

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9533 OF 2018

INTERNATIONAL SPIRITS AND WINES
ASSOCIATION OF INDIA

....APPELLANT(S)

VERSUS

STATE OF HARYANA AND OTHERS

...RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

The appellant having been unsuccessful in its challenge to Rule 24(i-eeee) of the Haryana Liquor License Rules 1970 (as amended by the Haryana Liquor License (Amendment) Rules 2017), (hereinafter referred to as ‘the Rules’) as being *ultra vires* the Punjab Excise Act, 1914 (hereinafter referred to as ‘the Act’), is in appeal before this Court. The amended Rule provides for a single L-1BF license for the entire State to deal in imported foreign liquor, bottled outside India and imported into the country in a bottled form (i.e. bottled in original). Under challenge is also clause 9.5.1.2 of the State Excise Policy for the year 2017-2018 to that extent,

carried forward to the year 2018-2019 also. The procedure for grant of the single license under the amended Rule is through tender by e-bidding, with a reserve price of Rs. 50 crores.

2. Sri Gopal Subramaniam, learned senior counsel for the appellant, submitted that the creation of a monopoly by the State in favour of a private entity, to trade in liquor, is contrary to Article 19(6) of the Constitution of India. The impugned order acknowledges that it would lead to serious distortions in the market, yet erroneously declines interference holding that once the matter moves from State control into the hands of private enterprise, the restrictions applicable to the State cease to apply. Reliance was placed on ***Akadasi Padhan vs. State of Orissa***, AIR 1963 SC 1047, to contend that if a monopoly is created by the State in its favour, the same cannot be constitutionally permitted if the private agents appointed pursuant thereto, act as independent entities. Sri Subramaniam also relied on ***Khoday Distilleries Ltd. vs. State of Karnataka (I)***, (1995)1 SCC 574, to submit that once the State parts with its privilege to trade in liquor, in favour of private individuals, the rigours of Article 14 will continue to apply to provide equal opportunity to all desirous to do so. Alternatively, it was submitted that the absence of sufficient checks and balances

gives untrammelled and uncanalised powers to the sole licensee which again is constitutionally impermissible. Sri Subramaniam further relied on ***Khoday Distilleries Ltd. vs. State of Karnataka (II)*** (1996) 10 SCC 304, to submit that the interpretation of Section 58 (2)(e) and 59(a) of the Act by the High Court was flawed. Rule 24 (i-eeee) was *ultra vires* the Act. The interpretation put by the High Court grants wider powers to the Financial Commissioner, than the State Government itself. The single monopolistic L-1BF license was also discriminatory and violative of Article 14 of the Constitution in so far as no such requirement was stipulated for wholesale trade in Indian made foreign liquor or country liquor in the State. There was no rational or reasonable classification for this distinction between licensees, having any rationale or nexus with any object to be achieved.

3. Ms. Pinky Anand, learned Additional Solicitor General, submitted that the appellant never participated in the bidding process for the L-1BF license. A mere apprehension that a single L-1BF license for the entire State may affect market dynamics, when the reality was otherwise, resulting in rise of revenue, negates the challenge laid out by the appellant. The issue of monopoly in the hands of a private entity is devoid of merit as the process is

through public auction, open to participation by all, and not tailored to suit any particular person or activated by malafides, relying on ***Association of Registration Plates vs. Union of India***, (2005) 1 SCC 679. Trade in original bottled foreign liquor was only a fraction of the entire liquor trade in the State, ranging between 0.64 percent to 1.98 per cent. The aim and object of the amendment was to increase revenue, curb pilferage, control illicit trade in the State of Indian made foreign liquor and bottled in original bottled foreign liquor. The Financial Commissioner was competent under Section 59(a) read with Section 13 to amend Rule 24 by incorporation of Rule 24 (i-eeee) providing for a single L-1BF license for the entire State, as the competence of the State for issuance of license under Section 58(2)(e) was limited to a local area only.

4. Sri M.K. Dutta, learned counsel for the sole L-1BF licensee for 2017-2018, submitted that the appellant was not even a bidder. The question of any apprehension on its part simply does not arise. There are sufficient checks and balances in the excise license providing for cancellation also if the conditions of the license were not followed. The grant of a monopolistic license as the agent of the State Government was permissible in the law for trade in liquor.

5. We have considered the submissions on behalf of parties. The appellant assails the amended Rule 24(i-eeee) as *ultra vires* the provisions of the Act. Integral to the issue is whether the state government is competent to issue licences for a local area alone under Section 58(2)(e) of the Act, while the Excise Commissioner, a sub-delegate of the Financial Commissioner is competent under Section 13(b) read with Section 59(a) to issue L-1BF licence for the entire state under the amended rule, notwithstanding the prohibition in Section 13(a) to the delegation of powers under Section 58 by the State Government. The amended Rule 24(i-eeee) relevant to the controversy reads as follows:

“ (xiv) for clause (i-eeee), the following clause shall be substituted, namely: -

(i-eeee) For a license in form L-1BF –

(a) Reserve price shall be Rs.50,00,00,000/-.

(b) The license in form L-1BF shall be allotted through e-bidding to the highest bidder.

(c) There shall be only one L-1BF license in the State.”

6. Under Section 8 of the Act, the State government exercises general superintendence and control of Excise Administration and Excise Officers. Section 9 provides for vesting powers of the

Financial Commissioner in the Excise Commissioner by the State Government. Section 13 dealing with delegation of powers provides:

“Delegation:

(a) The State Government may by notification delegate to the Financial Commissioner or Commissioners all or any of its powers under this Act, except the powers conferred by sections 14, 21,22, 31, 56 and 58 of this Act.

(b) The State Government may by notification permit the delegation by the Financial Commissioner, Commissioner or Collector to any person or class of persons specified in such notification of any powers conferred by this Act or exercised in respect of excise revenue under any Act for the time being in force.”

The Financial Commissioner is therefore competent to delegate only such powers to the Excise Commissioner which the State Government can delegate to the former under the Act, in view of the prohibition contained in Section 13(a) of the Act.

7. Section 58 of the Act, in its relevant extract reads as follows:

“Power of State Government to make Rules:

(1) The State Government may by notification make rules for the purpose of carrying out the provisions of this Act or any other law for the time being in force relating to excise revenue.

(2) In particular and without prejudice to the generality of the foregoing provisions, the State Government may make rules:

.....

(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 intoxicant may be granted and regulating the number of such licenses which may be granted in any local area;

(3) Previous publication of rules: - The power conferred by this section of making rules is subject to the condition that the rules be made after previous publication;

Provided that any such rules may be made without previous publication if State Government consider that they should be brought into force at once.”

Under Section 58(2)(e) of the Act, the State Government alone has the power to regulate the number of licenses which may be granted in any local area for wholesale or retail sale.

8. Relevant to the discussion are also Rules 3 and 4 which provide as follows :

“3. The authority given by these rules to grant and renew licenses is, in each case, subject to the restrictions contained in the Punjab Intoxicants License and Sale Order as to the localities in which licenses may be granted and the number of licenses which may be granted in any local area, and to such reservations from the general superintendence of the Financial Commissioner as the State Government may notify under Section 8 of the Punjab Excise Act, 1914.

4. Every license shall be granted to a particular licensee in respect of particular premises/area.”

9. Chapter D of the Punjab Intoxicants License and Sales Orders, 1956 (hereinafter referred to as ‘the Order’) provides for the number of licences and reads as under :

“6. The number of liquor vends except vends licenced in form L-2 for the wholesale and retail sale of foreign liquor to the public only and drug shops, which may be licenced in any local area, shall be the number which the Financial Commissioner, subject to the control of the State government considers necessary. The number of L-2 vends, which may be licenced in any local area, shall be the number of such licences granted by the Collector under the rules.”

10. In the scheme of the Act, the Rules and the Order read together it is apparent that a liquor license is to be granted for a local area only. The power to determine the number of licences that may be granted in any category in a local area is exclusively vested in the State Government under Section 58(2)(e) of the Act. The delegation of this power by the State Government to the Financial Commissioner is prohibited by Section 13(a). This is only in consonance with the general power of superintendence vested in the State Government under Section 8.

11. In ***Khoday Distilleries vs. State of Karnataka (II)*** (supra), a similar provision under the Karnataka Excise Act 1965 fell for consideration therein:

“71(1): The State Government may, by notification and after previous publication, make Rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision, the State Government may make Rules –

.....

(e) regulating the periods and localities in which and the persons or classes of persons to whom, licenses for the wholesale or retail sale of any intoxicant may be granted and regulating the number of such licenses which may be granted in any local area:

(f)

(g)

(h) prescribing the authority by which, the form in which and the terms and conditions on and subject to which any license or permit shall be granted, and may, by such Rules, among other matters.”

This Court held as follows :-

“11.The Act itself provides that the number of licenses can be regulated by the State. If the State chooses to regulate licenses by providing that the license shall be granted only to a company owned by the State, it cannot be said that such a license is something which is outside the purview of the Act or the rule-making authority of the State under the Act.”

12. The Act maintains a clear distinction between a local area as the unit for grant of licence, and the entire State for other purposes. The State government is the sole repository of these other powers with regard to the entire State evident from Sections 5 and 6 which read:

“5. Power of State Government to declare limit of sale by retail and by wholesale- The State Government may by notification declare with respect either to the whole of Punjab or to any local area comprised therein, and as regards purchasers generally or any specified class of purchasers, and generally or for any specified occasion, the maximum or minimum quantity or both of any intoxicant which for the purposes of this Act may be sold by retail and by wholesale.

6. Power to limit application of notifications, permits, etc., made under this Act.- Where under this Act any notification is made, any power conferred, any appointment made or any license, pass or permit granted, it shall be lawful to direct –

(a) That it shall apply to the whole of Punjab or to any specified local area or areas;

xxxxxx”

The power to declare by notification that a licence granted shall be applicable to the entire State is exclusively vested in the State Government under Section 6(a) of the Act.

13. The High Court has held that in contradistinction to Section 58(2)(e) of the Act, which limits the powers of the State Government to grant of licence for a local area, the Excise Commissioner, as the delegatee of the Financial Commissioner, was competent under Section 59(a) to grant a single L-1BF licence for the entire State.

“59. Powers of Financial Commissioner to make rules:-

The Financial Commissioner may, by notification, make rules,-

- (a) regulating the manufacture, supply, storage or sale of any intoxicant, including-
 - (i) the character, erection, alteration, repair, inspection, supervision, management and control of any place for the manufacture, supply, storage or sale of such article and the fittings, implements, apparatus and registers to be maintained therein;
 - (ii) the cultivation of the hemp plant and the collection of spontaneous growth of such plant and the preparation of any intoxicating drug;
 - (iii) the tapping or drawing of tari from any tari producing tree;
- (b) regulating the bottling of liquor for purposes of sale;
- (c) regulating the deposit of any intoxicant in a warehouse and the removal of any intoxicant from any warehouse or from any distillery or brewery;
- (d) prescribing the scale of fees or the manner of fixing the fees payable in respect of any license, permit or pass or in respect of the storing of any intoxicant;

- (e) regulating the time, place and manner of payment of any duty or fee;
- (f) prescribing the authority by, the restrictions under, and the conditions on, which any license, permit or pass may be granted, including provisions for the following matters-
 - (i) the prohibition of the admixture with any intoxicant of any substance deemed to be noxious or objectionable;
 - (ii) the regulation or prohibition of the reduction of liquor by a licensed manufacturer or licensed vendor from a higher to a lower strength;
 - (iii) the strength at which intoxicant shall be sold, supplied or possessed;
 - (iii-a) the fixing of the price below and above which any intoxicant shall not be sold or supplied by the licenced vendor.
 - (iv) the prohibition of sale of any intoxicant except for cash;
 - (v) the fixing of the days and hours during which any licensed premises may or may not be kept open, and the closure of such premises on special occasions;
 - (vi) the specification of the nature of the premises in which any intoxicant may be sold, and the notice to be exposed at such premises;
 - (vii) the form of the accounts to be maintained and the returns to be submitted by license-holders; and
 - (viii) the prohibition or regulation of the transfer of licenses;
- (g) (i) declaring the process by which spirit shall be denatured;
- (ii) for causing spirit to be denatured through the agency or under the supervision of its own officers;

- (iii) for ascertaining whether such spirit has been denatured;
- (h) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use;
- (i) regulating the disposal of confiscated articles;
- (j) prescribing the amount of security to be deposited by holders of leases, licenses, permits or passes for the performance of the conditions of the same.”

14. The nature of powers conferred under Section 59 of the Act, make it manifest that it is but a regulatory power available only after a license is granted to the licensee for a local area, to ensure supply, storage, sale or otherwise that the conditions of the license are adhered to and necessary directions can also be given for the purpose.

15. The Excise Commissioner, a sub-delegate of the Financial Commissioner, in exercise of the powers conferred under section 59 of the Act by virtue of the Haryana Government Excise and Taxation notification dated 01.04.2016, made the impugned amendment to the Haryana Liquor License Rules, 1970. The same were notified on 29.03.2017. These rules were called the Haryana Liquor License (Amendment) Rules, 2017. Rule 1(2) stated that they shall come into force with effect from 01.04.2017. Rule 3 of

the amendment substituted Rule 24 (i-eeee) which provided that there shall be only one L-1BF license in the State. The amendment with regard to the number of licenses that could be issued for the entire State is in teeth of Sections 6 and 58(2)(e), delegation of which by the State Government is expressly prohibited by Section 13(a).

16. The distinction sought to be drawn by the High Court with regard to the term 'local area' under Section 58(2)(e) of the Act as being confined to small compact area only and that the Financial Commissioner by virtue of the power to regulate supply, storage or sale of any intoxicant had the power to determine the number of licenses to be granted for the entire State in a particular category, in our view, is not only unreasonable but also in teeth of the statutory Scheme and its provisions. To hold that the power of Financial Commissioner under Section 59(a) of the Act to regulate sale of liquor, and that sale could be regulated through grant of licence, the Financial Commissioner was vested with the power to determine the number of licences, to our mind is not only unreasonable but also unsustainable. Such an interpretation amounts to reading words into the statute which the legislature itself never intended. The amendment notified by the Excise

Commissioner as a delegate of the Financial Commissioner was *per se* ultra vires the powers of the latter under Section 6 and 13(a) read with Section 58(2)(e) of the Act. The unreasonableness and incongruity in the reasoning by the High Court would vest wider powers in the Excise Commissioner than the State Government itself. While the State Government would have the power to determine the number of licences and to issue licence for a local area only, the Excise Commissioner would have a superior power to determine the number of licences and issue licences for the entire State.

17. The meaning and scope of a regulatory power fell for consideration in ***Deepak Theatre vs. State of Punjab***, 1992 Supp (1) SCC 684,

“4. The power to regulate includes the power to restrain, which embraces limitations and restrictions on all incidental matters connected with the right to trade or business under the existing licence. Rule 12(3) regulated entry to different classes to the cinema hall and it was within the rule making power of the State Government to frame such rule. The court further held that fixing limit of rate of admission was an absolute necessity in the interest of the general public and the restriction so placed was reasonable and in public interest....”

18. The Financial Commissioner was therefore not competent to amend the Rules with regard to grant of number of licences for the entire state, and which power was exclusive to the State Government under Section 6 read with Section 13(a) and 58(2)(e) of the Act. In conclusion, we hold that Rule 24(i-eeee) as amended by the Financial Commissioner in exercise of powers under Section 59(a) of the Act is ultra vires the powers of the Financial Commissioner under the Act and is therefore struck down. In view of Rule 24(i-eeee) itself having been struck down, it is not considered necessary to discuss or consider the other grounds of challenge raised.

19. The appeal is allowed.

.....**CJI.**
[RANJAN GOGOI]

.....**J.**
[NAVIN SINHA]

NEW DELHI
FEBRUARY 12, 2019.

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

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INTERNATIONAL SPIRITS AND WINES
ASSOCIATION OF INDIA . . APPELLANT(S)

VERSUS

STATE OF HARYANA AND ORS. . . RESPONDENT(S)

JUDGMENT

K.M. JOSEPH, J.

1. Having perused the judgment authored by brother Justice Navin Sinha notwithstanding the highest respect that I maintain for him, I express my inability to accept the reasoning given in support of the conclusion on the point which has been dealt with by him and the consequent verdict.

2. The appellant is the writ petitioner before the High Court in writ petition No.6870 of 2017 which came to be decided along with another writ petition. Appellant is a company registered under Section 25 of the Companies Act. It claims to be a representative body of International spirits and wines companies

doing business in India. On 06.03.2017, the excise policy for the State of Haryana came to be announced for the period 01.04.2017 to 31.03.2018. Under clause 9.5.1.1, a wholesale licence in the form of L-1BF for imported foreign liquor (BIO) was prescribed. The licensee was authorized to import IFL (BIO) including beer from other countries and supply it to L-1s, L-4 and L-5s, L-12Cs and L-12Gs of the State. Clause 9.5.12, however, provided that there will be only one wholesale licence in the form of L-1BF in the State. It was contemplated that licence was to be settled by e-tenders through the Departmental Portal in a completely secure and transparent manner. The reserve price was fixed at Rs.50 crores. Under the general conditions provisions for L-1BF it was provided as follows:

"(vi) The licensee will have to submit pricing of each brands at the time of approval of the brand and department will approve his maximum sale price factoring in the landing price, expenses, profit margin, prevalent rates of same or equivalent brands in the neighboring States and the Government levies. The licensee shall do this preferably in the first quarter of the financial year."

3. Originally Clause 9.5.1.2 was challenged. The third respondent had been appointed as exclusive licensee and declaration was sought that the appointment was invalid. While the Writ Petition was pending, the Haryana Liquor License (Amendment) Rules, 2017 was introduced. The rules came into effect on 01.4.2017. Thereupon the appellant challenged Rule 24 (i-eeee) of the 1970 Rules introduced by the amending Rules. The said Rule reads as follows:

"3. In the said rules, in rule 24, -

.....

(xiv) for clause (i-eeee), the following clause shall be substituted, namely:-

"(i-eeee) For a license in form L-1BF -

(a) Reserve price shall be Rs. 50,00,00,000/-

(b) The license in form L-1BF shall be allotted through e-bidding to the highest bidder

(b) There shall be only one L-1BF license in the State.

(d) In case no eligible bid equal to or above the reserve price is received for the lone L-1BF license, the same shall be allotted exclusively to a Government owned entity on the terms and conditions as decided by the Government. The permit and brand label fee shall be levied as under to procure Stock of liquor by the L-1BF licensee."

4. The ground which failed to persuade the Division Bench of the High Court but which has found acceptance at the hands of my learned Brother Sinha J.

is that the impugned rule is ultra vires, the power of the Finance Commissioner under Section 59 of the Punjab Excise Act, 1914 (hereinafter referred to as "the Act"). The argument of the appellant is that the power to make a rule regarding number of licenses is with the State Government and it is said power which has been usurped by the Financial Commissioner in purported exercise of the power under Section 59 of the Act. To put it differently, the question would be whether the power is vested with the State Government under Section 58 or with the Financial Commissioner under Section 59 of the Act. It is but natural that I set out the provisions of Section 58 and 59 of the Act.

"58. Power of State Government to make Rules
- (1) The State Government may by notification make rules for the purpose of carrying out the provisions of this Act or any other law for the time being in force relating to excise revenue.

(2) In particular and without prejudice to the generally of the foregoing provisions, the State Government may make rules: -

- (a) prescribing the duties of excise officers;
- (b) regulating the delegation of any power by the Financial Commissioner, Commissioner or Collector, under Section 13, Clause (b);
- (c) prescribing the time and manner of presenting and the procedure for dealing

with appeals from orders of excise officers;

(d) regulating the import, export, transport or possession of any intoxicant or Excise bottle and the transfer, price or use of any type of 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 licenses which may be granted in any local area;

(f) prescribing the procedure to be followed and the matters to be ascertained before any license is granted for the retail vend of liquor for consumption on the premises;

(g) for the prohibition of the sale of any intoxicant to any person or class of persons;

(h) regulating the power of excise officers to summon witnesses from a distance;

(I) regulating the grant of expenses to witnesses and compensation to persons charged with offences under this Act and subsequently released, discharged or acquitted.

(j) for the prohibition of the employment by a license holder of any person or class of persons to assist in his business in any capacity what so ever;

(k) for the prevention of drunkenness, gambling and disorderly conduct in or near any licensed premises and the meeting or remaining of persons of bad character in such premises;

(l) prohibiting the printing, publishing or otherwise displaying or distributing any advertisement or other matter commending or soliciting the use of, or offering any intoxicant calculated to encourage or incite any individual or class of individuals or the public generally to commit an offence under this Act, or to commit a breach or evade the provisions of any rule or order made there under,

or the conditions of any license, permit or pass obtained there under:-

(m) prohibiting within the State the circulation, distribution or sale of any newspaper, book, leaflet, booklet, or other publication printed and published outside the State which contains any advertisement or matter of the nature described in clause (1);

(n) declaring any newspaper, book, leaflet, booklet or other publication, wherever printed or published, containing any advertisement or matter [of the nature described in clause (1)] to be forfeited to the State Government; and

(o) implementing generally the policy of prohibition.

(3) Previous publication of rules - The power conferred by this section of making rules is subject to the condition that the rules be made after previous publication.

Provided that any such rules may be made without previous publication if State Government consider that they should be brought into force at once.

59. Powers of Financial Commissioner to make rules - The Financial Commission may, by notification, make rules.

(a) regulating the manufacture, supply, storage or sale of any intoxicant, including:-

(i) the character, erection, alteration, repair, inspection, supervision, management and control of any place for the manufacture, supply storage or sale of such article and the fittings, implements apparatus and registers to be maintained therein;

(ii) the cultivation of the hemp plant and the collection of spontaneous growth of such plant and the preparation of any intoxicating drug.

(iii) the tapping of drawing of tari from any tari producing tree.

(b) regulating the bottling of liquor for purposes of sale.

(d) regulating the deposit of any intoxicant in a warehouse and the removal of any intoxicant from any warehouse or from any distillery or brewery.

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

(f) regulating the time, place and manner of payment of any duty or fee;

(g) prescribing the authority by, the restrictions under, and the conditions on which any license, permit or pass may be granted including provision for the following matters: -

(i) The prohibition of the admixture with any intoxicant of any substance deemed to be noxious or objectionable;

(ii) The regulation or prohibition of the reduction of liquor by a licensed manufacture or licensed vendor from a higher to a lower strength;

(iii) [the strength at which intoxicant shall be sold], supplied or possessed;

(iii-a) the fixing of the price below and above which any intoxicant shall not be sold or supplied by the licensed vendors;

(iv) The prohibition of sale of any intoxicant except for cash;

(v) The fixing of the days and hours during which any licensed premises may or may not be kept open, and the closure of such premises on special occasions;

(vi) The specification of the nature of the premises in which any intoxicant may be sold, and the notice to be exposed at such premises;

(vii) The form of the accounts to be maintained and the return to be submitted by license holders; and

(viii) The prohibition or regulation of the transfer of licenses;

(g-i) declaring the process by which spirit shall be denatured;

(ii) for causing spirits to be denatured through the agency or under the supervision of its own officers;

(iii) for causing spirits to be denatured through the agency or under the supervision of its own officers;

(h) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use;

(i) regulating the disposal of confiscated articles;

(j) prescribing the amount of security to be deposited by holders of leases, licenses, permits or passes for the performance of the conditions of the same."

5. The case of the appellant is built around the provisions contained in Section 58(2) (e) of the Act.

6. The Punjab Excise Act, 1914 as extended to the State of Haryana contains the following provisions *inter alia*:

Section 5 of the said Act reads as follows:

"5. Power of State Government to declare limit of sale by retail and by wholesale. -

The [State] Government may by notification declare with respect either to the whole of [Haryana] or to any local area comprised therein, and as regards

purchasers generally or any specified class of purchasers, and generally or for any specified occasion, the maximum or minimum quantity or both of any [intoxicant] which for the purposes of this Act may be sold by retail and by wholesale."

(emphasis supplied)

The expression "any local area" stands out in the said statutory provision as distinct from the whole of Haryana. It is to be noted that Section 5 does not deal with the rule making power of the State. In fact, it relates to the maximum and minimum quantity or both of any intoxicants which may be sold by retail and by wholesale. Similarly, Section 6(a) reads as follows:

"6. Power to limit application of notifications, permits, etc., made under this Act.- Where under this Act any notification is made, any power conferred, any appointment made or any license, pass or permit granted, it shall be lawful to direct -

- (a) that it shall apply to the whole of [Haryana] or to any specified local area or areas;
- (b)
- (c)
- (d)"

(emphasis supplied)

Equally Section 6 also does not deal with the power to make rules.

7. It is apparent that the legislature has maintained a distinction between the whole and a part

and the part is what is captured in the expression "local area". Further Section 8 of the said Act reads as follows:

"8. Superintendence and control of excise administration and excise officers. -

- (a) Subject to the control of the [State] Government and unless the [State] Government shall by notification otherwise direct, the general superintendence and administration of all matters relating to excise shall vest in the Financial Commissioner."
- (b)
- (c)"

(emphasis supplied)

8. Section 9 of the said Act provides for appointment of an Excise commissioner and it reads as follows:

"9. Excise Commissioner. - The State Government may by notification appoint an Excise Commissioner, and, subject to such conditions and restrictions as it may deem fit, may invest him with all or any of the powers conferred on the Financial Commissioner by this Act."

9. In terms of the notification vesting powers of the finance Commissioner apparently under Section 59 it is that the Excise Commissioner has made the rules "Haryana Liquor Licence Rules 1970. It is undoubtedly true that Section 13 forbids delegation

of power under Section 58 *inter alia* on the Financial Commissioner or Commissioner. Section 34 comes under Chapter VI and is relevant. It reads as follows:

"34. Fee for terms, conditions and form of, and duration of licenses, permits 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)

(3)"

10. Section 35 speaks about grant of licences for sale. Sub-section (1) of the said provision reads as follows:

"35. (1) Grant of licenses for sale. - Subject to the rules made by the Financial Commissioner under the powers conferred by this Act, the Collector may grant licenses for the sale of any [intoxicant] within his district."

(emphasis supplied)

11. Coming to Section 58 undoubtedly what is pressed before us by the appellant is a specific provision contained in Section 58(2)(e). Breaking down the said sub-section, in my view produces the following inevitable result. The State Government has the power to frame rules.

- 1) To regulate the periods of licences, permits and passes either wholesale or retail;
- 2) To regulate the localities for which wholesale or retail licences, permits or passes may be granted.
- 3) To regulate the persons or classes of persons to whom the licences, permits or passes may be granted either by way of a wholesale or retail licence;

12. The latter part of Section 58(2)(e) on the other hand also permits the Government to regulate by rules, the number of such licences which may be granted in any local area. Therefore, it is clear that it is in respect of the licences which are referred, be it wholesale or retail mentioned earlier

in the provision which can be regulated but however limited to any local area. As against this and immediately following Section 58 in Section 59, legislature has also empowered the financial Commissioner to make rules *inter alia* to regulate the manufacture, supply, storage or sale or any intoxicant.

13. It is relevant to notice that the High Court in the impugned judgment has specifically dealt with the expression "local area" by adverting to a judgment of this Court reported in 1995 (1) SCC 351. The expression "local area" has been designedly employed and it has to be given full play. It certainly cannot mean the whole of the State. Any other interpretation would render the word 'local area' in Section 58(2)(e) meaningless and, in fact, it would involve doing complete violence to the plain meaning of the words "local area". It may be true that the whole may include the part (see in this regard the maxim in Brooms Legal Maxims *Omne Majus Continet in Se Minus*) but I do not think that the converse namely the part would include the whole could hold good. Thus, the

expression "local area" as used in Section 58(2)(e) would appear to convey the impression that the legislature intended to confer power on the State to place restrictions on the number of licences which are to be given qua any local area. In fact, in the written submission given by the State of Haryana, a definite case is set up that the State in its wisdom can conclude that a particular local area owing to the special conditions should be protected from the harmful effects of alcohol consumption. An example of tribal sub plan area is enlisted where the State may be carrying on a special programme. I would think that this view finds support also from another circumstance in the form of Rule 3 of Haryana Liquor Licence Rules, 1970. The said Rule reads as under:

"3. The authority given by these rules to grant and renew licenses is, in each case, subject to the restrictions contained in the Punjab Intoxicants License and Sale Order as to the localities in which licenses may be granted and the number of licenses which may be granted in any local area, and to such reservations from the general superintendence of the financial commissioner as the State government may notify under Section 8 of the Punjab Excise Act, 1914.

(emphasis supplied)

14. Thus, the said rule reinforces the view that the expression "number of licences" which may be granted in the local area is within the exclusive domain of the State Government and reliance placed by the appellant on the number of licences which may be granted in Section 58(2) (e) to strike at the impugned rule which is otherwise sourced under Section 59 is without any basis. In other words going through both the Act and the Rules, a distinction is made between the whole of the State and the local area. In regard to rule making power, undoubtedly, the legislature has specifically conferred rule making power qua the number of licences in any local area upon the State. Unless it can be reasoned that the powers to regulate sale of liquor within the meaning of Section 59 which is undoubtedly placed on the shoulders of the financial Commissioner would not include the power to make rules in regard to the number of licences for the State as a whole, the argument of the appellant must fail.

15. The word 'regulate' in fact came to be considered by the decision of this Court in D.K. Trivedi and Sons v. State of Gujarat 1986 (Suppl.) SCC 20. The matter arose under Section 13 *inter alia* of the Mines and Minerals (Regulation & Development) Act, 1957. This Court went on to hold *inter alia* as follows :

"30. Bearing this in mind, we now turn to examine the nature of the rule-making power conferred upon the State Governments by Section 15(1). Although under Section 14, Section 13 is one of the sections which does not apply to minor minerals, the language of Section 13(1) is in *pari materia* with the language of Section 15(1). Each of these provisions confers the power to make rules for "regulating". The *Shorter Oxford English Dictionary*, Third Edition, defines the word "regulate" as meaning "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings". Thus, the power to regulate by rules given by Sections 13(1) and 15(1) is a power to control, govern and direct by rules the grant of prospecting licences and mining leases in respect of minerals other than minor minerals and for purposes connected therewith in the case of Section 13(1) and the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith in the case of Section 15(1) and to subject such grant to restrictions and to adapt them to the circumstances of the case and the surroundings with reference to which such power is exercised. It is pertinent to bear in mind that the power to regulate

conferred by Sections 13(1) and 15(1) is not only with respect to the grant of licences and leases mentioned in those sub-sections but is also with respect to "purposes connected therewith", that is, purposes connected with such grant."

16. No doubt it is true that Section 13 of the Mines and Minerals (Regulation & Development) Act, 1957 which was considered by the Court *inter alia* read as follows:

"13. *Power of Central Government to make rules in respect of minerals.* -

(1) The Central Government may, by notification in the Official Gazette, make rules for regulation the grant of prospecting licences and mining leases in respect of minerals and for purposes connected therewith.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

* * * *

(i) the fixing and collection of dead rent fines, fees or other charges and the collection of royalties in respect of -

(i) prospecting licences,

(ii) mining leases,

(iii) minerals mined, quarried, excavated or collected;

* * * *

(r) any other matter which is to be, or may be, prescribed under this Act."

17. However, having regard to the connotation of the word 'regulate' it would include power to control the sale of liquor under the Act. Control of sale is possible by providing for licences as it is through licencing that the authority can provide for conditions under which the sale could be best controlled. If the power to regulate include the power to stipulate licences it undoubtedly also would include power to provide for number of licences qua the State as a whole a matter which I have reasoned does not fall under Section 58(2) (e) of the Act.

18. In the judgment of this court in Khoday Distilleries Ltd. and Others v. State of Karnataka and Others reported in 1996 (10) SCC 304, the issue arose under the Karnataka Excise Act, 1965. Undoubtedly, there is a provision therein which is *pari materia* with Section 58(2) (e) of the Punjab Excise Act in the Karnataka Excise Act, 1965 which has been extracted at para 8 of the said judgment. The case in fact related to a distributor licence and not wholesale or retail licence which is what the provision speaks of.

19. The Court was not dealing with the specific question which is posed before us as is clear from the judgement. I have in fact, gone through the Karnataka Excise Act and I find that while Section 71 confers power on the State Government to make rules there is no provision akin to Section 59 of the Punjab Excise Act which confers power on any other authority in which case it could not possibly be contended that sub-section (2) of Section 71 would in any manner cut down the width of the general power of Section 71(1) for the State Government to make rules for the purpose of the Act.

20. In such circumstances, I would respectfully disagree with the majority view as expressed in the judgment of my learned Brother Justice Navin Sinha. I would confirm the finding by the learned Division Bench of the High Court that the Financial Commissioner has power to decide upon the number of licenses.

21. Having expressed my disagreement with regard to the finding of the sole issue which has been dealt with in the majority judgment I must necessarily

proceed to consider the two other contentions which has been raised by the appellant. The appellant has contended that the rule leads to the creation of a monopoly and what is really objectionable, in favour of a private party and it is contrary to the guarantee embedded under Article 19(1)(g) of the Constitution. The High Court has repelled this argument also. It relied upon the judgment of this Court reported in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others; 1995(1) SCC 574 wherein this Court in paragraph 22 held as follows :

"22. In Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner AIR 1954 SC 220, where the vires of Excise Regulation I of 1915 was under challenge on the ground of violation of Article 19(1)(g), the Constitution Bench of five learned Judges, among other things, held that:

(a) In order to determine the reasonableness of restrictions, envisaged by Article 19(6), regard must be had to the nature of the business and the conditions prevailing in that trade. These factors would differ from trade to trade and no hard and fast rule concerning all trades can be laid down. It cannot also be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or

business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them require regulation as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold, require also special qualification in the parties permitted to use them, manufacture or sell them. The Court in this connection referred to the observations of Field, J. in *P. Crowley v. Henry Christensen*; 34 L ED 620 : 137 US 86 (1890) a part of which is as follows:

"The sale of such liquors in this way has, therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. ... Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality and not of federal law. The police power of the State is fully competent to regulate the business to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. ... It is a matter of legislative will only."

(b)The elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trade which all could carry on. The provisions of the law cannot be attacked merely on the ground that they create a monopoly. Properly speaking, there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor. The Court for this purpose relied upon the following observations of Lord Porter in *Commonwealth of Australia v.*

Bank of New South Wales; 1950 AC 235 : (1949) 2
AII ER 755:

"Yet about this, as about every other proposition in this field, a reservation must be made, for their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency, or in some other body, be justified. Every case must be judged on its own facts and its own setting of time."

(c)When the contract is thrown open to public auction, it cannot be said that there is exclusion of competition and thereby monopoly is created.

(Emphasis supplied)

22. I may also refer to the judgment of this Court in Maninderjit Singh Bitta v. Union of India and others reported in 2005(1)SCC 679. In this case undoubtedly the rule provided that there will be only one license of the nature concerned. However, the right to the license was settled by way of e-tender. It was open to any person who is otherwise eligible to participate in the e-tender. Undoubtedly the guarantee of fairness of the State action and the taboo against arbitrariness must inform the State action once it decides to permit trade in liquor. It is to be noticed that the introduction of the rule was

primarily to earn maximum profits. The case of the state is that introduction of the rule has enabled collection of greater amounts by way of revenue. This cannot be said to be entirely an irrelevant consideration. Going too far in these matters may involve the court making a foray into the ordinarily forbidden territory of policy.

23. No doubt, the appellant draws our attention to the recent decision of this Court in The Kerala Bar Hotels Association & Another v. State of Kerala & Others AIR 2016 SC 163. In fact, one the contentions of the appellants was that the state had 3 options. The first is prohibition, the second is State monopoly in manufacture or trade and the third was to allow private players into the business in which everyone has a right to partake in the business. The court went on to hold *inter alia* as follows:

"24. We disagree with the submissions of the Respondents that there is no right to trade in liquor because it is *res extra commercium*. The interpretation of **Khoday** put forward by Mr. Sundaram is, in our opinion, more acceptable. A right under Article 19(1)(g) to trade in liquor

does exist provided the State permits any person to undertake this business. It is further qualified by Article 19(6) and Article 47. The question, then, is whether the restrictions imposed on the Appellants are reasonable."

The Court found support from the judgment of this Court in the Constitution Bench in Krishna Kumar Narula v. State of Jammu & Kashmir AIR 1957 SC 1368 which took the view that dealing in liquor is a legitimate business although the State could impose reasonable restriction. The court however noted that in Khoday's case (supra), the concept of *res extra commercium* came to be applied on the business of manufacture and trade of potable liquor.

I may also notice paragraph 27 of The Kerala Bar Hotels Association case (supra) which reads as below:

"27. We now move to the arguments predicated on Article 19 of the Constitution. We have already noted that the business in potable liquor is in the nature of res extra commercium and would therefore be subject to more stringent restrictions than any other trade or business. Thus while the ground of Article 19(1)(g) can be raised, in light of the arguments discussed with regard to Article 14, it cannot be said that the qualification on that right is unreasonable."

(Emphasis supplied)

24. I would not lose sight of in the facts of this case one dimension in this regard. The appellant is an association of companies. Article 19 provides for various fundamental freedoms. However, unlike Article 14 and 21, these freedoms are not conferred on non-citizens. In other words, Article 19 is confined to citizens. It is well settled that a company though a juristic person but not being a natural person is not a citizen within the meaning of Article 19. The writ petition is filed without joining any shareholder who is a citizen. I would also take the view that therefore reliance placed on Article 19 may not hold good.

25. Judicial review of policy is justified only if the policy is arbitrary or unfair or violative of fundamental rights. Courts must be loathe to venture into an evaluation of State policy. I have noticed the principles enunciated in paragraph 25 and also noted the view taken by this Court in paragraph 27 of the Kerala Bar Hotel Cases Supra. I may also notice that the question

which actually fell for consideration was in a different factual matrix. I do not think that the earlier view taken by this Court both in Cooverjee B. Bharucha Vs. Excise Commissioner and the Chief Commissioner, Ajmer and Others AIR 1954 SC 220 and Khoday's case (supra) in relation to the effect of throwing open the right to obtain an exclusive privilege not flowering into a monopoly has not been overridden.

26. The third complaint of the appellant is this. The assumption of the monopolistic position by the licensee would lead to arbitrary and unfair practices which would leave the members of the appellant without redress. The High Court, it is pointed out has rejected the contention by essentially reasoning that the licensee as long as it conforms to the conditions and law is a free agent and shut out the prospect of judicial review.

This is what the High Court finds:-

"32. There may be some safeguards within the policy which protect the rights of the upstream licenses such as manufacturers as well as the downstream licenses i.e. the purchasers, such as, retailers and holders of licences for bars, clubs and restaurants. There is no doubt, however, that a sole wholesaler can pick and choose the

parties that he wishes to deal with and, in effect, refuse to deal with those he does not wish to deal with including by devising various strategies. In doing so, the sole wholesaler can also effectively promote and encourage a particular brand or brands in preference to others. For instance, he may grant a particular dealer or a dealer in particular brands different payment facilities and not grant the same to others or others who deal in certain other brands. There is nothing that stops him from doing so. The question is whether that would render the appointment of a sole wholesaler illegal.

33. The State, we will presume, even in the trade and business of liquor must act fairly and impartially and not arbitrarily. We will presume that in granting liquor licences and permits the State cannot adopt a pick and choose policy and must throw the field open to all those who are otherwise eligible. In the present excise policy, the State has permitted every eligible party to bid. It has not discriminated against or in favour of any party. The essential criteria for the appointment of the wholesaler is the value of the bid.

34. The challenge to the policy and to the rule on the ground that the appointment of a sole wholesaler in respect of an L-1BF Licence would adversely affect the commercial interests of those who he deals with or those who must deal with him, such as, the petitioners is not well founded. As we noted earlier, theoretically it is possible that the commercial interests of certain dealers and manufacturers will be affected, in as much as, the sole wholesaler will have the choice of who it would deal with. The sole wholesaler would also be entitled to grant better facilities to some of the dealers. That, however, would not render the policy illegal. A private party is entitled to deal with any person or enterprise. The State, absent special circumstances, cannot do so. We will presume it cannot do so, even in so far as the trade and business of liquor is concerned. However, once a matter moves from the control of the State or the instrumentalities of the State into the hands of private enterprises, the restrictions applicable to the State and its instrumentalities cease to be applicable. This

is invariably the case in auctions and tenders. Take for instance, a case where the State decides to construct a building or a group of buildings. It can do so itself to the exclusion of all others. It is also entitled to engage private parties to do so. The State cannot pick and choose who to deal with. Absent any special circumstances, the State would be bound to consider the claim of every party that is otherwise eligible to undertake the work. However, once the State parts with its rights to construct a building and hands it over to a private enterprise, the matter ends there so far as it concerns the work that it has contracted to the private party. The contractor is not bound to call for tenders in respect of every item involved in the construction. The contractor is not bound to consider the application of every party for the supply of material required for the construction of the buildings. The contractor is entitled to obtain the material from such parties as it desires and on such terms and conditions that the contractor desires. The suppliers of the material would not be entitled to compel the contractor to afford them an opportunity of supplying the material. The rules of the game that apply to a State or an instrumentality of the State do not apply to such contractors."

27. In this case, in fact, Mr. Gopal Subramaniam, learned senior counsel for the appellant drew our attention to the fact that the figures would show that the licensee has indeed being acting unfairly. It is the case of the appellant that the sole licensee can misuse his position in at least three ways. It is contended that it is possible that the licensee prefers certain brands to others inasmuch as it concerns negotiation, longer credit period and other

terms and conditions. BIO suppliers would be at the mercy of the licensee and they would have no option but to reconcile with the terms and conditions which would be laid down by the licensee. Secondly, it is contended that failure to adhere with the terms and conditions set out may result in a situation where a particular brand would not be made available in the State of Haryana. It is further contended that in view of the monopolistic position enjoyed by the licensee it may choose to promote certain brands over others on account of unfair negotiating position made available to it by the license. There are no checks and balances to ensure that interest of other stakeholders is taken care of. Though the conditions provide that the licensee will have to supply goods demanded there are no means by which the actual demand can be ascertained. It is further pointed out that it is open to the licensee to offer discounts to the retailers it seeks to favour. This results in neutralizing the condition relating to the maximum sale price being fixed by the excise authority. Onerous conditions can be placed upon purchasers as

well as suppliers by the sole licensee and the lack of checks and balances renders the same violative of Article 14.

28. The guarantee of Article 14 against the State undoubtedly embraces all spheres of its activities. If the action falls foul of the mandate of Article 14 it is vulnerable, though different yardsticks may operate. Undoubtedly the expression 'state' would also include within its sweep an instrumentality of the State as it would fall under the expression "other authorities" in Article 12 of the Constitution. The matter relating to which authorities fall under Article 12 has been the subject matter of a catena of decisions of this Court. The principles have been culled out with sufficient clarity and I do not see any occasion or any reason to dwell more upon the same as the appellant even does not have a case that the licensee would be an instrumentality of the state within the meaning of Article 12 of the Constitution. It is a trite law that an effort at bringing a body within Article 12 must originate specifically in the pleadings.

29. Pleadings in this case on this point is conspicuous by its absence.

30. The appellant would point out that in fact, after the new regime has been put in place, 5 star hotels were not being provided sufficient stocks of BIO products being supplied by the members of the appellant. Further it is pointed out that immediately upon grant of the licence in 2017, there has been a sudden decline in the sales of BIO products supplied by the members of the appellant. The reason for this decline is sought to be placed at the door step of the sole licensee. The appellant has pointed out that there has been sudden decline of 25% in the supply of BIO brands of United Spirits Ltd.. There is a reference of 30% decline of BIO products of Pernod Ricard as well. There has been significant rise of the product of Pernod Ricard in the neighboring states of Rajasthan and Delhi, it is pointed out.

31. I would notice that many of the contentions of the appellant are in the form of apprehensions about what may happen in future. In fact, there is a case for the respondents that no complaint as such

was moved against the licensee during the period. The licensee is duty bound under the terms and conditions of licence to submit pricing of each brand at the time of approval of the brand. The department is bound to approve the maximum sales price factoring in various elements. The licensee must indicate among other things, the landing price, expenses, profit margin. The price is also determined based on the prevalent rates of the same and equivalent rate at the neighboring states and the Government levies.

32. Furthermore, the exclusive licensee is under the condition required to keep sufficient stock of all brands as are demanded by the procuring licensees and all such brands as were registered with the department in 2016-17. Thus at least two restrictions exist as in built safeguards which operate against the exclusive licensee. The licensee is obliged to keep sufficient number of stock of all brands which are demanded by the procuring licensees. In this case, the members of the appellant would fall within the expression

'procuring licensees'. Secondly, there is a regulation of the maximum price which the exclusive licensee can demand as the price is to be fixed by the State itself. A question however, no doubt, arises as to what would happen if the exclusive licensee himself also operates retail outlets and he promotes certain brands and/ or dampens the trade in others. In the first place I would think that ordinarily on the principle that a person would act in his own self interest there would be no reason for the licensee to deny himself the proceeds of the higher turnover based on more sales as by seeking to dampen the sale of certain brands it is the licensee who would suffer a loss. Let me assume however that he is placed in a situation where there is a conflict of interest and by suppressing the sale of certain brands and permitting the sale of other brands the exclusive licensee is placed in a more advantageous position, and therefore, he prefers it. I must remind myself that the complaint of the individual company would be that brand which it wishes to import and deal in is not made

available. Quite clearly if there is any such concrete incident which is pointed out, it would be an infraction of the condition of the licence. Certainly it would give rise to power with the authorities to take suitable action as available in law including in appropriate cases, cancellation of the licence. If such provisions are not already there I would observe that the State may devise suitable provisions so that an individual who acts as the licensee of the state would not do what the State itself would be forbidden from doing under the Constitution. I must also remind myself that at the same time, the State has apparently gained by way of enhanced collection of revenue by the new regime put in place. The State's power to experiment in economic matters shall not suffer invalidation at the hands of the Court. Such power must be premised solely on State action falling foul of the Constitution and the laws. State would however do well to provide for a suitable mechanism by which it can provide appropriate safeguards so that there is fair dealing by the exclusive

licensee. Subject to the above observations I would
dismiss the appeal with no order as to costs.

.....J.
(K.M. Joseph)

New Delhi;
February 12, 2019