

CASE NO.:
Appeal (Civil) 3017 of 1997

PETITIONER:
State of Punjab & Anr.

RESPONDENT:
M/s Devans Modern Breweries Ltd. & Anr.

DATE OF JUDGMENT: 20/11/2003

BENCH:
CJI., R.C. Lahoti & Dr. AR. Lakshmanan.

JUDGMENT:
JUDGMENT

Dr. AR. LAKSHMANAN, J.

I have had the privilege of perusing the judgment proposed by my learned Brother Justice B.N. Agrawal. However, with respect, I express my inability to agree with the same and I propose to write a separate judgment in the following terms.

As facts and provisions of the relevant law have been set out in the judgment of my learned Brother Justice B.N. Agrawal, I do not propose to extract them again.

Civil Appeal No. 3017 of 1997 was filed by the State of Punjab against the judgment of the Division Bench of the Punjab & Haryana High Court dated 17.01.1997 in Writ Petition (Civil) No. 5358 of 1996. The said writ petition was filed by Respondent No.1 in this appeal, namely, M/s. Devans Modern Breweries Ltd., Ludhiana praying for issuance of a writ in the nature of Certiorari quashing the imposition of import fee on Beer vide Order 1-D (iii) of the Punjab Excise Fiscal Orders, 1932, amended from time to time, latest being notification dated 27.03.1996 which is impugned in the writ petition and for other consequential prayers.

Civil Appeal Nos. 2696 and 2697 of 2003 were filed by Penguin Alcohols (P) Ltd. and Another etc. against the State of Kerala and Others against the common judgment of the High Court of Kerala dated 06.04.2001 in Writ Appeal Nos. 3 and 10 of 2001 dismissing the appeal filed by them.

The original petitions were filed by appellants herein against Exhibit P1 notification issued by the State of Kerala enhancing the rate of import fee from Rs. 2/- per proof litre to Rs.5/- on Indian Made Foreign Liquor (hereinafter referred to as "IMFL"). The import fee was initially levied under Government Order, G.O.(MS) No. 57/92/TD dated 31.12.1992. The learned Single Judge upheld the levy holding that it is a fee and regulatory in nature. The appellants preferred writ appeals, which were dismissed by the Division Bench by the impugned common order in Writ Appeal Nos. 3 and 10 of 2001.

In both the appeals, common questions arise for consideration and hence they have been heard together and are being disposed of by this common judgment.

The points for consideration in both the appeals are:

- a) Whether the import fee levied is the price for parting with the privilege given to the respondent to import liquor into the State and, therefore, the same is within the competence of the State to impose import fee;
- b) Whether the imposition of import fee does not, in any way, restrict trade, commerce and intercourse among the States.

It is well settled by a catena of decisions that the trade in liquor is not a fundamental right. It is a privilege of the State. The State parts with this privilege for revenue consideration. In Punjab, the Excise Policy of the State is formulated every year. It is also made known to the licensees much before their licenses for the year comes to an end. It is also a matter of fact that the licensees have paid the fee on demand. The fee was first levied in the year 1992. The licensee, in the Punjab case, had been holding the licence all through this period and never challenged or protested against levy of the fee. The licensees having paid the fee without any protest all through is not entitled to challenge the same, which does not suit them. The licensee cannot approbate and reprobate. In Punjab, the grant of licences are governed by the Punjab Excise Act, 1914 (for short "the Act") and various rules and orders framed under it. In the Punjab case, the challenge of the appellant is limited to the imposition of import fee in addition to the countervailing duty on Beer. It is not disputed by the appellant that the State is competent and is entitled to impose excise duty or countervailing duty besides there is no bar on the State to charge any other fee on account of consideration of the privilege provided to the licensee to provide them the right to trade in liquor. A perusal of the impugned notification shows that the State Government substituted the existing provision with regard to import fee and increased the rate of this fee. It is part of the privilege price i.e. consideration amount on account of which the licence was granted to the licensee. Further, the licensee had an option to opt out of the business field if such levies were detrimental to their interest or were to their disadvantage.

The respondent in Civil Appeal No. 3017 of 1997 carries on wholesale trade in the State of Punjab. Under the rules, the licensee is required to obtain a licence in Form L-1, which is valid for one year. In addition to this under the Punjab Excise Fiscal Orders, 1932, the respondent is liable to pay duty/fee at the rates mentioned therein. As a result of this, the respondent has to pay excise duty/import fee as the case may be. Over and above this, there is an import fee which is levied by the State Government in exercise of its powers under Section 58 of the Act. According to learned counsel for the State of Punjab all these charges and levies are really a price for the privilege of carrying on the trade under the L-1 license as far as the privilege of importing alcohol into the State of Punjab. The impugned levy is under the Punjab Excise act, 1914, which is a pre-Constitution Act. It is this Act which provides that no intoxicant shall be imported, exported or transported except after the payment of duty to which it may be liable under the Act. The words "duty to which it may be liable under this Act" were substituted by the words "duty of customs or excise to which it may be liable". This change was also brought about by the Government of India on adaptation of Indian Laws Order 1937. It was, therefore, argued by the State that the power is conferred under Section 58(2)(b) to regulate the import, export, transport and possession of any intoxicant. Therefore, the different imposts have to be construed in this background. There is, therefore, an excise duty so-called which is provided for under Rule 5 of the Punjab Excise Fiscal Orders, 1932, not only on locally produced beer but also on imported beer. The Statutory Authority for this imposition can be found from the provisions including Section 16 read with Section 32 of the Act. In addition to the excise duty under Rule 5, there is also a provision for grant of licence for sale of intoxicants. To carry on the trade in wholesale, a person has to obtain a L-1 licence for which an annual pre-determined sum is payable. Similarly, in addition there are licences for production and for manufacture each of which licence has its own pre-determined fee which has to be paid for obtaining such a licence. The modalities of the levy of fees or the quantum of the fees has no bearing on its legal pedigree which is that of consideration for the permission to carry on an activity in the noxious articles. Thus, if a person wants to carry on a wholesale trade in liquor in Punjab, he will have to (a) obtain a L-1 licence for which he would pay the fees in accordance with the policy carried on for the period; (b) On the liquor purchased by him, he will have to pay duty on all purchases irrespective of the source of the product. This duty is the duty under Rule 5 of the Punjab Excise Fiscal Orders, 1932, in relation to beer read with Rule 1 of the said Orders in case of IMFL.

In case, the licensee seeks a permit to bring in imported alcohol, he would have to pay as a condition of the permission to import under Section 16(b) read with Section 19 an import pass fee at such sum fixed by the Government. The respondent in this case/writ petitioner has mixed up these different imposts and has referred to the duty paid under Rule 5 which is an amount equivalent to the excise duty and the fee under Rule 1 (d) of Punjab Excise Fiscal Orders, 1932. As already noticed, on imported goods there are two independent imposts, namely, duty equal to the local excise duty under Rule 5 and an import fee under Rule 1(d) of the Punjab Excise Fiscal Orders, 1932.

On 31.01.2002, this Court passed an order which read as under:

"In the course of the argument, it was noticed that the principal argument on behalf of the respondents before the High Court, which was upheld by the High Court, was that the import fee, which is the subject matter of these proceedings, had been imposed by the State of Punjab without authority of law. The response on behalf of the State of Punjab before the High Court was that the right of the respondents to import beer into the State was privilege conferred by the State upon the respondents to which Article 301 had no application because the respondents had no right to trade in liquor de hors that privilege and that the import fee was the price for the privilege. In the course of the argument before us, we asked Mr. K.K. Venugopal, learned counsel for the State, to tell us what the source of power for the imposition of the import fee was. Mr. Venugopal referred in reply to Sections 18, 19, 34, 58 and 59 of the Punjab Excise Act, 1914. In other words, the contention of the State before us is that the import fee is a fee and the respondents are required to pay such fee to bring beer into the State."

In compliance with the aforesaid order, a detailed additional affidavit was filed on behalf of the State of Punjab by quoting the relevant provisions of the Punjab Excise Act, 1914, namely, Section 3(9) - "Excise Revenue", Section 3(10) - "Export", Section 3(12) - "Import", Section 16 - "Import, export and transport of intoxicant", Section 17 - "Power of State Government to prohibit import, export and transport of intoxicant", Section 18 - Passes necessary for import, export and transport, Section 19 - Grant of passes for import, export and transport, Section 31 - Duty on excisable articles, Section 32 - Manner in which duty may be levied, Section 33 - Payment for grant of leases, Section 34 - Fees for terms, conditions and form of, and duration of licences, permits and passes, Section 35 - Grant of licence for sale, Section 58 - Power of State Government to make Rules, Section 59 - Powers of Financial Commissioner to make rules. Along with the additional affidavit, a copy of the Notification No. 5998 called the Punjab Excise Fiscal Orders and prescribed levy of rates of duty etc. was filed and marked as Annexure-A-1. It is seen from the additional affidavit that this notification was republished by the State of Punjab in the year 1965. The State vide notification dated 24.03.1986 introduced amendment to the Punjab Excise Fiscal Orders, 1986 and as per Clause 5 of the notification, Order 1-D was added after Order 1-C levying an import fee of Rs. 3.20 per proof litre on all imports of IMFL and rectified spirit into the State of Punjab.

Vide notification dated 31.03.1992, the Government of Punjab made further amendment in the Fiscal Order and issued Punjab Excise Fiscal (10th amendment) Orders, 1992 and substituted Order 1-D stating that "All imports of liquor and spirit shall be subject to the levy of an import fee as prescribed." By further amendment vide notification dated 27.03.1996, the Punjab Excise Fiscal Orders, 1932 was amended and the Order 1-D item (iii) was substituted. In exercise of powers conferred under the Act, the State Government framed rules which have been marked as Annexure P-2.

Thus, it is seen from the Punjab Liquor Import, Export Order, 1932, the State Government is competent and empowered to regulate the import and export of liquor. Under the Punjab Liquor Licence Rules, 1956, there are 21 types of licences which are prescribed and are given. The respondent in this appeal is holding L-1 licence i.e. Wholesale and retail vend of foreign liquor to

trade only. The said licence is given on fixed licence fee, which is subject to variation as per excise policy of the Government based on year to year. The State Government has incorporated as one of the terms and conditions on the L-1 holders to pay import fees also at the prescribed rate as per the Punjab Excise Fiscal Order, 1996. The respondent has been accepting the terms and conditions from 1992 onwards and acted on the same, the licence was renewed on yearly basis.

Similarly, under the provisions of the Punjab Liquor Permit & Pass Rules, 1932, the State Government issued permit in form L-32, in the case of import and the licensees are liable to pay permit fee at the prescribed rate. As already stated, the respondent has mixed up two different imposts. The respondent has referred to the duty paid under Rule 5 i.e. equivalent to Excise duty and fees under Order (1) (D) of the Punjab Fiscal Orders, 1932. As stated above, on imported goods by L-1 holder, there are two different and independent imposts in the shape of Excise duty under Rule 5 and import fee under Rule (1) (D) of Punjab Excise Fiscal Orders, 1932. In addition he has to pay licence fee under the Punjab Liquor Licence Rules, 1956, which is fixed on yearly basis. Thus, it is seen that as per provisions of Section 58 (D) as well as Section 59 (D) the State Government, in my opinion, has power to regulate the import and price of any description of bottle and the scale of the fee and the manner of the fee payable by any licensee.

It is stated in the additional affidavit that the word "fee" is not used in the strict sense to attract the doctrine of quid pro quo. This is the price or consideration which the State Government charges for parting with this privilege and granting the same to the vendors. Therefore, in my opinion, the amount charged is not a fee nor a tax but it is in the nature of price of a privilege which the purchaser has to pay in any trading and business in noxious article/goods. The collection of such amount in the shape of import fee does not form part of the general revenue of the State. As stated above, it is one of the terms and conditions of the Excise Policy applicable to all L-1 holders including the respondents herein. In my view, respondents cannot be permitted to challenge the terms and conditions of the policy if they want to avail the benefit of the same.

This Court, in a number of judgments, has held that the State Government has unfettered powers to regulate the Export/Import sale of intoxicants and in exercise of its regulatory powers, the import fee has been incorporated as one of the terms of the Excise Policy on yearly basis. We will refer to the relevant judgments in the later part of this judgment.

The learned counsel for the respondent submitted that there is no source of power for imposition of import fee over and above the countervailing duty and that the appellant-State was not able to show that under which Authority or provision of the Punjab Excise Act, 1914, they can impose the import fee over and above the countervailing duty. It is further submitted that a combined reading of Section 33A of the Punjab Excise Act, 1914, Articles 301 and 304 of the Constitution and Entry 51 of List II of Seventh Schedule to the Constitution makes it clear that the State of Punjab has no authority to impose the import fee over and above the countervailing duty. This contention, in my opinion, has no force for the reasons stated and the discussions made in paragraphs supra.

In my opinion, Articles 302 and 304A of the Constitution of India are not attracted to the present case as the imposition of import fee does not, in any way, restrict trade commerce and intercourse among the States. In my opinion, the permissive privilege to deal in liquor is not a "right" at all. The levy charged for parting with that privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with the privilege. In this context, we can usefully refer to *Har Shankar and Others etc. etc. vs. The Deputy Excise and Taxation Commissioner and Others etc.* AIR 1975 SC 1121 and *Panna Lal and Others vs. State of Rajasthan and Others* (1975) 2 SCC 633. As noticed earlier, dealing in liquor is neither a right nor is the levy a tax or a fee. Articles 301-304 will be

rendered inapplicable at the threshold to the activity in question. Further, there is not even a single judgment which upholds the applicability of Articles 301-304 to the liquor trade. On the contrary, numerous judgments expressly hold these Articles to be inapplicable to trade, commerce and intercourse in liquor. We can beneficially refer to the judgments in *The State of Bombay vs. R.M.D. Chamarbaugwala* [1957] SCR 874, *Har Shankar's case* (supra), *M/s. Sat Pal and Co. and Others vs. Lt. Governor of Delhi and Others* (1979) 4 SCC 232 and *Khoday's case*. The learned counsel for the respondent submitted that Articles 301-304 are violated or transgressed. In view of discussions in paragraphs above, it is clearly demonstrated as to how and why Articles 301-304 are inapplicable to liquor trade in any form.

We shall now deal with the Kerala matter in Civil Appeal Nos. 2696 and 2697 of 2003.

The learned counsel for the licensee/appellant in this case also contended that Part XIII of the Constitution interdicts Parliament and State Legislatures from enacting laws containing discriminatory measures/taxation in respect of inter-state trade and commerce and that the said articles in Part XIII impose a constitutional limitation on the power of the Parliament and the Legislatures of the States and that the said Part XIII of the Constitution enshrines a principle of paramount importance that the economic unity of the country cannot be interfered with by economic protectionism and creation of trade barriers, fiscal or otherwise. He would further submit the restriction in Part XIII of the Constitution also apply to Taxation Laws and the provisions of Part XII of the Constitution are subject to the limitations set out in Part XIII and such regulatory measures also do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. He would also urge that Article 303(1) prohibits Parliament and the Legislature of a State from enacting any law giving preference to one State over another or from making any discrimination between one State and another by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule and that the obstructions or impediments to the free flow of trade would be violative of the freedom declared by Article 301. In this context, he referred to the case in *The Automobile Transport (Rajasthan) Ltd. vs. The State of Rajasthan and Others* [1963] 1 SCR 491. It is further submitted that the limitation upon the Legislative power stipulated in Article 303(1) and Article 304A will apply to trade in liquor. It is further contended that the discriminatory levy of import fee is violative of Articles 303(1) and 304A of the Constitution. According to the learned counsel for the appellant/licensee, the power of the State to levy a tax or a fee should be traceable to the entries in the Seventh Schedule to the Constitution. Entry 51 of List II provides for a levy of duty of excise on alcoholic liquor for human consumption manufactured or produced in the State and countervailing duties at the same or lower rates of similar goods manufactured or produced elsewhere in India and, therefore, the State Legislature has no power to levy any countervailing duty on imported liquor in excess of the excise duty on liquor manufactured within the State. The State of Kerala imposes a countervailing duty on imported liquor which is equivalent to the excise duty paid by the manufacturers within the State. The State imposes an import fee in addition to the countervailing duty and the direct and immediate effect of the import fee is to favour local manufacturers by making the imported liquor costlier. He would further contend that Article 303(1) prohibits the State Legislature from taking discriminatory measures and Article 304A also prohibits the State from imposing such discriminatory levies. It is also submitted that the State Legislature has no competence to levy an import fee in addition to countervailing duty.

The argument advanced by learned counsel for the licensee was countered by learned senior counsel appearing for the State of Kerala. The learned counsel submitted that the import of liquor into the State of Kerala is prohibited under Section 6 of the Abkari Act and, therefore, liquor can be imported only after obtaining permission from the Government in the form of permit issued under Section 24 of the Abkari Act. As a matter of fact, it was

submitted that the State has not issued any licence to anybody including the Kerala State Beverages Corporation to import liquor. The Kerala State Beverages Corporation has licence only for wholesale and retail of liquor which will not authorise them to import liquor and that the only licence issued to import liquor into the State is the permit issued on payment of the import fee and, therefore, it is seen that the levy of import fee is authorized by Sections 6 and 24 of the Abkari Act, 1977. It is not excise duty or countervailing duty referable to Entry 51 of List II. It is a collection falling under Entry 8 of List II. It is the price paid to the State for parting with its exclusive privilege of dealing in liquor which includes every fact of it including its import. In my view, the State has the right to prohibit every form of activity in relation to intoxicants including its import. Though it is alleged by the appellant that the State has discriminated against, the same has not been substantiated or established by any material. The State, in this case, has granted such permit to the Beverages Corporation on their paying the fee fixed for the purpose as per notification enabling the Corporation to import liquor from the petitioners/licensees and others. The import fee so paid is passed on to the consumers. Even in the Punjab case, we have already noticed, that the right to import liquor is dependant on the issue of the import permit on payment of the import fee as consideration for parting with the State's exclusive privilege to import the liquor. It is purely a contractual dealing between the State and the importer and, therefore, no question of violation of Article 301 can arise. The importer had no anterior right to import liquor and hence cannot complain of any violation of Article 301 at that stage as right to trade in liquor is not a fundamental right. His right to import is referable to the import permit which he acquired on payment of the import fee. No further impediment has been created in the import of the liquor so that Article 301 is not attracted in relation to the payment of the import fee which was prior to getting his privilege of importing. The appellant/licensee having entered into a contractual relationship with the State obtained the privilege and enjoyed the benefit of it. It is not open to the petitioners to turn round subsequently and repudiate the obligations subject to which they obtained the privilege. Regulation in the interest of public health and order takes the case out of Article 301 and regulation for purpose of Article 301 is not confined to such regulations alone which will facilitate the trade.

An affidavit was also filed on behalf of the State of Kerala dated 16.04.2003 stating that the collection of import fee in the State of Kerala while issuing permit to import IMFL is referable to Sections 6 and 24 of the Abkari Act, 1977, and that it is the price payable by the grantee to the State for parting with the privilege of importing IMFL which is exclusively that of the State. Along with the affidavit, Annexure R1 (photocopy of permit issued) and Annexure R2 (year-wise statement showing the amount of import fee collected by the State) was filed. It is not in dispute that the Kerala State Beverages Corporation is the exclusive wholesale distributor of IMFL within the State of Kerala. Previously, the retail distribution of IMFL in the State was done by 14 shops of the Kerala State Beverages Corporation and 231 shops by private individuals to whom licences were granted by auction conducted every year. However, the scheme has been changed and the retail distribution of IMFL in the State is now being carried on by a few shops of the Kerala State Consumer Federation and the rest of the shops by the Kerala State Beverages Corporation. This is apart from the sales in bars, clubs, etc. under licences issued in relevant Forms under the Foreign Liquor Rules. The Kerala State Beverages Corporation gets its supply of IMFL from distributors within the State as also from manufacturers and distributors outside the State. The Kerala State Beverages Corporation calls for tenders fixing a floor price for the supply with a view to ensure quality as also to prevent unhealthy competition and loss of revenue. Based on these tenders, the Kerala State Beverages Corporation enters into contracts with the manufacturers/distributors. After entering into contracts with the manufacturers/distributors, to enable the import of IMFL to the State, the Kerala State Beverages Corporation applies to the authorized officer for grant of permit for import of specified quantity of IMFL after depositing in advance, the countervailing duty and the import fee payable on the quantity of IMFL sought to be imported. Details of the payments so made are entered in

Column No. 6 of the import permit issued. The name of the outside manufacturer/distributor from whom the IMFL is being procured is also mentioned in the permit for identification of the product. The import fee paid by the Kerala State Beverages Corporation is ultimately passed on to the consumers by adding to the final selling price of the product. The State has to deploy its officers at all the check-posts to monitor import of IMFL. Every consignment, on crossing the border has to be escorted till it reaches the warehouse of the Kerala State Beverages Corporation to check diversion and misuse and the State is incurring heavy expenses for regulating import of liquor into the State. Therefore, the import fee was increased from Rs.2/- per proof litre to Rs.5/- per proof litre in 1995. Even after the increase in the import fee, the import of liquor to the State was steadily increasing till 1999-2000. The affidavit now filed along with the Annexures gives us a clear picture of the levy of import fee while issuing permit to import IMFL. Before the High Court, the learned counsel for the appellants therein have raised only one contention that the imposition of import fee is not in the nature of regulatory fee. It was contended on behalf of the State that the levy is permissible and authorized under Sections 6, 7, 17 and 18 of the Act and that the import fee is the only fee realized from a firm which supplies liquor to the Kerala State Beverages Corporation to be supplied to other licensees in the State and that the levy of import fee is also well founded under the Act basically referable to the legislative Entries 8 and 66 of List III of the Seventh Schedule to the Constitution. The learned Single Judge and also the learned Judges of the Division Bench rejected the contention of the licensee and upheld the levy on import.

At the time of hearing, many judgments were cited by both sides in regard of their respective contentions. I feel it is not necessary to deal with or refer to all the judgments cited, as in my opinion, the real questions in this case as contended by the licensees are that the State has no authority to impose the import fee and that it is violative of Articles 301 and 304 of the Constitution. The real question, in my opinion, is whether Articles 301 and 304 at all apply. In the alternative, it was submitted by learned senior counsel for the State of Punjab that compensatory or regulatory levies have always been held to be valid and permissible under Articles 301 and 304. In this context, he referred to the decisions in the cases of *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, [1961] 1 SCR 809; *The Automobile Transport (Rajasthan) Ltd. case (supra)*, *State of Bihar vs. Chambers of Commerce (1996) (103) STC 1*, *Godfrey Ltd. vs. State of Rajasthan (2001) (121) STC 54*, *Jindal Strips Limited and Others vs. State of Haryana (2002) 19 PHT 299*. If that be so, it is undeniable that regulations deemed necessary and apposite are liable to be imposed on liquor trade more than any other activity since the former is considered inherent and noxious, pernicious and *res extra commercium*. Regulation is thus the hall-mark of the State action in respect of liquor and that regulation can be and indeed normally is through the mode of imposition of levies which levy is also necessary to regulate by keeping out and excluding persons entering the liquor trade. We have already extracted the provisions of 1914 Act. The contention of the licensee is that once a L-1 wholesale liquor licence is issued to him, the State's permissive privilege in respect of liquor stands permanently parted with and thereafter no additional or further levy of any kind even in respect of activities other than wholesale selling under L-1 licence can be raised.

This argument, in my opinion, is completely fallacious and ex-facie unsustainable. This contention ignores the well-established legal statutory and operational distinction demarcating and dealing separately with several distinct activities in relation to liquor, namely, manufacture, possession, sale, transport, import, export consumption on premises of hotel/restaurant etc. Each activity is separately defined and separately itemized and separately dealt with in statute as also in the rules and involves a diverse range of separate licences, passes, permits and applications each of differing contained format and ambit. The import fee levied in the instant case is fully authorized by the 1914 Act and delegated legislation thereunder and is clearly *intra vires*. I have already listed in paragraphs above all the provisions

authorizing the levy in question in the instant case which is mentioned in the additional affidavit of the State of Punjab. The provisions summarized above confer ample regulatory power upon the excise authority to regulate several activities related with liquor in any reasonable manner and in particular to regulate its import. The regulatory power includes power to levy a monthly fee in that regard such as the impugned import fee. Indeed levy for such fee to exclude and to keep out certain people from the liquor trade and to keep the number of persons participating in this trade within reasonable limits has been recognized by this Court in Har Shankar's case (supra) relying upon and quoting American decisions.

The statutory provision in question must be interpreted and read broadly and not narrowly. The approach must be to uphold the validity of the impugned delegated legislation by a process of fair and broad reading of the statutory mandate. Even if the Act does not specifically provide for the levy in question by name to provide statutory authority for its imposition by delegated legislation and the levy is actually imposed by the delegated legislation made under that Statute, the same would be valid and not ultra vires. In the instant case, the levy has been imposed by the Punjab Fiscal Orders as amended from time to time under specific statutory authority to issue such orders under Sections 58 and 59 of the Act, in particular, and other provisions of the Act as itemized in paragraphs supra. Since the rule making power has not been shown to be bad, the Punjab Fiscal Orders, once made have the effect of the Statute itself and become part of the Statute since they have been made under valid rule making power. The statutory provisions of the Punjab Act and the Rules itemized in paragraphs above amply delineate that regulatory power and the impugned import fee is nothing but a facet and manifestation of that regulation by the State. Hence, in my view, the levy in question is valid as a regulatory levy which has consistently been held on the touchstone of Article 304.

The conduct of the respondent/licensee in attempting to wriggle out of his contractual obligations is contrary to the clear and unequivocal principle laid down in Har Shankar's case (supra). The issuance of liquor licence constitutes a contract between the parties i.e. between Excise Authorities on the one hand and the individual applicant contractor on the other. The respondent having accepted the contracts/licences, having fully exploited the advantage flowing from the contract to the exclusion of others and having reaped rich commercial benefits from that activity, it is not open to the contractor to wriggle out from the contract by challenging, inter alia, any particular condition of that contract/licence. The respondent herein seeks to do exactly that by challenging the condition requiring him to pay import fee. Har Shankar's case (supra) clearly disentitle the liquor contractor from wriggling out of contractual obligations solemnly undertaken. Likewise, in Panna Lal's case (supra), this Court in the specific context of liquor licence had this to say.

"The licenses in the present case are contracts between the parties. The licensees voluntarily accepted the contracts. They fully exploited to their advantage the contracts to the exclusion of others. The High Court rightly said that it was not open to the appellants to resile from the contracts on the ground that the terms of payment were onerous. The reasons given by the High Court were that the licensees accepted the license by excluding their competitors and it would not be open to the licensees to challenge the terms either on the ground of inconvenient consequence of terms or of harshness of terms."

As a matter of fact, the respondent is the only and the sole challenger of the instant levy of import fee. It is stated that no other liquor contractor or beer manufacturer or importer has challenged the import fee in Punjab at any point of time at any forum. The import fee on IMFL on rectified spirit was levied from the Year 1986 and at no time the respondent challenged the levy of import fee from 1986 onwards on IMFL and continued to import large quantities of beer and paid large sums of fee as per the prescribed rates. The writ petition was filed only in April, 1996. The respondent accepted the

burden of this contract and obviously did so because he enjoyed the benefits flowing from this contract. Having done so, in my view, he cannot and should not be allowed to wriggle out of his contractual and licence obligation.

In the case of Government of Maharashtra & Ors. vs. M/s. Deokar's Distillery (V.N. Khare, CJI and Dr. AR. Lakshmanan, J concurring) reported in (2003) 5 SCC 669, this Court, in para 32, observed thus:

"The order of the High Court is bad in law. The High Court, in our view, has erred in not appreciating that the impugned demand notice was also in the nature of demanding balance of the price of the exclusive privilege which would become final only on issue of the notification, order under Article 309, the bulk of which has already been recovered in advance, which privilege exclusively vests with the Government considering the effect of provisions especially Section 49 and Section 143 (2)(u) of the Prohibition Act. In our opinion, the establishment charges demanded are in the nature of price for parting with the privilege to permit manufacture and sale of liquor, and the privilege exclusively vests with the Government."

Again in para 40, this Court observed thus:

"As pointed out by Y.V. Chandrachud, C.J., as he then was, what the respondents agreed to pay was the price of an exclusive privilege which the State parted with in their favour. They cannot, therefore, avoid their liability by contending that the payment which they were called upon to make is truly in the nature of excise duty and no such duty can be imposed on liquor not lifted or purchased by them. The respondents, in our view, must fail in their contention both on account of the objection to the maintainability of the appeals and on merits concerning the nature of the payment which they are liable to make."

In the above case, the power of the State Government under Section 58 A to recover cost of supervision was challenged. Per majority, this Court held that the power of the State Government extends to recovering the differential amount consequent to upward revision of pay-scales and allowances with retrospective effect and that such differential amount can be demanded even in exercise of residuary powers of the State Government and that the liquor licensees having given undertaking in the application in Form PLA prescribed under the Rules to abide by the orders made under the Act and the rules could not escape their contractual liability. This Court also further held that the establishment charges demanded are in the nature of price for parting with the privilege to permit manufacture and sale of liquor and the privilege exclusively rests with the Government.

The same effect is the judgment of this Court in the case of Assistant Excise Commissioner & Ors. Vs. Issac Peter & Ors. (1994) 4 SCC 104. In the context of a liquor contract, this Court held as under:

"..... We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay

more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

Kalyani Stores vs. The State of Orissa and Others [1966] 1 SCR 865 case was heavily relied on by the respondent/licensee. The Constitution Bench has not in that cases adverted to the issue of liquor trade being res extra commercium and has simply considered whether Articles 301/304 are violated or not. The case, in my opinion, would have no relevance to the instant case.

The following judgments can be usefully referred for the proposition that the rights are vested in the State which it may part with for a consideration.

In the case of Har Shankar and Others etc. etc. vs. The Deputy Excise and Taxation Commissioner and Others etc. AIR 1975 SC 1121 (paras 44, 46, 47, 50, 51, 53, 55, 57 and 58 dealt with the rights of the State in this regard).

In the case of Nashirwar and Others vs. State of Madhya Pradesh and Others, 1975 (1) SCC 29, this Court held that by virtue of Entry 8 of List II, the Government can hold a public auction to grant lease, the amount representing the consideration for the grant of such right or privilege.

In the case of State of Orissa and Others vs. Harinarayan Jaiswal and Others (1972) 2 SCC 36, this Court held that the Government is the exclusive owner of the privilege to sell the right to sell liquor, reliance on Article 19(1)(g) or Article 14 of the Constitution becomes irrelevant.

In the case of State of Andhra Pradesh vs. Prabhakara Reddy AIR 1987 SC 933 held that all rights in regard to manufacture and sale of intoxicants vest in the State and it is open to the State to part with those rights for a consideration and that the consideration for parting with the privilege of the State is neither excise duty nor licence fee but it is the price of the privilege.

In the case of State of U.P. and Others vs. Sheopat Rai and Others 1994 Supp (1) SCC 8 held that the term 'licence fee' in the context of the U.P. Excise Law connotes the idea of it being the consideration in money received by the Government from a private person by grant of a licence (contract) for parting in such person's favour, its exclusive privilege or right of carrying on certain activities in respect of country liquor or drugs under 'auction system' in public auctions.

In the case of State of Haryana and Others vs. Lal Chand and Others, AIR 1984 SC 1326, this Court has held that the licence fee is a price for acquiring such privilege and one who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid, by a petition under Article 226.

State of Punjab vs. M/s. Dial Chand Gian Chand & Co. AIR 1983 SC 743 is also a case arising under the Punjab Intoxicants Licence and Sale Order, 1956. This Court held that the writ jurisdiction of the High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred.

In the case of Khoday Distilleries Ltd. and Others vs. State of Karnataka and Others, (1995) 1 SCC 574. The Constitution Bench of this Court held that a citizen has no fundamental right to trade or business in liquor as a beverage and that the activities which are res extra commercium

cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor since trade or business in liquor as a beverage is res extra commercium and that the State may also create monopoly in itself for trade or business in such liquor. It is further held that the State can further place restrictions and limitations on such trade or business and such restrictions and limitations can be placed by subordinate legislation as well. It is also further held that the State is not precluded from regulating the trade and business in potable liquor merely because it imposes tax or fee on purchase or sale and income is derived from such liquor.

In the case of Solomon Antony and Others vs. State of Kerala and Others, (2001) 3 SCC 694, the contractors are required to pay the consideration payable to the State for sale of liquor for importing designated quantity of rectified spirit in respect of which the consideration payable is equivalent to excise duty. This Court justified the order passed by the High Court in holding that the contractors are bound to pay the amount which is a measured excise duty payable on the designated quantum of rectified spirit in terms of Rule 8 of the Rules and which the contractors had undertaken in the agreements executed by them to pay. This Court further held that the power of the Government to enhance the rate of excise duty from Rs.5/- per bulk litre to Rs.10/- per bulk of arrack could not be assailed.

The Division Bench of the Kerala High Court to which I was a member has also taken the same view in Kerala Distilleries and Allied Products Limited vs. Assistant Commissioner (Assessment) (I), Commercial Tax, Special Circle, Palakkad and Others reported in 2000 (Vol. 117) STC page 553) in the following terms:

"The manufacture and sale of liquor are the exclusive privilege of the State and the State, by the process of licensing, is parting with the said privilege and what is charged by the State is only the privilege price through the process of licensing and it is not excise duty."

"The concept of excise duty on production and manufacture as understood in the Central Excise Act cannot be equated in the case of excise duty under the Abkari Act since the manufacture and the sale of liquor are the exclusive privilege of the State and the State, by the process of licensing, is parting with the said privilege and what is charged by the State is only the privilege price through the process of licensing the price and it is not excise duty."

The above rulings are amongst the catena of cases on the point that the rights are vested in the State which it may part with for consideration.

I have already dealt with the concept of contractual relationship between the State and the licensee whereunder the licensee having obtained a privilege and enjoyed the benefit of it, it is not open to the licensees to turn round subsequently and repudiate the obligations attaching with the obtained privilege. The following are the cases on the point.

In the case of State of Haryana and Others vs. Jage Ram and Others AIR 1980 SC 2018, this Court held that the bids in respect of country liquor vends at an annual auctions and the amounts which bidders agree to pay to State Government under auction terms is neither fee nor excise duty on undrawn liquor but price of privilege which State parted in their favour.

In the case of State of Haryana and Others vs. Lal Chand and Others, (1984) 3 SCC 634, this Court held that after making bid for grant of exclusive privilege of liquor vend with full knowledge of terms and conditions of auction, the bidder cannot wriggle out of the contractual obligations arising out of acceptance of his bid by filing writ petition.

In the case of State of Punjab vs. M/s Dial Chand Gian Chand and Company (1983) 2 SCC 503, this Court held that a licensee who participates in the auction voluntarily and with full knowledge is bound by the bargain and the writ petition filed under Article 226 by such licensee in an attempt to

dictate terms of the licence without paying the licence fee must fail. The highest bidder after acceptance of his bid cannot challenge the second auction on ground of adverse effect on his business.

We shall now consider the cases on the freedom guaranteed by Article 301 which is not available to liquor because it is a noxious substance injurious to public health order and morality. The following cases can be usefully referred:

In the case of *M/s Sat Pal and Co. and Others vs. Lt. Governor of Delhi and Others* (1979) 4 SCC 232, this Court held that the Ordinance does not infringe any right under Article 19 (1)(g) or Article 301 there being no fundamental right to trade in liquor and that the ordinance was both a fiscal measure and one for safeguarding public health and public morals and hence it could validly be made retrospective and that the test of reasonable restrictions has to be judged in the light of the purpose for which the restriction is imposed, that is, as may be required in the public interest and restrictions that may validly be imposed under Article 304(b) are those which seek to protect public health, safety, morals and property within the territory and the present levy under the amended provisions of the Act in its application to Delhi could certainly be said to be one enacted both with the object of regulating the trade or business in intoxicants and with a view to realising the goal fixed in Article 47 of the Constitution.

In the case of *The State of Bombay vs. R.M.D. Chamarbaugwala* [1957] SCR 874, this Court held as under:

"Gambling activities were in their very nature and essence extra-commercium although they might appear in the trappings of trade. They were considered to be a sinful and pernicious vice by the ancient seers and law-givers of India and have been deprecated by the laws of England, Scotland, United States of America and Australia. The Constitution-makers of India, out to create a welfare State, could never have intended to raise betting and gambling to the status of trade, business, commerce or intercourse. The petitioners, therefore, had no fundamental right under Art. 19(1)(g) or freedom under Art. 301 of the Constitution in respect of their prize competitions that could be violated and the validity of the impugned act, in pith and substance an Act relating to gambling, did not fall to be tested by Arts. 19(6) and 304 of the Constitution"

In the case of *M/s Fatehchand Himmatlal and Others etc. vs. State of Maharashtra* (1977) 2 SCC 670, this Court held as follows:

"A meaningful, yet minimal analysis of the Debt Act, read in the light of the times and circumstances which compelled its enactment, will bring out the human setting of the statute. The bulk of the beneficiaries are rural indigents and the rest urban workers. These are weaker sections for whom constitutional concern is shown because institutional credit instrumentalities have ignored them. Money lending may be ancillary to commercial activity and benignant in its effects, but money-lending may also be ghastly when it facilitates no flow of trade, no movement of commerce, no promotion of intercourse, no servicing of business, but merely stagnates rural economy, strangles the borrowing community and turns malignant in its repercussions. The former may surely be trade, but the latter - the law may well say - is not trade. This narrow, deleterious pattern of money-lending cannot be classed as 'trade'. Hence Article 301 does not apply."

In the case of *B.R. Enterprises etc. vs. State of U.P. and Others etc.* (1999) 9 SCC 700, this Court held that this case relates to lottery which is gambling in nature. This Court held that merely because a lottery transaction is run by State itself will not change its character as *res extra commercium* and that merely because lottery tickets are goods, transaction of sale thereof cannot constitute trade and while trade contains skill with no chance, gambling contains the element of chance with no skill and, therefore, ban by any State on the sale of lotteries of other States within its territory does not

violate Articles 301 and 303.

We have already noticed that the regulation in the interest of public health and order takes the case out of Article 301, and Regulation for the purpose of Article 301 is not confined to regulations which will facilitate the trade.

In the case of M/s. Bishamber Dayal Chandra Mohan etc. etc. vs. State of U.P. and Others etc. etc., AIR 1982 SC 33, this Court in paras 36 and 37 observed as under :

"The word 'free' in Art. 301 does not mean freedom from laws or from regulations. Art. 301 guarantees freedom of trade, commerce and intercourse throughout the country from any State barriers. It declares that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. The whole object was to bring about the economic unity of the country under a federal structure, so that the people may feel that they are members of one nation is to guarantee to every citizen the freedom of movement and residence throughout the country. That is achieved by Art. 19(1)(d) and (e). No less important is the freedom of movement or passage of commodities from one part of the country to another. The progress of the country as a whole also requires free flow of commerce and intercourse as between different parts, without any barrier. This freedom of trade, commerce and intercourse throughout the country without any 'State barriers' is not confined to inter-State trade as well. In other words, subject to the provisions of Part XIII, no restrictions can be imposed upon the flow of trade, commerce and intercourse, not only between one State and another, but between any two points within the territory of India whether any State border has to be cross or not.

It is now well settled that the regulatory measures or measures imposing compensatory taxes do not come within the purview of the restrictions contemplated by Art. 301. The regulatory measures should, however, be such as do not impede the freedom of trade, commerce and intercourse. It cannot be said that the instructions conveyed by the State Government by the impugned teleprinter message imposing the requirement for the making of an endorsement by the Deputy Marketing Officer or the Senior Marketing Officer or the physical verification of stocks of wheat during the course of transit, are a 'restriction' on the freedom of trade, commerce and intercourse within the country, i.e., across the State or from one part of the State to another. These are nothing but regulatory measures to ensure that the excess stock of wheat held by a wholesale dealer, commission agent or a retailer is not transported to a place outside the State or from one district to another. Even if these requirements are construed to be a 'restriction' on the inter-State or intra-State trade the limitation so imposed on the enjoyment of the right cannot be considered to be arbitrary or of an excessive nature. Nor can it be said that such restrictions do not satisfy the test of reasonableness."

The case of State of Tamil Nadu vs. M/s. Hind Stone etc. etc. reported in AIR 1981 SC 711 relates to non-renewal of mining lease for black granite. It was submitted by the counsel in this case, that the impugned rule offends Articles 301 and 303 of the Constitution. This Court rejected the same as without force. This Court held as under:

".....The Mines & Minerals (Regulation and Development) Act is, without doubt a regulatory measure. Parliament having enacted it for the express purpose of "the regulation of mines and the development of minerals". The Act and the rules properly made thereunder are, therefore, outside the purview of Article 301. Even otherwise, Article 302 which enables Parliament, by law, to impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest also furnishes an answer to the claim based on the

alleged contravention of Article 301....."

The case of State of Tamil Nadu & Others vs. M/s. Sanjeetha Trading Co. & Others (1993) 1 SCC 236 relates to prohibition of export of timber outside the State to prevent illicit felling. This Court held that where goods are declared to be essential commodities/articles and export thereof prohibited with a view to effect equitable distribution at a fair price the prohibition in the circumstances would not be an unreasonable restriction. This Court further held as follows:

"The power to impose restrictions conferred on the Parliament under Art. 302 is not qualified by the word 'reasonable' while in Art. 304 (1)(b) which confers such power on the State legislature the expression 'reasonable' precedes 'restrictions' and a further check is provided by the proviso thereto. Therefore, before Art. 304 comes into play, it has to be held that the prohibition introduced by the amendment on movement and transport of any particular item amounts to a restriction. Any prohibition on movement of any article from one State to another has to be examined with reference to the facts and circumstances of that particular case - whether it amounts to regulation only, taking into consideration the local conditions prevailing, the necessity for such prohibition and what public interest is sought to be served by imposition thereof."

In the case of State of Bihar & Ors. vs. Harihar Prasad Debuka etc. AIR 1989 SC 1119, this Court observed thus:

"In the instant case what is being insisted is a permit disclosing particulars of the goods to be transported. Art. 304(b) clearly permits the State legislature to impose such a reasonable restriction on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest. The word 'with' involves an element having its sit us in another State. It cannot be therefore said that the insistence on the disclosure in respect of goods entering Bihar from another State if otherwise legitimate would not be protected by Art. 304(b)."

The High Court of Punjab proceeded to decide the case on a total wrong assumption that the import fee levied is in the nature of duty which cannot be imposed under the Excise Act, 1984 when, in fact, the import fee levied is the price for parting with the privilege given to the licensee to import beer into the State and, therefore, the same is within the competence of the State to impose import fee. I am of the view that the licensee besides the payment of duty etc. is to comply with such conditions as the State Government may impose while formulating the excise policy for the concerned year. The State, in my view, is competent and entitled to impose excise duty or countervailing duty. Besides there is no bar on the State to charge any other fees on account of consideration for the privilege provided to the licensee to trade in liquor which privilege he did not otherwise have. Therefore, the licensee is liable to comply with the other conditions imposed by the State Government from time to time. As held in many cases referred to supra the levy in dispute under challenge is an import levy. It is neither duty nor countervailing duty. It is part of the consideration money i.e. the price of the privilege given to the licensees for dealing in liquor. The decision of this Court in the case of Kalyani Stores (supra) is not applicable to the facts of the present case and that the Punjab Excise Act, 1914 is an existing law under Clause 10 of Article 366 of the Constitution of India and its continued application is saved by Article 372 of the Constitution of India. It is also saved by Article 305 of the Constitution from attack under Articles 301 and 303 of the Constitution. It is well within the legislative competence of the State.

In the result, Civil Appeal No. 3017 of 1997 filed by the State of Punjab is allowed and the judgment of the High Court which is impugned in this Civil Appeal stands set aside. Likewise, the appeals filed by the appellants in Civil Appeal Nos. 2696 and 2697 are dismissed and the common judgment of the High Court in Writ Appeal Nos. 3 and 10 of 2001 is affirmed. However, there shall be no order as to costs.

JUDIS