC 29) and *Har Shan ker v. Dy. Excise and Taxation Commissioner* ((1975) 3 SCR 254 : (1975) 1 SCC 737) held that the State

has exclusive privilege to deal in intoxicating liquor and, therefore, the State can auction the right to vend by retail or wholesale foreign liquor. It also found that intoxicating liquor included denatured spirit and the validity of the levy of the vend fee by the State cannot be questioned. Following this view the High Court dismissed the writ petitions. Against the decision, the appeals have been preferred by special leave. A batch of writ petitions have been filed in this Court under Article 32 of the Constitution of India challenging the validity of the levy of vend fee. Apart from the grounds taken in the civil appeals, the constitutional validity of U.P. Excise (Amendment) Act 5 of 1976 has been challenged as un-constitutional and beyond the legislative competence of the State. It is further pleaded that the provisions of the Industries (Development and Regulation) Act, 1951 has taken control of fermentation industry and as such a right to legislate by the State with regard to denatured spirit and industrial alcohol is beyond the competence of the State legislature.

7. U.P. Excise Act was enacted in the year 1910. It empowers the State to prohibit the import and export, transport, manufacture, sale and possession of liquor and all intoxicating drugs in the United Provinces. The vend fee was first imposed by the Government of U.P. on March 18, 1937 on denatured spirit. In 1972 the State Legislature enacted the U.P. Excise Amendment Act 30 of 1972. By a notification dated November 3, 1972 the government was authorised to sell by auction the right of retail or wholesale vend of foreign liquor. New rules were framed, the effect of which was that a vend fee of Rs. 1.10 per bulk litre was imposed payable in advance on denatured spirit issued for industrial purposes. The legality of the levy was challenged in the High Court of Allahabad and a Bench of that Court on March 24, 1973 held the notification was ultra vires. After the decision of the Allahabad High Court holding that the levy was illegal, this Court in two decisions *Nashirwar v. State of M. P.* ((1975) 2 SCR 861 : (1975) 1 SCC 29) and *Har Shankar v. Dy. Excise and Taxation Commissioner* ((1975) 3 SCR 254 : (1975) 1 SCC 737), held that the State under its regulatory powers can prohibit every form of activity in relation to intoxicants, its manufacture, storage, export, import and sale. The State's power to auction the right to vend by retail or wholesale foreign liquor was upheld.

8. Relying on the two decisions of this Court, the U.P. State Legislature repealed and re-enacted the U.P. Excise (Amendment) Act No. 30 of 1972 by the U.P. Excise (Amendment) (Re-enactment and Validation) Act, 1976. The validity of the amendment Act 1976 was again challenged in the Allahabad High Court in *V. P. Anand and Sons v. State of U. P.* (1976 ALJ 436 (FB)). A Full Bench of the Court held that the State has exclusive privilege of auctioning the right of wholesale or retail vend of intoxicating liquor and upheld the validity of the Act.

9. Mr. Nariman, learned counsel, raised several contentions. The first main contention of the learned counsel was that the levy of vend fee (under Rule 17 - para 680 of the Excise Manual - page 200-201) on the denatured spirit is without legislative competence as it does not fall within Entry 8 of List II of the Seventh Schedule. Even if it is held that the State has the exclusive right to grant privilege for the manufacture and sale of intoxicating liquor, it was submitted that the right did not extend to denatured spirit used for industrial purposes as it is confined only to potable liquor. The second important contention raised by the learned counsel was that after the enactment of Industrial (Development and Regulation) Act, 1951 under Entry 52 of List I by Parliament, the Union had taken under its control in public interest the industries including the fermentation of industrial alcohol, and as such the Central Government alone is empowered to provide for regulating by licence/permit or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any article relating to a schedule industry as denatured spirit or industrial alcohol.

10. In *State of Bombay v. F. N. Balsara* (1951 SCR 682 : AIR 1951 SC 318 : 52 Cri LJ 1361) the

constitutional validity of the Bombay Prohibition Act (25 of 1949) insofar as it restricted the possession and sale of foreign liquor was impugned on the ground that it was an encroachment on the field assigned to the Dominion Legislature under Entry 19 of List I. Under Entry 31, List II to the Seventh Schedule of the Government of India Act, 1935, the Provincial Legislature had the power to make laws in respect of intoxicating liquor that is to say the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. The corresponding entry in the Constitution of India is List II, Entry 8 which is in identical terms. The plea that was taken was that list I, Entry 19 conferred the power on the Dominion Legislature to make laws with respect to import, export across customs frontiers and as such the State law restricting possession and sale of foreign liquor encroached upon the field of Dominion Legislature. This Court held that the words 'possession and sale' occurring in Entry 31, List II must be read without any qualification. In considering the meaning of the words 'intoxicating liquor' set out in Entry 31 of List II, Gwyer C.J. in *Bhola Prasad v. King Emperor* (1942 FCR 17, 25 : AIR 1942 FC 17 : 43 Cri LJ 481), stated as follows :

A power to legislate with respect to intoxicating liquors could not well be expressed in wider terms.

Again the learned Chief Justice observed :

It is difficult to conceive of legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with their production, manufacture, possession, transport, purchase or sale; and these words seem apt to cover the whole field of possible legislation on the subject.

11. The above observation were affirmed by this Court in *Balsara* case (1951 SCR 682 : AIR 1951 SC 318 : 52 Cri LJ 1361). Dealing with the meaning of word 'liquor', the Court referred to the various *Abkari* cases in several provinces and found that all the Provincial Acts of this country have consistently included liquor containing alcohol in the definition of 'liquor' and 'intoxicating liquor' and, therefore, the framers of the Government of India Act, 1935, could not have been entirely ignorant of the accepted sense in which the word 'liquor' has been used in the various excise Acts of this country and concluded that the word 'liquor' covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. By adopting another method of approach, the Court observed that the object of the Prohibition, possession and sale of intoxicating liquor and to enforce the prohibition effectively, the wider definition of the word 'liquor' would have to be adopted so as to include all alcoholic liquids which may be used as substitution of intoxicating drinks to the detriment of the health. In *Nashirwar v. State of M. P.* ((1975) 2 SCR 861 : (1975) 1 SCC 29), Chief Justice Ray held that the State Legislature is authorised to make a provision for public auction by reason of power contained in Entry 8 of List II of the Constitution. The decision negated the concept of inherent right of citizen to do business in liquor. This Court gave three principal reasons to hold that there is no fundamental right of citizen to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality, to prohibit trades in noxious or dangerous goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxication liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise laws shows that the State has the exclusive right or privilege of manufacture or sale of liquor. After pointing out the three principal reasons, the Court followed the decisions in *State of Bombay v. F. N. Balsara* (1951 SCR 682 : AIR 1951 SC 318 : 52 Cri LJ 1361), holding that

absolute prohibition of manufacture or sale of liquor is permissible and the only exception can be for medicinal preparations. In the context it is clear that the decisions proceeded on the basis that the word 'intoxicating liquor' is not confined to potable liquor alone but would include all liquor which contain alcohol.

12. Mr. Nariman, the learned counsel, submitted that the two cases Balsara case and the Nashirwar case ((1975) 2 SCR 861 : (1975) 1 SCC 29) cannot be read as to include alcohol manufactured for the purpose of industries such as industrial alcohol. It was submitted that in both the cases the Court was concerned only with legislation relating to prohibition and the decisions should be restricted to liquor which may contain alcohol which is likely to be misused as potable liquor. In support of his contention, the learned counsel referred to two decisions J Nageshwara Rao v. State of Madras (AIR 1954 Mad 643 : (1953) 2 MLJ 724) and Emperor v. Moti Lal Chander (ILR 39 Cal 1053 : 16 CWN 785) and submitted that if the State can exercise any control over intoxicating liquor, it can only be restricted for the purpose of preventing subversion of its use for defeating the prohibition policy. We are unable to accept this contention in various Abkari Acts in the Province of India, the Court held that liquor would not only cover alcoholic liquor which is generally used for beverage purposes and produce intoxication but would also include liquids containing alcohol.

13. We will now briefly refer to the decisions of the Supreme Court which the learned counsel submitted were confined only to potable liquor.

14. Cooverjee B. Bharucha v. Excise Commissioner and Chief commissioner, Ajmer (1954 SCR 873 : AIR 1954 SC 220 : 1954 SCJ 246), related to an auction sale of liquor shop under the Excise Regulation Act, 1915. In Bharucha case (1954 SCR 873 : AIR 1954 SC 220 : 1954 SCJ 246) it was held that licence may be restricted, that the restriction must be in regard to the sale of liquor and that there may be absolute prohibition of the sale of liquor. The Court also took into account the public expediency and public morality and police power of State to regulate business and mitigate evils.

15. In M/s. Guruswamy & Co. v. State of Mysore ((1967) 1 SCR 548 : AIR 1967 SC 1512 : (1967) 2 SCJ 287) the auction related to exclusive privilege of selling toddy from certain shops. The Court held that the auction enabled the license to sell the toddy and the licensee paid what be considered to be the equivalent value of the right. State of Orissa v. Harinarayan Jaiswal ((1972) 3 SCR 784 : (1972) 2 SCC 36), related to sale by public auction of the exclusive privilege of selling country liquor in retail shops. Amar Chandra Chakraborty v. Collector of Excise ((1973) 1 SCR 533 : (1972) 2 SCC 442), also related to the cancellation of the licence by the vend of country spirit by import and for supply to the excise vendors in the territory of Tripura. The next case that was referred to by the learned counsel was Har Shankar v. Dy. Excise & Taxation commissioner ((1975) 3 SCR 254 : (1975) 1 SCC 737). Chandrachud, J., as he then was, speaking for the Court stated : (SCC p. 758, para 53)

In our opinion the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decision of this Court in the State of Bombay v. F. N. Balsara (1951 SCR 682 : AIR 1951 SC 318 : 52 Cri LJ 1361); Cooverjee B. Bharucha v. Excise Commissioner and Chief Commissioner, Ajmer (1954 SCR 873 : AIR 1954 SC 220 : 1954 SCJ 246); State of Assam v. A. N. Kidwai, Commissioner of Hills Division and Appeals, Shillong (1957 SCR 295 : AIR 1957 SC 414 1957 SCJ 345); Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam (1958 SCR 1240 : AIR 1958 SC 398 : 1958 SCJ 798); Amar Chandra Chakraborty v. Collector of Excise ((1973) 1 SCR 533 : (1972) 2 SCC 442) and State of Bombay v.

R. M. D. Chamarbaugwala (1957 SCR 874 : AIR 1957 SC 699 : 1957 SCJ 607) as interpreted in State of Orissa v. Harinarayan Jaiswal ((1972) 3 SCR 784 : (1972) 2 SCC 36) and Nashirwar v. State of M. P. ((1975) 2 SCR 861 : (1975) 1 SCC 29)

There is no fundamental right to do trade or business in intoxicants. The State under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession.

16. Though most of the cases dealt with the right of the State Government as regards the auction of country liquor, in Balsara case (1951 SCR 682 : AIR 1951 SC 318 : 52 Cri LJ 1361), Nashirwar case ((1975) 2 SCR 861 : (1975) 1 SCC 29), and Har Shankar case ((1975) 3 SCR 254 : (1975) 1 SCC 737), the Court was concerned with the right of the State Government over foreign liquor.

17. After considering all the decisions of five Constitutional Benches, Chandrachud, J., as he then was, summed up the position at page 274 as follows : (SCC p. 755, para 47)

These unanimous decision of five Constitutional Benches uniformly emphasised after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to the health and welfare of the public is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, froth their inherent nature, been treated as a class by themselves by all civilised communities.

18. Har Shankar case ((1975) 3 SCR 254 : (1975) 1 SCC 737) related to licensing of retail sale of foreign liquor for consumption on the premises of the licensees. The grant of licence for sale of country spirit, foreign liquor, beer were subject to the provisions of the Punjab Act I of 1914. The demand by the government for payment of large sums of money from hoteliers or barkeepers who supply foreign liquor for consumption were challenged as arbitrary, without authority and illegal. The provisions in the Act which provided for a levy on retail vend of foreign liquor was held to be valid. The decisions referred to above make it clear that the power to legislate under List II, Entry 8 relating to intoxicating liquor comprises of liquor which contains alcohol whether it is potable or not. The plea of the State is that the levy is for parting with the exclusive right of the State with regard to intoxicating liquor and the levy was for the purpose of conferring a right on the licensees. That the State has the exclusive right of manufacture or sale of intoxicating liquor which includes liquor containing alcohol has been recognised.

19. The second most important contention raised by Mr. Nariman is that after passing of the Industries Development and regulation) Act, 1951, the claim by the State to monopoly with regard to production and manufacture and the sale of the denatured spirit or industrial alcohol is unsustainable. In order to appreciate this contention it is necessary to refer to the relevant entries in Lists I and Ii of the Seventh Schedule of the constitution. List I, Entry 52 runs as follows :

Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

20. In List II the entry relating to industries is Entry 24 which is as follows :

Industries subject to the provisions of Entries 7 and 52 of List I.

21. Entry 7 in List I relates to industries to be declared by Parliament by laws to be necessary for the purpose of defence or for the prosecution of war. In this case we are not concerned with Entry 7. A

reading of Entry 52 in List I and Entry 24 in List II makes it clear that the Parliament will have exclusive jurisdiction to legislate regarding industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest, connected with these two entries is Entry 33 in List III, Concurrent List which provides :

Trade and commerce in, and the production, supply and distribution of, -

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

22. The subject of trade and commerce in, and the production supply and distribution of the products of the any industry which has been declared by Parliament under List I, Entry 52 is in the Concurrent List on which both Parliament and State can legislate.

23. The Industries (Development and Regulation) Act, 1951 was enacted by Parliament to provide for development and regulation of certain industries. Section 2 declares that it is expedient in the public interest that the Union shall take in its control industries specified in First Schedule. Item 26 in the first Schedule is fermentation industries (i) alcohol (ii) other products and fermentation industries. Chapter II of the Act councils. Chapter III deals with regulation of scheduled industries undertakings. Section 10 requires registration of existing industrial undertakings. Section 12 deals with revocation and amendment of licences in certain cases. Section 14 deals with the procedure for the grant of licence or permission. Section 15 confers power of investigation to be made into scheduled industries or industrial undertakings. Section 18-G confers power on the Central Government to control supply, distribution, price, etc. of certain articles. An considerable reliance was placed on Section 18-G for the contention that the Central Government has the exclusive power with regard to notified industries to control supply, distribution, fixation of price etc., it is necessary to set out the material part of the section in full. Section 18-G(1) runs as follows :

The Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability at fair prices 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, provide for regulating the supply and distribution thereof and trade and commerce therein.

24. Sub-section 2 of Section 18-G confers certain powers without prejudice to the generality of the powers conferred by sub-section (1) by a notified order to provide for matters enumerated in it (a) to (h) of the sub-section. These powers include amongst others the right to control the price. The power conferred under Section 18-G(1) is exercisable by the Central Government insofar as it considers it to be necessary or expedient. The plea of the learned counsel is that the notification made by the Central Government exclude the power of the State government to fix the price of denatured spirit and rectified spirit as it has been placed beyond the powers of the State to regulate the distribution of licences, permits etc. The notification that is relied on the Ethyl Alcohol (Price Control) Amendment Order, 1975, dated October 31, 1975. The order reads as follows :

In exercise of the powers conferred by Section 18-G of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government hereby makes the following order further to amend the Ethyl Alcohol (Price Control) Order, 1971 namely :

1. (1) This order may be called the Ethyl Alcohol (Price Control) Amendment Order, 1975.

(2) It shall come into force on the date of its publication in the official Gazette.

2. In the Ethyl Alcohol (Price Control) Order, 1971 (hereinafter referred to as the said order), in clause 2, for the Table, the following Table shall be substituted, namely :

#-----	(1) (2)-----
-----	1. Absolute Alcohol conforming Six hundred and sixty-eight rupeesto ISI Standard No. 321-1952, and forty-one paise, per kilonaked for equivalent volume litre.at 100 per cent v/v strength :2. Rectified spirit conforming to Six hundred and twenty-twoISI Standard No. 323-1959 naked rupees and twenty paise perfor equivalent volume at 100 kilo litre.per cent v/v strength.3. Rectified spirit conforming to Five hundred and eighty-nineISI Standard No. 323-1959 naked rupees and ten paise per kilofor 94-60 per cent v/v strength. litre.-----
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25. The table prescribes the price of various types of alcohol and rectified spirit. The price of ethyl alcohol is fixed under the powers conferred on the Central Government under Section 18-G(1) for securing the equitable distribution and availability at fair price. The Ethyl Alcohol (Price Control) Order, 1961 which was made by the Central Government in exercise of the powers conferred on it under Section 18-G of the Industries (Development and Regulation) Act, 1951 fixed the maximum ex-distillery price for industrial alcohol and rectified spirit under Clauses 1 and 2 of the Order. Clause 3 permitted additional charges in certain cases of alcohol supplied after denaturation with general or special denaturants, the cost of such denaturation being allowed to be charged. Ethyl Alcohol (Price Control) Order, 1964 while fixing the maximum ex-distillery price of ethyl alcohol under Clause 3 permitted additional charges to be levied in certain cases such as for covering costs incurred for transport of molasses to the distillery and any octroi duty paid or payable on molasses and when alcohol is supplied after denaturation, to include actual cost of such denaturants plus some octroi charges as specified in the clauses. Clause 3(a) empowered the Excise Commissioner of the State to determine the additional charges leviable under Clause 3 in case of any doubt or dispute. Ethyl Alcohol (Price Control) Order, 1971 while fixing ex-distillery price or ethyl alcohol provided for fixation of the price after taking into account various factors enumerated in Clause 2(2) (a to h). Reading various Ethyl Alcohol (Price Control) Orders passed by the government from time to time, it is clear that the order permitted the adding of the expenses incurred for transportation, payment of octroi duty etc. to the price fixed. We are unable to read the Ethyl Alcohol (Price Control) Orders as explicitly or impliedly taking away the power of the State to regulate the distribution of intoxication liquor by collecting a levy for parting away with its exclusive rights. If the powers of Parliament and the State Legislature were confined to Entry 52 in List I and the Entry 24 in List II, Parliament would have has exclusive power to legislate in respect of industries notified by Parliament. The Power of the State under Entry 24, List II is subject to the Provisions of Entry 52 in List I. But we have to take into account Entry 26 in List II and Entry 33 in List III for determining the scope of legislative power of the Parliament and the State. Entry 26 in List II is as follows :

Trade and Commerce within the State subject to the provisions of Entry 33 of List III.

26. Under Entry 33, List III the Parliament and the State have concurrent powers to legislate regarding the production, supply and distribution of the products of industries notified by the Parliament. Furthermore it has to be noted that the exclusive power of the State to provide for manufacture, distribution, sale and possession etc. of intoxicating liquor is vested with the State. The power of the State Government to levy a fee for parting with its exclusive right regarding intoxication liquor has also been recognised as is seen from the various State Acts regulating manufacture, sale, etc. of intoxicating liquor. A fair scrutiny of the relevant entries, makes it clear that the power to regulate the notified industries is not exclusively within the jurisdiction of Parliament as List III, Entry 33 in the Concurrent List enables a law to be made regarding production, supply, distribution of products of a notified industry.

27. In *Ch. Tika Ramji v. State of U. P.* (1956 SCR 393 : AIR 1956 SC 676 : 1956 SCJ 625) a question arose whether Sugarcane (Regulation of Supply and Purchase) Act passed by the State Legislature and Notification issued therein by the State Government were repugnant to the notifications made under the Industries (Development and Regulation) Act of 1951. Two notifications issued by the State Government under U P Sugarcane (Regulation of Supply and Purchase) Act, 1953 prohibiting the occupier of the factory to which area he is assigned from entering into an agreement to purchase cane except through a cane growers' co-operative society under certain circumstances and assigning different sugar-cane factories specified to certain purchase centres for supply to them of sugar-cane for the crushing season were challenged as ultra vires. The plea was that the subject-matter of the legislation fell within the exclusive jurisdiction of Parliament and the impugned notifications were repugnant to the notifications made under the industries (Development and Regulation) Act, 1951, On October 31, 1951, Parliament enacted the industries (Development and Regulation) Act, 1951 to provide for development and regulation of certain industries. By Section 2 of the Act it was declared that it was expedient in public interest that the Union should take in its control the industries specifies in the First Schedule which included in Item 8 thereof, the industries engaged in the manufacture of production of sugar-cane. Industries (Development and Regulation) Act, 1951 was amended by Act 26 of 1953 by adding Chapter IIIA entrusting Central Government with power so far as it appears necessary or expedient for securing the equitable distribution and availability at fair price of any article relatable to scheduled industry to provide by notified order for regulation supply and distribution and trade and commerce thereof. The impugned notification which required the factories to purchase their sugar-cane from the co-operative societies and assigned certain areas for factories as cane purchasing centre, for the factories was stated to be ultra vires as they were beyond the State's competence and covered by the notification under the industries (Development and Regulation) Act. Justice Bhagwati observed at page 411 :

When, however it came to the products of the controlled industries comprised in Entry 52 of List I, trade and commerce in, and production, supply and distribution of these goods became the subject-matter of Entry 33 of list III and both Parliament and the State Legislatures had jurisdiction to legislate in regard thereto.

The learned Judge proceeded to observe :

That sugar-cane being goods which fell directly under Entry 27 of List II was within the exclusive jurisdiction of the State Legislature and it was competent to legislate with regard to it and as such the impugned Act was intra vires of the State Legislature. The power to legislate regarding production supply and distribution of goods is subject to provisions Entry 33, List III which deals with products and industries notified by Parliament. Entry 33 being in the concurrent List,

legislative power of the State regarding production, supply and distribution of goods cannot be denied.

28. The Court on the facts of the case found that even assuming that sugar-cane was article or class of articles relating to the notified industries within the meaning of section 18-G of Act 65 of 1951, no order was issued by the Central Government in exercise of its powers vested in it and therefore, no question of repugnancy arose. In the case before us it cannot be discerned from the Ethyl (Price Alcohol Control) Order that the power of the State Government to prescribe a levy for parting with its exclusive rights relating to intoxicating liquor had been taken away.

29. In *Baijnath Kedia v. State of Bihar* ((1970) 2 SCR 100 : (1969) 3 SCC 836) a question arose as to whether the Bihar Legislature had jurisdiction to enact the second proviso to Section 10(2) of the Bihar Land Reforms Act, 1950 by which the terms and conditions of the lease of mines and minerals could be substituted for the terms and conditions laid down in the Bihar Mines and Minerals Concession Rules. On the strength of the amended Section 10(2) of the Reforms Act and amended Rule 20 the Bihar Government demanded from the appellant rent contrary to the terms of his lease. It was held that Entry 54 in Union List speaks of requirements of mines and minerals development and Entry 23 in List II is subject to Entry 54. Once a declaration was made under Entry 54 specifying the extent of vesting the competency was only with the Parliament.

30. The attempt of the learned counsel to trace the power to enact the second provision to Section 10 of the Act to Entry 18 of List II was rejected. The plea of the learned counsel was that the modification of the existing lease was a separate topic and not covered by Section 15 of Act 67 of 1957. The Court rejected the plea on the ground that the entire legislative field in relation to mines and minerals had been withdrawn from the State Legislature. The decision does not help the appellants for on the facts it is clear that the entire field relating to mines and minerals had been occupied and taken away from the legislature and as such it was beyond the competence of the State to legislate on mines and minerals. In the case before us the position is different because the power of the State Legislature to legislate in respect of the intoxicating liquor and its exclusive right regarding intoxicating liquor cannot be questioned.

31. The third contention of Mr. Nariman learned counsel is that the vend fee levied by the State is not and was never treated by the State as charge or rental as the consideration for granting exclusive privilege. On the other hand the levy is excise duty or a fee which the State is not entitled to collect. The submission of the learned counsel was that even though it is found that the State is entitled to make laws regarding intoxicating liquor under List II, Entry 8, it has no power to impose any tax. The power to tax by the State is confined only to Entry 51 List II which empowers the State to levy duty on alcoholic liquor for human consumption and as denatured spirit is not alcoholic liquor for human consumption, a levy of excise duty is not permissible by the State. It was contended that the levy of a fee was also not permissible unless it had some relation to the expenses incurred for that purpose. According to the Solicitor - General, Mr. Kacker, the levy was not a tax or a fee but a levy for parting with the exclusive right of the State in respect of intoxicating liquor. In view of the stand taken by the State it is unnecessary for us to go into the question as to whether the levy is a tax or a fee.

32. For dealing with the contention of Mr., Nariman that the levy was never collected in lieu of the State parting with its rights, it is necessary to refer to the relevant provisions of the Act. The United Provinces Excise Act, 1910 (Act 4 of 1910) was passed in 1910. Subsequently it was adopted and modified by the Government of India (Adaptation of Indian Laws) Order, 1927 and Adaptation of

Laws Order, 1950. Chapter IV of the Act deals with manufacture, possession and sale while Chapter V deals with duties and fees. The Act refers to excise revenue, duty, fee, tax, fine, and payment as condition for the grant of licence for any exclusive privilege. Section 3(1) defines, excise revenue as meaning revenue derived or derivable from any duty, fee, tax, fine or confiscation imposed or ordered under the provisions of the Act or of any law in force relating to alcohol or intoxicating drug. Excise Duty and countervailing duty is defined under Section 3, sub-section (3a) as meaning such excise duty or countervailing duty, as the case may be, as mentioned in Entry 51 of List II of the Seventh Schedule of the Constitution. Chapter II relates to establishment and control of the Excise Department. Chapter III prohibits import of intoxicants. Intoxicant means any liquor which in turn includes any liquid containing alcohol. Section 12 prohibits import unless permission is obtained on conditions imposed by the State Government are satisfied and any duty imposed under Section 28 is paid. Section 28 refers to duties and fee and provides that an excise duty or countervailing duty, as the case may be, directed by the State Government may be imposed on any excisable article. Under this section, a duty on import, export, transport, manufacture is levied in accordance with the provisions of Sections 12(1), 13, 17 and 18. The stand taken by the State before us is that the levy which is being collected, is not in the nature of an excise duty or countervailing duty. Though a duty under Section 28, Proviso (ii) on denatured spirit was levied after proviso (ii) to Section 28, was omitted by the Government (Adaptation of Indian Law) Order, 1937, no excise duty on denatured spirit was levied.

33. Apart from the duties that is leviable, the Excise Commissioner is empowered under Section 30 instead of or in addition to any duty to accept payment of a sum in consideration of the grant of licence of any exclusive privilege under Section 31, the Excise Commissioner may grant any person a licence for exclusive privilege of manufacturing or supplying or selling wholesale or retail, any country liquor or intoxicating drug within any local area. Reading Section 30 and 24 together, it is clear that the Excise Commissioner may accept payment in consideration for the grant of the licence for any exclusive privilege. The exclusive privilege under Section 24 was confined only to country liquor within a local area. Before examining the impact of Section 24-A inserted by U.P. Act 30 of 1972, it may be mentioned that Chapter VI empowers the collection of fees for licence or permits granted under the Act. A licence fee was only collected under notification dated May 22, 1930 for licence for wholesale vend of denatured spirit. The Excise Department on January, 23, 1937 introduced Rule 17(2) under Section 40(2)(d) imposing vend fee of annas 7 per bulk gallon for the issue from the distillery. This fee was not collected regarding denatured spirit issued to industries engaged in the manufacture of synthetic rubber.

34. By notification dated November 3, 1972 the U.P. Government amended the Excise Rules and substituted Rule(2). The rule is purported to have been issued under Section 40(2)(d) in exercise of the powers conferred on the government under Section 40(1). By the notification the issue of denatured spirit from a distillery a vend fee of Rs. 1.10 per litre was made payable in advance except regarding the issue to institutions exempted under the rule. The learned counsel strenuously contended that this levy does not purport to be in consideration of the grant of licence for any exclusive privilege. On the other hand, the learned counsel pointed out that Section 40(2)(d) refers to the rule making power of the government for regulating the import, export, transport or possession of the intoxicants. The power, if any, is conferred on the Excise Commissioner under Section 41 enabling him to make rules prescribing the scale of fees in respect the scale of fees in respect of licence, permits or pass or storing any intoxicants. In 1972, U.P. Act 30 of 1972 added Section 24-A which provides that subject to provisions of Section 31, the Excise commissioner may grant to any person a licence or licences for the exclusive privilege of selling by retail at shops (for consumption both on and off the licensed premises, or for consumption off the licensed premises

only) any foreign liquor in any locality. After the introduction of Section 24-A the Excise Commissioner is empowered to grant any person a licence for the exclusive privilege of selling foreign liquor. Before the amendment, Section 24 was restricted to country liquor or intoxicating drug. By the amended 24-A the Excise Commissioner may accept payment of a sum in consideration for the grant of the licence for any exclusive privilege for selling foreign liquor. Section 31 to which Section 24-A is subject, relates to grant of licences and it does not in any way restrict the power thus conferred by Section 24-A. The plea put forward by the learned counsel is that word 'foreign liquor' cannot be understood as including denatured spirit as the section would itself indicate that the licence is for selling for consumption which would indicate that foreign liquor is meant for human consumption. We are unable to give the words 'foreign liquor' such a restricted meaning for the word consumption cannot be confined to consumption of beverage alone. When liquor is put to any use such as manufacture of other articles, the liquor is all the same consumed. Further, Section 4(2) provides that the State may declare what shall be deemed to be country liquor or foreign liquor. The State had under Rule 12 issued notification dated December 30, 1960 defining 'foreign liquor as meaning all rectified, perfumed, medicated and denatured spirit, wherever made. The plea that the Excise Commissioner had no right to accept payment in consideration for the grant of the licence for the exclusive privilege for selling wholesale or retail foreign liquor which includes denatured spirit, cannot, therefore be accepted. Rule 17(2) no doubt purports to have been issued under the rule-making powers conferred on the government under Section 40(2)(d) which enables the government to make rules for regulating the import, export, transport or possession of any intoxicants. It may be noted that when the amended Rule 17(2) was introduced on November 3, 1972, Section 24-A had been amended by U.P. Act 30 of 1972 and the power of Excise Commissioner to accept payment for grant of licence for exclusive privilege cannot be denied.

35. The validity of Act 30 of 1972 which authorised the Excise Commissioner to collect a vend fee for the retail or wholesale vend of foreign liquor was challenged. The Allahabad High Court upheld the challenge holding that the State did not have the exclusive privilege to collect the vend fee. This view was not accepted by the Supreme Court in *Nashirwar* case ((1975) 2 SCR 861 : (1975) 1 SCC 29) and *Har Shanker* case ((1975) 3 SCR 254 : (1975) 1 SCC 737) which held that under the regulatory power, the State and power to auction the right to vend by retail or wholesale foreign liquor. As Act 30 of 1972 was struck down by the Allahabad High Court the State came forward to validate Act 30 of 1972 as it stood when it was passed by introducing the U.P. Excise (Amendment) (Re-enactment and Validation) Act, 1976 (U.P. Act 5 of 1976). The preamble refers to the passing of U.P. Amendment Act, it being struck down by the Allahabad High Court and the subsequent decision of the Supreme Court in *Nashirwar* case ((1975) 2 SCR 861 : (1975) 1 SCC 29), and states that it had become necessary to enact the (Amendment) (Re-enactment and Validation) Act. In the main Act after Section 1, sub-section (2) was introduced providing that it shall be deemed to have been force ever since the commencement of the United Provinces Excise Act, 1910. After Section 24 of the principal Act, Section 24-A was introduced, Section 24-A(1) re-enacts Section 24-A(1) added by U.P. Act 30 of 1972. Section 24-B was introduced for removal of doubts which declared (i) that the State Government has exclusive privilege for manufacture and sale of country and foreign liquor; (ii) that the amount described as licence fee in clause (c) of Section 41 is in its essence rental or consideration for the grant of such right or privilege by the State Government; and (iii) that the Excise Commissioner as the head of the Excise Department of the State shall be deemed while determining or realising such fee, to act for and on behalf of the State Government. Section 30 was substituted which specifically mentioned that the Excise Commissioner may accept payment of a sum in consideration of the grant of privilege for any exclusive or other privilege under Section 24-A. Section 24-A was not specifically mentioned in Sectioned 30 as it stood before

the re-enactment. After the introduction of Section 24-A, the Excise Commissioner had a right to grant the privilege of selling of foreign liquor. The fact that Section 30 did not specifically mention Section 24-A might not have made any difference. But in order to remove all doubts the new section 30 had been introduced. Section 41 clause (c) was re-enacted to enable the fixation of fee payable for the grant of exclusive or other privilege under Section 24 and Section 24-A. Section 40 was also amended so as to give retrospective effect; Section 4 of the Act 5 of 1976 also provides that the U.P. Excise (Amendment) Act, 1972 shall be deemed to be and always to have been as valid as of the provisions of this Act were in force at all material times. In short the purpose of introduction of Act 5 of 1976 was to make it clear that U.P. Excise (Amendment) Act, 1972 shall be deemed to be and always to have been valid. In view of our findings that U.P. Excise (Amendment) Act, 1972 was valid the effect of U.P. Act 5 of 1976 is to remove all doubts and to give retrospective effect.

36. It was next contended that foreign liquor which is defined under Rule 12 as including denatured spirit, cannot apply to specially denatured spirit. Foreign liquor was defined as including specially denatured spirit. By notification, the excise Commissioner of U.P. on May 3, 1976 framed U.P. Licences for the Possession of Denatured Spirit and Specially Denatured spirit Rules, 1976. In the preamble to the rules it is stated that the Excise Commissioner with the previous sanction of the State Government was making the rules relating to licences for possession of denatured spirit including specially denatured spirit for industrial purposes. Rule 1(iii) provides that specially denatured spirit means spirit rendered unfit for human consumption in such manner as may be prescribed by the Excise Commissioner by notification in this behalf and does not include ordinary denatured spirit for general use. Rule 2 provides that licences for the possession of the denatured spirit including specially denatured spirit for industrial purpose shall be of three kinds. The learned counsel contended that though foreign liquor is defined as including denatured spirit it cannot be held to include specially denatured spirit. Denatured spirit mentioned in the rules is treated as including specially denatured spirit for industrial purpose. Denatured spirit has ethyl alcohol as one of its constituents. The specially denatured spirit for industrial purpose is different from denatured spirit only because of the difference in the quantity and quality of the denaturants. Specially denatured spirit and ordinary denatured spirit are classified according to their use and denaturants used. We are unable to accept the contention of the learned counsel that specially denatured spirit for industrial purpose is different from the ordinary denatured spirit. The definition of alcohol under Rule 12 includes both ordinary as well as specially denatured spirit.

37. It was next contended that if the levy of Rs. 1.10 per bulk gallon of denatured spirit as vend fee is upheld it would result in violating the appellants'/petitioners' fundamental right to carry on their trades and business under Article 19(1)(g) of the Constitution. According to the learned counsel, the price fixed per gallon of ethyl alcohol under the Ethyl Alcohol (Price Control) Order is 59 paise, per gallon. If the levy is not considered as a tax and could not be passed on to the consumer, as price fixed under the Ethyl Alcohol Amendment Order is only 59 paise, it would be confiscatory in nature. It is seen that the right of the State Government to accept payment of a sum for the grant of its exclusive privilege cannot be questioned. The price fixed for ethyl alcohol is ex-distillery price and we see no impediment for the addition of Rs. 1.10 as vend fee by the State Government.

38. Dr. L. M. Singhvi, who appeared as intervener in Civil Appeals Nos. 2191 to 2198 of 1978 for the appellants and for petitioners in Special Leave Petitions Nos. 125 to 126 of 1979 while adopting the contentions of Mr. Nariman submitted that the stand taken by the U.P. Government in earlier proceedings in the High Court was that the levy was in the nature of Excise Duty or a fee while the present stand is that it is neither a duty nor fee but only a levy for the conferment of the exclusive privilege. It is true that the stand taken by the government in the earlier proceedings was different

but that would not make any difference so long as the government had a right to impose the levy. It has been found that after the addition of Section 24-A by Act 30 of 1972, the Commissioner was entitled to accept payment for conferring the privilege which the State owned exclusively. The learned counsel submitted that so far as his clients M/s. Rallis Chemicals, Kanpur and M/s. Rallis India, petitioners in Special Leave Petitions Nos. 125 to 126 of 1979 are concerned they are only holders of licences for possession and are not licensees under F.L. 16. In the same class fall the appellants in Civil Appeal No. 2248 of 1978, M/s. Synthetic and Chemicals who are only purchasers of denatured spirit. It was submitted that for this class of persons if the vend fee for the grant exclusive privilege of the State for sale of liquor, it cannot be recovered from the purchasers. Rule 17(2) relates to vend of denatured spirit. It empowers the Collector (i) to grant to a distiller a licence for manufacture of denatured spirit (ii) to grant to a approved dealers of denatured spirit a licence in form F.L. 16 for the wholesale vend of denatured spirit. Scale of fee is given in the rule which prescribes that for sales not exceeding 10,000 litres per annum the fee will be Rs. 100 and for sales exceeding 10,000 litres, the fee shall be increased by Rs. 500 for every 5,000 litres or fraction thereof. Sub-rule (2) provides that in case of issue from a distillery, a vend fee of rupee one and ten paise per bulk gallon will be payable before the spirit is issued. The fee charged is very different from the one in Rule 17(1) which provides that the distillery or an approved dealer for wholesale vend of denatured spirit may be given a licence in Form F.L. 16. The distiller and the approved dealer is to pay a licence fee for the sales at the rate prescribed. But sub-rule (2) speaks of levy of vend fee in case of issue from the distillery which is payable in advance before the spirit is issued. It is admitted that the petitioners and the appellants who claim as purchasers do not have a licence under F.L. 16. Therefore, sub-rule (1) has no application. The levy on person who are purchasers is for the possession of denatured spirit in excess of the prescribed limit. The permission granted in their favour and the allotment order of the specially denatured spirit prescribed the terms and conditions under which the allotment is made. The licences are granted to them under Form F.L. 39 and they have to abide by those conditions. The notification of the Excise Commissioner of U.P. dated May 3, 1976 provides that the licence for the possession of denatured spirit including the specially denatured spirit for industrial purpose shall be of three kinds. We are concerned with the licences for the possession for use in industries in which alcohol is destroyed or converted chemically in the process into other products and the product does not contain alcohol such as, ether, styrene, butadiene, acetone and polythene etc. The licence granted for this purpose is in Form F.L. 39. Rule (3)(a) provides that the fee for the licence in Form F.L. 39 shall be at a rate prescribed for industry to industry by the Excise Commissioner per litre, payable on the quantity of specially denatured spirit obtained from any distillery in Uttar Pradesh and that fee shall be realised by the Excise Inspector in-charge of Distillery from the distillery. The conditions relating to grant of a licence for issue of denatured spirit for industrial purposes are laid down in Rule 4. Special conditions regarding licence in Forms F.L. 39, 40 and 41 are prescribed in Rule 5. The appellants/petitioners having applied for and obtained licences in Form F.L. 39 are bound to comply with the conditions.

39. Lastly, it was contended that the provisions of Uttar Pradesh Excise (Amendment) Re-enactment and Validation) Act, 1976 is invalid and confiscatory as its retrospective operation imposes on unbearable burden on the appellants/petitioners. It was stated that the licence under F.L. 39 was issued only in the year 1979 and no levy could be made regarding denatured spirit that was supplied before that date. The answer of the State is that the levy was imposed for permission granted in their favour and allotment orders of denatured spirit issued to them from the various distilleries. The parties after having paid the fee had taken possession of the orders of denatured spirit from the distillery. Act 5 of 1976 has been given retrospective effect as the levy imposed under Act 30 of

1972 was found to be illegal and unsustainable by the Allahabad High Court which was reversed by this Court. By giving retrospective effect, the State has only restored the status quo enabling the collection of the levy validly made by Act 30 of 1972.

40. Reliance was placed on the decision of this Court in A. B. Abdul Kadir v. State of Kerala ((1976) 2 SCR 690 : (1976) 3 SCC 219 : 1976 SCC (Tax) 270) for the contention; that retrospective operation of an Act when it harshly operates is liable to be held as invalid. At page 706 this Court observed that the power to make a valid law would enable providing for prospective and retrospective operation of the provisions. It was observed that in judging the reasonableness of the retrospective operation could not by itself be treated as decisive. On the facts of the case there could be no complaint because what is sought to be collected is levy which was legally made.

41. The result is, all the contentions raised by the learned counsel for the appellants/petitioners fail and appeals and the petition are dismissed with costs one set of hearing fee. The State Appeal C.A. No. 1130 of 1976 is allowed but there will be no order as to costs.

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