

State of U.P. and Another

Vs

Synthetics and Chemicals Ltd. and Another

Civil Appeal No. 2722(NT) of 1991

(Dr. T. K. Thommen, R. M. Sahai JJ)

18.07.1991

JUDGMENT

THOMMEN, J. - Leave granted.

2. This appeal is brought by the State of Uttar Pradesh against the judgment of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 361 of 1976. The High Court, allowing the writ petition, declared the Uttar Pradesh Sales of Motor Spirit, Diesel Oil and Alcohol Taxation (Amendment) Act, 1976 (U.P. Act 8 of 1976) to be null and void insofar as it purported to levy purchase tax on industrial alcohol. By this Act, sub-section (1) of Section 3 of the United Provinces Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Act, 1939 was amended, so as to substitute the following sub-section :

"3. (1) There shall be levied with effect from May 2, 1974 -

#(a) \* \* \*##

(b) at the point of first purchase of alcohol in the State, a tax at the rate of 40 paise per litre for the first million litres and at the rate of 20 paise per litre for the remainder, payable by the purchaser, and which shall be collected and paid in the prescribed manner to the State Government :..."

This levy was sought to be justified by the State, when challenged in the writ proceeding, as a valid exercise of its legislative power on a matter falling under Entry 54 of List II of the Seventh Schedule of the Constitution. The writ petitioners, challenging the levy, contended that the State legislature was incompetent to levy tax with reference to Entry 54 of List II in respect of industrial alcohol insofar as that article was the subject of regulation by the Central Government in exercise of its power under Section 18-G of the Industries (Development and Regulation) Act, 1951 (Act 65 of 1951) (hereinafter referred to as 'the IDR Act') and that the price of that Article was regulated by the relevant Price Control Orders made by the Central Government under the said Act. Any levy of sales tax or purchase tax by the State by recourse to Entry 54 of List II, it was contended, would come into direct conflict with the law made by Parliament and the control exercised by the Central Government under that law in regard to an industry falling under Entry 52 of List I read with Entry 33 of List III. The writ petitioners, relying upon the decision of a Constitution Bench of this Court in Synthetics and Chemicals Ltd. v. State of U.P. ((1990) 1 SCC 109) contended before the High Court that, insofar as industrial alcohol was concerned, the State was incompetent to levy sales tax by reason of the operation of the Ethyl Alcohol (Price Control) Orders made by the Central Government in exercise of its power under Section 18-G of the IDR Act.

3. The State contended before the High Court that the aforesaid decision of this Court did not deal with any levy of tax falling under Entry 54 of List II. The power of the State to levy taxes on the sale or purchase of goods was not the subject of consideration in that decision. What was considered was the power of the State to collect vend fee or transport fee or the like by recourse to Entry 8 of 51 of List II with reference to the production, manufacture, possession, transport, purchase and sale of industrial alcohol during the operation of the IDR Act 6 and the rules made thereunder.

4. The High Court accepted the contention of the writ petitioners and held that the impugned purchase tax, if allowed to be levied on industrial alcohol, would have the effect of raising its price beyond the limit prescribed under the Price Control Orders made by the Central Government in relation to industrial alcohol in exercise of its power under the IDR Act. The High Court accordingly declared that the impugned levy of purchase tax on industrial alcohol was, during the operation of the Price Control Orders of the Central Government, beyond the legislative competence of the State.

5. In *Synthetics* ((1990) 1 SCC 109) this Court held that vend fee, transport fee and the like levied by Uttar Pradesh, Maharashtra and certain other States by recourse to Entry 8 or Entry 51 of List II were null and void insofar as such impost came into direct conflict with the exercise of power by the Centre for the control of supply, distribution, price, etc. of industrial alcohol under Section 18-G of the IDR Act and the rules or orders made thereunder. That case was apparently not concerned with the exercise of legislative power with reference to Entry 54 of List II which reads :

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

Significantly, this entry shows that, subject to Entry 92-A of List I, taxes on the sale or purchase of goods (other than newspapers) taking place within the State are the exclusive preserve of the State. The only restriction on this legislative power is what is stated in Article 286. Nevertheless, in the concluding portion of the judgment, Sabyasachi Mukharji, J. (as he then was) stated : (SCC p. 158, para 86)

The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislative of alcohol :

(a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.

(b) It may lay down regulation to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.

(c) The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.

(d) However, in case State is rendering any service, as distance from its claim of so-called grant of privilege, it may charge fees on quid pro quo."

6. So stating, the earlier decision of this Court in *State of U.P. v. Synthetics & Chemicals Ltd.*

((1980) 2 SCC 441 : (1989) 2 SCR 531) so far as it related to industrial alcohol, was overruled, but only prospectively, so as not affect collection of taxes already made. While invalidating the fees levied under various enactments challenged in Synthetics ((1990) 1 SCC 109), (including the transport fee levied under the Bombay Prohibition Act, 1949 and the vend fee levied by the State of Uttar Pradesh in respect of industrial alcohol) to the extent that such levies were unsupported by quid pro quo, this Court also held, as seen above, that sales tax could not be charged on industrial alcohol because of the Ethyl Alcohol (Price Control) Orders.

7. Vend fee or transport fee was collected by various States purportedly in exercise of the power referable to Entry 8 of List II. The fee was at time sought to be levied under the Excise Rules made under the Excise Act and extended to potable alcohol and industrial alcohol alike. Though the fee was collected supposedly in return for service rendered, it was more often than not the price of licence to deal in what is otherwise the exclusive privilege of the State.

8. No citizen has a fundamental right to deal in intoxicating liquors and it is the right of the State to control production, manufacture, sale, etc. of such liquors with a view to even prohibiting the trade. The term 'intoxicating liquors' was so widely interpreted in decisions like Synthetics ((1980) 2 SCC 441 : (1980) 2 SCR 531) that State interference by way of control - albeit as vend fee or transport fee - of trade in non-potable alcohol was challenged as a transgression on the area reserved for Parliament in respect of a controlled industry (see Entry 52 List I) and as repugnant to the control exercised by the Centre as regards the products of such a controlled industry (see Entry III). The challenge was specifically on the ground that the levy of fees could not be justified except within the bounds of Entry 8 of List II which is a subject of legislation limited to potable alcohol, but not a taxing entry, and of Entry 51 of List II which relates to duties of excise on alcoholic liquors for human consumption, but excluding medicinal and toilet preparations containing alcohol. The contention was that no fee or duty could be levied by the States in respect of industrial alcohol. This contention was accepted by this Court in Synthetics ((1990) 1 SCC 109) as correct provided the levy of fees in respect of industrial alcohol was unsupported by quid pro quo. In other words, although Entry 66 of List II justified collection of fees in respect of matters falling in that List, levy of any such fee, by reason of the limitation of the entries in that List concerning alcohol, had to be confined to potable liquor and could not be extended to industrial alcohol unless there was quid pro quo. This was the rationale of the challenge in Synthetics ((1990) 1 SCC 109) and the crux of the ratio decidendi of that decision. It was never contended by the States that the vend fee was a tax referable to Entry 54 of List II or the transport fee imposed by the Prohibition Act and the Rules was a levy under Entry 56 of List II. The Bombay Rectified Spirit (Transport in Bond) Second Amendment Rules, 1981 (made under the Bombay Prohibition Act, 1949) was challenged precisely for the reason that it was an invalid collection of fee amounting to an impermissible interference with the Central control of industrial alcohol. This Court, as seen above, upheld the challenge insofar as industrial alcohol was concerned, unless there was quid pro quo.

9. The Advocate General, appearing for the appellant-State of U.P. (respondent in the High Court), submits that the reference to sales tax in the judgment of this Court in Synthetics ((1990) 1 SCC 109) which the High Court in the present case thought was binding upon it, was accidental and did not arise from the judgment. The levy of sales tax was not in question at any stage of the arguments. Nor was the question considered as it was not in issue. The court gave no reason whatever for abruptly stating that sales tax was not leviable by the State by reason of the Ethyl Alcohol (Price Control) Orders. The question which arose for consideration was in regard to the validity of vend fee and other fees charged by the States. The argument was that such impost, to the extent that it fell on industrial alcohol, encroached upon the legislative field reserved for Parliament in respect of a

controlled industry coming under Entry 52 of List I (read with Entry 33 of List III). Vend fee or transport fee and similar fees, unless supported by quid pro quo, this Court held, interfered with the control exercised by the Central Government under the IDR Act, 1951 and the various orders made thereunder with respect to prices, licences, permits, distribution, transport, disposal, acquisition, possession, use, consumption, etc. of articles related to a controlled industry, industrial alcohol being one of them. But none of the observations in the judgment warranted the abrupt conclusion, to which the court came, that the power to levy taxes on sale or purchase of goods referable to Entry 54 of List II was curtailed by the control exercised by the Central Government under the IDR Act. The casual reference to sales tax in the concluding portion of the judgment, the Advocate General points out, was accidental and per incuriam.

10. Counsel for the respondents-writ petitioners, however, submits that the prices are strictly controlled by the Central Government in exercise of its power under the IDR Act. The State law cannot be allowed to disturb such prices. Any attempt to raise the prices, despite the strict control exercised by the Central Government by means of statutory orders, is an invalid exercise of power. Levy of sale or purchase tax affects the price, for the incidents of tax on the customer. The customer will have to pay the amount of tax at the point of first purchase which would be in addition to the price determined by the Central Government under the Price Control Orders. This is a transgression on the legislative control exercised by Parliament and by the Central Government acting as its delegate.

11. The Government of U P. charged fee under the U.P. Excise Act, 1910 (as amended in 1972 and 1976); the Government of Maharashtra charged transport fee under the Bombay Rectified Spirit (Transport in Bond) Rules 1951 made under the Bombay Prohibition Act, 1949, and the Andhra Pradesh Government extended the Excise Act, 1968 and the Distillery Rules, 1970 and the Rectified Spirit Rules, 1971 to all alcohol plants. The applicability of these Acts and the Rules so far as industrial alcohol was concerned, was challenged in *Synthetics* ((1990) 1 SCC 109) principally on the ground that the legislative power of the State to levy excise duty under Entry 51 of List II did not extend to industrial alcohol; and, in respect of that Article no fee in the nature of a regulation of control or licence could be charged by reference to Entry 51 or 8 of List II which had no application to industrial alcohol, and also by reason of the control exercised by Parliament and the Central Government under the IDR Act, 1951 which is a law referable to Entry 52 of List I and Entry 33 of List III. Dealing with that contention, this Court states : (SCC pp. 123-24, para 2)

"The main question that falls for consideration in these matters is whether the vend fee in respect of the industrial alcohol under different legislations and rules in different States is valid. The question is - is the vend fee an impost leviable or extractable by the States under different Acts... The questions with which we are mainly concerned are the following :

(i) whether the power to levy excise duty in case of industrial alcohol was with the State legislature or the Central legislature ?

(ii) what is the scope and ambit of Entry 8 List II of the Seventh Schedule of the Constitution ?

(iii) whether, the State Government has exclusive right or privilege of manufacturing, selling, distributing, etc. of alcohols including industrial alcohol."

This Court further says : (SCC p. 125, para 4)

"... In these matters, this Court is concerned with the taxing power of the States to impose and levy excise duty on industrial alcohol and/or imposts as vend fees."

12. After elaborately discussing the increasing use of industrial alcohol, as distinct from potable alcohol, this Court says : (SCC p. 137, para 4)

"The only question which has to be determined is whether intoxicating liquor in Entry 8 in List II is confined to potable liquor or includes all liquors."

Answering that question, which is characterised as the only question, this Court categorically states that intoxicating liquor within the meaning of Entry 8 of List II is confined to potable liquor and does not include industrial liquor.

13. Referring to the constitutional obligations of the State, this Court says : (SCC pp. 156-58, paras 77, 82, 84 and 85)

"Article 47 of the Constitution imposes upon the State the duty to endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and products which are injurious to health... Does Article 47 oblige the State to prohibit even such industries as are licensed under the IDR Act but which manufacture industrial alcohol ? ....

In that view of the matter, it appears to us that the relevant provisions of the U.P. Act, A.P. Act, Tamil Nadu Act, Bombay Prohibition Act, as mentioned hereinbefore, are unconstitutional insofar as these purport to levy a tax or charge imposts upon industrial alcohol, namely alcohol used and usable for industrial purposes...

Furthermore, in view of the occupation of the field by the IDR Act, it was not possible to levy this impost.

After the 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as Item 26 of the First Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non-potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the central licences under IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which they do not possess. Nor can the States claim exclusive right to produce and manufacture industrial alcohol which are manufactured under the grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under Such grant be amenable to States' claim of exclusive possession of privilege. The State can neither rely on Entry 8 of List II nor Entry 33 of List III as a basis for such a claim. The State cannot claim that under Entry 33 of List III, it can regulate industrial alcohol as a product of the scheduled industry, because the Union under Section 18-G of the IDR Act, has evinced clear intention to occupy the whole field. Even otherwise sections like Sections 24-A and 24-B of the U.P. Act do not constitute any regulation in respect of the industrial alcohol as product of the

scheduled industry. On the contrary, these purport to deal with the so-called transfer of privilege regarding manufacturing and sale. This power, admittedly, has been exercised by the State purporting to act under Entry 8 of List II and not under Entry 33 of List III."

Summing up in paragraph 86 of the judgment, this Court stated what we have already set out above. However, for continuity, we will repeat clause (c) of that paragraph : (SCC p. 158, para 86)

"(c) The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Order, sales tax cannot be charged by the State on industrial alcohol."

14. We have extensively quoted from the judgment of the Constitution Bench in *Synthetics & Chemicals Ltd. v. State of U.P.*, ((1990) 1 SCC 109) with a view to showing that the court was concerned with only one question, and that was whether the States could levy excise duty or vend fee or transport fee and the like by recourse to Entry 51 or 8 in List II in respect of industrial alcohol. This Court held, as seen above, that the States had no such power under either entry in respect of non-potable or industrial alcohol. This Court did not deal with the taxing power of the State under Entry 54 of List II which deals with 'taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I'. The power of the State to levy taxes on sale or purchase of goods under that entry was not the subject matter of discussion by this Court, although in paragraph 86 of the leading judgment of Sabyasachi Mukharji, as he then was, there is a reference to sales tax. He says : "The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II." Entry 52 of List II is mentioned in connection with excise duty and sales tax, but neither of them falls under Entry 52. Reference to Entry 51 of List II ought to have been made if it was excise duty that the court had in mind. Entry 54 of List II would have been referred to, and not Entry 52, if the court had in mind sales tax. On the other hand, Entry 52 refers to "Taxes on the entry of goods into a local area for consumption, use or sale therein. None had a case that this entry had any application to the fees or charges in question. The Court further says : (SCC p. 158, para 86)

"However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Order sales tax cannot be charged by the State on industrial alcohol."

That was abrupt observation without a preceding discussion, and inconsistent with the reasoning adopted by this Court in earlier decisions from which no dissent was expressed on the point. Coming, as it does immediately, after a reference to Entry 52 of List II in connection with excise duty and sales tax when neither falls under that entry, the submission of the Advocate General that the observation regarding sales tax in para 86 of the judgment was per incuriam assumes great significance.

15. The genesis of the problem dealt with in *Synthetics* ((1990) 1 SCC 109) is traceable to the decision in the *State of Bombay v. F.N. Balsara* (1951 SCR 682 : AIR 1951 SC 318 : 52 Cri LJ 1361) where this Court stated that the word 'liquor' as understood on this country at the time of the Government of India Act, 1935 comprehended not only alcoholic liquors which were generally used as beverages and which produced intoxication, but also all liquors containing alcohol. Section 2(24) of the Bombay Prohibition Act, 1949 was held to be intra vires. However, so far as medicinal and

toilet preparations containing alcohol were concerned, Sections 12 and 13 of the Act were held to be invalid, being an unreasonable restriction on the fundamental right, to the extent that they prohibited possession, sale, use and consumption of liquors for medicine and toilet preparations, but were held to be valid to the extent that they applied to other categories of alcoholic liquors, namely, spirits of wine, methylated spirit, wine, beer and toddy, as these items were distinctly separate and easily severable from the other category, namely, all liquors containing alcohol.

16. It was this principle which was followed by this Court in *Synthetics* ((1980) 2 SCC 441 : (1980) 2 SCR 531) where it was held that there was no fundamental right for a citizen to carry on trade or business in liquor and that the State had the power to enforce absolute prohibition on manufacture or sale of intoxicating liquor by reason of Article 47 of the Constitution and that the State had exclusive right or privilege to manufacture or sell liquor. This Court also held that the expression 'intoxicating liquor' was not confined to potable liquor, but would also include all liquors which contained alcohol. The State Government had the power to levy a fee for parting with its exclusive right in respect of intoxicating liquor. This Court stated that 'alcohol' included both ordinary as well as specially denatured spirit. Denatured spirit contains ethyl alcohol. The specially denatured spirit for industrial purposes 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 were classified according to their use and denaturants used. This Court rejected the distinction sought to be drawn between denatured spirit for industrial purposes and ordinary denatured spirit.

17. It was this wider understanding of 'intoxicating liquor' so as to comprehend not only potable alcohol, but also industrial alcohol, that was disapproved in *Synthetics* ((1990) 1 SCC 109). In drawing the distinction between potable and non-potable alcohol, this Court had in mind the tremendous changes which have taken place in science and technology and in industry and commerce and the increasing use of industrial alcohol in various industries. Drawing a distinction between potable and non-potable alcohol and, confining the doctrine of Article 47 to the former, this Court came to the conclusion that the impugned statutory provisions purportedly levying fees or enforcing restrictions in respect of industrial alcohol were impermissible in view of the control assumed by the Central Government in exercise of its power under Section 18-G of the IDR Act in respect of industry falling under Entry 52 of List I, read with Entry 33 of List III. Alcohol as an industry being one of the industries brought within the purview of the IDR Act and thus under the regulatory control of the Union, the power to grant licence for the manufacture of alcohol is vested in the Central Government. Distilleries manufacturing alcohol are necessarily licensed under the IDR Act for such distilleries can manufacture alcohol of all types and therefore, are necessarily brought under the control of the Central Government.

18. It is in this background that the cardinal question has to be examined, that is, whether or not the power of the State to levy tax on the sale or purchase of goods falling under Entry 54 of List II will comprehend industrial alcohol. It is significant that the taxing power of State on a matter falling within its competence under this entry, namely, sale or purchase of goods (other than newspapers) is subject to the taxing power of Parliament under Entry 92-A of List I, and other provisions of the Constitution, plenary and unlimited, and untrammelled by the supervisory or regulatory power of Parliament under Entry 52 of List I read with its concurrent power under Entry 33 of List III. This is the crucial distinction between the side taxing power of the State under Entry 54 of List II and its conditional or restricted taxing power, for example, over mineral rights mentioned in Entry 50 of that List which was considered in *India Cement Ltd. v. State of T.N.* ((1990) 1 SCC 12). Similarly, the power of the State in respect of potable alcohol (as distinguished from industrial alcohol) falling under Entry 8 of List II is significantly unfettered, unlike, for example, mines and mineral

development over which the regulatory power of the State is specifically stated to be subject to the regulatory power of Parliament (see Entry 23 of List II read with Entry 54 of List I). The legislative competence of the State in respect of mines and minerals was accordingly held to be denuded to the extent that the field was covered by Section 9 of the Central Act, namely, Mines and Minerals (Regulation and Development Act), 1957 (see *India Cement* ((1990) 1 SCC 12)). Unlike mines and mineral, alcohol stands on a different footing, and is dealt with differently, dependent on whether it is potable or not. What is significant is that legislation falling in pith and substance under Entry 8 or Entry 51 of List II in relation to alcoholic liquor for human consumption (as distinguished from industrial alcohol) whether for the purpose of levying vend fee or transport fee or excise duty, strictly confined to such articles, is not subject to challenge on the ground of legislative incompetence or repugnancy by reason of the power vested in Parliament under Entry 52 or Entry 84 of List I of Entry 33 of List III. Incompetence or repugnancy arises only when the impact of the legislation falls, not incidentally, but substantially on industrial alcohol so as to transgress on a field occupied by Parliament.

19. In *M.P.V. Sundararamier & Co. v. State of A.P.* (1958 SCR 1422, 1479 : AIR 1958 SC 468 : (1958) 9 STC 298) Venkatarama Aiyar, J., speaking for the Constitution Bench, referred to the entries in the three lists of the Seventh Schedule of the Constitution and drew a distinction between the main subjects of legislation forming one group and taxes forming another group. Entries 1 to 81 of List I are the main subjects of legislation within the competence of Parliament. Entries 82 to 92 of that List (92-A and B have since been added) enumerate the taxes which Parliament is competent to impose. Likewise, Entries 1 to 44 forming one group in List II relate to the main subjects within the legislative competence of the States, while 45 to 63 of that List deal specifically with the taxes leviable by the States. The general power of legislation vested in the States regarding trade and commerce, production, supply, etc. is referable to Entries 26 and 27 of List II. The power of the State is mentioned in Entry 54 of List II. This power is, however, subject to certain restrictions imposed under Article 286. Clause (1) of Article 286 prohibits a State from imposing, or authorising the imposition of, a tax on the sale or purchase of goods taking place outside the State or in the course of import into or export out of the territory of India. Parliament is empowered under clause (2) of this article to formulate by law principles for determining when a sale or purchase taxes takes place outside a State or in the course of import into or export out of the territory of India. Clause (3) of this article empowers Parliament to impose certain restrictions and conditions on the taxing power of the State in respect of goods declared by Parliament to be of special importance in interstate trade or commerce and certain other goods falling under clause (29-A) of Article 366. The legislative power of Parliament in respect of interstate trade or commerce and its taxing in regard to it are respectively mentioned in Entries 42, 92-A and 92-B of List I.

20. Taxes levied and collected by the Union on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of interstate trade or commerce, are assigned to the States in the manner provided in clause (2) of Article 269. Clause (3) of that article says that Parliament may by law formulate principles for determining when a sale or purchase or consignment of goods takes place in the course of interstate trade or commerce. It was by virtue of this power that Parliament enacted the Central Sales Tax Act, 1956, Section 3 and 4 of which formulate principles for determining when a sale or purchase of goods has taken place in the course of interstate trade or commerce or outside a State. In all other respects the State enjoys legislative power to levy taxes on the sale or purchase of goods.

21. Industry as a subject of legislation falls under Entry 24 of List II. But this provision is subject to Entries 7 and 52 of List I dealing respectively with "Industries declared by Parliament by law to be

necessary for the purpose of defence or for the prosecution of the war" and "Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest." It is Entry 52 of List I that is relevant for the present purpose for it is in respect of that entry that Parliament enacted the IDR Act, 1951 to provide for the development and regulation of certain industries. This Act contains a declaration by Parliament that 'it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule'. 'Fermentation Industries' (i.e. alcohol and other products of fermentation industries) is Item 26 of the First Schedule. Section 18-G of the IDR Act confers upon the Central Government the power of control of supply, distribution, price, etc. of the articles mentioned in the First Schedule of the Act. All powers vested in the Central Government under Section 18-G of the IDR Act are referable to Entry 52 of List I dealing with 'controlled' industries, read with Entry 33 of List III which pertains to 'Trade and commerce in, and production, supply and distribution of the products of controlled industries.

22. None of the entries in the Concurrent List deals with tax but general subjects of legislation. No conflict can, therefore, arise between the taxing powers of the Union and the States. Parliament has the power to legislate in respect of a 'controlled industry falling under Entry 52 of List I, and both Parliament and the States have the power to legislate in respect of the trade and commerce in, and the production, supply and distribution of, the products of a 'controlled' industry (Entry 33 of List III). These are not taxing entries and so not, therefore, relate to taxes, but powers of regulation and control. The power to control industry being thus vested in Parliament (Entry 52 of List I) and the legislative power in respect of trade and commerce in such industry being concurrently vested in the Union and the States (Entry 33 of List III) any exercise of control by the State must be subject to the legislative power of Parliament and the power conferred on the Central Government by such legislation (Article 246). Any exercise of power by the State which transgresses upon the power of Parliament or of the Central Government, as it delegates, is to the extent of such transgression null and void.

23. Entry 8 of List II reads :

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

These matters concerning intoxicating liquors are thus included within the legislative competence of the States. In respect of any such matter, the States are competent to levy fees (Entry 66 of List II). Entry 51 of List II relating to excise duty on alcoholic liquors for human consumption reads :

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

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

While this entry clearly refers to liquor for human consumption, the same meaning has been judicially ascribed in *Synthetics* ((1990) 1 SCC 109) to 'intoxicating liquors' in Entry 8 of the same

List. The legislative competence of the State in respect of 'intoxicating liquors' referred to in Entries 8 and 66 of List II as a subject of legislation and fee respectively and the power of the State to levy excise duty on "alcoholic liquors for human consumption" falling under Entry 51 of the same List must be necessarily be confined to potable alcohol, and cannot include industrial alcohol or medicinal and toilet preparations containing alcohol (see Entry 84 of List I). Any transgression by the State on industrial alcohol will be invalid for want of power by reason of the limitation of Entries 8 and 51 of List II (being confined to potable alcohol) and consequent transgression on areas covered by Entries 52 and 84 of List I respectively relating to declared industry and excise duty on industrial alcohol and medicinal and toilet preparations containing alcohol, and also for repugnancy arising from a clash with the centrally occupied field falling under Entry 33 of List II. This is why this Court in *Synthetics* ((1990) 1 SCC 109) held that State should not impose any fee, whether called vend fee, transport fee, excise duty and the like, on industrial alcohol as such impost would trespass upon the statutory orders made by the Central Government in exercise of its power of control under Section 18-G of the IDR Act as regards ethyl alcohol and other non-potable products of fermentation industries.

24. Article 298 of the Constitution says that the executive power of the State, within the area of its legislative competence, or, subject to legislation by Parliament, in areas falling outside its legislative competence, shall include the conduct of any trade or business, the acquisition, holding and disposal of property and the making of any contract for such purpose. The regulatory powers of the State extend to every form of activity concerning intoxicating liquor for human consumption. The production, manufacture, possession, transport, purchase and sale, of such articles fall within the regulatory power of the State. The State is entitled to levy fees in respect of any such matter (Entry 66 List II).

25. The power regulation and control is separate and distinct from the power of taxation. Legislative exercise of regulation or control referable to Entry 52 of List I or Entry 8 of List II is distinct and different from a taxing power attributable to Entry 54 of List II or Entry 92-A or 92-B of List I. The power to levy taxes on sale taxes on sale or purchase or consignment is referable to these entries, and subject to the other provisions of the Constitution, the taxing power of the State is not cut down by the general legislative control vested in Parliament and referable to the general topic of legislation.

26. In *R.M.D.C. (Mysore) Private Limited v. State of Mysore* ((1962) 3 SCR 230 : AIR 1962 SC 594), a Constitution Bench of this Court held : (SCR headnote p. 231; and 244)

"that the subject of 'betting and gambling' in Entry 34 of List II of the Seventh Schedule to the Constitution of India and that of 'taxes on betting and gambling' in Entry 62 of List II have to be read separately as separate powers, and, therefore, when control and regulation of prize competitions was surrendered to Parliament by the resolution dated February 23, 1956, the power to tax could not be said to have been surrendered."

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"Therefore, if the Mysore legislature had the power, which in our opinion, it had and it had not surrendered its power to Parliament which, in our opinion, it had not then it cannot be said that the imposition of the tax is a piece of colourable legislation and is on that ground unconstitutional."

27. In *Ganga Sugar Co. Ltd. v. State of U.P.* ((1980) 1 SCC 223 : 1980 SCC (Tax) 90 : (1980) 1 SCR 769), Krishna Iyer, J., speaking for the Constitution Bench, dealt with a challenge against the levy of purchase tax on the raw material consumed by a controlled industry namely, the sugar industry, and stated : (SCC p. 232, para 27)

"Is the legislation ultra vires because the State enters the forbidden ground by enacting on controlled industry ? It is undisputed that sugar industry is a controlled industry, within the meaning of Entry 52, List I of Seventh Schedule and, therefore, the legislative power of Parliament covers enactments with respect to industries having regard to Article 246(1) of the Constitution. If the impugned legislation invades Entry 52 it must be repulsed by this Court. But Entry 54 in List II of the Seventh Schedule empowers the State to legislate for taxes on purchase of goods and so if the Act under consideration is attracted, in pith and substance, by this entry legislative incompetence cannot void the Act."

28. This is precisely the question in the instant case, namely, whether or not the impugned legislation falls in pith and substance within Entry 54 of List II, and not whether the industry (producing goods the sale of which is leviable to tax under the impugned legislation) is controlled within the ambit of Entry 52 of List I. This question was not considered in *Synthetics* ((1990) 1 SCC 109).

29. A like question arose in a different form in *Ch. Tika Ramji v. State of U.P.* (AIR 1956 SC 676 : 1956 SCR 393). This Court rejected the challenge in that case against the constitutional validity of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and the notifications issued thereunder. It was held that the impugned Act and the notifications were intra vires the State legislature as they concerned with the regulation of the supply and purchase of sugarcane which in no way trespassed upon the exclusive jurisdiction of the Centre with regard to sugar. No question of repugnancy under Article 254 of the Constitution could arise because Parliament and the State legislated in different fields and dealt with separated and distinct matters even though of a cognate and allied character. There is no inconsistency between the two enactments. The provisions of Section 18-G of the IDR Act, 1951 did not cover sugarcane or indicate any intention on the part of Parliament to cover the entire field of such legislation. Raw material did not come within the ambit of 'any article or class of articles relating to any scheduled industry within the meaning of that Act.' The court further pointed out that even if sugarcane was an article which fell within the purview of Section 18-G of the Act, no order having been issued by the Central Government under that provision, no repugnancy could arise, for repugnancy had to exist as a fact and not as a mere possibility. The existence of an order covering the entire field was an essential pre-requisite to give rise to repugnancy.

30. Similarly, in *Kannan Devan Hills Produce v. State of Kerala* ((1972) 2 SCC 218 : AIR 1972 SC 2301 : (1973) 1 SCR 356) a Constitution Bench of this Court stated : (SCC p. 299, para 28)

"It seems to us clear that the State has legislative competence to legislate on Entry 18, List II and Entry 42, List III. This power cannot be denied on the ground that it has some effect on an industry controlled under Entry 52, List I. Effect is not the same thing as subject matter. If a State Act, otherwise valid, has effect on a matter in List I it does not cease to be a legislation with respect to an entry in List II or List III."

31. In *Hoechst Pharmaceuticals Ltd. v. State of Bihar* ((1983) 4 SCC 45 : 1983 SCC (Tax) 248 : AIR 1983 SC 1019) this Court reiterating the observations of the Constitution Bench in *Sundaramier* case (1958 SCR 1422, 1479 : AIR 1958 SC 468 : (1958) 9 STC 298) as regards the distinction between general subjects of legislation and taxes in List I and List II and the absence of any entry in List III relating to taxes (apart from levy of fees) stated : (SCC p. 93, para 76; SCC (Tax) p. 296, para 76)

"... Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be instruction by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State's exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relating to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-section (3) of Section 5 (of the Bihar Finance Act, 1981) and paragraph 21 of the Control Order issued by the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play."

32. These decisions unmistakably demonstrate the power of the State to levy taxes on the sale or purchase of goods other than newspapers, but subject to Entry 92-A of List I which deals with the legislative power of Parliament to levy taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of interstate trade or commerce. Subject to the overriding power of Parliament in respect of what falls under Entry 92-A and the provisions of Article 286, the State has full legislative competence in levying taxes on the sale or purchase of goods other than newspapers. The power to tax under Entry 54 of List II being a specific power, it cannot be cut down or in any manner fettered by the general power of control exercised by Parliament by legislation on a matter falling under Entry 52 of List I relating to an industry, the control of which by the Union is declared by Parliament by law to be expedient in the public interest, read with Entry 33 of List III dealing with trade and commerce in, and the production, supply and distribution of the products of any such controlled industry, and imported goods of the same kind as such products, and other articles mentioned in Entry 33. The impugned provision of the Uttar Pradesh Sales of Motor Spirit, Diesel Oil and Alcohol Taxation (Amendment) Act, 1976 levying tax at the point of first purchase of alcohol in the State is undoubtedly an impost falling in pith and substance under Entry 54 of List II. In the absence of any fetter on the legislative power and in the absence of any valid challenge against the provision as a colourable piece of legislation, the impugned legislative enactment remains unimpeachable.

33. The control exercised by the Central Government by virtue of Section 18-G of IDR Act is in a field far removed from the taxing power of the State under Entry 54 of List II. So long as the impugned legislation falls in pith and substance with the field of the State, the control of the Central Government in exercise of its power under the IDR Act in respect of a controlled industry falling under Entry 52 of List I cannot in any manner prevent the State from imposing taxes on the sale or purchase of goods which are the products of such industry and which are referable to Entry 33 of List III. As seen above, the taxing power of the State under Entry 54 of List II cannot be cut down by the general legislative power of control of the Central.

34. The levy of fee, whether called vend fee or transport fee or duty or charge, whether levied by rules purportedly made under the Excise Act or the Prohibition Act or any other statute, otherwise than as a proper levy falling in pith and substance under a taxing entry, was not valid, to the extent

that it lacked quid pro quo and applied to industrial alcohol. Any such fee or charge can be justified as a mode of control falling in pith and substance under Entry 8 read with Entry 66 of List II only to the extent that it remains within the bound of the concerned subject matter, namely, 'intoxicating liquors', which must necessarily exclude industrial alcohol.

35. We see no substance in the contention that the Price Control Orders made by the Central Government in exercise of its power under the IDR Act fettered the legislative power of the State on a matter falling under Entry 54 of List II. Taxes on sale or purchase are not governed by the Price Control Orders, for the purpose of the latter is to prevent the seller from pricing his goods beyond the limit prescribed by the Orders. That is a fetter on the free play of demand and supply. When supply is scarce, the prices are bound to rise and it is that vice which is controlled by fixing the maximum price. But that does not in any manner curtail the power of the State to levy taxes on the sale or purchase of goods. It is no doubt true that the consumer of the article must, in addition to the price, pay purchase tax due in respect of them. But that is by reason of a valid levy which is within the constitutional power of every State, and is de hors the price, though often referable to it.

36. The High Court, in our view, was clearly in error in striking down the impugned provision which undoubtedly falls within the legislative competence of the State, being referable to Entry 54 of List II. We are firmly of the view that the decision of this Court in Synthetics ((1990) 1 SCC 109) is not an authority for the proposition canvassed by the assessee in challenging the provision. This Court has not, and could not have, intended to say that the Price Control Orders made by the Central Government under the IDR Act imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sales or purchase of goods. The reference to sales tax in paragraph 86 of that judgment was merely accidental or per incuriam and has, therefore, no effect on the impugned levy.

SAHAI, J.

(concurring) - I have, carefully, gone through the judgment of brother Thommen, J. I agree with every word that has been said by him. But considering the importance of issues involved I would like to add few words of my own.

38. The dispute is about levy of purchase tax on industrial alcohol. The High Court held that the State legislature was competent to enact a law imposing purchase tax on it in exercise of power under Entry 54 of List II. But it struck down the levy as it would disturb price structure regulated by Central Government. It was held that control of alcohol industry having been taken over by the Parliament, for purpose of regulation and development the State stood denuded of its taxing power under entry 54 of List II to the extent the field of price fixation was covered by the price control order issued by the government. And the purchase price being component of price fixation which squarely fell within the power of Central Government the imposition of purchase tax amounted to intrusion into the forbidden area of price fixation by Central Government. Support for this was drawn, principally, from the two Constitution Bench decisions in India Cement Ltd. v. State of Tamil Nadu ((1990) 1 SCC 12) and Synthetic and Chemicals v. State of U.P. ((1990) 1 SCC 109). The first was relied for the principle that even a taxing legislation by the State could be invalid to the extent it trespassed on Central legislation on the same subject. And the latter for the conclusion that, 'however, sales tax cannot be charge on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders sales tax cannot be charged by the State on industrial alcohol.' Reliance on India Cement Ltd. ((1990) 1 SCC 12) was under complete misapprehension. The State in that case attempted to levy less on royalty. It was to be held to be invalid. To save it the State

attempted to justify it as a tax in exercise of power under Entry 50 of List II. The submission was negated as the legislative power of State under Entry 50 of List II was 'subject to any limitation imposed by the Parliament by law relating to mineral development'. The bench held that in view of the Parliamentary legislation under Entry 54 of List I and the declaration made under Section 2 and provisions of Section 9 of the Act the State legislation was overridden to that extent. No such restriction or limitation is placed under Entry 54 of List II except that the exercise of power has been made subject to the provisions of Entry 92 of List I.

39. But the problem has arisen due to the conclusion in the case of *Synthetic and Chemicals* ((1990) 1 SCC 109). The question was if the State legislature could levy vend fee or excise duty on industrial alcohol. The bench answered the question in the negative as industrial alcohol being unfit for human consumption the question in the negative as industrial alcohol being unfit for human consumption the State legislation was incompetent to levy any duty of excise either under Entry 51 or Entry 8 of List II of the Seventh Schedule. While doing so the bench recorded the conclusion extracted earlier. It was not preceded by any discussion. No reason or rationale could be found in the order. This gives rise to an important question if the conclusion is law declared under Article 141 of the Constitution or it is per incuriam and is liable to be ignored.

40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (*Young v. Bristol Aeroplane Co. Ltd.* ((1944) 1 KB 718 : (1944) 2 All ER 293)). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu v. Rajdewan Dubey* ((1962) 2 SCR 558 : AIR 1962 SC 83) this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law ? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (*Salmond on Jurisprudence* 12th Edn., p. 153). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.* ((1941) 1 KB 675, 677 : (1941) 2 All ER 11) the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority.' It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur* ((1989) 1 SCC 101). The bench held that, 'precedents sub-silentio and without argument are of no moment.' The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ration decidendi*. In *B. Shama Rao v. Union Territory of Pondicherry* (AIR 1967 SC 1480 : (1967) 2 SCR 650 : 20 STC 215) it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or

authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

42. Effort was made to support the conclusion, indirectly, by urging that the State having raised same objections by way of review petition and the same having been rejected it amounted impliedly as providing reason for conclusion. Law declared is not that can be culled out but that which is stated as law to be accepted and applied. A conclusion without reference to relevant provision of law is weaker than even casual observation. In the order of Brother Thommen, the extracts from the judgment of the Constitution Bench quoted in extenso demonstrate that the question of validity of levy of sales and purchase tax was neither in issue nor was it raised nor is there any discussion in the judgment except of course the stray argument advanced by the learned Attorney General to the following effect : (SCC p. 139, para 43)

"But alcohol not fit for human consumption are not luxuries and as such the State legislatures, according to Attorney General, will have no power to levy tax on such alcohol."

Sales tax of purchase tax under Entry 54 is levied on sale or purchase of goods. It does not contemplate any distinction between luxury and necessity. Luxuries are separately taxable under Entry 62. But that has nothing to do with Entry 54. What promoted this submission is not clear. Neither there was any occasion nor there is any constitutional inhibition or statutory restriction under the legislative entry nor does the taxing statute make any distinction between luxuries and necessities for levying tax. In any case the bench did not examine it nor did it base its conclusions on it. In absence of any discussion or any argument the order was founded on a mistake of fact and, therefore, it could not be held to be law declared. The bench further was not apprised of earlier Constitution Bench decisions in *Hoechst Chemicals v. State of Bihar* ((1983) 4 SCC 45 : 1983 SCC (Tax) 248 : AIR 1983 SC 1019) and *Ganga Sugar Mill v. State of U.P.* ((1980) 1 SCC 223 : 1980 SCC (Tax) 90 : (1980) 1 SCR 769) which specifically dealt with the legislative competence of levying sales tax in respect of any industry which had been declared to be of public importance. Therefore, the conclusion of law by the Constitution Bench that no sales or purchase tax could be levied on industrial alcohol with utmost respect fell in both the exceptions, namely, rule of *sub-silentio* and *being in per incuriam*, to the binding authority of the precedents.

43. Ethyl alcohol is not fit for human consumption. It is principally used as raw material for manufacture of rubber etc. Since it was of all India importance the activities of which affected the country as a whole, it was declared as of public importance by adding it as Item (1) under Entry 26 of the first Schedule appended to the Industries (Development and Regulation) Act, 1951, (hereinafter referred as IDRA). The effect of this declaration was that it stood removed from Entry 24 of List II and allocated to the Central legislature. The control thus vested in the Parliament. But Entry 33 in Concurrent List permits both the Parliament and the State legislature to deal with trade and commerce in it and also regulate production, supply and distribution of goods declared to be of public importance. The State could, therefore, enact law under Entry 33 subject to it that the State legislation could not be repugnant to Central legislation. That is if the field is already occupied by Central enactment then the State legislation to that extent shall be invalid. (See *Tika Ramji v. State of U.P. and Hoechst Pharmaceuticals Ltd. v. State of Bihar* ((1983) 4 SCC 45 : 1983 SCC (Tax) 248 : AIR 1983 SC 1019).

44. Can this principle apply to levy of purchase tax by an enactment made in exercise of legislative power under Entry 54 of List II ? Power to tax is a sovereign power. In federal system of

governance it is exercised by distribution of power between the Union and the State. Both are supreme in their sphere. That is brought out clearly by Article 246(1) and Article 246(3) of the Constitution. The legislative field for levying tax by Union is set out in Entries 82 to 92 in List I and of State in Entries 45 to 63 in List II of the Seventh Schedule. There is no overlapping. Fields are clearly demarcated. Limitations and restrictions are also mentioned. Unlike general entries power to levy tax cannot be deduced from another entry as ancillary exercise of power. Since the Concurrent List does not contain any entry relating to taxing power the concept of occupied field or repugnancy cannot arise. If there is clash between exercise of power under List II and List I then the State legislation may be invalid due to Article 246(1). But since there can be no clash or invalidity in relation to taxing power the question of invalidity cannot arise.

45. Price fixation of ethyl alcohol is an exercise of power for regulating distribution and supply of it. The general entry for regulating distribution and supply is different from exercise of taxing power. The two do not even remotely touch each other. Therefore, if the price goes up in exercise of taxing power then subject to its being arbitrary or confiscatory it could not be struck down as intruding in forbidden field. In *Hoechst Pharmaceuticals* ((1983) 4 SCC 45 : 1983 SCC (Tax) 248 : AIR 1983 SC 1019) this Court while examining the ambit of Entry 54 of List II observed, 'Entry 54 of List II of the Seventh Schedule is only subject to Entry 92-A of List I and there can be no further curtailment of the status of power of taxation.' Therefore, the entire basis for striking down the levy that even though the State had plenary power to impose tax on sales/purchase of goods it can exercise taxing power under Entry 54 of List II so long as it does not militate against the legislative field occupied by the Central Government under the IDR Act or any other enactment made under Entry 52 of List I proceeded on completed misconception of taxing powers of State. In fact as stated earlier the entire theory of occupied field or State legislation being repugnant to Central legislation is available when the two legislatures exercise their powers under Concurrent List. Therefore, the order of the High Court striking down the levy cannot be upheld.

#### ORDER

46. For the reasons stated by us in our concurring judgments dated July 18, 1991, we set aside the impugned judgment of the High Court, and the appeal by the State shall accordingly stand allowed. However, we do not make any order as to costs.

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