REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5138 OF 2019
(Arising out of SLP (C) No.449 of 2014)

The State of Jharkhand & Ors. .....Appellant(s)

Versus

M/S Ajanta Bottlers & Blenders Pvt. Ltd. ....Respondent(s)

J U D G M E N T

A.M. Khanwilkar, J.

1. Leave granted.

2. This appeal takes exception to the impugned judgment and order of the High Court of Jharkhand at Ranchi in Writ Petition (T) No.7499 of 2012 dated 25th July, 2013, whereby the writ petition filed by the respondent to assail the notification dated 6th November, 2012, as published in the official gazette on 10th November, 2012, issued by the Board of Revenue, Jharkhand in exercise of powers conferred under Section 90 of the Jharkhand

Excise Act, 1915 came to be allowed on the ground that the State had no legislative competence to levy tax/fee on the import of rectified spirit, as it is a non-potable liquor i.e. alcohol not fit for human consumption. Additionally, the High Court opined that the appellant-State had failed to justify the impugned levy on rectified spirit on the basis of services provided by the State in lieu thereof or being in the nature of *quid pro quo*. The original notification is in Hindi, the same reads thus:

"ANNEXURE-3

झारखण्ड गजट

असाधारण अंक

झारखण्ड सरकार द्वारा प्रकाशित

संख्या 680 19 कार्तिक, 1934 शकाब्द

रांची, शनिवार 10 नवम्बर, 2012

राजस्व पर्षद

———

अधिसूचना

8 नवम्बर, 2012

संख्या–1/नीति–40–21/2012–926/रा0प0–झारखण्ड

उत्पाद अधिनियम 1915 (अधिनियम–2, 1915) की धारा–90 द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए, राजस्व पर्षद, झारखण्ड, पर्षद अधिसूचना संख्या–23–137–2, दिनांक 29 अप्रैल, 1919 के अन्तर्गत बनाई गई नियमावली नियम–106(ट) के बाद एक नया नियम–106(ठ) निम्न प्रकार जोड़ती है:–

नियम–106 (ठ):–''अधिसूचना संख्या–470 एफ. दिनांक 15 जनवरी, 1915 के कंडिका–3 के शीर्ष 'विदेशी शराब' का उप शीर्ष (d) के अन्तर्गत उद्घोषित विदेशी शराब जिसका विनिर्माण उत्पाद अधिनियम की धारा–2 (15) (iii) के अनुरूप किया जाएगा के उत्पादन हेतु आयातित सुषव/संशोधित सुषव, जिसका उपयोग सर्वप्रथम पुनरासवन विधि से ई.एन.ए. के विनिर्माण में किया जाएगा, के विदेशी मदिरा में पेय प्रयोजनार्थ परिवर्तन के समय परन्तु मदिरा के बोतलबंदी के पूर्व, इस उद्देश्य से आयात की गयी सुषव/संशोधित सुषव की कुल मात्रा पर 6/– रू प्रति एल.पी. लीटर की दर से आयात शुल्क जमा किया जाएगा।''

यह अधिसूचना राजकीय गजट में प्रकाशन की तिथि से प्रभावी होगा।

संख्या–1/नीति–40–21/2012–927/रा.प.–झारखण्ड उत्पाद अधिनियम, 1915 (अधिनियम–2, 1915) की धारा–90 द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए, राजस्व पर्षद, झारखण्ड, पर्षदीय अधिसूचना संख्या–23–137–2, दिनांक 29 अप्रैल, 1919 के अन्तर्गत बनाई गई नियमावली नियम–106 (ठ) के बाद एक नया नियम–106 (ड) निम्न प्रकार जोड़ती है:–

नियम–106 (ड) :– 'झारखण्ड राज्य में देशो मदिरा/मसालेदार देशी मदिरा के पेय प्रयोजनार्थ उत्पादन के उद्देश्य से, आयातित सुषव/संशोधित सुषव के देशी मदिरा एवं मसालेदार देशी मदिरा में परिवर्तन के समय परन्तु मदिरा के बोतलबंदी अथवा सैचेटिंग पूर्व, वर्णित उद्देश्य से, आयात की गई सुषव/संशोधित सुषव की कुल मात्रा पर 0.25 रू. (पच्चीस पैसा) प्रति बल्क लीटर की दर से आयात शुल्क जमा किया जाएगा।''

यह अधिसूचना राजकीय गजट में प्रकाशन की तिथि से प्रभावी होगा।

संख्या–1/नीति–40–21/2012–928/रा.प.–झारखण्ड उत्पाद अधिनियम, 1915 (अधिनियम–2, 1915) की धारा–90 द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए, राजस्व पर्षद, झारखण्ड, पर्षदीय अधिसूचना संख्या–23–137–2, दिनांक 29 अप्रैल, 1919 के द्वारा बनाई गई नियमावली के अन्तर्गत अधिसूचित अधिसूचना संख्या–1/नीति–10–33/ 2008–583, दिनांक 15 मई, 2008 द्वारा बनाये गये नियम–106 (ज) में निम्न प्रकार संशोधन करती है:–

नियम–106 (ज) :– ''झारखण्ड राज्य के बाहर किसी भी स्थान/क्षेत्र से सुषव/संशोधित सुषव/ई.एन.ए. का, पेय प्रयोजनार्थ आयात किये जाने पर, आयात की जानेवाली मात्रा पर 0.25 रू. (पच्चीस पैसा) प्रति बल्क लीटर की दर से पारक शुल्क (परमिट फी) झारखण्ड राज्य में देय होगा।''

यह अधिसूचना राजकीय गजट में प्रकाशन की तिथि से प्रभावी होगा।

राजस्व पर्षद, झारखण्ड के आदेशानुसार,
(ह./–) अस्पष्ट,
उप सचिव,
राजस्व पर्षद, झारखण्ड, रांची।"

Free translation thereof has been filed by the appellant as annexure P-2. However, during the hearing as some doubt was raised about the accuracy of annexure P-2, we thought it appropriate to get the document (original in Hindi) translated from

the official translator of this Court. That translated version, reads thus:

"Translated version of Gazette by the Official Translator of the Supreme Court.

ANNEXURE -3

THE
JHARKHAND GAZETTE
EXTRAORDINARY
PUBLISHED BY THE GOVERNMENT OF JHARKHAND

No. 680 19 Kartik, 1934 Shakabd

Ranchi, Saturday, 10th November 2012

REVENUE BOARD
Notification
6th November 2012

No.1/ Policy-40-21/2012-928/ Ra. Pa.- In exercise of the power conferred by section 90 of Jharkhand Excise Act 1915 (Act-2 1915), the Revenue Board, Jharkhand makes the following addition of new rule in Rule 106 (Tha) after Rules Rule 106 (Ta) in Notification No. 23-137-2 dated 29th April 1919.

Rule 106 (Tha): Foreign Liquor under sub-head (d) of head 'Foreign Liquor' in Para-3 of Notification No. 470 F. dated 15 January 1919, which manufacturing shall be done in accordance with section-2 (15)(iii) of Excise Act, for its manufacturing, the imported spirit/ rectified spirit, which shall be first used for manufacturing of E.N.A. through repeated distillation, for foreign liquor beverage (at the time of conversion), but before bottling of liquor, for this purpose Import fee shall be deposited at the rate of Rs. 6/- per L.P. liter on the total quantity of imported spirit/rectified spirit."

This notification shall come into force on the date of its publication in the official gazette.

No.1/Policy-40-21/2012-927/*Ra.Pa.*- In exercise of the power conferred by Section 90 of Jharkhand Excise Act, 1915 (Act 2, 1915), Board of Revenue, Jharkhand makes the addition of new Rule – 106(Da)

after Rule 106(Tha) of the Rules prepared under Board Notification No.23-137-2 dated 29th April, 1919.

Rule 106(Da):- With the purpose of manufacturing of country liquor/spiced country liquor beverage in the State of Jharkhand, at the time of conversion in imported alcohol/rectified country spirit and spiced country liquor, but before bottling and storage of liquor, with the described purpose, the import fee shall be deposited at the rate of Re.0.25 (Twenty Five Paise) per Bulk Litre on the total amount of imported spirit/rectified spirit.

This notification shall come into force on the date of its publication in the Official Gazette.

No.1/Policy-40-21/2012-928/*Ra.Pa.* – In Exercise of the power conferred by Section 90 of Jharkhand Excise Act, 1915 (Act 2, 1915), the Board of Revenue, Jharkhand, makes amendment in the Rule 106 (Ja) made vide notified notification No.1/Policy-10-32/2008-583, dated 15th May 2008 in the Rules made vide Board Notification No.23-137-2 dated 29 April 1919:-

Rule 106(Ja) :- On the import of spirit/rectified spirit/ENA beverage from any place/area outside the state of Jharkhand, the permit fee at the rate of Re.0.25 (Twenty Five Paisa) per Bulk Litre will be payable on the imported quantity in the State of Jharkhand.

This notification shall come into force on the date of its publication in the official gazette.

By the order of Board of Revenue, Jharkhand
Sd/-illegible
Deputy Secretary,"

3. As aforesaid, the High Court accepted the challenge to the above-mentioned notification for the reasons noted hitherto. The relevant discussion in the impugned judgment in that behalf, reads thus:

"13. The State under List-II is empowered to levy fee under Entry 66 in respect of any of the matters in the list but not including fees taken in any Court. Entry 66 read with entry 8 of List II therefore provides competence to the State to levy fee in respect of intoxicating liquor i.e. alcoholic liquor fit for human consumption i.e. to say on the production, manufacture, possession, transport, purchase and sale of intoxicating liquor. **The present levy seeks to levy fee on the import of rectified spirit to be utilized for the purpose of, firstly for manufacture of ENA through re-distillation process and then for manufacture of IMFL.** Rectified spirit is not fit for human consumption and it therefore does not come within the meaning of intoxicating liquor as contained in Entry 8 of List II. Levy on the import of rectified spirit is not a fee on intoxicating liquor i.e. fit for human consumption. **By the impugned notification, the Board of Revenue in exercise of power conferred under section 90 of the Excise Act, 1915 has chosen to levy fee on the import of rectified spirit which is used for manufacture of ENA through re-distillation process and then for the purpose of manufacture of IMFL at the time before bottling @ Rs. 6.00 per LP Litre.** Industrial alcohol/non-potable spirit i.e. rectified spirit being not alcoholic liquor fit for human consumption, cannot be the subject matter of any regulation or control by the State under Entry 8, 51 and 66 of List II of Seventh Schedule of the Constitution. **The State has the power to levy fees under the garb of grant of privilege from those who deal in liquor or alcohol fit for human consumption i.e. potable liquor as distinct from non-potable liquor or alcoholic liquor unfit for human consumption.**

Under Entry 51 of List-II, State has been empowered to levy excise duty on alcoholic liquor fit for human consumption manufactured or produced in the State and countervailing duty at the same rate or lower rates on similar goods manufactured or produced elsewhere in India. Even under the instant Entry, the rectified spirit which is non potable liquor, does not come within the meaning of alcoholic liquor fit for human consumption on which the State can levy excise duty under Entry 51 of List-II. **The levy of import fees on rectified spirit therefore by the State Legislature before bottling of IMFL by shifting the event of taxation, cannot be held to be justified as in pith**

and substance, the levy is on import of rectified spirit i.e. non-potable liquor i.e. alcohol not fit for human consumption. Levy of fee on non-potable liquor i.e. unfit for human consumption or industrial alcohol is permissible under Entry 52 of List-I of Seventh Schedule of the Constitution. Under Entry 84 of List-I, excise duty on tobacco and other goods manufactured or produced in India can be levied except on alcoholic liquor for human consumption; opium, Indian hemp and other narcotic drugs and narcotics. In the wake of such clear demarcation of legislative fields between Union and State Legislature, the impugned notification levying import fees on rectified spirit i.e. non potable liquor or alcoholic liquor unfit for human consumption by applying the rule of pith and substance, 18 cannot come within the legislative competence of the State Legislature. **The impugned levy therefore is beyond the legislative competence of the State Legislature and consequentially also beyond the rule making power of the Board of Revenue**."

(emphasis supplied)

And again.....

"16. The respondent State sought to justify the levy as a regulatory measure for supervision and control of potable liquor to protect public health and morality. **However, there are no materials brought on record by the respondent State to justify that any services in lieu thereof are provided in the nature of quid pro quo to justify the imposition of such a levy**. The petitioner is already having various licences granted by the Excise Department, Government of Jharkhand in Form- 19, 19(B), 20, 25 and 28(A) prescribed by the Board of Revenue and is paying the licence fee for grant of such licences. Under Form-19 a licence for compounding and blending of foreign liquor is given. In Form-19(B), petitioner has been granted licence for the manufacture of foreign liquor / beer as also for the sale of foreign liquor / beer through licencee distributors as also to import or transport the same under bond. The petitioner has a licence for bottling of potable foreign liquor under Form-20 for which it pays fees in advance of Rs. 50,000/- for the year. In Form-25 it has been granted licence to manufacture denatured spirit at its distillery / warehouse. The petitioner also has a licence under Form-28(A) to manufacture spirit in distillery not

used in the manufacture of potable liquor for which it also pays a licence fees. It is the contention of the petitioner that it is paying establishment charges on the posting of excise official at its premises. **Therefore, the respondent State have not been able to justify the impugned levy on rectified spirit on the basis of services provided in lieu thereof. Besides this, the petitioner has been paying licence fee for issuance of licence under different forms in the nature of a regulatory fee. The impugned levy therefore, is not justifiable on this account as well**.

17. In these circumstances, levy of import fee on rectified spirit which is impermissible for the State Legislature, also has the effect of impeding the inter-State trade and commerce as guaranteed under Article 301 of the Constitution of India. At the same time, it is within the exclusive legislative competence of Parliament to levy any duty or tax on rectified spirit i.e. industrial alcohol. Such action therefore, is in teeth of the Article 301 of the Constitution of India.

18. In view of the aforesaid reasons and discussions and in view of the settled law laid down by the judgments of the Hon'ble Supreme Court referred to herein above, the notification dated 10th November 2012 issued by the Board of Revenue, Jharkhand in exercise of powers conferred under section 90 of the Jharkhand Excise Act, 1915, cannot be sustained in law and it is accordingly quashed. Consequentially, the demand raised vide notice dated 24th November 2012 (Annexure-4) for deposit of import fees on rectified spirit, is also quashed. Petitioner shall be entitled to refund of any such import fees deposited under the impugned notification.
Writ petition is accordingly allowed."

(emphasis supplied)

The correctness of the view so taken by the High Court is the subject matter of challenge in this appeal, at the instance of the State. In defending the notification before the High Court, the

appellant-State had asserted that the rule inserted by the subject notification being Rule 106 (Tha), is an impost and is merely described as an import fee. Because, it is reckoned on the basis of quantity of pure alcohol content of rectified spirit (which is known as "London Proof Liter"), imported for the purposes of manufacture of potable Foreign Liquor after the process of compounding, blending and reduction of strength of spirit from over proof strength to under proof strength is complete. Further, the unit for charging import fee is London Proof Liter (for short, "**LPL**") because, it does not change even after the spirit has undergone through the process of compounding, blending & reduction of strength. Indisputably, nothing can be nor will be charged in advance, so long as the imported rectified spirit is non-potable and till it is in the form of raw material. In other words, nothing is charged on industrial alcohol. Thus, it is neither a violation of provisions of the Constitution nor is it an arbitrary use of power under Section 90(7) by the Board of Revenue who was competent to issue the same towards levy of any kind of fee on potable liquor. In substance, the stand of the appellant-State is that the stated import fee is not on rectified spirit in its raw form as such, but on pure alcoholic liter "LPL" in the form of potable liquor. Further, it

is a regulatory fee only for supervision and control of production of potable liquor to protect public health and morality. It was further asserted that no right inheres in any person for doing business in intoxicants. That right exclusively belongs to the State. Resultantly, it is open to the State to part with those rights for a consideration on conditions as may be deemed appropriate. There is no need for the State to establish commensurate services rendered by it to apply the doctrine of *quid pro quo,* in respect of impost of any kind of fee on potable liquors.

4. The High Court, however, was not impressed by the stand taken by the State and proceeded to answer the matters in issue against the State for reasons afore-quoted, in the extracted portion of the impugned judgment.

5. The appellant-State has approached this Court to assail the view so taken by the High Court. More or less, the State has reiterated its stand as was taken before the High Court. In that, the charge in terms of the impugned Rule 106(Tha) to the licensees was neither in the nature of a tax nor excise duty. The impost is a normal incidence of a trading or business transaction in respect of the rights exclusively inhering in the State - with regard to

production and manufacture of intoxicating liquor covered by Entry 8 of list II of the Seventh Schedule of the Constitution of India. The levy is, essentially, to regulate and ensure that the imported rectified spirit is not diverted and misused as a substitute for potable alcohol. It is open to the State to deal in intoxicants its manufacture, possession, sale, transport, import, export, consumption on premises of hotel and restaurants etc. Further, the State has exclusive rights and privileges of manufacturing and selling liquor. It is urged that the approach of the High Court is completely wrong and against the settled legal position.

6. *Per contra,* the respondents have supported the conclusions reached by the High Court and would contend that a close reading of Rule 106(Tha) clearly indicates that it purports to levy "import fee" on imported rectified spirit, used for production of Indian Made Foreign Liquor (for short, "**IMFL**") manufactured in the respondent factory under a valid licence for import and also to manufacture of the product (IMFL). It is urged that the provision regarding collection of the fee after the rectified spirit has been used to first produce ENA and then potable liquor, would not alter the character of the levy being impost on the imported rectified

spirit. The State is not competent to legislate on imported industrial liquor or levy any charge or tax thereon as such. The postponement of realization of charges predicated in the impugned rule would not alter the efficacy of the rule, providing for levy of import fee on rectified spirit. Relying on the decisions of this Court it was urged that rectified spirit is highly intoxicating and cannot be consumed by humans. It is industrial alcohol on which the State is not competent to legislate or levy taxes in the garb of duty or fee. The imported rectified spirit, in that form, would not attract excise duty. That can primarily be imposed on the happening of production or manufacture of goods produced or manufactured within the State. It is then urged that the respondent is engaged in production of "IMFL" for which it has obtained all essential licences prescribed by the Board of Revenue on payment of licensing fees for grant of such licenses such as "Form 19" for compounding and blending of foreign liquor, Form19-B for manufacture of foreign liquor/beer as also for the sale of foreign liquor/beer through licensee distributors as also to import or transport the same, Form 20 for bottling of potable foreign liquor, Form 25 for manufacture denatured spirit at its distillery/ warehouse, Form 28(A) for manufacture of spirit in distillery not

used in the manufacture of potable liquor. In that view of the matter, it is not open to the State to levy impugned charges in the garb of import duty, or excise duty, as the case may be, on the imported rectified spirit, for production of "IMFL". The respondent prays that the appeal be dismissed being devoid of merits and the decision of the High Court be affirmed.

7. We have heard learned counsel for the parties. Additionally, they have filed written submissions.

8. The seminal issue to be answered in this appeal is about the purport of the notification dated 6th November, 2010 as published on 10th November, 2012 and whether it is in the nature of legislation by the State on the subject of industrial alcohol. Alcohol can generally be classified into the following categories:

> "I. **Isopropyl alcohol** (or **IPA** or **isopropanol**) is a compound with the chemical formula **$CH_3CHOHCH_3$**. It is a colourless, flammable chemical compound with a strong odour. As an isopropyl group linked to a hydroxyl group, it is the simplest example of a secondary alcohol, where the alcohol carbon atom is attached to two other carbon atoms. If consumed, Isopropanol is converted into acetone in the liver, which makes it extremely toxic. Often used for disinfecting skin an antiseptic.
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> II. **Methyl Alcohol** (or **Methanol**): Chemical Formula – **CH_3OH:** Not for human consumption. If consumed, can cause blindness and death. Methanol acquired the name wood alcohol because it was once produced

chiefly by the destructive distillation of wood. Today, methanol is mainly produced industrially by hydrogenation of carbon monoxide.

III. **Ethyl alcohol,** (also known as **Ethanol** and abbreviated as EtOH), is a colourless, volatile, and flammable liquid that is soluable in water. Its chemical formula is C_2H_6O, or can be written as C_2H_5OH or **CH_3CH_2OH**. It has one methyl (-**CH_3**) group, one methylene (-**CH_2**-) group, and one hydroxyl (-**OH**-) group."

The first two categories are poisonous, toxic and fatal for human consumption, rendering its use only for industrial purposes. It is stated that Isopropanol and methanol, because of their inherent chemical properties, cannot be purified and used for the production of 'intoxicating liquor' or 'potable liquor' by adopting 'physical means' like decantation, filtration, redistillation, fractional distillation etc. The third category namely, Ethyl Alcohol or Ethanol (in India is usually produced from molasses derived from sugarcane) in its concentrated form and it is also known as "Rectified Spirit" and its strength measured in LPL signifies the strength of alcohol by volume, 13 parts of which weigh exactly equal to 12 parts of water at 51 degrees Fahrenheit.

9. Be that as it may, rectified spirit after it undergoes certain 'physical changes' by adopting 'physical means' like re-distillation, rectification (repeated or fractional distillation) to remove

impurities, it becomes purer and is known as Extra Neutral Alcohol (ENA). Thereafter, by addition and mixing of colouring and flavouring agents (compounding), as well as after dilution with water, ENA is left for maturation, to be bottled and used as 'intoxicating liquor' or 'potable liquor' known as Indian Made Foreign Liquor (IMFL). Whereas the country liquor, also known as 'Desi Sharab' is prepared from rectified spirit or low grade ENA having alcohol content below 40% (as decided by different State Governments) which may be coloured (by caramel) and may be spiced too. Notably, the chemical composition of Ethyl alcohol or Ethanol (**C_2H_6O** or **C_2H_5OH** or **CH_3CH_2OH**) remains the same in the entire process, though addition of colouring and flavouring agents makes it a mild concoction/mixture/solution (in chemical parlance a solution of alcohol is known as 'tincture') which renders it more palatable to human consumption.

10. We have adverted to the above-mentioned process, noted in the written submissions filed by the appellant, so as to give proper interpretation to the impugned notification and the subject rules, in particular Rule 106(Tha). English version of the said rule noted in the notification (as translated by the official translator of this

Court reproduced in paragraph 2 above), in our opinion, makes it amply clear that the levy or impost fructifies only upon completion of distillation process (in two stages- first from rectified spirit to ENA and then from ENA to IMFL) and in particular converting into a final product "IMFL". The collection of impost is, however, deferred until the bottling of that product. In other words, the levy is not at the stage of import of rectified spirit within the State; nor at the stage of initial distillation thereof to Extra Neutral Alcohol (ENA) and not until the product IMFL is ready for bottling as such. Thus, the levy under the impugned rule ripens or fructifies only after the original raw material (imported rectified spirit) has undergone distillation process at two different stages and transmute and mutate into an intoxicant or potable alcohol palatable to human consumption, but its (impost) collection is effected just before bottling it in that form (potable liquor). Indeed, the levy predicated in this rule is on the total quantity of imported rectified spirit utilised for mutating it in the form of IMFL, a new produce. The last part of the rule stipulates the quantum of charges to be levied on such utilized imported rectified spirit for production of the foreign liquor. For that limited purpose, the

quantity of imported rectified spirit utilized in the production of potable liquor, is reckoned.

11. Reading the impugned provision as a whole and line by line or word by word in this perspective, it must follow that the substance of the provision is to levy charges on the product IMFL produced or manufactured by use of imported rectified spirit. In that sense, the levy is not on the input (imported rectified spirit) of the final product as such but is on the manufactured or produced product being potable alcohol palatable to human consumption. For the purposes of computing the levy, the yardstick of Rs.6 per LPL on the total quantity of imported rectified spirit utilized for production of IMFL is reckoned. Thus, the impost is not on the imported rectified spirit as such but only on the produced foreign liquor before it is bottled for sale in the wholesale or retail market, as the case may be. If so understood, the whole edifice of the argument of respondents regarding the interpretation of the impugned rule must collapse. For, the challenge to the impugned rule is on the assumption that it permits the competent authority to levy charges on the imported rectified spirit and not fit for human consumption but which has the potency of being used for

producing intoxicants or potable liquor though exclusively meant for industrial purposes. Once that assumption is discounted or disregarded, nothing more survives for consideration. We say so because, it is well established that the State may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 and 8 of List II and may also laydown regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol. Had it been the case of levy on non-potable alcohol (imported rectified spirit) *per se*, only then the question about the competency of the State Legislature or the justness of the levy on the doctrine of *quid pro quo* may become relevant. However, if it is a case of legislation in respect of potable alcohol, as has been noted by us hitherto, the State would be competent to legislate in that regard and levy charges – be it for regulating the same or impost for parting with its rights regarding manufacture, storage, export, sale and possession thereof.

12. We may usefully advert to the Constitution Bench decision (Five Judges) in ***Har Shankar and Ors. Vs. The Dy. Excise and***

Taxation Commissioner and Ors.[1], paragraph Nos.53 to 59, which read thus:

> "53. In our opinion, the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decisions of this Court in *Balsara case*[2], *Cooverjee case*[3], *Kidwai case*[4], *Nagendra Nath case*[5], *Amar Chakraborty case*[6] and the *R.M.D.C. case*[7], as interpreted in *Harinarayan Jaiswal case*[8] and *Nashirwar case*[9]. There is no fundamental right to do trade or business in intoxicants. **The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants — its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants.** In *American Jurisprudence*, Vol. 30 it is stated that while engaging in liquor traffic is not inherently unlawful, nevertheless it is a privilege and not a right, subject to governmental control (p. 538). **This power of control is an incident of the society's right to self-protection and it rests upon the right of the State to care for the health, morals and welfare of the people. Liquor traffic is a source of pauperism and crime** (pp. 539, 540, 541).
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> 54. It was unnecessary in *Krishna Kumar Narula case*[10] to examine the question from this broader point of view, as the only contention bearing on the constitutional validity of the provision impugned therein was not permitted to be raised as it was not argued in the High

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[1] (1975) 1 SCC 737
[2] 1951 SCR 682 : AIR 1957 SC 414
[3] 1954 SCR 873 : AIR 1954 SC 318
[4] 1957 SCR 295 : AIR 1957 SC 414
[5] 1958 SCR 1240 : AIR 1958 SC 398
[6] (1973) 1 SCR 533 : (1972) 2 SCC 442
[7] 1957 SCR 874 : AIR 1957 SC 699
[8] (1972) 3 SCR 784 : (1972) 2 SCC 36
[9] (1975) 1 SCC 29
[10] (1967) 3 SCR 50 : AIR 1967 SC 1368

Court. The discussion of the question whether a citizen has a fundamental right to do trade or business in liquor proceeded in that case, avowedly, from a desire to clear the confusion arising from the "different views" expressed by the two Judges of the High Court. This may explain why the Court restricted its final conclusion to holding that dealing in liquor is business and the citizen has a right to do business in that commodity. The Court did not say, though such an implication may arise from its conclusion, that the citizen has a fundamental right to do trade or business in liquor. If we may repeat, Subba Rao, C.J. said:

> "We, therefore, hold 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."

It is significant that the judgment in *Krishna Kumar Narula case* does not negate the right of the State to prohibit absolutely all forms of activities in relation to intoxicants. The wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants on such terms of general application as the State deems expedient.

55. **Since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. By Article 298 of the Constitution, the executive power of the State extends to the carrying on of any trade or business and to the making of contracts for any purpose**. As observed in *Harinarayan Jaiswal case*, (SCC p. 44, para 13)

> "if the Government is the exclusive owner of those privileges, reliance on Article 19(1)(*g*) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights."

Section 27 of the Act recognises the right of the Government to grant a lease of its right to manufacture, supply or sell intoxicants. Section 34 of the Act read with Section 59(*d*) empowers the Financial Commissioner to direct that a licence, permit or pass be granted under the Act on payment of such fees and subject to such restrictions and on such conditions as he may prescribe. In such a scheme, it is not of the essence whether the amount charged to the licensees is pre-determined as in the appeals of Northern India Caterers and of Green Hotel or whether it is left to be determined by bids offered in auctions held for granting those rights to licensees. **The power of the Government to charge a price for parting with its rights and not the mode of fixing that price is what constitutes the essence of the matter. Nor indeed does the label affixed to the price determine either the true nature of the charge levied by the Government or its right to levy the same**.

56. The distinction which the Constitution makes for legislative purposes between a "tax" and a "fee" and the characteristics of these two as also of "excise duty" are well-known. "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered". A fee is a charge for special services rendered to individuals by some governmental agency and such a charge has an element in it of a quid pro quo. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. **The amounts charged to the licensees in the instant case are, evidently, neither in the nature of a tax nor of excise duty. But then, the "licence fee" which the State Government charged to the licensees through the medium of auctions or the "fixed fee" which it charged to the vendors of foreign liquor holding licences in Forms L-3, L-4 and L-5 need bear no quid pro quo to the services rendered to the licensees. The word "fee" is not used in the Act or the Rules in the technical sense of the expression. By "licence fee" or "fixed fee" is meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the State can carry on a**

trade or business, such a charge is the normal incident of a trading or business transaction.

57. While on this question, we may with advantage cite a passage from *American Jurisprudence* (Vol. 30, pp. 642, 645) which is based on the decisions in *Gundling* v. *Chicago*[11], *Phillips* v. *Mobile*[12] and *Richard* v. *Mobile*[13], It says:

> "the familiar principle that the imposition of licence fees on useful and honourable occupations must not exceed the cost of issuing the licence, plus the expense of inspecting and regulating the business licensed ... is not necessarily applicable to a liquor license. **The liquor traffic is not something which is licensed for the purpose of promoting it. Indeed, licence fees may be exacted in amounts intended to discourage participation in the business. The courts have quite generally refused to hold that the licence fee imposed, merely because it is large, is a tax, where the object is to control, regulate, and restrict, and not to encourage the liquor traffic, the revenue being the result of the system and not the motive for its adoption . . . . The higher the fee imposed for a licence, it is sometimes said, the better the regulation, as the effect of a high fee is to keep out the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it**."

58. In the view we have taken, the argument that the Government cannot by contract do what it cannot do under a statute must fail. No statute forbids the Government from trading in its own rights or privileges and the statute under consideration, far from doing so, expressly empowers it by Sections 27 and 34 to grant

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[11] 44 L Ed 728
[12] 52 L Ed 578
[13] 52 L Ed 581

> leases of its rights and to issue the requisite licences, permits or passes on payment of such fees as may be prescribed by the Financial Commissioner.
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> 59. The argument that in *Cooverjee case* the impugned power having been exercised in respect of a centrally administered area, the power was not fettered by legislative lists loses its relevance in the view we are taking. It is true that in that case it was permissible to the Court to find, as in fact it did, that the fee imposed on the licensees was "more in the nature of a tax than a licence fee". As the authority which levied the fee had the power to exact a tax, the levy could be upheld as a tax even if it could not be justified as a "fee", in the constitutional sense of that term. **But the "licence fee" or "fixed fee" in the instant case does not have to conform to the requirement that it must bear a reasonable relationship with the services rendered to the licensees. The amount charged to the licensees is not a fee properly so-called nor indeed a tax but is in the nature of the price of a privilege, which the purchaser has to pay in any trading or business transactions**."
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> (emphasis supplied)

13. Indeed, if the State legislation was to provide for levy on the imported rectified spirit *per se* the same would be without jurisdiction, as consistently held, including by the Constitution Bench in ***Deccan Sugar & Abkari Co. Ltd. Vs. Commissioner of Excise, A.P.***[14], paragraph No.2 of this decision, which reads thus:

> "2. It is settled by the decision of this Court in *Synthetics and Chemicals Ltd.* v. *State of U.P.* that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fall under that category the

[14] (2004) 1 SCC 243

> State Legislature cannot impose any excise duty. The decision in *Synthetics and Chemicals Ltd.* v. *State of U.P.* has been followed in *State of U.P.* v. *Modi Distillery*[15] where certain wastage of ethyl alcohol was sought to be taxed. This Court following the decision in *Synthetics and Chemicals Ltd.* came to the conclusion that this cannot be done."

14. The next question is whether the levy is in the nature of tax or excise duty. If it is a case of excise duty on potable liquor produced by use of imported rectified spirit, the State has jurisdiction to legislate in respect of duty on the production or manufacture of such goods produced or manufactured within the State. In the present case, we find merits in the submissions of the appellant State that the impost is neither in the nature of a tax nor excise duty but it is towards the charges by whatever name, for regulating the production of potable liquor to preserve public health and morality including for parting with its rights or privileges regarding manufacture, supply or sale of potable liquor or intoxicating liquor and to regulate the use of imported rectified spirit for production and sale of potable liquor. In such a case, the State need bear no *quid pro quo* to the services rendered to the licencee for production of foreign liquor (IMFA).

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[15] (1995) 5 SCC 753

15. The fact that the manufacturer-respondent has already obtained requisite licences for import of rectified spirit and production of foreign liquor (IMFA) on payment of fixed rates does not mean that the State has surrendered all facets of its rights in respect of every form of activity in relation to potable liquor – its manufacture, storage, export, import, sale and possession. The amended provision is an enabling provision authorising the State to levy charges or impost for ceding its one or more of the activity in respect of foreign liquor (IMFL) produced by use of imported rectified spirit. Such impost can be in addition to the general power of the State to issue licence on payment of fees for production and sale of potable liquor. As observed in ***Har Shankar*** (supra), in paragraph No.56, the State need bear no *quid pro quo* to the services rendered to the licensees of producer of foreign liquor.

16. The respondent, however, placed heavy reliance on the decision in ***State of U.P. & Ors. Vs. Vam Organic Chemicals Ltd. and Ors.***[16], to contend that the State is obliged to justify the impost based on *quid pro quo.* We are afraid, this decision is of no avail to the respondent. In that case, the Court was dealing with

[16] (2004) 1 SCC 225

challenge to Rule 3(a) therein on the ground that the State Legislature did not have legislative competence to legislate on "denatured spirit" which is unfit for human consumption. In that context, this Court relied on the decision in ***Synthetics and Chemicals Ltd. and Ors. Vs. State of U.P. and Ors.***[17] and answered the issue. If the case under consideration was to be regarding legislation on imported rectified spirit as such, this decision would have come handy. However, having opined that the purport of the impugned Rule 106(Tha), is to permit impost on the final processed product being foreign liquor "IMFL", before bottling as fit for human consumption, the State has jurisdiction to legislate on that subject and need bear no *quid pro quo* to the services rendered to the licencee of manufacturer of foreign liquor (IMFL).

17. In view of the above, we do not intend to dilate on other arguments and reported decisions pressed into service by the respective parties. Suffice it to observe that the challenge to the amended Rule 106 (Tha), in our opinion, is unfounded and is based on erroneous assumption that it purports to authorise the

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[17] (1990) 1 SCC 109

State to levy charges on the imported rectified spirit as such. However, upon proper interpretation of the said rule we hold that it purports to empower the State to levy charges on the final processed product being foreign liquor (IMFL) manufactured by use of imported rectified spirit. This appeal, therefore, ought to succeed.

18. Accordingly, we allow this appeal and quash and set aside the impugned judgment and order of the High Court dated 25th July, 2013 passed in WP(T) No.7499 of 2012. The said writ petition stands dismissed. All pending interim applications are disposed of. No order as to costs.

.....J
(A.M. Khanwilkar)

.....J
(Ajay Rastogi)

New Delhi;
July 02, 2019.