

CASE NO.:

Appeal (civil) 3017 of 1997

Appeal (civil) 2696-2697 of 2003

PETITIONER:

State of Punjab and Anr.

RESPONDENT:

M/s. Devans Modern Breweries and Anr.

DATE OF JUDGMENT: 20/11/2003

BENCH:

B.N. Agrawal

JUDGMENT:

J U D G M E N T

B.N. AGRAWAL, J.

The question involved in this batch of appeals, arising out of an order of reference made by a three Judge Bench of this Court, is as to whether Article 301 of the Constitution of India (hereinafter referred to as "the Constitution") will have any application in relation to potable liquor the business whereof is said to be res extra commercium; in view of the decisions of this Court in Cooverjee B. Bharucha Vs. The Excise Commissioner & The Chief Commissioner, Ajmer, & Ors., [(1954) SCR 873]; The State of Bombay Vs. R.M.D. Chambarbaugwala [(1957) SCR 874]; Har Shankar & Ors. Vs. The Deputy Excise & Taxation Commissioner & Ors., [(1975) 1 SCC 737] and Khoday Distilleries Ltd. & Ors., Vs. State of Karnataka & Ors. [(1995) 1 SCC 574].

These appeals arise out of judgements and orders passed by Punjab and Haryana High Court and Kerala High Court. The State of Punjab imposed tax on import of potable liquor manufactured in other States. The State of Kerala also imposed a similar levy. The Punjab and Haryana High Court by its judgment dated 17.01.1997 passed in Writ Petition (Civil) No. 5358 of 1996 quashed the notification dated 27.03.1996 imposing levy of import duty by the State of Punjab in exercise of its powers conferred upon it under Sections 31, 32 and 58 of the Punjab Excise Act, 1914 (hereinafter referred to as "the Punjab Act") on two grounds viz.; (i) the State has no power to levy such tax under the Punjab Act and (ii) in view of the Constitution Bench decision of this Court in Kalyani Stores Vs. The State of Orissa and others [1966(1) SCR 865], the imposition of duty is ultra vires Article 301 of the Constitution.

So far as challenge to imposition of import duty on potable liquor by the State of Kerala under Abkari Act, 1077 (hereinafter referred to as "the Abkari Act") is concerned, the Kerala High Court has dismissed the writ application on grounds, inter alia, that such duty, being regulatory in nature, is not ultra vires the Abkari Act. The High Court did not enter into the question of applicability of Article 301 of the Constitution vis-à-vis effect of imposition of such import duty on potable liquor.

Mr. P.N.Misra, learned Senior Counsel appearing on behalf of the appellant - State of Punjab in the Punjab matter having regard to several provisions of the Punjab Act submitted that the High Court committed a manifest error in holding that the State has no power to impose such a tax. As regards applicability of Article 301 of the Constitution, the learned counsel contended that as the State has the exclusive privilege to deal in potable liquor in any manner it likes, it has the concomitant requisite power to impose such tax by way of restriction on import. The learned counsel further contended that as no trader can claim any fundamental right in carrying on trade or business in potable liquor, question of applicability of Article 301 of the Constitution would not arise. It may not be out of place to mention that at the stage of reply Dr. A.M. Singhvi, learned Senior Counsel

filed written submissions on behalf of the State of Punjab more or less reiterating the contentions raised by Mr. P.N. Misra.

Mr. T.L.V. Iyer, the learned senior counsel appearing on behalf of State of Kerala submitted that it is within the province of the State to impose restrictions on import of potable liquor by imposing import duty. According to learned counsel such a duty has not been imposed by the State in exercise of its statutory power conferred upon it in terms of Entry 51, List II of the Seventh Schedule to the Constitution but regulatory powers as envisaged in Entry 8 thereof. In other words, Mr. Iyer contended that the import duty has been levied not as a measure of tax but as a part of regulation on the trade. The learned counsel further contended, although such a stand has not been taken by the State before the High Court, but having regard to the well-settled principle of law as laid down by this Court and referred to hereinafter, the State can impose such duty as a price for parting with its exclusive privilege.

In support of the contentions the learned senior counsel appearing for the State of Punjab and that of Kerala relied upon the decisions of this Court in the cases of Har Shankar (supra), Nashirwar and Others Vs. State of Madhya Pradesh and Others (1975) 1 SCC 29, State of Orissa and Others Vs. Harinarayan Jaiswal and Others (1972) 2 SCC 36, State Bank of Haryana and Others Vs. Jage Ram and Others (1980) 3 SCC 599, State of Andhra Pradesh Vs. Y. Prabhakara Reddy (1987) 2 SCC 136, State of U.P. and Others Vs. Sheopat Rai and Others 1994 Suppl. (1) SCC 8, State of Haryana and Others Vs. Lal Chand and Others (1984) 3 SCC 634, State of Punjab Vs. M/s. Dial Chand Gian Chand and Company (1983) 2 SCC 503, Solomon Antony and Others Vs. State of Kerala and Others (2001) 3 SCC 694, Khoday Distilleries Ltd. and Others (supra) and Government of Maharashtra and Ors. Vs. M/s. Deokar's Distillery JT 2003 (3) SC 86.

Mr. Mohan Jain, learned counsel appearing on behalf of the respondents-licensees of the State of Punjab and Mr. R.Venkataramani, learned Senior Counsel, appearing on behalf of the intervenor, on the other hand, contended that power to impose tax by the State of Punjab is circumscribed by Sub-section 3 of Section 33A of the Punjab Act. It was submitted that power to impose countervailing duty being statutorily restricted, the State cannot be permitted to achieve the same object indirectly by taking recourse to 'exclusive privilege' theory.

Mr. Ashok H. Desai and Mr. R.F. Nariman, learned senior counsel appearing on behalf of the licensees - appellants in the Kerala matter raised the following contentions:

(1) Levy of import duty having been expressly conferred by the statute, the State cannot justify such a levy on the spacious ground of having exclusive privilege of dealing in potable liquor.

(2) The State of Kerala having specifically raised a plea that such a levy was justified by way of a fee and/or as a regulatory measure cannot now turn round and contend that the levy was imposed by way of a price for parting with the exclusive privilege of the State. As the State of Kerala has not granted any licence to the appellants, the question of parting of any privilege in their favour does not arise. Pointing out to the admitted fact that Kerala State Beverages Corporation has been granted the monopoly to deal in liquor and the appellants and other traders having been selling liquor to the Corporation, the question of rendition of any service by the State of Kerala to the licensees so as to justify imposition of a fee or regulatory tax therefor does not arise.

(3) Any fee regulating trade by grant of a licence would amount to 'tax' within the meaning of clause (28) of Article 366 of the Constitution. Reliance in this connection has been placed on D.C. Gouse & Co.etc. Vs. State of Kerala and Anr. etc. [1980(1) SCR 804] and Corporation of Calcutta and Anr., Vs. Liberty Cinema [1965(2) SCR 477].

(4) The applicability of the doctrine of "res extra commercium" and/or the concept of privilege theory on the part of the State would be attracted only in a 'no right' situation. Once a right to trade has

been conferred by the State, it cannot take umbrage under the privilege doctrine. Even the State, at the time of grant of licence by way of exclusive privilege, is bound by its own action, which in a given case, may attract the wrath of Article 14 of the Constitution. Reliance in this behalf has been placed on State of M.P. & Ors., Vs. Nandlal Jaiswal & Ors., [1986(4) SCC 566].

(5) The Constitution Bench of this Court in Krishna Kumar Narula Vs. The State of Jammu and Kashmir & Ors. 1967(3) SCR 50 having clearly laid down that trade in liquor would come within the purview of Article 19(1)(g) of the Constitution, the State can only impose a reasonable restriction in terms of Clause (6) of Article 19 thereof. In Khoday Distilleries Ltd. (supra), this Court having clearly held that when a licence is granted, persons similarly situated cannot be discriminated against which would clearly lead to the conclusion that not only a fundamental right in terms of Article 14 of the Constitution but also other constitutional rights including those contained in Part XIII of the Constitution are available in relation to trade in liquor.

(6) In Kalyani Stores (supra), H. Anraj Vs. Government of Tamil Nadu (1986) 1 SCC 414 and State of Madhya Pradesh Vs. Bhailal Bhai & Ors. 1964(6) SCR 261 this Court having clearly held that Article 301 of the Constitution would be applicable also in relation to obnoxious trade, there is no reason as to why the said decisions shall be departed from.

(7) Keeping in view the decisions of this Court in Atiabari Tea Company Limited Vs. The State of Assam & Ors., [1961(1) SCR 809] and The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others [1963 (1) SCR 491] the purpose of Article 301 of Constitution being to maintain economic unity of the entire country, the State cannot by imposition of a tax infringe upon the provisions contained in Part XIII of the Constitution which is a self-contained part.

(8) The phraseology, used in Article 301 of the Constitution, namely, trade, commerce and intercourse being of wide amplitude, the right to carry on trade and business as envisaged in Article 19(1)(g) or Article 298 of the Constitution cannot restrict the scope and ambit thereof.

In view of the rival contentions, as noticed hereinbefore, the following questions arise for consideration:

- (i) Whether the impugned notifications issued by the State of Punjab and that of Kerala are illegal being fraud on the Constitution.
- (ii) Whether the import duty can be said to have been validly imposed having regard to the doctrine of 'exclusive privilege' of the State to deal in obnoxious matters?
- (iii) Whether dealing in liquor which is said to be 'res extra commercium' would nonetheless attract Part XIII of the Constitution?

Re: Question (i)

The impugned notifications issued by the State of Punjab and that of Kerala read as under:

I "Government of Punjab
Department of Excise and Taxation
NOTIFICATION

The 27th March, 1996

No. G.S.R. 28/P.A.I./14/Ss. 31, 32 and 58/Amd. (118)/96

In exercise of powers conferred by sections 31, 32 and 33 of the Punjab Excise Act, 1914 (Punjab Act 1 of 1914) and all other powers enabling him in this behalf, the Governor of Punjab is pleased to make the following

order, without previous publication, further to amend the Punjab Excise Fiscal Orders, 1932, namely:-

ORDERS

1. (1) These orders may be called the Punjab Excise Fiscal (Second Amendment) Orders, 1996.

(2) They shall come into force on and with effect from the first day of April, 1996.

2. In the Punjab Excise Fiscal Orders, 1932 (hereinafter referred to as the said Orders), in order 1, in the table, under column "Rate of duty per proof litre" -

(a) in item (1), against sub item (c) for the figures "4.00" the figures "3.00" shall be substituted;

and

(b) in item (3) against sub-item (b) for the figures "3.50" the figures "3.00" shall be substituted.

3. In the said Orders in order 1-B -

(a) for the words "rupees three" the words "rupees two" shall be substituted; and

(b) for clause (iii) to the proviso, the following clause shall be substituted namely:-

"(iii) the Indian Made Beer shall be at the rate of thirty-eight paise per bulk litre."

4. In the said orders in order 1-D, for item (iii), the following item shall be substituted namely:-

"(iii) rupees four and sixty paise per bulk litre."

II. "S.R.O. No. 330/96. In exercise of the powers conferred by sections 6, 7, 17 and 18 of the Abkari Act, 1 of 1077 and in modification of notification issued under G.O. (p) No. 24/94/TD dated 3rd March, 1994 and published as S.R.O. No. 256/94 in the Kerala Gazette Extraordinary No. 180 dated 3rd March, 1994, as subsequently amended, the Government of Kerala hereby direct that the import and export fees, the excise duty and luxury tax under the said sections shall be levied on the following kinds of liquors manufactured in the State and exported outside the State under bond in force or manufactured elsewhere in India and imported into the State by land, air, or sea under bond, at the rates mentioned against each kind of liquor.

The excise duty, import fee or luxury tax on liquor manufactured elsewhere in India and imported into the State by land, air or sea otherwise than under bond shall be equal to the duty to which such liquor manufactured in the State are liable under the Act such as import fee, excise duty or luxury tax namely:-

Kind of Liquor
Rate of
excise duty
Rate of

luxury
tax
Rate of
import fee
Rate of
export fee
1. Indian Made
Foreign Liquor
including beer
except those
consumed by
Defence Service.

(1) When exported
by distilleries/
Foreign Liquor
(compounding,
Blending and
(Bottling) Units/
Breweries to other
State and not
reimported into this
State, in cases where
the following terms
and conditions are
satisfied namely:-

Rs. 5
(Rupees five
only) per
proof litre in
the case of
Indian Made
Foreign
Liquor and
Rs. 2
(Rupees two
only) per
bulk litre in
the case of
beer

(i) The export is
under bond to cover
the duty at the rate
of an amount equal
to 200 per cent of
the value of Indian
Made Foreign
Liquor and
gallonage fee at the
rate of Rs. 3 per
bulk litre in the case
of beer.

(ii) No objection
certificate for import
certificate from the

excise authorities of the importing State is produced by the Distilleries/ Foreign Liquor (Compounding, Blending and Bottling) Units/ breweries.

(iii) Excise duty, luxury tax and export fee paid to Kerala Government before export.

(iv) The verification certificate from the Excise Authorities of the importing State is produced before the Excise officers in charge of the Distilleries/ Foreign Liquor (Compounding, Blending and Bottling) Units/ Breweries within 42 days of dispatch or within such further time as the Excise Commissioner may allow for sufficient cause.

(v) The duty at the rate of an amount equal to 200 per cent of the value of Indian Made Foreign Liquor and gallonage fee at the rate of Rs. 3 per bulk litre in the case of Beer is paid on all quantities unaccounted for; and

(vi) Export is through air, rail road or ship.

(2) in the case of:-

(a) Indian Made
Foreign liquor other
than beer imported
(bond or under
bond)

Rs. 5 per
proof litre

(b) Beer imported
(bond or under
bond)

Rs. 2 per
bulk litre

(c) wine imported
(duty paid or under
Bond)

Rs. 2 per
bulk litre

(3) In other cases:

(a) Indian Made
Foreign Liquor
(excluding beer and
wine)

An equal
amount to
100 per
cent of its
value

(b) Beer

Rs. 3 per
bulk litre

(c) Wine

Rs. 3 per
bulk litre

IV. Medicated wine
and similar
preparations but not
including
preparations on
which duty is
leviable under the
Medicinal and toilet
preparations (Excise

Duties) Act, 1955
Rs. 12
(Rupees
twelve
only) per
proof litre

Published in K.G. Ex. No. 379 dt. 29.3.1997 as S.R.O.
No. 210/97

Explanation:-Where any liquor is chargeable with duty at a rate depending on the value of the liquor, such value shall be the value at which the Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd., purchases such liquor from the suppliers and in case any such liquor is not purchased by the Kerala State Beverages (Manufacturing and Marketing) Corporation, such value shall be the value fixed by the Commissioner.

This notification shall come into force on 1st day of April, 1996."

Before embarking upon the questions raised in these appeals, the relevant provisions of the Punjab Act may be noticed which run thus:-

S.3.(9) "Excise revenue" means revenue derived or derivable from any payment, duty fee, tax, confiscation, or fine imposed or ordered under the provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs, but does not include a fine imposed by a court of law.

S.3(12). "Import" (except in the phrase "import into India") means to bring into Punjab and Haryana otherwise than across a custom frontier as defined by the Central Government.

S.16. Import, export and transport of intoxicants:-
No such intoxicant shall be imported, exported or transported except -

- (a) after payment of any duty to which it may be liable under this Act or execution of a bond for such payment, and
- (b) in compliance with such condition as the State Government may impose.

S.17. Power of State Government to prohibit import, export and transport of intoxicants:- The State Government may by notification:-

- (a) prohibit the import or export of any intoxicant into or from Punjab, Haryana or any part thereof; or
- (b) prohibit the transport of any intoxicant.

S.18. Pass necessary for import, export and transport:- Except as otherwise provided by any rule made under this Act, no intoxicants exceeding

such quantity as the State Government may prescribe by notification shall be imported or transported except under a pass issued under the provision of the next following section;

Provided that in the case of duty paid foreign liquor such passes shall be dispensed with unless the State Government shall by notification otherwise direct;

Provided further, that no such conditions as may be determined by the Financial Commissioner, a pass granted under the excise law in force in another State may be deemed to be a pass granted under this Act.

S.19. Grant of passes for import, export and transport:-Passes for the import, export and transport of intoxicants may be granted by the Collector.

Provided that passes for the import and export of such intoxicant as the Financial Commissioner may from time to time determine shall be granted only by the Financial Commissioner.

S.31. Duty on excisable articles:- An excise duty or a countervailing duty as the case may be at such rate or rates as the State Government shall direct, may be imposed either generally or for any specified local area, on any excisable article.

- (a) imported, exported or transported in accordance with the provisions of section 16; or
- (b) manufactured or cultivated under any licence granted under section 23; or
- (c) manufactured in any distillery established or any distillery or brewery licensed under section 21.

Provided as follows:-

- (i) duty shall not to be so imposed on any article which has been imported into India and was liable on importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1878.

Explanation:- Duty may be imposed under this section at different rates according to the places to which any excisable article is to be removed for consumption, or according to the varying strength and quality of such article.

S.32. Manner in which duty may be levied:- Subject to such rules regulating the time, place and manner as the Financial Commissioner may prescribe such duty shall be levied rateably, on the quantity of excisable article imported, exported, transported, collected or manufactured in or issued from a distillery brewery or warehouse;

Provided that duty may be levied:-

(a) on intoxicating drugs by an acreage rated levied on the cultivation of the hemp plant or by a rate charged on the quantity collected.

(b) On spirit or beer manufactured in any distillery established or any distillery or brewery licensed, under this Act in accordance with such scale of equivalents calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be as the State Government may prescribe.

(c) On tari, by a tax on each tree from which the tari is drawn;

Provided further that, where payment is made upon issue of an exciseable article for sale from a warehouse established or licensed under section 22(a) it shall be made -

(a) If the State Government by notification so directs, at the rate of duty which was in force at the date of import of that article; or

(b) In the absence of such direction by the State Government, at the rate of duty which is in force on that article on the date when it is issued from the warehouse.

S.33. Payment for grant of leases: - Instead of or in addition to any duty leviable under this chapter the State Government may accept payment of a sum in consideration of the lease of any right under section 27.

S.33-A. Saving for duties being levied at commencement of the Constitution:- (1) Until provision to the contrary is made by Parliament, the State Government may continue to levy any duty which it was lawfully levying immediately before the commencement of the Constitution under this Chapter as then in force.

(2) The duties to which this section applies are:-

(a) any duty on intoxicants which are not exciseable articles within the meaning of this Act; and

(b) any duty on exciseable article produced outside India and imported into Punjab/Haryana whether across a customs frontier as defined by the Central Government or not.

(3) Nothing in this section shall authorize the levy by the State Government of any duty which as between goods manufactured or produced in the State and similar goods not so manufactured or produced discriminates in favour of the former or which in the case of goods manufactured or produced outside the State discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

S.34. Fees for terms, conditions and form of, and duration of licences, permit and passes:-(1) Every licence, permit or pass granted under this Act shall be granted:-

- (a) on payment of such fees, if any.
- (b) Subject to such restrictions and on such conditions,
- (c) In such form and containing such particulars,
- (d) For such period,

as the Financial Commissioner may direct.

(2) Any authority granting a licence under this Act may require the licensee to give such security for the observance of the terms of his licence, or to make such deposit in view of security, as such authority may think fit.

S.58. Power of State Government to make Rules:

(1)....

(2) in particular and without prejudice to the generality of the foregoing provision, the State Government may make rules:-

(d) regulating the import, export, transport or possession of any intoxicant or Excise bottle and the transfer, price or use of any type or description of such bottle.

(e) regulating the period and localities for which and the persons or classes of persons to whom licenses, permits and passes for the vend by wholesale or by retail of any intoxicants may be granted and regulating the number of such licences which may be granted in any local area;

(f) prescribing the procedure to be followed and the matters to be ascertained before any licence is granted for the retail vend for consumption on the premises.

S.59. Powers of Financial Commissioner to make rules:- The Financial Commissioner may by notification make rules:-

(d) prescribing the scale of fees or the manner of fixing the fees, payable in respect of any licence, permit or pass or in respect of the storing of any intoxicant;

Apart from provisions of the Punjab Act, it would also be necessary to notice Sections 17 and 18 of the Abkari Act occurring in Chapter V dealing in "Duties, Taxes and Rentals" applicable in the State of Kerala which read thus:

"17. Duty on liquor or intoxicating drugs:- A duty of excise or luxury tax or both shall, if the Government so direct, be levied on all liquor and intoxicating drugs:

(a) permitted to be imported under Section 6; or

- (b) permitted to be exported under Section 7; or
- (c) permitted under Section 11 to be transported; or
- (d) manufactured under any licence granted under Section 12; or
- (e) manufactured at any distillery, brewery, winery or other manufactory established under Section 14; or
- (f) issued from a distillery, brewery, winery or other manufactory or warehouse licensed or established under Section 12 or Section 14; or
- (g) sold in any part of the State;

Provided that no duty or gallonage fee or vend fee or other taxes shall be levied under this Act on rectified spirit including absolute alcohol which is not intended to be used for the manufacture of potable liquor meant for human consumption.

Explanation:- For the purpose of this section and Section 18, the expression "duty of excise", with reference to liquor or intoxicating drugs, include countervailing duty on such goods manufactured or produced elsewhere in India and brought into the State.

18. How duty may be imposed:- (1) Such duty of excise may be levied:

- (a) in the case of spirits or beer, either on the quantity produced in or passed out of a distillery, brewery or warehouse licensed or established under Section 12 or Section 14 as the case may be or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort or on the value of the liquor as the case may be, as the Government may prescribe;
- (b) in the case of intoxicating drugs on the quantity produced or manufactured or issued from a warehouse licensed or established under Section 14;
- (c) xxx
- (d) xxx
- (e) in the case of toddy, or spirits manufactured from toddy, in the form of a tax on each tree from which toddy is drawn, to be paid in such instalments and for such period as the Government may direct; or
- (f) by import, export or transport duties assessed in such manner as the Government may direct; or

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(2) The luxury tax on liquor or intoxicating drugs shall be levied:-

- (i) in the case of any liquor in the form of a fee for licence for the sale of the liquor and in the form of a gallonage fee or vending fee, or in any one of such forms; and;

(ii) in the case of an intoxicating drug, in the form of a fee for licence for the sale of the intoxicating drug.

(3) The duty of excise under sub-section (1) and the luxury tax under sub-section (2) shall be levied at such rates as may be fixed by the Government, from time to time, by notification in the Gazette, not exceeding the rates specified below:-

(1)
Duty of excise
Maximum rates

(i)
Duty of excise on liquors
(Indian made)
Rs. 200 per proof litre or an amount equal to 200 per cent of the value of the liquor.

(ii)
Duty of excise on intoxicating drugs
Rs. 1 per gram or
Rs. 933.10 per seer.

(iii)
Duty of excise in the form of tax on trees tapped for toddy
Rs. 50 per tree per half-year or part thereof

(2)
Luxury tax:

(a)
When levied in the form of a fee for licence for sale of foreign liquor -

(i)
For licence for sale of foreign liquor in wholesale
Rs. 15000 for a year or part thereof

(ii)
For licence for sale of foreign liquor in hotels or restaurants
Rs. 12000 for a year or part thereof

(iii)
For licence for sale of medicated wines
Rs. 1000 for a year or part thereof

(iv)
For licence for sale of foreign liquor in non-proprietary clubs to members

Rs. 1500 for a year or part thereof

(v)

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(b)

When levied in the form of gallonage fee

Rs. 10 per bulk litre or

Rs. 45.46 per bulk gallon

(c)

When levied in the form of a fee for licence for the sale of foreign liquor (Foreign made)

(i)

In wholesale

Rs. 25,00,000 (Rupees

Twenty Five lakhs) for a year or part thereof

(ii)

In retail

Rs. 10,00,000 (Rupees Ten

lakhs) for a year or part thereof

(iii)

In hotels or restaurants

Rs. 25,00,000 (Rupees

Twenty Five lakhs)for a year or part thereof

(iv)

In non-proprietary clubs to its members

Rs. 10,00,000 (Rupees Ten lakhs) for a year or part thereof

(v)

In Seamen's and Marine Officer's clubs to its members

Rs. 10,00,000 (Rupees Ten lakhs) for a year or part thereof

(d)

When levied in the form of gallonage fee

(i)

Foreign Liquor (Foreign made) other than beer and wine

Rs. 200 (Rupees Two hundred) per bulk litre

(ii)

For foreign made beer and wine

Rs. 25 (Rupees Twenty Five) per bulk litre

Provided that where there is a difference of duty of excise or luxury tax as between two licence periods, such difference may be collected in respect of all stocks of Indian made foreign liquor

or intoxicating drugs held by licensees at the close of the former period.

Note: The expression 'Foreign Liquor (Foreign made) means any liquor produced, manufactured, or blended and compounded abroad and imported into India by land, air or sea.

Explanation:- Where any liquor is chargeable with duty at a rate depending on the value of the liquor, such value shall be the value at which the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited purchases such liquor from the suppliers and in case any such liquor is not purchased by Kerala State Beverages (Manufacturing and Marketing) Corporation limited such value shall be the value fixed by the Commissioner."

Provision to grant licence is contained in Chapter VI of the Abkari Act, Section 24 whereof is as under:

"24. Forms and conditions of licenses, etc:-Every license or permit granted under this Act shall be granted:-

- (a) on payment of such fees, if any;
- (b) for such period;
- (c) subject to such restrictions and on such conditions; and
- (d) shall be in such form and contain particulars - as the Government may direct either generally, or in any particular instance in this behalf."

The State of Kerala raised a contention that the imposition of levy is referable to Entry 66 of List II of the Seventh Schedule to the Constitution. An additional affidavit was filed before the Kerala High Court wherein it was averred that such a levy has been imposed also by way of a regulatory fee. No plea whatsoever has been raised that such a levy is towards a price or a part of price for parting with exclusive privilege. The High Court accepted plea of the State that the levy is by way of regulatory fee in relation whereto doctrine of 'quid pro quo' has no application.

Before the High Court of Punjab and Haryana although a plea was raised that the impost was by way of a price for parting with the exclusive privilege but in its impugned judgment the High Court rejected the same having regard to the provisions contained in Section 33A of the Punjab Act.

The Excise Acts referred to hereinbefore seek to regulate trade and business in liquor. They have their origin before coming into force of the Government of India Act, 1935 or the Constitution and, thus, being pre-constitutional laws, validity thereof and/or any statutory impost levied thereunder would be subject to Articles 372 and 305 of the Constitution vis-à-vis Article 13 thereof. The statutory rights and obligations created by reason of the aforementioned Acts, after coming into force of the Constitution, would, therefore, be subject to the extent saved by the Constitution itself and, thus, the provisions thereof, the rules made thereunder and actions taken must conform to the limitations imposed thereby. The said Acts, therefore, must be construed keeping in view Entries 8 and 51 of List II of the Seventh Schedule to the Constitution. Before dealing with the matter further, it may be noticed that in the instant case I am not concerned with validity or the interpretation of a pre-constitutional law but a post-constitutional one. The impugned levy, therefore, must be justified having regard to the relevant entries made in List II of the Seventh Schedule to the Constitution. Section 6 of the Abkari Act permits import of liquor on payment of duties, taxes, fees and such other sums as are due to the Government and Section 7 thereof provides for export. Section 17 provides for levy of a duty of excise or luxury tax or both on liquor permitted to be

imported under Section 6 thereof. Section 18 deals with the manner in which such duty should be imposed. Sections 31 and 32 of the Punjab Act are in pari materia with Section 17 and Section 18 respectively of the Abkari Act.

A question arises as to what is "excise duty". An excise duty can be imposed on manufacturer of goods only in terms of statute made by the Parliament. An exception thereto has been made in the case of liquor in terms whereof the State Legislature has been empowered to levy excise duty by reason of Entries 8 and 51 of List II of the Seventh Schedule to the Constitution which read thus:

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

Entry 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."

Legislative competence of the State to levy any fee is, therefore, limited to levy of countervailing duty. In other words, any levy on import can not exceed the excise duty levied on the manufacturers of the State. The State, therefore, cannot levy any duty in addition to the countervailing duty. The notification refers to excise duty and countervailing duty, which in terms of Section 3(6-B) of the Punjab Act mean any such excise duty or countervailing duty as the case may be, as is mentioned in Entry 51 of List II of the Seventh Schedule to the Constitution. The State, therefore, cannot levy any import fee over and above the excise duty/countervailing duty, having regard to the said definition. Sections 17 and 18 of the Abkari Act, which are in pari materia with Sections 31 and 32 of the Punjab Act, are referable to Entry 51 alone. As Entry 51 puts an embargo on the State to make a legislation, there cannot be any gainsaying that any levy in terms of Sections 17 and 18 of the Abkari Act would be subject thereto.

Can the levy be said to be valid if thereby regulatory licensee fees have been imposed? The answer to the said question must be rendered in the negative.

Clause (28) of Article 366 reads as under:

"taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;

A regulatory impost would, thus, come within the purview of the tax. A fee in terms of the constitutional schemes may be either a regulatory licensee fees or a fee in lieu of rendition of service. When no service is rendered a fee can be justified only by way of licensee fees. Such impost, however, would be a tax and, thus, would clearly be referable to Entry 51 of List II to the Constitution and not Entry 66 thereof. (See Liberty Cinema (supra), D.C. Gouse & Co. (supra) and Hindustan Times & Ors., Vs. State of U.P. and Anr., JT 2002 (9) SC 317).

Indisputably, the State while imposing import duty has exercised its power under the statute. The impugned notifications in no uncertain terms and unequivocally refer to the source of power therefor. The functions of the State to impose a fee or tax in terms of the provisions of the statute is a legislative function. Such legislative function must be attributed to the source of the State's power in terms of Entry 51 of List II to the Constitution and not otherwise. If the legislations in question are found to be unreasonable in nature or fraud on the Constitution, would it still be permissible for the State to turn round and contend that such imposts are not being levied in exercise of its taxation power but attributable to its

regulatory power? In other words, can the State turn round and contend that what it sought to do was not in terms of legislative function but merely by way of executive action? Answer to the said question again must be rendered in the negative. It is a well-settled principle of law that a thing which cannot be done directly cannot be done indirectly. (See Priyanka Overseas Pvt. Ltd. and Another Vs. Union of India and Others, 1991 Supp (1) SCC 102). In relation to an administrative act, it is well-settled that a statutory authority is not permitted to support its decision on a ground d'hors the ground stated in the order. (See Commissioner of Police, Bombay Vs. Gordhandas Bhanji, AIR 1952 SC 16 and Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851). On the same analogy, a legislation which is found to be fraud on the Constitution, cannot, inter alia, be upheld on any other ground. Entry 8 of List II of the Seventh Schedule to the Constitution does not permit the State to levy a fee on import of liquor. It deals only with production, manufacture, possession, transport, purchase and sale of intoxicating liquors and nothing else. Entry 8 of List II, thus, does not speak of import or export. Its purpose is to regulate and not impose any statutory impost. The State in exercise of its delegated powers cannot do what would constitutionally be impermissible.

A subsidiary question which arises for consideration is as to whether the State of Punjab, having regard to Section 33A of the Punjab Act, could levy such duty. In Sub-Section (1) of Section 33A provision has been made permitting the State to continue to levy any duty which it had lawfully been levying immediately before the commencement of the Constitution. The said provision is in tune with Article 305 of the Constitution, therefore, the same calls for a strict construction. Sub-section (3) of Section 33A is couched in negative language by reason whereof power of the State to levy any duty has been taken away in the event thereby any discrimination is made in favour of goods manufactured or produced in the State and similar goods manufactured or produced in another locality. Clearly such a provision is in consonance with Article 304 of the Constitution. If by reason of a statute an embargo has been placed on the State's power to levy any fee, it is beyond any cavil of doubt that such a levy cannot be held to be justified by reason of an executive action or otherwise.

It is trite that even a term of the contract cannot be in violation of an express provision contained in a statute. By reason of provisions of the Abkari Act or the Punjab Act, no power has been conferred upon the State to impose any import fee over and above the excise duty/countervailing duty. It is not disputed that such countervailing duty has been levied and the licensees pay the same. The power to levy fee and the power to grant licences, permits and passes occur in different chapters of the Acts. The powers under different chapters are required to be exercised for different purposes. One is legislative in character and the other refers to executive action. Furthermore, under the Punjab Act fees for grant of licences, permits and passes are required to be paid on the terms as the Financial Commissioner may direct. Having regard to the fact that the Financial Commissioner is the statutory authority in relation thereto, the State cannot be said to have any jurisdiction thereover, particularly, in the matter of levy of import fee which clearly is referable to Chapter V of the Punjab Act and has nothing to do with grant of licence occurring in Chapter VI.

The matter may be considered from another angle. Having regard to Article 265 of the Constitution a tax must be imposed by a statute. Even such impost is impermissible by any bye-law or rule. (See Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., (1970) 2 SCC 467; A Venkata Subba Rao Vs. State of Andhra Pradesh, (1965) 2 SCR 577 and Attorney General Vs. Wilts United Dairies (1922) 91 Law Journal, KB 897.

In Synthetics and Chemicals Limited & Ors., Vs. State of UP and Others (1990) 1 SCC 109 at page 158, a Seven-Judge Bench of this Court has equated excise duty with the price for privileges. In the matter of interpretation of Constitution, the said decision has been referred to with approval in Welfare Assn. A.R.P., Maharashtra & Anr. Vs. Ranjit P. Gohil & Ors. [JT 2003 (2) SC 335]. In the said seven Judge Bench decision, this Court observed thus:

"On an analysis of the various Abkari Acts and Excise Acts, it appears that various provinces/States reserve to themselves in their respective States the right to transfer exclusive or other privileges only in respect of manufacture and sale of alcohol and not in respect of possession and use. Not all but some of the States have provided such reservation in their favour. The price charged as a consideration for the grant of exclusive and other privileges was generally regarded as an excise duty. In other words, excise duty and price for privileges were regarded as one and the same thing. So-called privilege was reserved by the State mostly in respect of country liquor and not foreign liquor which included denatured spirit."

In view of the foregoing discussions, I am of the opinion that the impugned levy cannot be sustained.

Re: Questions (ii) and (iii)

What is Res-Extra-Commercium:

In Black's Law Dictionary, Fifth Edition, 'Res' has been defined as follows:

"By 'res', according to the modern civilians, is meant everything that may form an object of rights, in opposition to 'persona,' which is regarded as a subject of rights. 'Res', therefore, in its general meaning, comprises actions of all kinds; while in its restricted sense it comprehends every object of right, except actions."

In Trayner's Latin Maxims, Fourth Edition, 'Extra Commercium' is stated as "Beyond Commerce. This is said of things which cannot be bought or sold, such as public roads, rivers, titles of honour, etc."

In Words and Phrases, Volume 15 A, it has been stated:

"Property once dedicated to public use is 'extra commercia', and inalienable by seizure and sale under execution against a municipal corporation, unless it is made affirmatively and clearly to appear that its use had been abandoned or lost by nonuser."

In Bouvier's Law Dictionary, Volume I, Third Edition, at page 531, it is stated:

"It has been frequently said by the Supreme Court that commerce includes intercourse, though usually the term is qualified as 'commercial intercourse'; Gibbons v. Ogden, 9 Wheat. (U.S.) 1, 6 L.Ed 23; U.S. v. E.C. Knight Co., 156 U.S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Welton v. Missouri, 91 U.S. 275, 280, 23 L.Ed. 347; Pensacola Telegraph Co. v. Western Telegraph Co., 96 U.S. 1, 9, 24 L.Ed. 708; Mobile County v. Kimball, 102 U.S. 691, 702, 26 L.Ed. 238 (where the phrase is 'intercourse and traffic'); Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211, 241, 20 Sup. Ct. 96, 44 L.Ed. 136; Lindsay & P. Co. V. Mullen 176 U.S. 126, 20 Sup. Ct. 325, 44 L.Ed.400; Interstate Commerce Commission v. Brimson, 154 U.S. 447, 470, 14 Sup Ct. 1125, 38 L.Ed. 1047; Lottery Case, 188 U.S. 321, 346, 23 Sup. Ct. 321, 47 L.Ed.

492. The first expression of this was by Marshall, C.J., in *Gibbons v. Ogden*, 9 Wheat (U.S.) 1, 6 L.Ed. 23; quoted by Fuller, C.J., in *U.S. v. Knight Co.*, 156 U.S. 1, 15 Sup. Ct. 249, 39 L.Ed. 325; and characterized by White, J., as a "luminous definition" in *Northern Securities Co. v. U.S.*, 193 U.S. 197, 24 Sup. Ct. 436, 48 L.Ed. 679, to the effect that commerce is something more than traffic; "It is intercourse; it describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." This has been practically, if not literally, quoted in all the cases cited. There is nothing in the decisions to define or limit so broad a term as intercourse, except the word commercial, usually attached to it. As it is hardly likely that the courts intended to say that commerce is intercourse in the sense in which it is defined "communication between persons or places"; Cent. Dict.: it is probable that the word was not intended to be used to express more than such intercourse as is connected with traffic and transportation with foreign countries or between the States."

Dealing in liquor or for that matter in lottery, tobacco is not prohibited under the Constitution. On the other hand, in the constitutional schemes itself Parliament or the State Legislature has been conferred power to regulate the said trade like any other trade. In fact India has entered into trade agreements to deal in liquor with other sovereign countries. India has entered into International treaties in the matter of foreign investment in liquor. Trade in liquor finds place in World Trade Organization (WTO) and General Agreement on Trade and Tariff (GATT). In terms of the WTO and GATT guidelines have been laid down as regards import and export of potable liquor. India, as a signatory to WTO and GATT, is expected to follow the said guidelines. It is expected to remove all trade barriers subject to the other provisions contained therein. It is also supposed to levy taxes/ countervailing duties in terms of such international treaties. No constitutional provision or statute prohibits trade in liquor. Article 47 of the Constitution empowers the State to impose prohibition. Once a prohibition is imposed by any State in exercise of said powers, indisputably no person will have any right to deal in potable liquor.

Applicability of *Res-extra commercium* is a judge made law. Constitution does not provide for it. Even if Entries 8, 51 and 54 of List II, on the other hand, lead to the conclusion that the State has the legislative power to make regulatory enactment in the spheres provided for them, the State indisputably may exercise its right to prohibit dealings in liquor either wholly or partially but if it allows trade and business in liquor by parting with its exclusive privilege; a presumption will arise unless contrary intention is shown in the statute or licence granted therefor that it has not retained unto itself a right to deal with a part of the trade itself or through its agency. As has been noticed in the Kerala matter the State has given the monopoly to trade in liquor in favour of the Kerala State Beverages Corporation. Nowhere it is stated either by way of counter-affidavit or under the statute that the State has reserved unto itself any right in the matter relating to carrying on trade or business in potable liquor. As soon as a licence is granted upon receipt of a fee fixed by it, the State would be presumed to part with its entire privilege. To say that while exercising its regulatory power for the purpose of controlling the trade and business in potable liquor, it has reserved unto itself a part of its exclusive privilege would not be correct unless the same is explicitly pleaded and proved.

Regulatory measures in the matter of trade and business in potable liquor have been taken by reason of a statute. All regulations on the trade, thus, must be governed by the statutes operating in the field and not by way of executive action. The provisions of the statute or the contracts made

thereunder must scrupulously be followed by all concerned as they are bound by the same. When a legislation referable to Entries 8, 51 and 66 etc. had occupied the field, the State, in absence of any provision contained in the statute, cannot turn round and contend that it will exercise its power of exclusive privilege even though it had granted licence in terms of the statute. Having regard to the constitutional scheme the power of the State to undertake trade and business is referable to Article 298 of the Constitution. The duties, functions and responsibilities of a Government in a democracy are different from monarchism. Rights and privileges of a monarch cannot be equated with an elected Government in a democratic set-up. If the power of the Government in other words to deal in trade or commerce, be it liquor or any other commodity, can only be traced to Article 298 of the Constitution, it goes without saying that the same would be subject to all constitutional limitations applicable in relation thereto. The State while exercising its constitutional power under Article 298 of the Constitution cannot itself be an extra constitutional authority so as to violate the constitutional provisions. It like any other trader must confine itself within the four corners of the statutes governing the field which are enacted in terms of one entry or the other made in any of the three lists to the Seventh Schedule of the Constitution.

A State, therefore, may be entitled to either completely prohibit a trade or business in liquor and create monopoly either in itself or in any other agency and furthermore it can for the purpose of selling the licence adopt any mode with a view to maximize its revenue but while doing so it must, having regard to a large number of decisions of this Court, not act arbitrarily. The State while carrying on business by way of parting with its privilege or distribution of largess must conform to the equality clause enshrined in Article 14 of the Constitution. It has been so held in *Nandlal Jaiswal (supra)* at pages 604-605 in the following terms:

"But, before we do so, we may at this stage conveniently refer to a contention of a preliminary nature advanced on behalf of the State Government and respondents 5 to 11 against the applicability of Article 14 in a case dealing with the grant of liquor licences. The contention was that trade or business in liquor is so inherently pernicious that no one can claim any fundamental right in respect of it and Article 14 cannot therefore be invoked by the petitioners. Now, it is true, and it is well settled by several decisions of this Court including the decision in *Har Shanker v. Deputy Excise & Taxation Commissioner [(1975) 3 SCR 254 : (1975) 1 SCC 737 : AIR 1975 SC 1121]* that there is no fundamental right in a citizen to carry on trade or business in liquor. The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and respondents 5 to 11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that

article."

Privilege, thus, can be claimed by a State in a 'no right' situation, namely, when citizen is not permitted to carry on trade. But once the State takes a decision to part with its privilege, it cannot make any discrimination whatsoever. Dealing in liquor by the persons in whose favour licences have been granted in terms of the statutory enactments derive a right therefor which cannot be said to be "Res-Extra Commercium"

Now comes the question as to how far and to what extent, if any, the fundamental and other rights of a citizen could be available in the matter of trade in potable liquor. Article 19(1)(g) guarantees that all citizens shall have the right to practice any profession or to carry on any occupation, trade or business. However, in terms of Article 19(6) this right can be restricted by a statute imposing reasonable restrictions. A combined reading of clauses (1) and (6) of Article 19 makes it clear that a citizen has a fundamental right to carry on any trade or business and the State can make a law imposing reasonable restrictions on the said right in the interest of the general public. It is, therefore, obvious that unless dealing in liquor is excluded from 'trade or business', a citizen has a fundamental right to deal in that commodity.

This right was recognized in the *The State of Bombay and Another Vs. F.N. Balsara* [(1951) SCR 682] where Fazl Ali, J., observed at page 717 that "we hold that to the extent to which the prohibition Act prevents the possession, use and consumption of non-beverages and medicinal and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Art. 19(1)(f) of the Constitution even if they may be within the legislative competence of the provincial legislature,"

But in *Cooverjee B. Bharucha* (supra) a Constitution Bench of this Court held that there is no inherent right in a citizen to sell intoxicating liquors. This decision was rendered relying on *P.Crowley, Chief of Police of the City and County of San Francisco, California Vs. Henry Christenses* [(1890) 34 Law. Ed.620(A)].

However, this exclusive privilege theory was rejected by a Constitution Bench of this Court in *Saghir Ahmad & Anr. Vs. State of U.P. & Ors.* [AIR 1954 SC 728] stating that this doctrine has no place under Indian Constitution. It was observed that establishment of a monopoly does not create a reasonable restriction. The observations made in *Cooverjee B. Bharucha* (supra) stating that the general observations occurring in the judgment have to be taken with reference to the facts of that case were duly explained. It was reiterated that the State has a right to prohibit trade which is illegal or immoral or injurious to the health and welfare of the public by taking recourse to regulating legislation contemplated by Article 19(6).

The fundamental right to trade in intoxicant liquor was recognized in *State of Kerala & Ors. Vs. P.J. Joseph* [AIR 1958 SC 296]. There the Government of Travancore and Cochin imposed 20% commission for sanction of extra quota of Foreign Liquor to wholesale licencees. The said impost was challenged before the High Court of Judicature for Travancore Cochin, which was struck down by said High Court. On Appeal by State this Court while upholding the judgment of High Court observed "an impost not authorised by law cannot possibly be regarded as a reasonable restriction and must, therefore, always infringe the right of the respondent to carry on his business which is guaranteed to him by Article 19(1)(g) of the Constitution." It was held that an impost in terms of an executive order having no authority of law would be illegal imposition.

This principle has been affirmed by a Constitution Bench of this Court in *Krishna Kumar Narula Vs. State of Jammu and Kashmir & Ors.*, 1967(3) SCR 50. After discussing all previous decisions, Subba Rao, C.J., held that "a scrutiny of these decisions does not support the contention that the court held that dealing in liquor was not business or trade. They were only considering the provisions of the various Acts which conferred a restricted right to do business. None of them held that a right to do business in liquor was not a fundamental right". It was observed that "If the activity of a dealer, say, in ghee is business; then how does it cease to be business if it is in liquor. Liquor can be manufactured, brought or sold like any other commodity. It is consumed throughout the World though some countries

restrict or prohibit the same on economic or moral grounds". It was further held that "dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make a law imposing reasonable restrictions on the said right, in public interests."

In R.M.D. Chamarbaugwala (supra) S.R. Das, C.J. observed that the American Congress have no power to control gambling and like spurious transactions under its power over 'inter-State commerce' if they were not held to be 'commerce'.

Even in Har Shankar (supra) Chandrachud, J. (as the learned Chief Justice then was) held that the right to trade in liquor is not absolute and it is to be treated as a separate class. But therein also it has not been held that despite fulfilling the regulatory measures, the trade would be illegal. The point that arose for consideration therein was the State's power to prohibit trade. In that case, this Court had no occasion to consider the question involved in the present one.

A large number of decisions, as noticed hereinbefore, have been cited at the Bar for the proposition that by reason of grant of licence, the licensee is merely granted a permissive privilege subject to the degree of regulatory control as may be deemed necessary and appropriate having regard to the fact that nobody has any constitutional right to trade in liquor in view of its inherently pernicious and noxious nature. I may deal with some of the decisions cited at the bar a little later but the principles which emerge from the various decisions of this Court and particularly by Constitution Benches of this Court are:

(i) Trade in liquor is against public morality and thus res extra commercium. No citizen has any Fundamental Right to carry on business in liquor. [See R.M.D. Chamarbaugwala (supra)]. As there does not exist any right to carry on trade, Article 301 shall not apply.

(ii) Right to trade in liquor is a Fundamental Right within the meaning of Article 19(1)(g) of the Constitution subject, of course, to the reasonable restrictions in terms of Clause (6) of Article 19. [See Krishna Kumar Narula (supra)]

(iii) Right of the State to deal exclusively in liquor is its own privilege. It does not matter as to whether such right is restricted while parting with privilege by reason of a statute in terms of Article 19(6) of the Constitution.

(iv) (a) The equality clause even in the matter of carrying on trade is not available. The right of the State to part with its privilege being a superior right, the inferior right of a citizen to carry on trade, shall give way to State's superior right.

(b) The State while carrying on any trade or business itself cannot make any discrimination and its acts must be fair and reasonable. [See Nandlal Jaiswal (supra)]

(v) The State's right is absolute when a complete prohibition is imposed and at that stage the State can part with its exclusive privilege in any manner it likes and it is also entitled to take any measures for having the best price. [See Har Shankar (supra)].

In Khoday Distilleries Ltd. (supra) at pages 608-609, a Constitution Bench referred to some of the decisions as referred to hereinbefore and summed up its findings [para 60(a)(b)(e)(f)(g)]:

"(a) The rights protected by art. 19(1) are not absolute but qualified. The qualifications are stated in cls. (2) to (6) of art. 19. The fundamental rights guaranteed in art. 19(1)(a) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by cls.

(2) to (6) of art. 19 of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently

vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., res extra commercium, (outside commerce). There cannot be business in crime.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under art. 19(6) or even otherwise.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are res commercium. The restrictions and limitations on the trade or business in potable liquor can again be both under art. 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business."

The decisions of this Court including those rendered by the Constitution Benches struck different notes. They at times stand poles apart. Inconsistencies and contradictions in the said decisions are galore. Some latter Constitution Bench decisions although took note of the earlier Constitution Bench decisions, but only sought to distinguish the same and not referred the matter to a larger Bench for consideration of correctness of one view or the other. I may, therefore, proceed on the premise that some of the principles in Khoday (supra) are correct, although one may have strong reservations even in this behalf. In Khoday (supra) expressly or by necessary implication fundamental right to deal in any goods is accepted. Only exception which was made are those commodities, business of which is inherently noxious and pernicious and is condemned by the civilized society. It has sought to lay down the law that there cannot be a business in crime.

Dealing in a commodity which is governed by a statute cannot be said to be inherently noxious and pernicious. A society cannot condemn a business nor there exists a presumption in this behalf if such business is permitted to be carried out under statutory enactments made by the legislature competent therefor. The legislature being the final arbiter as to the morality or otherwise of the civilized society has also to state as to business in which article (s) would be criminal in nature. The society will have no say in the matter. The society might have a say in the matter which could have been considered in a Court of law only under common law right and not when the rights and obligations flow out of statutes operating in the field. Health, safety and welfare of the general public may again be a matter for the legislature to define and prohibit or regulate by legislative enactments. Regulatory statutes are enacted in conformity with clause (6) of Article 19 of the Constitution to deal with those trades also which are

inherently noxious and pernicious in nature and furthermore thereby sufficient measures are to be taken in relation to health, safety and welfare of the general public. The courts while interpreting a statute would not take recourse to such interpretation whereby a person can be said to have committed a crime although the same is not a crime in terms of the statutory enactment. Whether dealing in a commodity by a person constitutes a crime or not can only be subject matter of a statutory enactment.

The Excise Acts enacted by the States mandate the licensees to carry on their activities in terms of the conditions of licence and the provisions contained therein. So long as the business activities of the licensees are within the four-corners of the conditions of the licence and the provisions of the Licensing Act, they, without any obstruction whatsoever, are entitled to carry on their trade, business or commerce. They would be liable to be proceeded against for commission of an offence only in the event they violate the statutory provisions wherefor the statute itself provides for imposition of penalty.

Thus, when a person has been granted a licence strictly in conformity with the Excise Act to carry on his business activities in terms of the statute operating in the field, the same can neither be termed as pernicious, obnoxious and injurious to health, safety and welfare of the general public. No public interest can be inferred by any court of law by going beyond the statutory provisions. Even monopoly of the State either in itself or in any agency created by it for manufacture, possession, sale and distribution of liquor can be created only by a statute which must conform to the provisions of clause (6) of Article 19 of the Constitution, i.e., by making a valid law, by way of a regulatory legislative enactment.

From the analysis of decisions rendered by this Court in Cooverjee B. Bharucha, R.M.D. Chambarbaugwala, Har Shankar or Khoday Distilleries, it will appear that a person cannot claim any right to deal in any obnoxious substance on the ground of public morality. The State, therefore, is entitled to completely prohibit any trade or commerce in potable liquor. Such prohibition, however, has not been imposed. Once a licence is granted to carry on any trade or business can it be said that a person is committing a crime in carrying on business in liquor although he strictly complies with the terms and conditions of licence and the provisions of the statute operating in the field? If the answer to the said question is to be rendered in affirmative it will create havoc and lead to anarchy and judicial vagaries. When it is not a crime to carry on such business having regard to the fact that a person has been permitted to do so by the State in compliance with the provisions of the existing laws, indisputably he acquires a right to carry on business. Even in respect to trade in food articles or other essential commodities either complete prohibition or restrictions are imposed in the matter of carrying on any trade or business, except in terms of a licence granted in that behalf by the authorities specified in that behalf. The distinction between a trade or business being carried out legally or illegally having regard to the restrictions imposed by a statute would have, therefore, to be judged by the fact as to whether such business is being carried out in compliance of the provisions of the statute(s) operating in the field or not. In other words, so long it is not made impermissible to carry on such business by reason of a statute, no crime can be said to have been committed in relation thereto. The doctrine of *res extra commercium*, thus, would not be attracted, whence a person carries on business under a licence granted in terms of the provisions of the regulatory statutes.

No case and in particular the decisions relied upon by the learned counsel appearing on behalf of the State of Punjab and that of Kerala had evolved a principle that despite paying a large amount of licence fees and despite fulfillment of terms and conditions of licence and other statutory provisions, the trade or business carried out by the licensee shall be at an eternal peril, which may at any point of time be determined or a new tax imposed or they be proceeded against at the whims or caprice of the executive wing of the State. In our constitutional scheme such a situation is unthinkable. The country is governed by rule of law and despite existence of a valid legislation operating in the field, executive whims or caprice cannot be permitted to have any role to play. Validity of a tax imposed by the State Legislature, thus, must be determined on the constitutional anvil of

the legislative competence and not on any other basis. The decisions of this Court which had no occasion to consider these aspects of the matter can be of no assistance and would not constitute binding precedents. [See *Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. and Others - (2003) 2 SCC 111*]

The right of the State to carry on trade or business under Article 298 of the Constitution would be subject to the same constitutional limitations in the matter of carrying on trade or business in liquor as in other cases. The distinction being only that the State has a monopoly to do so. Once the State does not exercise the said right and considers it expedient to allow the citizens to carry on the business or trade, it cannot be said that the licensees do not derive any right whatsoever. Even when the State exercises such right by creating a monopoly in itself, it would be subject to the same constitutional limitations as envisaged, inter alia, under Articles 14 and 301 of the Constitution. Articles 14 and 301 of the Constitution protect from the maladies of discrimination. Such discrimination may be in between persons and persons, persons and State and State and State.

Can a State which exercises its right to create monopoly, prevent another State to export or import its product? If in between two States such discriminations are not possible, a discrimination inter se between licensees of two States would also not be permissible. Such discrimination would also not be permissible between a State and a person carrying on similar trade or commerce in one State vis-à-vis a person or State carrying on business in another State.

Once the regulations restricting the right to carry on business in potable liquor is attributed to reasonable restrictions and public interest clause, contained in clause (6) of Article 19 of the Constitution, the fundamental right to carry on trade under Article 19 is conceded. Once such a right is conceded, it cannot be said that although a person has a Fundamental Right to carry on trade or business for the purpose of Article 19(1)(g), subject to imposition of reasonable restrictions by a law made in terms of clause (6) of Article 19, he does not have such a right in terms of Article 301 of the Constitution or for that matter Article 14 thereof. Articles 303 and 304 of the Constitution also provide for imposition of restrictions and thus even a freedom guaranteed to a person under Article 301 is not an absolute one, but subject to the constitutional limitations provided therefor. Article 301 confers freedom but not a licence. The protection from discrimination as envisaged in *Khoday Distilleries (supra)* [para 60(g)] would not only operate against the State which is the licensor but having regard to the constitutional goals to be achieved by the commerce clause contained in Article 301, must be extended to another State which seeks to impose restrictions on import.

Let me raise a hypothetical question. If some States intend to exercise their right/ privilege/ monopoly in the trade in potable liquor - can such imposition of tax be still justified? Answer thereto must be rendered in the negative. Now the question is with regard to the applicability of Article 301 of the Constitution in the matter of trade, commerce and intercourse in potable liquor.

The preamble to the Constitution speaks of unity and integrity of India in terms whereof India is required to be treated country as a whole. This theory of unity and integrity of India may have to be found out while considering the economic integrity of the country vis-à-vis the economic barriers which may be put by the States. For the purpose of considering the question as regards the interpretation of Article 301, one has to notice the sources thereof. It is now beyond any cavil of doubt that except a part of Part XIII of the Constitution the major part of the concept thereof was borrowed from Sections 92 and 99 of the Australian Constitution as also Section 297 of the Government of India Act, 1935.

Clause 17 of the draft as introduced before the Drafting Committee by Sir. B.N. Rau in October, 1947 is in the following terms:

"Subject to the provisions of any Federal Law, trade, commerce and intercourse among the units shall, if between the citizens of the Federation, be free:

Provided that nothing in this section shall prevent any unit from imposing on goods imported from other units any tax to which similar goods manufactured or produced in that unit are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced:

Provided further that no preference shall be given by any regulation of trade, commerce or revenue to one unit over another:

Provided also that nothing in this section shall preclude the Federal Parliament from imposing by Act restrictions on the freedom of trade, commerce and intercourse among the units in the interests of public order, morality or health or in cases of emergency."

The marginal note appended to Sir B.N. Rau's clause 17 to the effect "Freedom of trade, commerce and intercourse among the units" is clearly suggestive of the fact that Section 92 of the Australian Constitution provided for a comparable provision vis-a-vis other Constitutions. It is also beneficial to notice that Sections 92 and 99 of the Australian Constitution confer different rights and the same are independent of each other. Trade, commerce and intercourse as noticed hereinbefore are of wide amplitude. The term "commerce" is wider than trade.

In United States Vs. Patterson [55 Fed.Rep. 605 at 639], it is held:

"The word "commerce" is undoubtedly, in its usual sense, a larger word than "trade", in its usual sense. Sometimes "commerce" is used to embrace less than "trade", and sometimes "trade" is used to embrace as much as "commerce".

An inhibition by Article 301 has been provided to the effect that the Legislature shall not interfere in the commerce between the State and State as also to the effect that the Legislature of a State shall not give any preference to one State over the other. Article 301 of the Constitution in no uncertain terms provides for a freedom in the matter of trade, commerce and intercourse. Such trade, commerce and intercourse are inter-State as also intra-State. By reason of Part XIII of the Constitution, the Constitution makers sought to evolve a high policy. On a comparison made between Section 297 of the Government of India Act, 1935 with Part XIII of the Constitution, it will be found that the latter is wider than the former. The said part of the Constitution is a self-contained part. Several improvements made in Part XIII of the Constitution as compared to Section 297 are worth taking note of. By reason of the said provisions, the entire country has been considered to be one economic unit. It now embraces within its fold both 'commerce and trade' and not 'trade' alone. 'Commerce' was provided for in Entry 27 of List II only under the 1935 Act. Part XIII, however, refers to the relevant entries contained in all the Lists of Seventh Schedule to the Constitution. The limitation of power as regards legislative competence of the State and the Parliament having regard to clause 2 of Article 303 and sub-clauses (a) and (b) of Clause (1) of Article 304 is clear pointer of the new dimension given to Article 301 of the Constitution. Even if a comparison is made between the terminologies used in Article 301 on the one hand and Articles 19 and 298 on the other, it would be evident that whereas in the former 'trade, commerce and intercourse' have been used but in the latter only the words 'trade or business' have been used. Such trade, commerce and intercourse is in relation to entire territory of India whether inter-State or intra-State unlike Section 297 of the Government of India Act. Article 301 makes a declaration that 'trade, commerce and intercourse throughout the territory of India shall be free', which in turn must mean that it shall be free from control of Executive and Legislature. I may, however,

hasten to add that by reason thereof although a liberty has been granted but such liberty cannot be equated with a licence inasmuch it would be subject to restrictions. Articles 302 and 303 categorically state that there shall be no discrimination between one State and the other but restrictions inhere in such liberty as would appear from clause 2 of Article 303 of Constitution, if a situation stipulated therein arises for consideration. In other words, discrimination is at the heart of this Chapter. By reason of the said provision, the State is prohibited from imposing a tax without making any discrimination whatsoever so as to impede free flow of inter-State or intra-State trade. The State, however, is entitled to impose reasonable restrictions as also levy tax in public interest. But the same indisputably would be subject to the conditions laid down in Articles 303 and 304 of the Constitution.

The precise question which arises for consideration is as to whether a trade in liquor would come within the purview of trade, commerce and intercourse, within the meaning of Article 301 of the Constitution. In the earlier part of this judgment I have considered the difference between a trade to which a citizen has an absolute right and a trade where no such absolute right exists being dangerous or obnoxious; but once such trade is permitted in terms of a regulatory statute, the same cannot be said to be per se illegal. Earlier I have considered the difference between a trade which is not prohibited under any law and a trade carrying whereof although is of dangerous or obnoxious subjects but is permitted in law and subject to the regulatory statute. For the purpose of invoking Part XIII of the Constitution, one may safely proceed on the assumption that a citizen of India may not have a Fundamental Right in terms of Article 19(1)(g) of the Constitution to carry on a trade or business but there could be little difficulty in upholding the right to carry on such trade on the ground that the same has been permitted by the State, although a citizen but for such permission would not have a right to deal in the commodity in question. It may be noticed that in Article 303 of the Constitution the terminology used is "relating to". These words are of wide amplitude. These expressions relate to all entries relating to trade or commerce and not one entry in one of the Lists. It, thus, refers to all such entries which are referable to trade and commerce occurring in any of the three lists.

Tobacco is one of the goods which would otherwise come within the purview of the doctrine of "Res extra commercium", if the meaning thereof as judicially defined is held to be good. Dealing in tobacco is regulated by the Tobacco Act, a Parliamentary Act. It is universally acknowledged that cigarettes cause cancer but having regard to the Tobacco Act and other statutes it cannot be contended that the State can prohibit business in cigarette without any legislation, i.e., only through executive instructions. In terms of Article 303 of the Constitution, Tobacco Act which is made in terms of Entry 52 of List I of the Seventh Schedule to the Constitution would prohibit the States from making any discriminatory legislation. It is, therefore, difficult to understand as to how a prohibition can be imposed in respect of liquor in relation where to also a legislative power has been conferred upon the State specifically in terms of Entries 8 and 51 in List II of the Seventh Schedule to the Constitution.

At this juncture, it is useful to refer to the decision of this Court in *Atiabari Tea Company Limited* (supra) wherein this Court in no uncertain terms laid emphasis upon the economic unity of the country. In that case before the Constitution Bench an argument was advanced to the effect that Article 301 is circumscribed by Article 303 but the same was not accepted.

Gajendragadkar, J. (as he then was) held at pages 843-844 as follows: "In drafting the relevant Articles of Part XIII the makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal policy which had been adopted by the constitution for the governance of the country. Political freedom which had been won, and political unity which had been accomplished by the Constitution, had to be sustained and strengthened by the bond of economic unity. It was realised that in course of

time different political parties believing in different economic theories or ideologies may come in power in the several constituent units of the Union, and that may conceivably give rise to local and regional pulls and pressures in economic matters. Local or regional fears or apprehensions raised by local or regional problems may persuade the State Legislatures to adopt remedial measures intended solely for the protection of regional interests without due regard to their effect on the economy of the nation as a whole. The object of Part XIII was to avoid such a possibility. Free movement and exchange of goods throughout the territory of India is essential for the economy of the nation and for sustaining and improving living standards of the country. The provision contained in Art. 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character; it is not also a mere statement of a directive principle of state policy; it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country."

In Automobile Transport (Rajasthan) Ltd. (supra), the validity of the tax impugned therein was upheld only on the ground that it was compensatory in nature. There had been a cleavage of opinion amongst the Hon'ble Judges in the said matter; three Hon'ble Judges holding that such impost was ultra vires and three Hon'ble Judges holding the same to be intra vires. Subba Rao, J. upheld the constitutionality of the impost by agreeing with other three Hon'ble Judges on the ground that the impost was compensatory in nature. The Bench not only accepted the constitutional principles laid down by this Court in Atiabari (supra) but made a clear distinction between the regulatory measures which can be adopted by a State and imposition of a tax. It, further, struck a note of caution that a geographical barrier cannot be set up by a State for the purpose of earning revenue or for the benefit of the people thereof. It was held that Article 301 covers a wide area.

Subba Rao, J. elaborated as to what is the nature of a compensatory tax. The learned Judge, further, emphasized the concept of freedom in the following terms at pages 564-565 of the Report:-

"(1) Article 301 declares a right of free movement of trade without any obstructions by way of barriers, inter-State, or intra-State or other impediments operating as such barriers. (2) The said freedom is not impeded, but, on the other hand, promoted, by regulations creating conditions for the free movement of trade, such as, police regulations, provision for services, maintenance of roads, provision for aerodromes, Wharfs etc., with or without compensation. (3) Parliament may by law impose restrictions on such freedom in the public interest; and the said law can be made by virtue of any entry with respect where of Parliament has power to make a law. (4) The State also, in exercise of its legislative power, may impose similar restrictions, subject to the two conditions laid down in Article 304(b) and subject to the proviso mentioned therein. (5) Neither Parliament nor the State Legislature can make a law giving preference to one State over another or making discrimination between one State and

another, by virtue of any entry in the Lists, infringing the said freedom. (6) This ban is lifted in the case of Parliament for the purpose of dealing with situations arising out of scarcity of goods in any part of the territory of India and also in the case of a State under Article 304(b), subject to the conditions mentioned therein. And (7) The State can impose a non-discriminatory tax on goods imported from other States or the Union territory to which similar goods manufactured or produced in that State are subject.

'Commerce and intercourse' include trade in all its manifestations. Obstructions or impediments to the free flow of trade would be violative of the freedom declared by Article 301. Subba Rao, J., in the said case held at page 548 as under:

"The next question is, where is it free? The second, expression "throughout the territory of India" demarcates the extensive field of operation of the said freedom. The said intercourse shall be free throughout the territory of India. The use of the words 'territory of India' instead of 'among the several States' found in the American Constitution or "among the States" found in the Australian Constitution, removes all inter-State or intra-State barriers and brings out the idea that for the purpose of the freedom declared, the whole country is one unit. Trade cannot be free through-out the territory of India, if there are barriers in any part of India, be it inter-State or intra-State. So long as there is impediment to that freedom, its nature or extent is irrelevant. The difference will be in degree and not in quality. The freedom declared under Article 301 may be defined as a right to free movement of persons or things, tangible or intangible, commercial or non-commercial, unobstructed by barriers inter-State or intra-State or any other impediment operating as such barriers. To State it differently all obstructions or impediments whatever shape they may take, to the free flow or movement of trade, or non-commercial intercourse, offend Article 301 of the Constitution except in so far as they are saved by the succeeding provisions."

It is beyond any cavil of doubt that Part XIII of the Constitution contains a principle of importance as regards economic sovereignty and integrity of India by doing away the trade barriers as also an attempt by the State to provide economic protection to the States. Once, it is held that the limitation upon the legislative power stipulated in Article 303(1), 304(a) would apply to trade in liquor, there cannot be any doubt in view of several Constitution Bench decisions of this Court that Article 301 will also apply thereto. [See Kalyani Stores (supra), H. Anraj (supra) and Bhailal Bhai (supra)].

In A.B.Abdul Kadir & Ors. Vs. State of Kerala, AIR 1976 SC 182, this Court, when the validity of a luxury tax (in the nature of excise duty) on tobacco was challenged as violative of Article 304(b), proceeded on the basis that the business was protected by Article 301 but rejected the plea, on the merits, holding that the restrictions imposed were reasonable and in the public interest.

In Anraj's case (supra) this Court considered Entry 34 of List II in terms whereof the State Legislature has been conferred power to enact Statutes on gambling. In M/s. Maruthi Agencies, Bangalore rep. by its Proprietor Vs. The State of Tamil Nadu and others, 1997(1) MLJ 589, it was held that in the event lotteries are organized by a State, sale of tickets thereof cannot be prohibited in other States on the ground that it is gambling

and prohibited by List II. If trade in liquor like gambling or betting were not to be regulated by statutes it is difficult to comprehend as to why entries in respect thereof have been made in the Seventh Schedule to the Constitution.

The American decisions relied upon before this Court may not be held to have any application having regard to the fact that trade in liquor in the United States of America was completely prohibited at one point of time but the same was modified by reason of Constitution Twenty-first Amendment. Let me now take the case of 21st Amendment in US Constitution. In the Constitution of the United States, an express provision guaranteeing freedom from inter-State trade and commerce does not exist. There only the Congress is empowered to regulate commerce. In the States freedom on trade and commerce clause only provides for a limitation upon the power of the State Legislature but not Congress and the freedom is confined to the inter-State aspect.

In Southern Pacific Co., Vs. State of Arizona (1945) 325 US 761, it is stated:

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the State legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests".

It is further stated:

"The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body."

In the United States, the inter-State restraint trade as such is prohibited but a State is not denuded of its power imposing general taxes under its taxing power. The state has also the power to regulate such aspects of commerce which do not require a new form of national control. (See Bob-Lo Excursion Company Vs. People of the State of Michigan. (1948) 333 US 28).

Furthermore, in United States a complete prohibition was imposed. The said prohibition was sought to be relaxed by 21st Amendment which is in the following terms:

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

In the United States of America, the State has the requisite power to impose general taxes. Despite the same, an exemption granted in favour of local manufacturers vis-à-vis the exporters was frowned upon by the

American Courts.

In *Bacchus Imports, Ltd. Vs. Herbert H. Dias* (82 L.Ed. 2d 200), the challenge was to the following effect:

"1a. Appellants challenge the constitutionality of the Hawaii liquor tax, which is a 20% excise tax imposed on sales of liquor at wholesale. Specifically at issue are exemptions from the tax for certain locally produced alcoholic beverages. The Supreme Court of Hawaii upheld the tax against challenges based upon the Equal Protection Clause, the Import-Export Clause, and the Commerce Clause. In *re Bacchus Imports, Ltd.*, 65 Haw 566, 656 P2d 724 (1982). We noted probable jurisdiction, 462 US 1130, 77 L.Ed 2d 1365, 103 S Ct 3109 (1983), and now reverse."

White, J. speaking for the majority stated the law thus:

"3. A cardinal rule of Commerce Clause jurisprudence is that "no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce...by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v State Tax Comm'n*, 429 US 318, 329, 50 L Ed 2d 514, 97 S Ct 599 (1977)(quoting *Northwestern States Portland Cement Co. v Minnesota*, 358 US 450, 458, 3 L Ed 2d 421, 79 S ct 357, 67 ALR2d 1292 (1959)). Despite the fact that the tax exemption here at issue seems clearly to discriminate on its face against interstate commerce by bestowing a commercial advantage on okolehao and pineapple wine, the State argues - and the Hawaii Supreme Court held - that there is no improper discrimination."

The Court noticed:

"(4a, 5) Much of the State's argument centers on its contention that okolehao and pineapple wine do not compete with the other products sold by the wholesalers. The State relies in part on statistics showing that for the years in question sales of okolehao and pineapple wine constituted well under one percent of the total liquor sales in Hawaii. It also relies on the statement by the Hawaii Supreme Court that "we believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii," In *re Bacchus Imports, Ltd.*, 65 Haw, at 582, n 21, 656 P2d, at 735, n 21, as well as the court's comment that it had "good reason to believe neither okolehao nor pineapple wine is produced elsewhere." *Id.*, at 582, n 20, 656 P 2d, at 735, n 20. However, neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present "competitive threat" to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead, they go only to the extent of such competition. It is well settled that "we need not know how unequal the Tax is before

concluding that it unconstitutionally discriminates." *Marryland v. Louisiana*, 451 US 725, 760, 68 L Ed 2d 576, 101 S Ct 2114 (1981).

The State's position that there is no competition is belied by its purported justification of the exemption in the first place. The legislature originally exempted the locally produced beverages in order to foster the local industries by encouraging increased consumption of their product. Surely one way that the tax exemption might produce that result is that drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the price differential that the exemption will permit. Similarly, nondrinkers, such as the maturing young, might be attracted by the low prices of okolehao and pineapple wine. On the stipulated facts in this case, we are unwilling to conclude that no competition exists between the exempted and the nonexempted liquors."

As regards the State's right on economic protectionism it was said:

"A finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose, see *Hunt v Washington Apple Advertising Comm'n*, 432 US 333, 352-353, 53 L Ed 2d 383, 97 S Ct 2434 (1977), or discriminatory effect, see *Philadelphia v New Jersey*, supra. See also *Minnesota v Clover Leaf Creamery Co.*, supra, at 471, n 15, 66 L Ed 2d 659, 101 S Ct 715. Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce. See *Pike v Bruce Church, Inc.*, 397 US 137, 142, 25 L Ed 2d 174, 90 S Ct 844 (1970). The Hawaii Supreme Court described the legislature's motivation in enacting the exemptions as follows:

"The legislature's reason for exempting 'ti root okolehao' from the 'alcohol tax' was to 'encourage and promote the establishment of a new industry,' S.L.H. 1960, c 26; Sen Stand Comm Rep No. 87, in 1960 Senate Journal, at 224, and the exemption of 'fruit wine manufactured in the State from products grown in the State' was intended 'to help' in stimulating 'the local fruit wine industry'. S.L.H. 1976, c 39; Sen Stand Comm Rep No. 408-76, in 1976 Senate Journal, at 1056." *In re Bacchus Imports, Ltd.* supra at 573-574, 656 P2d, at 730.

Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry. Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally

produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect."

The Learned Judge proceeded to observe:

"No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal. One of the fundamental purposes of the Clause "was to insure ...against discriminating State legislation." *Welton v Missouri*, 91 US 275, 280, 23 L Ed 347 (1876). In *Welton*, the Court struck down a Missouri statute that "discriminated in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product or manufacture of other states or countries..." *Id.*, at 277, 23 L Ed 347. Similarly, in *Walling v Michigan*, 116 US 446, 455, 29 L Ed 691, 6 S Ct 454 (1886), the Court struck down a law imposing a tax on the sale of alcoholic beverages produced outside the State, declaring:

"A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

See also *I.M. Darnell & Son Co. v Memphis*, 208 US 113, 52 L Ed 413, 28 S Ct 247 (1908)."

It was held:

"We also find unpersuasive the State's contention that there was no discriminatory intent on the part of the legislature because "the exemptions in question were not enacted to discriminate against foreign products, but rather, to promote a local industry." Brief for Appellee Dias 40. If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other. Consequently, it is irrelevant to the Commerce

Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers."

The learned Judge explained the application of 21st Amendment by posing the question:

"Whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."

and answered the same :

"Approaching the case in this light, we are convinced that Hawaii's discriminatory tax cannot stand. Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. *South-Central Timber, Development, Inc. v Wunnicke*, 467 US 82, 81 L Ed 2d 71, 104 S Ct 2237 (1984); *Hughes v Oklahoma*, 441 US 322, 60 L Ed 2d 250, 99 S Ct 1727 (1979); *Baldwin v G.A.F. Seelig, Inc.*, 294 US 511, 79 L Ed 1032, 55 S Ct 497, 101 ALR 55 (1935). State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was "to promote a local industry." Brief for Appellee Dias 40. Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment."

The minority opinion, however, proceeded on the basis that by reason of Twenty-first Amendment, the State has the power to create a monopoly. Such constitutional permissibility is absent from our constitutional scheme.

It may be noticed that the same principles as in *Atiabari* (supra) or *Automobile* (supra) have been applied by the Privy Council and the Australian Courts while interpreting Section 92 of the Australian Constitution to hold that even for any purpose for which the State has acted the legislation would not be relevant criteria for declaring it ultra vires if it is found that the same interferes with the right of trade. (See *James Vs. Commonwealth of Australia* (1936) A.C.578, *North Eastern Dairy Co. Ltd. Vs. Dairy Industry Authority of New South Wales* (1974-1975) 134 C.L.R. 559 at 581, *The Commonwealth & Ors. Vs. Bank of New South Wales & Ors.* (1949) 79 C.L.R. 497).

Mason, J. in *Pilkington Vs. Frank Hammond Pty. Ltd.* (1974) 131 C.L.R. 124 interpreted Section 92 of the Australian Constitution in the following terms:

"The section does not in terms speak of the private right of the individual to engage in trade, commerce, and intercourse among the States; it refers to trade, commerce and intercourse among the States as an entire and total concept and provides that it is to be 'absolutely free' in the sense in which this expression has been discussed in the decided cases. In saying so much the section protects the right of the individual to engage in inter-State trade, commerce and intercourse but it needs to be recognized that this protection is incidental to, and in a sense consequential upon, the protection which is given to the entire concept of inter-State trade, commerce and intercourse, including the various acts and transactions by which it is constituted."

Reference in this connection may also be made to North Eastern Dairy Co. Ltd. Vs. Dairy Industry Authority of New South Wales (1974-1975) 134 C.L.R. 559, at 615).

In India, the constitutional guarantee under Article 301 of the Constitution is more extensive than either in United States or Australia. The decisions of United States Supreme Court and Australian Supreme Court as also the Privy Council, as referred to hereinbefore, clearly demonstrate that in these countries, although States have more constitutional freedom but despite the same Commerce Clause received ample protection at the hands of the Judiciary.

Subba Rao, J. in Automobile case (supra) observed:

"The freedom declared under Article 301 may be defined as a right to free movement of persons or things, tangible or intangible, commercial or non-commercial, unobstructed by barriers, inter-State or intra-State or any other impediment operating as such barriers. To state it differently, all obstructions or impediments, whatever shape they may take, to the free flow or movement of trade, or non-commercial intercourse, offend Article 301 of the Constitution except in so far as they are saved by the succeeding provisions."

The public character theory although is an important, but has a limitation on the individual right which is guaranteed; having regard to the fact that legislative restriction ultimately permits the individual State to go ahead, only subject to the reasonable restriction. The rule against enacting protectionist measures has also been noticed by the High Court of Australia in Cole Vs. Whitfield & Anr. (1987-1988) 165 CLR 360, settling a long debate.

In Shree Mahavir Oil Mills and Another Vs. State of J&K and Others (1996) 11 SCC 39 at pages 53-54, this Court while rejecting an argument of justification of exemption from sales tax of small scale industrial units within the State of J&K on the ground that the commodity produced within the State and that produced in other States and sold in J&K, constitute different classes, has held as under:-

"The States are certainly free to exercise the power to levy taxes on goods imported from other States/Union Territories but this freedom, or power, shall not be so exercised as to bring about a discrimination between the imported goods and the similar goods manufactured or produced in that State. The clause deals only with discrimination by means of taxation; it prohibits it. The prohibition cannot be extended beyond the power of taxation. It means in the immediate context that States are free to encourage and promote the establishment

and growth of industries within their States by all such means as they think proper but they cannot, in that process, subject the goods imported from other States to a discriminatory rate of taxation, i.e., a higher rate of sales tax vis-a-vis similar goods manufactured/produced within that State and sold within that State. Prohibition is against discriminatory taxation by the States. It matters not how this discrimination is brought about..... We find it difficult to appreciate how can the concept of classification be read into clause (a) of Article 304 to undo the precise object and purpose underlying the clause. Shri Verma repeatedly stressed that the object underlying the impugned measure is a laudable one and that it seeks to serve and promote the interest of the State of Jammu and Kashmir which is economically and industrially an undeveloped State, besides being a disturbed State. We may agree on this score but then the measures necessary in that behalf have to be taken by the appropriate authority and in the appropriate manner. Part XIII of the Constitution itself contains adequate provisions to remedy such a situation and there is no reason why the necessary measures cannot be taken to protect the edible oil industry in the State in accordance with the provisions of the said Part."

It is thus evident that any manner of extension of protection to trade or business within the frontiers of State, at the cost of free inter-State trade or commerce will not stand the test of Article 301. The scheme of compensatory taxes, operate in an entirely different sphere. They cannot be confused with measures which are both in form and substance protectionist impositions.

In *Brown Vs. Maryland* (1827) 12 Wheat 419, the US Supreme Court in the context of the competence of the States to enact and impose a duty on imports or exports has held that the power to regulate inter state commerce in non-discriminatory fashion and "to break down or to eliminate barriers to trade amongst the States" is an essential federal power. It has, therefore, been said that in the absence of such a power "local interest exerting powerful influences in State Legislatures would, in the long run, prefer home industries over those that are out of state, establish tariff barriers, or employ other means tending to Balkanize the nation into hostile trade areas." [See also William O. Douglas J: *From Marshall to Mukherjea: Tagore Law Lectures 1956 P. 169*].

In *James Vs. Commonwealth of Australia* 1936 AC 578, referring to *McArthur's case* 28 CLR 530 it was held:

"It is now convenient to examine the actual language of the Constitution so far as relevant, in order to ascertain its true construction. The first question is what is meant by "absolutely free" in s. 92. It may be that the word "absolutely" adds nothing. The trade is either free or it is not free. "Absolutely" may perhaps be regarded as merely inserted to add emphasis. The expression "absolutely free" is generally described as popular or rhetorical. On the other hand, 'absolutely' may have been added with the object of excluding the risk of partial or veiled infringements. In any case, the use of the language involves the fallacy that a word completely general and undefined is most effective. A good draftsman would realize that the mere generality of the word must compel limitation in its interpretation. "Free" in itself is vague and indeterminate. It must take its colour

from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed out in McArthur's case. Free love, on the contrary, means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject, however, to his condition or behaviour not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs.

"Free" in s. 92 cannot be limited to freedom in the last mentioned sense. There may at first sight appear to be some plausibility in that idea, because of the starting-point in time specified in the section, because of the sections which surround s. 92, and because the proviso to s. 92 relates to customs duties. But it is clear that much more is included in the term; customs duties and other like matters constitute a merely pecuniary burden; there may be different and perhaps more drastic ways of interfering with freedom, as by restriction or partial or complete prohibition of passing into or out of the State.

Nor does "free" necessarily connote absence of discrimination between inter-State and intra-State trade. No doubt conditions restrictive of freedom of trade among the States will frequently involve a discrimination; but that is not essential or decisive. An Act may contravene s.92 though it operates in restriction both of intra-State and of inter-State trade."

However, in India Part XIII of the Constitution relates both to inter-State trade and commerce as also intra-State trade.

In Fox Vs. Robbins [8 CLR 115], It was held:

"Sec. 92 of the Constitution does not reframe State Acts by making new affirmative legislation not contemplated by the State Parliament. It prevents adverse discrimination from being lawful; so far as the Act can be effectively worked in conformity with the constitutional requirement it still stands; so far as it cannot it simply ceases to operate."

Once it is held that the principle of res-extra commercium is not applicable, the decisions in Kalyani Stores (supra), H. Anraj (supra) and Bhailal Bhai (supra) having been rendered by a Constitution Bench would constitute binding precedents. Once it is held that the Legislature has no power to levy any excise duty on imported liquor in excess of the countervailing duty within the State, having regard to the constitutional limitation imposed in terms of Entry 51, List II of Seventh Schedule to the Constitution, such discriminatory levy must be held to be violative of Article 303(1) and 304(a) of the Constitution. As import fee is an impost, thus, levy thereof in addition to countervailing duty would clearly attract the wrath of Article 304(a) of the Constitution. It has not been and could not have been contended that the tax is compensatory in nature as was the case in Automobile (supra). I am, therefore, of the opinion that the impugned

impost cannot be upheld.

Before parting, however, I may notice the submission made by Mr. Iyer on behalf of the State of Kerala that the licensees, having obtained a privilege and enjoyed the benefit out of it, cannot, turn round subsequently and repudiate the obligations subject to which they obtained the privilege. The submission of Mr. Iyer is wholly mis-conceived for more than one reason. The manufacturers of liquor outside the State of Kerala did not obtain any privilege from the State. The decisions relied upon by the learned counsel, namely, Har Shankar (supra), Jage Ram (supra), Lal Chand (supra), M/s. Dial Chand Gian Chand and Company (supra), thus, cannot be said to have any application in the instant case. The decisions in these cases were rendered in the fact situation obtaining therein. The licensees therein questioned the power of the State to hold auction by the State and/or they refused to comply with the terms and conditions of licence. In fact in Harshankar (supra) the Court on the factual matrix obtaining therein clearly came to the conclusion that the writ petition was not maintainable as thereby the licensees sought avoidance from compliance of contractual terms and licensing conditions and, thus, they were not entitled to any relief. The writ petitioners before the High Court had not questioned any of the terms and conditions of the licence. In Kerala case they are not even licensees at all. They are manufacturers of potable liquor, licences wherefor had been granted by other States. The State of Kerala has not parted any privilege in their favour. Even otherwise when the legislative competence of a State is in question, the same goes to the root of the jurisdiction. Once it is found that the State Legislature has exceeded its jurisdiction in imposing the impugned levy, the same being a fraud on the Constitution cannot be sustained on the procedural doctrine of estoppel or waiver.

For the reasons aforementioned, Civil Appeal No. 3017 of 1997 is dismissed and impugned judgment rendered by the Punjab and Haryana High Court quashing the Notification impugned before it is upheld. On 23.7.1998 when prayer for grant of interim relief was being considered, a prayer was made by Shri Harish N. Salve, learned Senior Counsel, appearing on behalf of the State of Punjab, to the effect that operation of impugned judgment rendered by the High Court may be stayed as the State was ready to undertake before this Court to refund the amount that would be realized by way of import duty together with interest thereon @ 15% per annum to the respondents in the event of dismissal of State's appeal by this Court and the said prayer having been acceded to, this Court stayed the operation of the judgment rendered by the High Court upon the aforesaid undertaking. In view of this, the State of Punjab is hereby directed to refund the amount that has been realized by it by way of import duty to the respondents together with interest thereon @ 15% per annum from the date of its realization till payment, which must be made within a period of three months. Civil Appeal Nos. 2696-2697 are allowed and the Notification impugned before the Kerala High Court is quashed. There shall be no order as to costs.