

M/S KHODAY DISTILLERIES LTD. ETC.

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v.

STATE OF KARNATAKA AND ORS. ETC.

OCTOBER 19, 1994

[M.N. VENKATACHALIAH, CJ, J.S. VERMA, P.B. SAWANT,
K. RAMASWAMY AND B.P. JEEVAN REDDY, JJ.]

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Constitution of India—Articles 19(1) (g), 19(6), 47, 298, 300A, 301 to 305 and Entry 8 and 51 of list II and Entry 52 of list I, Seventh Schedule—Right to carry trade in liquor—Whether a fundamental right—Held, No—State can prohibit completely trade or business in potable liquor Monopoly for manufacture, trade or business in liquor can be created in favour of State—Reasonable restrictions under Article 19(6) can be placed by subordinate legislation as well, so long as such legislation is not violative of any provisions of Constitution.

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Words and Phrases—Constitution of India—Article 19(1) (g)—Words ‘trade’ and ‘business’—Meaning of—Held, word ‘trade’ may include all connotations of word ‘business’—In Article 19(1) (g), words ‘trade’ and ‘business’ are used synonymously.

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Petitioners, wholesale trades in liquor had challenged the constitutional validity of the Karnataka Excise (Distillery and Warehouse) (Amendment) Rules, 1989, Karnataka Excise (Manufacture of Wine from Grapes) (Amendment) Rules 1989, Karnataka Excise (Brewery) (Amendment) Rules, 1989, Karnataka Excise (Sale of Indian and Foreign Liquor) (Amendment) Rules, 1989 and Karnataka Excise (Bottling of liquor) (Amendment) Rules, 1989 on the group that the Rules in question affected adversely the fundamental right of the parties to carry on trade or business in liquor and that the said Rules were violative of Articles 14, 19(1)(g), 47, 300 A, 301 and 304 of the Constitution of India. Some appeals had also been filed against the decision of the Kerala High Court upholding the validity of the Government order dated 9th December, 1992 passed by the Government of Kerala deciding to cancel all foreign liquor licences issued under Rule 13 (3) of the Kerala Foreign Liquor Rules, 1974 to Hotels, Restaurants and Tourist Homes. A bunch of special leave Petitions and writ petitions were filed against various decisions of the Andhra Pradesh

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- A High Court upholding the validity of the amendments to the A.P. Foreign Liquor and Indian Liquor Rules, 1970 and A.P. (Regulations of wholesale Trade, Distribution and Retail Trade in Indian Liquor and Foreign Liquor, Wine and Beer) Act, 1993.

B Two rival contentions of law raised. One, that there was no fundamental right to trade or business in liquor and that the State had power to regulate the trade or business by placing restrictions on such trade or business in the interests of the general public even to the extent of prohibiting completely such business or trade. The other contention was that a citizen had a fundamental right to trade or business in liquor and the State could only place reasonable restriction on the said right in the interests of general public by law made for purpose under Article 19 (6) of the Constitution. The State could not, therefore, prohibit completely the said trade or business in liquor in the garb of regulating it, and the limitations or restrictions placed had to pass the test of reasonableness.

D These matters were referred to the Constitution Bench to decide questions, firstly whether the petitioners/appellants had a fundamental right to carry on trade in liquor and secondly, whether the State could prevent the petitioners from carrying on with the business of liquor as apart from trade, during the unexpired period of the licences. Two incidental questions raised were (i) whether a monopoly for the manufacture, trade or business in liquor could be created in favour of the State and (ii) whether reasonable restrictions under Article 19 (6) of the Constitution could be placed only by Act of Legislature or by a subordinate legislation as well.

F It was contended that the State could not carry on trade in liquor under Article 47 of the Constitution. If the law on the subject was considered to be law under Article 19(6), it had to be on the basis that a citizen had got a fundamental right to trade in liquor. If the law was that a citizen had no fundamental right, then Article 19(6) could not be applied because the said article applied only to those rights which a citizen possessed. What a citizen could not do under Article 19 (1), the State could not do under Article 19(6). Secondly, it was submitted that assuming that the State had got the power to carry on trade in liquor *de hors* Article 19(6) and under Article 298 of the Constitution, the power under Article 298 could not extend to trade in liquor. Thus was so because the Union Government had

no executive power to trade in commodity which under Article 47 it was enjoined to prohibit. A

Alleging that the appellants petitioners had a fundamental right to trade in liquor, it was stated firstly, that Entry 51 of list II specifically accepted the fact that the manufacture of alcohol could be for human consumption. Entry 8 of List II specifically provided for production, manufacture, purchase and sale of intoxicating liquor. The implication of this Entry was that till prohibition was introduced by applying Article 47, there was no prohibition of consumption of liquor, and hence there was no prohibition for manufacture and sale of liquor. Secondly, it was submitted that the trade in liquor could not be looked upon as an obnoxious trade. Thirdly, the Union Government itself had recognised under its Industrial Policy Resolution as early as in 1956 that the production of potable alcohol as an industry had to be recognised though regulated and the licences had to be freely granted for the manufacture of the potable liquor. For all these reasons, it was submitted that there was no warrant for excluding liquor from the ambit of the word "any occupation, trade or business" under Article 19 (1)(g) of the Constitution. B C D

Disposing of the matter, this Court

HELD: 1.1. The rights protected by Article 19 (1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Articles 19(1)(a) to (g) are, therefore, to be read along with the said qualifications. [520-F] E

1.2. The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying or an occupation, trade or business which is inherently vicious and pernicious, and is commended by all civilised societies. It does not entitled citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public i.e. *res extra commercium* (outside commerce). There cannot be business in crime. [520-H, 521-A] F G

1.3. Potable liquor as a beverage is an intoxicating and depressent drink which is dangerous and injurious to health and is, therefore, an article which is *res-extra Commercium* inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence H

A the trade or business in liquor can be completely prohibited. [521-B-C]

1.4. Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medical purposes. Article 47 is one of the Directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the Directive principle contained in Article 47, except when it is used and consumed for medical purposes. [521-D-E]

1.5. The State can create a monopoly either it itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise. [521-F]

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

[521-G-H, 522-A]

1.7. When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any and the State cannot make discrimination between the citizens who are qualified to carry on the trade on business. [522-B]

1.8. The State can accept any mode of selling licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory. [522-C]

1.9. The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate productions, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business. [522-D-E] A
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1.10. The mere fact that the State levies taxes or fees on the productions, sale and income derived from potable liquor whether the production, sale to income is legitimate illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited. [522-F-G] C
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1.11. The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade business in the same the interests of general public. [522-H, 523-A] E

1.12. Likewise, the state cannot prohibit trade or business in industrial alcohol which is not used a beverage but used legitimately for industrial purpose. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19(6) of the Constitution. [523-B] F

1.13. The restriction placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor on alcohol may also be for the purpose of preventing their abuse of diversion for use as or in beverage. [523-C] G

State of Bombay & Anr. v. F.N. Balsara, [1951] SCR 682; *T.B. Ibrahim v. Regional Transport Authority, Tanjore*, [1953] SCR 290; *Cooverjee B. Bharucha v. The Excise Commissioner and Ors.*, [1954] SCR 8733; *Commonwealth or Australia v. The Bank of New South Wales*, (1950) AC 235; H

- A *State of Assam v. A.N. Kidwai, Commissioner of Hills Divisions and Appeals, Shillong*, [1059] SCR 295; *The State of Bombay v. Chamarbaugwala*, [1957] SCR 874; *Nagendra Nath Bora and Anr. v. The Commissioner of Hills Division and Appeals, Assam and Ors.*, [1958] SCR 1240; *Narendra Kumar and Ors. v. Union of India & Ors.*, [1960] 2 S.C.R. 375; *A.B. Abdul Kadir and Ors. v. The State of Kerala and Anr.*, [1962] Supp. 2 SCR 741; *Krishna Kumar Narula and Ors. v. State of Jammu & Kashmir and Ors.*, [1967] 3 SCR 50; *State of Orissa and Ors. v. Harinarayan Jaiswal and Ors.*, [1972] 3 SCR 784; *Amar Chandra Chakraborty v. Collector of Excise Government of Tripura and Ors.*, [1973] 1 SCR 533; *Nashirwar etc. etc. v. State of Madhya Pradesh*, [1975] 2 SCR 881; *Har Shankar and Ors. etc. etc. v. The Dy. Excise and Taxation Commissioner and Ors.*, [1975] 3 SCR 254; *Lakhanlal Etc. v. State of Orissa and Ors.*, [1977] 1 SCR 811; *Sat Pal and Co. etc. v. Lt. Governor of Delhi and Ors.*, [1977] 3 SCR 651; *Southern Petroleum and Chemicals, Trichur and Ors. v. State of Kerala and Ors.*, [1981] 4 SCC 391; *State of M.P. and Ors. v. Nandlal Jaiswal and Ors.*, [1986] 4 SCC 566;
- D *Doongaji and Co. v. State of Madhya Pradesh and Ors.*, AIR (1991) SC 1947; *Indian Mica Micanite Industries v. The State of Bihar and Ors.*, [1971] 2 SCC 236; *The State of U.P. and Ors. v. Synthetics and Chemicals Limited and Ors.*, [1980] 2 SCC 441 and *Synthetics and Chemicals Ltd. and Ors. v. State of U.P. and Ors.*, [1990] 1 SCC 109, relied on.

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2. Article 13(3)(a) of the Constitution states that law includes "any ordinance, order, bye-law, rule regulation, notification, custom or usage have in the territory of India the force of law" Clauses (2) to (6) of Article 19 make no distinction between the law made by the Legislature and the subordinate legislation for the purpose of placing the restrictions on the exercise of the respective fundamental rights mentioned in Article 19 (1)(a) to (g). Clause (6) of Article 19 only speaks of "operation of any existing law in so far as it imposes....." "from making any law imposing" reasonable restrictions on the exercises of the rights conferred by Article 19 (1)(g).

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There is nothing in this provision which makes it imperative to impose the restrictions in question only by a law enacted by the Legislature. Hence the restrictions in question can also be imposed by any subordinate legislation so long as such legislation is not violative of any provisions of the Constitution. This is apart from the fact that the trade or business in potable liquor is a trade or business in *res extra commercium* and hence can be

H regulated and restricted even by executive order provided it is issued by

the Government of State. [524-D-G]

3. The word "business" is more comprehensive than the word "trade" since it will include manufacture which the word "trade" may not ordinarily include. The primary meaning of the word "trade" is the exchange of goods for goods or goods for money. However, the word "trade" and "industry" are also used interchangeably many times. It all depends upon the context in which the words occur. Thus it is apparent that the word "trade" may include all the connotations of the word "business". In Article 19 (1)(g) of our Constitution, the words "trade" and "business" are used synonymously. Hence, in this case, after the taking-over of the trade, viz., the activity of buying and selling liquor, no activity was left with the petitioners to carry on under the licence held by them. [525-H, 526-A-B, 527-C-D]

Skinner v. Jack Breach Ltd., (1927) 2 KB 220; *National Association of Local Government Officers v. Bolton Corporation*, (1943) AC 166; *Aviation shipping Co. Ltd. v. Murray (Inspector of Texas)*, [1961] 2 All ER 805 and *K.K. Narula and Ors. v. State of Jammu and Kashmir and Ors.*, [1967] 3 SCR 50, referred to.

CIVIL APPELLATE/ORIGINAL JURISDICTION : Civil Appeal
Nos. 4708-12 of 1989 etc. etc.

From the Judgment and Order dated 13.11.89 of the Karnataka High Court in W.P. No. 16878-82 of 1989.

V.R. Reddy, Additional Solicitor General, K. Madhava Reddy, Shanti Bhushan, R.F. Nariman, A. K. Ganguli, T.V.S.N. Chari, Nikhil Nayyar, B.V. Acharaya, M. Veerappa, K.H. Nobin Singh, D. Prakash Reddy, Mrs. D. Bharathi Reddy, R.N. Naidu, N.Reddy, S.Sukumaran, C.N. Sreekumar, P. Mahale, P.N. Ramalingam, E.M.S. Anam, P.K. Pillai, M.A. Firoz, A.T.M. Sampath, E.C.Agrawala, P.P. Tripathi and B. Kanta Rao for appearing parties.

The Judgment of the Court was delivered by

SAWANT, J. This is a bunch of appeals, special leave petitions and writ petitions. The first group consists of C.A. Nos. 4708- 12/89, 4718-27/89, W.P. (C) Nos. 666 667, 693, 694, 774 and 910 of 1990 wherein constitutional validity of the (i) Karnataka Excise (Distillery and Warehouse) (Amendment) Rules, 1989, (ii) Karnataka Excise (Manufacture of Wine from

A Grapes) (Amendment) Rules, 1989, (iii) Karnataka Excise (Brewery) (Amendment) Rules, 1989, (iv) Karnataka Excise (Sale of Indian and Foreign Liquors) (Amendment) Rules, 1989 and (v) Karnataka Excise (Bottling of Liquor) (Amendment) Rules, 1989 was unsuccessfully challenged by various parties before the Karnataka High Court, *inter alia* on the ground that the Rules in question affected adversely the fundamental right of the parties to carry on trade or business in liquor and that the said Rules were violative of Articles 14, 19 (1) (g), 47, 300A, 301 and 304 of the Constitution of India. A Bench of three learned judges of this Court which heard this group of matters has referred them to the Constitution Bench.

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C The second group consists of C.A. Nos. 6043-50, 6051 and 6052 of 1993. These appeals arise out of the deciding of the Kerala High Court upholding the validity of the Government Order 9th December, 1992 passed by the Government of Kerala deciding to cancel all foreign liquor licences issued under Rule 13(3) of the Kerala Foreign Liquor Rules, 1974 to Hotels, Restaurants and Tourist Homes. A Bench of two learned Judges
D has referred the said matters also to the Constitution Bench for decision on the question whether appellants have a fundamental right to carry on trade in liquor.

E The third group consists of SLP (C) Nos. 13817- 28, 16208, 16601-02, 17935, 17953 of 1993, 185, 2479, 2962-63, 5898 of 1994, and W.P. (c) Nos. 587, 591, 592, 608, 612 & 625 of 1993. These matters arise out of various decisions of the Andhra Pradesh High Court upholding the validity of the amendments to the Andhra Pradesh Foreign Liquor and Indian Liquor Rules, 1970 from time to time and A.P. (Regulation of Wholesale Trade; Distribution and Retail Trade in Indian Liquor and Foreign Liquor, Wine and Beer) Act, 1993 (hereinafter referred to as the "A.P. 1993 Act"). The
F High Court has held that the Rules and the amendments thereto as well as the Act are not invalid on the ground that they violate the right to carry on trade in liquor which is not fundamental.

G In appears that some of the parties affected by the decision of the Andhra Pradesh High Court upholding the validity of the enactments and rejecting the argument that the petitioners have a fundamental right to carry on trade in liquor, filed writ petitions in the High Court for a declaration that though the validity of the enactments had been upheld by
H the High Court the A.P. 1993 Act deals only with the taking over of trade

but not business in liquor and, therefore, the State had no right to prevent the writ petitioners from carrying on which the business of liquor during the validity of their licences. The argument was that "trade" is different from "business". The High Court dismissed the petitions, S.L.P. (c) Nos. 9422-24 of 1994 filed against the said decision, forming the fourth group, has also been referred to the Constitution Bench to be decided along with the matters in the above three groups.

2. Thus in matters in the first three groups, this Bench has to answer one question viz., whether the appellants/petitioners have a fundamental right to carry on trade in liquor. The question involved in matters in the fourth group is different, viz., since the A.P. 1993 Act referred to above, deals only with the taking over of trade in liquor but not business, whether the State can prevent the petitioners from carrying on with the business of liquor as apart from trade, during the unexpired period of the licences.

3. We will first deal with the matters in groups 1, 2 and 3 and, therefore, with the question whether the appellants/petitioner have a fundamental right to carry on business in liquor.

4. Before we proceed to examine the question, it is necessary at the outset to focus our attention on the precise controversy raised before us and which, it is claimed, arises out of the conflicting decisions of this Court. For the purposes of contentions advanced before us, liquor covers not only those alcoholic liquids which are generally used as beverages and produce intoxication but also all liquids containing alcohol. Liquor is classified broadly into three classes, viz., (i) potable liquor which is used as beverage, (ii) liquor used in medicinal and toilet preparation and (iii) industrial liquor used for industrial purpose. Two rival contentions of law are canvassed before us. One, that there is no fundamental right to trade or business in liquor and that the State has power to regulate the trade or business by placing restrictions on such trade or business in the interests of the general public even to the extent of prohibiting completely such business or trade. The incidental consequence which flows from this contention is that the State has the exclusive privilege to sell liquor and this privilege can be sold under the relevant law. The State can, therefore, have also a monopoly in manufacturing, possessing and distributing liquor. The other contention is that a citizen has a fundamental right to trade or business in liquor and the State can only place reasonable restrictions on

- A the said right in the interests of general public by law made for the purpose under Article 19(6) of the Constitution. The State cannot, therefore, prohibit completely the said trade or business in liquor in the garb of regulating it, and the limitations or restrictions placed have to pass the test of reasonableness as in the case of trade or business in any other article.
- B It is in light of these rival contentions that we have to examine the question raised before us.

5. Two incidental question which, therefore, arise are (i) whether a monopoly for the manufacture, trade or business in liquor can be created in favour of the State and (ii) whether reasonable restrictions under Article 19(6) of the Constitution can be placed only by Act of Legislature or by a subordinate legislations as well.
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- It is contended that the State cannot carry on trade in liquor under Article 47 of the Constitution. If the law on the subject is considered to be law under Article 19 (6), it has to be on the basis that a citizen had got a fundamental right to trade in liquor. If the law is that a citizen has no fundamental right, then Article 19 (6) cannot be applied because the said Article applies only to those rights which a citizen possesses. What a citizen cannot do under Article 19 (1), the State cannot do under Article 19 (6). Secondly, it is submitted that assuming that the State has got the power to carry on trade in liquor *de hors* Article 19 (6) and under Article 298 of the Constitution, the power under Article 298 cannot extend to trade in liquor. This is so because the Union Government has no executive power to trade in a commodity which under Article 47 it is enjoined to prohibit.
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- F In support of the contention that the appellants/petitioners have a fundamental right to trade in liquor, it is argued firstly, that Entry 51 of List II specifically accepts the fact that the manufacture of alcohol can be for human consumption. The said Entry, among others, provides as follows : "Duty of Excise on intoxicating liquor for human consumption". Entry 8 of List II specifically provides for production, manufacture, purchase and sale of intoxicating liquor. The implication of this Entry is that till prohibition is introduced by applying Article 47, there is no prohibition of consumption of liquor, and hence there is no prohibition for manufacture and sale of liquor. Secondly, it is submitted that there are other substances like tobacco which are more harmful to health than alcohol and they are being sold freely. A majority of the States did not introduce prohibition and some
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States which purported to do it, failed and reverted to the earlier pre-prohibition condition. On the other hand, the revenue from the auction of excise, vend-fees, liquor and other levies forms a major source of the revenue of the State. Hence the trade in liquor cannot be looked upon as an obnoxious trade. Thirdly, the Union Government itself has recognised under its Industrial Policy Resolution as early as in 1956 that the production of potable alcohol as an industry has to be recognised though regulated and the licences have to be freely granted for the manufacture of the potable liquor. During the last several years, a large number of distillery, brewery and winery licences have been granted all over the country. For all these reasons, it is submitted that there is no warrant for excluding liquor from the ambit of the words "any occupation, trade or business" under Article 19(1) (g) of the Constitution.

6. We will first refer to the relevant provisions of the Constitution which have a bearing on the subject.

Article 19(1) (g) provides that all citizens shall have the right to practise any profession or to carry on any occupation, trade or business. This right conferred by the aforesaid provision is circumscribed by the provisions of clause (6) of the very Article which reads as follows :

"(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the States from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to -

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

- A Thus Article 19(1) (g) read with Article 19 (6) spells out a fundamental right of the citizens to practise any profession or to carry on any occupation, trade or business so long as it is not prohibited or is within the framework of the regulation, if any, if such prohibition or regulation has been imposed by the State by enacting a law in the interests of the general public. It cannot be disputed that certain professions, occupations, trades or businesses which are not in the interests of the general public may be completely prohibited while others may be permitted with reasonable restrictions on them. For the same purpose, viz., to subserve the interests of general public, the reasonable restrictions on the carrying on of a profession, occupation, trade etc., may provide that such trade, business etc., may be carried on exclusively by the State or by a Corporation owned or controlled by it. The right conferred upon the citizens under Article 19 (1)(g) is thus subject to the complete or partial prohibition or to regulation, by the State. However, under the provisions of Article 19 (6) the prohibition, partial or complete, or the regulation, has to be in the interests of the general public.
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Article 47 which is one of the Directive Principles of the State Policy reads as follows :

- E "47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health. – The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."
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- G This Article enjoins upon and in turn enables the state to take measures to raise the level of nutrition and the standard of living of its people and to improve the public health. Towards this end, the State is required to bring about prohibition of the consumption of intoxicating drinks and drugs which are injurious to health. The prohibition may be complete or partial and it would also include regulation. It cannot be disputed that liquor is one such drink.

Article 298 of the Constitution provides as follows :

- H "298. Power to carry on trade, etc. - The executive power of the

Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose : A

Provided that -

(a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and B

(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament." C

Thus both the Union and the State Government have within their respective spheres, power to carry on trade or business. D

Article 300A provides that no person shall be deprived of his property save by authority of law. It is undisputed that if a citizen is carrying on the business according to the provisions of law, his business cannot be taken away save by authority of law, if such a law is enacted to further the purpose whether of Article 19 (6) or Article 47. E

Article 301 reads as :

"301. Freedom of trade, commerce and intercourse- Subject to the other provisions of this part, trade commerce and intercourse throughout the territory of India shall be free." F

The right given by this Article to freely carry on trade, commerce and intercourse throughout the territory of India is undisputedly subject to the same restrictions as is the right under Article 19(1)(g).

Apart from the restrictions placed on the right under Article 301 by the provisions of Articles 19(6), 47, 302 and 303, the provisions of Article 304 also place such restrictions on the said right. So do the provisions of Article 305, so far as they protect existing laws and laws creating State monopolies. The provisions of the aforesaid Articles, so far as they are relevant for our purpose, read together, therefore, make the position clear G H

A that the right conferred by Article 19(1)(g) is not absolute. It is subject to restrictions imposed by the other provisions of the Constitution. Those provisions are contained in Articles 19 (6), 47, 302, 303, 304 and 305.

B 7. We may now refer to the relevant Entries of List II of the Seventh Schedule to the Constitution which give power to the State Governments to make the laws in question. Entry 8 reads as follows :

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

C Entry 51 reads as follows :

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

D (a) Alcoholic liquors for human consumption;

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

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

Thus a State has legislative competence to make laws in respect of the above subjects.

F The relevant Entry in List I which has a bearing on the subject is Entry 52 which reads as follows :

"52. Industries , the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

G Under this Entry, the Parliament has enacted the Industries (Development and Regulation) Act, 1951 (for short 'IDR Act') and Item 26 of Schedule I of that Act reads as "Fermentation Industries - (1) Alcohol, (2) Other products of Fermentation and Distillery". Read with Section 2 of the IDR Act, the said Entry would mean that the alcohol industry dealing in potable or non-potable alcohol is a controlled industry
H within the meaning of the said Act. We are not in this reference concerned

with the question as to whether there is any conflict between the relevant Acts of the respective State Legislatures and the Rules, Regulations, Notifications and Orders issued under the said Acts and the provisions of the IDR Act. It cannot further be denied that the pith and substance of the IDR Act is to provide the Central Government with the means of implementing their industrial policy which was announced in their resolution of 6th April, 1948 and approved by the Central legislature. That brings under central control the development and regulation of a number of important industries, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all India import. The development of the industries on sound and balanced lines is sought to be secured by the licensing of all new undertakings. Hence the IDR Act confers on the Central Government power to make rules for the registration of existing undertakings and for regulating the production and development of the industries mentioned in the Schedule and also for consultation with the Provincial (now-State) Governments in these matters. The Act does not in any way denude the power of the State Governments to make laws regulating and prohibiting the production, manufacture, possession, transport, purchase and sale of intoxicating liquors meant for human consumption (but not for medicinal or toilet preparations) and levying excise on them under Entries 8 and 51 of List II. If there is any incidental encroachment by the relevant State Acts on the area occupied by the IDR Act, that will not invalidate the State Acts. The impugned judgments of the High Courts also mention that the State Acts have received the assent of the President. Be that as it may.

8. We may now refer to the relevant authorities cited at the Bar.

In *State of Bombay & Anr. v. F.N. Balsara*, [1951] SCR 682 which is a decision of the Constitution Bench of five learned Judges, what fell for consideration was the validity of the Bombay Prohibition Act, 1949. In that case, this Court held that in view of the provisions of Article 47 of the Constitution, the total prohibition on potable liquor would be reasonable. It does not appear that any contentions were raised there on the basis of Article 19(1) (g) and hence there is no discussion with reference to the said provision.

In *T.B. Ibrahim v. Regional Transport Authority, Tanjore*, [1953] SCR 290 what fell for consideration was the validity of the amendment in 1950

- A to Rule 268 of the Madras Motor Vehicles Rules, 1940 to empower the Transport Authority to alter from time to time the starting place and termini for motor vehicles. The appellant was the owner of a bus-stand in the municipal limits which was being used for several years as a starting place and terminus for buses plying to and from the said limits. The
- B Transport authority passed a resolution changing the starting place and terminus for convenience of the public. The appellant challenged the said resolution and consequently the amendment to Rule 268, among others, as repugnant to Article 19 (1)(g) of the Constitution. A Constitution Bench of five learned Judges dealing with this contention held that the restrictions placed upon the use of the bus-stand for the purpose of picking up or
- C setting down passengers cannot be considered to be unreasonable. It may be that the appellant by reason of the shifting of the bus-stand has been deprived of the income he used to enjoy when the bus-stand was used for outward journeys. There is no fundamental right in a citizen to carry on business wherever he chooses and his right must be subject to any
- D reasonable restriction imposed by the executive authority in the interests of the public convenience. The restriction imposed has the effect of terminating the use to which the stand has been put hitherto. The restriction cannot be regarded as being unreasonable if the authority imposing such restriction has the power to do so. Whether the abolition of the stand was conducive to public convenience or not is a matter entirely for the
- E Transport Authority to judge and it is not up to the Court to substitute its opinion with that of the authority which is in the position having regard to its knowledge of local conditions, to appraise the situation.

In *Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer & Ors.*, [1954] SCR 873 where the vires of Excise Regulation I of 1915 was under challenge on the ground of violation of Article 19(1)(g), the Constitution Bench of five learned judges among others things, held that :

- G (a) In order to determine the reasonableness of restrictions, envisaged by Article 19 (6), regard must be had to the nature of the business and the conditions prevailing in that trade. These factors would differ from trade to trade and no hard and fast rule concerning all trade and no hard and fast rule concerning all trades can be laid down. It cannot also be denied that the State has the
- H power to prohibit trades which are illegal or immoral or injurious

to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them require regulation as to the locality in which they may be conducted. Some, by the dangerous character of the article used, manufactured or sold require also special qualification in the parties permitted to use them, manufacture or sell them. The Court in this connection referred to the observation of Field J. in *P. Crowley v. Henry Christensen*, 34 L.ed. 620 a part of which is as follows :

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

(b) The elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trade which all could carry on. The provisions of the law cannot be attacked merely on the ground that they create a monopoly. Properly speaking, there can be a monopoly only when a trade which could be carried on by all

A persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor. The Court for this purpose relied upon the following observations of Lord Porter in *Commonwealth of Australia v. The Bank of New South Wales*, [1950] AC 235 :

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

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

D In *State of Assam v. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong*, [1957] SCR 295 which is also a decision of the Constitution Bench of five learned Judges, the validity of the notification by which the Commissioner of Hills Division and Appeals was appointed the Appellate Authority under Assam Revenue Tribunal (Transfer of Powers) Act, 1948, was under challenge. The rival claimants had applied for grant of licences and settlement of country spirit shops and the parties who were dissatisfied with the orders of the Deputy Commissioner and those of the Excise Commissioner in appeals therefrom, appealed to the Appellate Authority whose orders were quashed by the High Court on the ground that the concerned notification was void. While dealing with the contentions raised therein, the Court held that a perusal of the Act and the Rules made it clear that no person had any absolute right to sell liquor, and the purpose of the Act and the Rules was to control and restrict the consumption of intoxicating liquors, such control and restriction being obviously necessary for the preservation of public health and morals, and to raise revenue.

F In *The State of Bombay v. R.M.D. Chamarbawala*, [1957] SCR 874, which is also a decision of a Constitution Bench of five learned Judges, the challenge was to the Bombay Lotteries and Prize Competition Control and Tax Act, 1948 as amended by the Bombay Lotteries and Prize Competition

Control and Tax (Amendment) Act, 1952. After referring to the observations made in the American decision in *Phalen v. Virginia*, 12 L.ed. 1030, the Court held as follows :

"It will be abundantly clear from the foregoing observation that the activities which have been condemned in this country from ancient times appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia in the cases referred to above. We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home, could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Art. 19(1) (g). We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Art. 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word "trade", "business", or "intercourse". We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts. 19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Art. 19 (1) (g) or Art. 301 of our Constitution."

The Court further held, relying on the observations in *United States v. Kahrigar*, 97 L.ed. 754, *Lewis v. United States of America*, 99 L.ed. 475 and *Mann v. Nash, L.R.*, [1932] 1 K.B. D. 752 that the fact of issuing a licence or imposing a tax means nothing except that the licensee shall be

- A subject to no penalties under the law if he pays it. The Government may tax what it also forbids and that nobody has a constitutional right to gamble but that if he elects to do so, though it be unlawful, he must pay tax. The revenue authorities are merely taxing the individual with reference to certain facts. They are not partners or shares in the illegality. The crime is
- B not a business and fact regulatory provisions have been enacted to control gambling by issuing licences and by imposing taxes does not in any way alter the nature of gambling which is inherently vicious and pernicious. The Court further held that the same result can be arrived at by applying the doctrine of pith and substance. When Article 19(1) (g) guarantees or Article 301 declares the freedom of trade, they describe human activities
- C in a specific aspect. They single out attributes which the act or transaction may wear and make the freedom, which they confer depend upon those attributes. The freedom secured by the two articles implies that no unreasonable restraint or burden shall be placed upon the act falling under that description because it is trade or commerce or intercourse. The Court,
- D then held that the Act impugned there did not purport directly to interfere with trade, commerce or intercourse as such, for the criterion of its application was the specific gambling nature of the transaction which it restricted. The purpose of the Act was not to restrict any thing which brought the transactions under the description of trade, commerce or intercourse. The Act was in pith and substance, an Act with respect to
- E betting and gambling and to control and restrict betting and gambling was not to interfere with trade, commerce or intercourse as such but to keep their flow free and unpolluted and to save them from anti-social activities. Hence the validity of that Act had not to be decided by the yardstick of reasonableness and public interest laid down in Articles 19(6) and 304. The
- F appeal against the stringency and harshness, if any, of the law does not lie to court of law. In that view of the matter, the court felt that it was not necessary to consider or express any opinion with regard to the vexed question whether restriction contemplated under Article 19 (6) and 305 (b) may extend to total prohibition. This was so because, the Court felt that it could not persuade itself to hold that Article 19 (1) (g) or Article 301
- G comprises all activities undertaken with a view to profit as "trade" within the meaning of those Articles. In this view of the matter, the Court held that the prize competition which the respondents there were carrying on being of a gambling nature, could not be regarded as trade or commerce and such, the respondents could not claim any fundamental right under
- H Article 19(1) (g) in respect of such competitions nor were they entitled to

the protection of Article 301.

In *Nagendra Nath Bora & Anr. v. The Commissioner of Hills Division & Appeals, Assam and Ors.*, [1958] SCR 1240, the appeals arose out of the orders passed by the revenue authorities under the provisions of Eastern Bengal and Assam Excise Act, 1910. The dispute was between the rival claimants who had tendered for the settlement of country spirit shops. While dealing with the matters in question, the Constitution Bench of five learned Judges observed by referring to the *State of Assam v. A.N. Kidwai*, (supra) and the observations made therein that no one had an inherent right to settlement of liquor shops. When the State by public notice invites candidates for settlement to make their tenders and in pursuance of such a notice, a number of persons make such tenders, each one makes a claim for himself in opposition to the claims and the others, and the public authorities concerned have to choose from amongst them. The question whether an administrative authority on such occasions functions merely in an administrative or quasi-judicial capacity must be determined on an examination of the statute and its rules. The Court held that the authorities cannot be said to pass purely administrative orders which were beyond the ambit of High Court's power of supervision and control.

In *Narendra Kumar & Ors. v. Union of India & Ors.*, [1960] 2 SCR 375 which is decision of the Constitution Bench of five learned Judges, the question whether restriction on fundamental rights includes their prohibition, fell for consideration squarely. On different dates prior to April 3, 1958, the petitioners in that case had entered into contracts of purchase of copper with importers at Bombay and Calcutta, but before they could take delivery from the importers, the Government of India in exercise of its powers under Section 3 of the Essential Commodities Act, 1955, issued on April 2, 1958 Non-ferrous Metal Control Order, 1958. Clause (3) of the Order provided that no person shall sell or purchase any non-ferrous metal at a price which exceeded the amount represented by an addition of 3.5 per cent to its landed cost, while clause (4) prohibited any person from acquiring any non-ferrous metal except under and in accordance with the permit issued in that behalf by the Controller in accordance with such principles as the Central Government may from time to time specify. No such principles were, however, published in the gazette nor laid before the Houses of Parliament. The Court held that the word 'restriction' in Article 19(5) and (6) of the Constitution includes cases of prohibition also. Where

- A the restriction reaches the stage of total restraint of rights, special care has to be taken by the courts to see that the test of reasonableness is satisfied by considering the question in the background of the facts and circumstances under which the Order was made, taking into account the nature of evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, the beneficial effect reasonably expected to result to the general public, and whether the restraint caused by the law was more than what was necessary in the interests of the general public. The Court, in this connection referred to *Chintaman Rao v. The State of Madhya Pradesh*, [1950] SCR 759, *Cooverjee's case* (supra) and *Madhya Bharat Cotton Association Ltd. v. Union of India*, AIR (1959) SC 634. The prohibition, according to the Court, has to be treated as only a kind of restriction. The Court then observed as follows :

- D "After Art. 19 (1) has conferred on the citizen the several rights set out in its seven sub-clauses, action is at once taken by the Constitution in cls. 2 to 6 to keep the way of social control free from unreasonable impediment. The *raison d'être* of a State being the welfare of the members of the State by suitable legislation and appropriate administration the whole purpose of creation of the State would be frustrated if the conferment of these seven rights would result in cessation of legislation in the extensive fields where these seven rights operate. But without the saving provisions that would be the exact result of the Art. 13 of the Constitution. It was to guard against this position that the Constitution provided in its cls. 2 to 6 that even in the fields of these rights new laws might be made and old laws would operate where this was necessary for general welfare. Laws imposing reasonable restriction on the exercise of the rights are saved by cl. 2 in respect of rights under sub. cl. (a) where the restrictions are "in the interests of the security of the State;" and other matters mentioned therein; by cl. 3 in respect of the right conferred by sub. cl. (b) where the restrictions are "in the interests of the public order; by cls. 4, 5 and 6 in respect of the rights conferred by sub-cl.(c), (d), (e), (f) and (g) the restrictions are "in the interest of the general public" - in cl. 5 is in respect of rights conferred by sub-cl. (d), (e) & (f) also where the restrictions are "for the protection of the interests of any scheduled tribe" . But for these saving provisions such laws would
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have been void because of Art. 13, which is in these words : - All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency be void; (2) The State shall not make any law which takes or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void"

At it was to remedy the harm that would otherwise be caused by the provisions of Art. 13, that these saving provision were made, it is proper to remember the words of Art. 13 in interpreting the words "reasonable restrictions" on the exercise of the right as used in cl. (2). It is reasonable to think that the makers of the Constitution considered the word "restriction" to be sufficiently wide to save laws "inconsistent" with Art. 19 (1), or "taking away the rights" conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt therefore that they intended the word "restriction" to include cases of "prohibition" also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore, be accepted."

In *A.B. Abdul Khadir and Ors. v. the State of Kerala & Anr.*, [1962] Supp. 2 SCR 741, which is a decision of Constitution Bench of five learned Judges, the Court observed that the system of auctioning of the right to possess excisable goods like country liquor, ganja, and bhang was only a method of realising duty through grant of licences to these who made the highest bid at the auctions and thus to raise revenue. In that case, what was under challenge was the system of auctions under the Cochin Tobacco Act, 1084 (M.E.) with the object of controlling the cultivation, production, manufacture, storage and sale of tobacco. By majority, the Court held that the income realised from such auction was in the nature of excise duty.

9. In *Krishna Kumar Narula & Ors. v. State of Jammu & Kashmir & Ors.*, [1967] 3 SCR 50 any question whether the right to carry on business of liquor is a fundamental right fell directly for consideration before a Constitution Bench of five learned Judges.

Since heavy reliance is placed on behalf of the appellants/petitioners

- A on this to contend that the right to carry on business in liquor is fundamental, it is necessary to examine this case a little more in detail.

B The facts were that the appellant was carrying on business in liquor in his hotel under an annual licence issued under Section 20 of the Jammu & Kashmir Excise Act, 1958. He had applied for a fresh licence for another year. Meanwhile, the Excise Department received complaints from the inhabitants of the locality objecting to the location of the bar in that locality. The complaints were inquired into and the appellant was informed by the Commission that the licence will not be issued unless he shifted the premises to some other approved locality. Writ petition filed by the appellant for quashing the order of the Commissioner was dismissed by the High Court. While dealing with the appeal against the High Court's order, this Court commenting on the combined reading of clauses (1) and (6) of Article 19 observed as follows :

- D "A combined reading of cls. (1) and (6) of Art. 19 makes it clear that a citizen has a fundamental right to carry on any trade or business, and the State can make a law imposing reasonable restrictions on the said right in the interests of the general public. It is, therefore, obvious that unless dealing in liquor is not trade or business, a citizen has a fundamental right to deal in that commodity. The learned Advocate General contended that dealing in liquor was no business or trade, as the dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals. The acceptance of this broad argument involves the position that the meaning of the expression "trade or business" upon and varies with the general acceptance of the standards of morality obtaining at a particular point of time in our country. Such an approach leads to incoherence in thought and expression. Standards of morality can afford a guidance to impose restrictions, but cannot limit the scope of the right. So too, a Legislature can impose restrictions on, or even prohibit the carrying on of a particular trade or business and the Court, having regard to the circumstances obtaining at a particular time or place may hold the restrictions or prohibition reasonable. The question, therefore, is, what is trade or business? Though the word "business" is ordinarily more comprehensive than the word "trade", one is used as synonymous with the other. It is not necessary to bring out
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the finer points of distinction between the said two concepts in this case. In the words of S.R. Das, J., as he then was, in *Narain Swadeshi Weaving Mills v. The Commissioner of Excess Profits Tax*, [1955] SCR 952 at p. 961: AIR (1955) SC 176 at p. 181 the words "business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. Even accepting this test, if the activity of a dealer, say, in ghee is business; then how does it cease to be business if it is in liquor? Liquor can be manufactured, brought or sold like any other commodity. It is consumed throughout the world, though some countries restrict or prohibit the same on economic or moral grounds. The morality or otherwise of a deal does not affect the quality of the activity though it may be a ground for imposing a restriction on the said activity. The illegality of an activity does not affect the character of the activity but operates as a restriction on it. If a law prohibits dealing in liquor, the dealing does not cease to be business, but the said law imposes a restriction on the said dealing."

The Court then referred to the decision in *T.B. Ibrahim's case* (supra). According to the respondent-State there, it was held in that case that dealing in liquor was not a business or trade within the meaning of Article 19 of the Constitution and there is no fundamental right in a citizen to carry on the business wherever he chooses and his right must be subject to any reasonable restriction imposed by the executive authority in the interests of public convenience. The Court observed that in that case this Court did not say that there was no fundamental right to do business but only held that a citizen could not claim that his fundamental right could not be restricted in public interests.

Nor, according to the Court, did the decision in *Cooverjee's case* (supra) lay down any such proposition. According to the Court, in that case this Court held that the impugned regulation was a reasonable restriction within the meaning of Article 19 (6). Referring to the extract from the Judgment of Field, J, in *Crowlene v. Christensen* referred to in that judgment (which we have already quoted above) and the concurrence expressed by the Court there with the said observations, the Court observed that the said passage from the judgment of Field, J. had nothing to do with the construction of Article 19 (1) (g) of the Constitution. According to the Court, there the learned Judge was considering the scope of the

- A "police power" and the said observations were made in that context and those observations were applied by this Court in *Cooverjee's* (supra) in considering the reasonableness of the restrictions imposed upon the fundamental rights. According to the Court, the perusal of the entire judgment shows that to the Court had indeed conceded the fundamental right but held that the said regulations operated as reasonable restriction on the said rights.
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- Similarly, according to the Court the following observations of this Court in *A.N. Kidwai's* case (supra) had no relevance to the inquiry, viz., whether there was a fundamental right to carry on business in liquor. The said observations are as follows :
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- "A perusal of the Act and rules will make it clear that no person has any absolute right to sell liquor and that the purpose of the Act and the rules is to control and restrict the consumption of intoxicating liquors, such control and restriction being obviously necessary for the preservation of public health and morals, and to raise revenue."
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- According to the Court, the said observations only mean that no absolute right to sell liquor was given to any person under the Act and that the said right was controlled by the provisions of the said Act. The Court further held that the respondent-state there could not draw any support from the decision of this Court in *Narendra Nath's* case (supra) because the question there was in regard to the scope of Articles 226 and 227 of the Constitution vis-a-vis the orders passed by the appropriate authorities under the Eastern Bengal and Assam Excise Act, 1910 although in that case two decisions of this Court, viz., *Cooverjee's* case (supra) and *A. N. Kidwai's* case (supra) were noticed, and it was observed that there was no inherent right to the settlement of liquor shops. According to the Court no question of fundamental right under Article 19 (1) arose in that case and hence the said observations were unhelpful to the State.
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- G The Court also found that the following observation made in the *R.M.D. Chamarbaugwala's* case (supra) were also not helpful to the State because that decision only laid down that gambling was not business of trade:

- H "We find it difficult to accept the contention that those activities

which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Art. 19 (1) (g).

Since the Court was not concerned with gambling, the said observations were not relevant. The Court then concluded with the scrutiny of the earlier decisions of this Court referred to above, that they did not support the contention that dealing in liquor was not business or trade. According to the Court, in those decisions this Court was only considering the provisions of the various acts which conferred a restricted right to business. None of the decisions held that a right to do business in liquor was not a fundamental right. The Court, therefore, held that dealing in liquor was business and a citizen has a right to do business in that commodity; but a state can make a law imposing reasonable restrictions on the said right in public interest. We will have an occasion to deal with the Court's observations and conclusions in this case at the appropriate stage hereinafter.

10. To proceed further with the decisions of this Court in chronological order, we may now refer to the next decision, viz., *State of Orissa & Ors. v. Harinarayana Jaiswal & Ors.*, [1972] 3 SCR 784 which is a decision of two learned judges. The facts were that the first respondent was carrying on business of country liquor in exercise of the powers conferred by Section 29 (2) of the Bihar and Orissa Excise Act, 1915. The appellant-State issued an order and in pursuance of that order a date was notified for selling by public auction the exclusive privilege of selling by retail, country liquor in eight shops. The respondent was the highest bidder but his bid was rejected because the Government was of the view that inadequate prices had been offered as a result of collusion between the bidders. Thereafter, tenders called for and the appellant accepted the tender in respect of one shop and rejected the others as it was again of the opinion that price offered was inadequate. Thereafter, the remaining seven shops were sold by private negotiations for substantially higher prices. The High Court had allowed the writ petition filed by the respondent and in appeal this Court referred

A to the decisions which we have cited above including the decision in *K.K. Narula's* case (supra). Hedge, J. speaking for the Court held has follows :

B "It is true that this Court has ruled that the right to trade in intoxicating drugs is also a right to carry on any trade or business within the meaning of Art. 19(1) (g) - See *Krishna Kumar Narula v. Jammu Kashmir State and Ors.* At the same time, it was held by this Court in *Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer and Ors.*, that for determining reasonable restrictions within the meaning of Art. 19(6) of the Constitution on the right given under cl. 19 (Sic) (1)(g), regard must be had to the nature of the business and the conditions prevailing in a particular trade; State has power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public and there is no inherent right in a citizen to sell intoxicating liquors by retail".

D In *Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura & Ors.*, [1973] 1 SCR 533 which is a decision of Constitution Bench of five learned Judges, the challenge was to the Excise Collector's order withdrawing liquor licence before expiry of time. Referring to the decision in *K.K. Narula's* case (supra), the Court held there as follows :

E "..... It is no doubt true that this Court in the case cited held that dealing in liquor is business and a citizen has a right to do business in that commodity but it was added that the State can make a law imposing reasonable restrictions on the said right in public interest. In dealing with reasonable restrictions on abstract standard or general pattern is possible to lay down. In each case, regard has to be had to the nature of trade or business, the conditions prevailing in such trade or business, the nature of the infringement alleged, and the underlying purpose of the restriction, the imposition of which is alleged to constitute an infringement."

G The Court then referred to the contention on behalf of the appellant that the provisions of section 43 of the Bengal Excise Act, 1909 which empowered the licensing authority to withdraw the licence for any reason whatsoever not falling under Section 42 of that Act, were unreasonable and violative of the appellant's fundamental right under Article 19, and held as follows :

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"..... It is no doubt true that in s.43, there is no express mention of the precise grounds on which the licence can be withdrawn. But in our opinion keeping in view the nature of the trade or business for which the grant of licence under the Act is provided the cause contemplated by s. 43 must be such as may have reasonable nexus with the object of regulating this trade or business in the general interest of the public. In the determination of reasonableness of restrictions on trade or business regard must be had to its nature, the conditions prevailing in it and its impact on the society as a whole. These factors must inevitably differ from trade to trade and no general rule governing all trades or businesses is possible to lay down. The right to carry on lawful trade or business is subject to such reasonable conditions as may be considered essential by the appropriate authority for the safety, health, peace, order and morals of the society. Article 47 of our Constitution directs the State to endeavour to prohibit consumption of intoxicating drinks or drugs which are injurious to health except for medicinal purposes. In the case of country liquor, therefore, the question of determining reasonableness of the restriction may appropriately be considered by giving due weight to the increasing evils of excessive consumption of country liquor in the interests of health and social welfare. Principles applicable to trades which all persons carry on free from regulatory controls do not apply to trade or business in country liquor; this is so because of the impact of this trade on society due to its inherent nature."

In *Nashirwar etc. etc. v. State of Madhya Pradesh*, [1975] 2 SCR 881 which is a judgment of three learned Judges, while dealing with the question whether the State has power to grant liquor licence by public auction and whether the said power violated fundamental right under Article 19 (1) (g) of the Constitution, the Court held as follows :

"There are three principal reasons to hold that there is no fundamental right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. Second there is power of the State to enforce an absolute prohibition of manufacturer or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the

A consumption except for medicinal purpose of intoxication drinks and of drugs which are injurious to health. Third, the history of excise laws shows that the State has the exclusive right or privilege of manufacture or sale of liquor.

B In *Balsara's* case (supra) this Court referred to Article 47 and said that the idea of prohibition was connected with public health. The Challenge to a prohibition law under our Constitution was made under Article 14 and 19 in *Balsara's* case. This Court held that absolute prohibition of manufacture or sale of liquor is permissible and the only exception can be for medicinal preparations.

C The concept of inherent right of citizens to do business in liquor is antithetical to the power of the State to enforce prohibition laws in respect of liquor.

D Das, C.J. in *State of Bombay v. R.M.D. Chamarbaugwala*, [1957] SCR 874 said that gambling could not be regarded as trade or business within the meaning of Article 19 (1) (f) and (g) and Article 301. Inherently vicious activities cannot be treated as entitling citizens to do business or trade in such activities. No one can deal in counterfeit coins or currency notes. Das C.J. held that activities which are criminal, or dealing in articles or goods which are res extra commercium could not have been intended to the permitted by Article 19 (1) (f) and (g) relating to fundamental rights to trade or business."

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Referring to *K.K. Narula's* case (supra) the Court held that it was not correct to read the said decision to mean that there was a fundamental right to do business in liquor. According to the Court, the said decision was that dealing in liquor is business and a citizen had a right to do business in that commodity and the State could impose reasonable restrictions on that right in public interest. If the State could prohibit business in liquor as held in *F.N. Balsara's* case (supra) that established that the State had exclusive right or privilege to manufacture, possess, or sell intoxicating liquor and, therefore, the State granted a right or privilege to persons in the shape of licence or lease. The Court then referred to *Harinarayan Jaiswal's* case (supra) and stated that that case had explained *K.K. Narula's* case (supra). The Court then observed as follows :

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H "Trade in liquor has historically stood on a different footing

from other trades. Restrictions which are not permissible with other trades are lawful and reasonable so far as the trade in liquor is concerned. That is why even prohibition of the trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of the liquor. The State possesses the right of complete control over all aspects of intoxicants, viz., manufacture, collection, sale and consumption. The State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. That is the view of this Court took in *Bharucha's* case (supra) and *Jaiswal's* case (supra)."

The Court also held that since in *Cooverjee's* case (supra) in no uncertain terms this Court had repelled the citizens' contention of inherent right to sell intoxicating liquor and since *Cooverjee's* case was a Constitution Bench decision, *K.K. Narula's* case which is also a Constitution Bench decision, cannot be said to have overruled the decision in *Cooverjee's* case.

In *Har Shankar and Ors. etc. etc. v. The Dy. Excise and Taxation Commissioner and Ors.*, [1975] 3 SCR 254 which is a decision of Constitution Bench of five learned Judges, the question whether a citizen had a fundamental right to trade in intoxicants and whether State had power to prohibit absolutely every form of activity relating to intoxicants, fell directly for consideration. While dealing with it, after referring to all the earlier decisions including the decision in *K.K. Narula's* case (supra), the Court held as follows :

"These unanimous decisions of five Constitution Benches uniformly emphasised after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to the health and welfare of the public, that elimination and exclusion from the business is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by themselves by all civilised communities. The contention that the citizen had either a natural or a fundamental right to carry on trade or business in liquor thus stood rejected.

But, in spite of the weight of this authority, a Constitution

A Bench Struck a different note in *Krishna Kumar Narula etc. v. The State of Jammu and Kashmir & Ors.*," It would, however, appear that the learned judges of the High Court had differed on the question whether the appellant had a fundamental right to do business in liquor and this Court desired "to make the position clear" in order to "avoid further confusion in the matter". The decisions in *Cooverjee's case* *Kidwai's case* and *Nagendra Nath's case* were cited before the Court but it took the view that they did not support the contention that dealing in liquor was not business or trade or that a right to do business in liquor was not a fundamental right....."

The Court then referred to the decision in *R.M.D. Chamarbaugwala's case* (supra) and observed as follows :

D "This decision was also cited before the Court in *Krishna Kumar's case* but it said : "This decision only lays down that gambling is not business or trade. We are not concerned in this case with gambling". With great respect, the reasons mentioned by Das, C.J. for holding that there can be no fundamental right to do trade or business in an activity like gambling apply with equal force to the alleged right to trade in liquor and those reasons may not be brushed aside by restricting them to gambling operations".

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F "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's case*, *Cooverjee's case*, *Kidwai's case*, *Nagendra Nath's case*, *Amar Chakraborty's case* and the *R.M.D.C. case*, as interpreted in *Harinarayan Jaiswal's case* and *Nashirwar's case*. 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", Volume 30 it is stated that while engaging in liquor traffic is not inherently lawful, nevertheless it is

a privilege and not a right, subject to governmental control. (page 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).

It was unnecessary in *Krishna Kumar Narula's* case to examine that question from this brother 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 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 interest".

"It is significant that the judgment in *Krishna Kumar Narula's* 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 dealing in intoxicants on such terms of general application as the State deems expedient."

In *Lakhanlal etc. v. State of Orissa & Ors.*, [1977] 1 SCR 811 which is decision of two learned Judges, the Court after referring to the decisions in *Cooverjee's* case, *K.K. Narula's* case and *Har Shankar's* case (supra) reiterated that there was no fundamental right to trade or business in intoxicants and that in all their manifestations these rights were vested in the State and indeed without such vesting there could be no effective regulation of various forms of activities in relation to intoxicants.

A In *Sat Pal & Co. etc. v. Lt. Governor of Delhi & Ors.*, [1979] 3 SCR 651 which is a decision of two learned judges, it was observed that if there is no fundamental right to carry on trade or business in liquor, there is no question of its abridgement of any restriction which can be styled as unreasonable. The Court reiterated the view taken in *Har Shankar's* case (supra) that the State under its regulatory power has a right to control or even to prohibit absolutely every form of activity in relation to intoxicants apart from anything else, its import too. This power of control is a question of society's right to self-protection and it rests upon the right of the State to act for the health, moral and welfare of the people. Liquor traffic is a source of pauperism and crime.

C In *Southern Petroleum and Chemicals, Trichur and Ors. v. State of Kerala & Ors.*, [1981] 4 SCC 391 which is a decision of three learned Judges, the Court held that no citizen has any fundamental right guaranteed under Article 19 (1) (g) of the Constitution to carry on trade in any noxious and dangerous goods like intoxicating drugs or intoxicating liquors.

D In *State of M.P. & Ors. v. Nandlal Jaiswal & Ors.*, [1986] 4 SCC 566, the Bench of two learned judges reiterated that it is well-settled by several decisions of this Court including the decision in *Har Shankar's* case (supra) that there is no fundamental right in a citizen to carry on trade or business in liquor. The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants and its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor.

F In *Doongaji & Co. v. State of Madhya Pradesh & Ors.*, AIR (1991) SC 1947, a Bench of two learned Judges while dealing with the question whether, after the expiration of the licence given to the appellant, fixation of the prices of the plant and machinery of the distillery and the attached warehouses and stock-in-trade and payment thereof to the appellant, was a condition precedent to taking possession thereof and given delivery to the new licensee which was a state owned Corporation found on facts that the appellant had no exclusive possession of the distillery which always remained with the Excise Department and the appellant was only working out the contract of manufacturing rectified spirit in the distillery and

wholesale supply of the same to the retail vendors within the area attached to it. Due to non-cooperation of the appellant, possession was taken and delivered to the incoming licensee as per the Rules and the appellant was not entitled to restitution. In that connection, the Court observed as follows:

"It is settled law by several decision of this Court that there is no fundamental right to a citizen to carry on trade or business in liquor. The State under its regulatory power has power to prohibit absolutely any form of activity in relation to an intoxicant, its manufacture, possession, import and export. No one claim, as against the State, the right to carry on trade or business in any intoxicants, nor the State be compelled to part with its exclusive right or privilege of manufacture, sale, storage of liquor. Further when the State has decided to part with such right or privilege to the others, then State can regulate consistent with the principles of equality enshrined under Art. 14 and any infraction in this behalf at its pleasure is arbitrary violating Art. 14. Therefore, the exclusive right or privilege of manufacture, storage, sale, import and export of the liquor through any agency other than the State would be subject to rigour of Art. 14."

11. We may now deal with the decisions relating to trade or business in industrial alcohol.

In *Indian Mica Micanite Industries. v. The State of Bihar & Ors.*, [1971] 2 SCC 236, a Constitution Bench of five learned Judges was concerned only with the question whether the fee levied under Rule 111 of the Bihar and Orissa Excise Rules on denatured spirit used and possessed by the appellant had sufficient *quid pro quo* for that levy. The question whether the citizen had a fundamental right to carry on trade or business in industrial alcohol was neither raised nor answered. Dealing with the question raised before it, the Court held, among other things that before a levy can be upheld as a fee, it must be shown that the levy has a reasonable co-relationship with the services rendered by the Government. The co-relationship is essentially a question of fact. On the facts of that case, the Court found that the only service rendered by the Government to the appellant and to other similar licensees was that the Excise Department had to maintain an elaborate staff not only for the purposes of ensuring that denaturing is done

- A properly by the manufacturer but also to see that the subsequent possession of denatured spirit in the hands either of a wholesale dealer or retail seller or any other licensee or permit holder was not misused by converting the denatured spirit into alcohol fit for human consumption. Since the State in that case, had not chosen to place before the Court the material in its possession from which the co-relationship between the levy and the services rendered could be established at least in a general way, the Court held that the levy under the impugned Rule could not be justified.
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- C In *State of U.P. & Ors. v. Synthetics and Chemicals Limited and Ors.*, [1980] 2 SCC 441, which is a decision of two learned Judges of this Court, the facts were that the State Legislature had enacted the U.P. Excise (Amendment) Act 30 of 1972. Under Notification dated 3rd November, 1972, the Government was authorised to sell by auction the right of retail or wholesale vend of foreign liquor. The new Rules were accordingly framed, the effect of which was that a vend-fee of Rs. 1.10 per bulk litre was imposed. The Allahabad High Court, however, held that notification to be *ultra vires*. However, after the decision of this Court in *Nashirwar's* case and *Har Shankar's* case (supra) where the State's power to auction the right to vend, by retail or wholesale, foreign liquor was upheld, the State Legislature enacted U.P. Excise (Amendment) Act, 1972 by U.P. Excise (Amendment) (Re-enactment and Validation) Act 5 of 1976. Thereafter the High Court upheld the validity of the re-enacted Act and against that appeals were preferred here. The vend fee was made payable in advance on denatured spirit issued for industrial purposes. In that case, the Court held that the expression "intoxicating liquor" in Entry 8 of List II, of Seventh Schedule of the Constitution is not confined to potable liquor alone but would include all kinds of liquor which contain alcohol. Hence the expression covered alcohol manufactured for the purpose of industries such as industrial alcohol. The Court also held that the words "foreign liquor" in Section 24-A of the State Act included the denatured spirit and the said words could not be given a restricted meaning for the word 'consumption' cannot be confined to consumption of beverages alone.
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- H When the liquor is put to any use such as manufacture of any articles, liquor is all the same consumed. Further, Section 4 (2) of the Act provides that the State may declare what shall be deemed to be country liquor or foreign liquor and the State had under the rules issued the notification defining "foreign liquor" as meaning all rectified, perfumed, medicated and denatured spirit whenever made. The Court further held that "specially

denatured spirit" for industrial purposes is not different from denatured spirit. The denatured spirit mentioned in the rules in question was treated as including "specially denatured spirit" for industrial purposes. The denatured spirit has ethyl alcohol as one of its constituents. The specially denatured spirit for industrial purposes is different from denatured spirit only because of the difference in the quality and quantity of the denaturants. Specially denatured spirit and ordinary denatured spirits are classified according to the use and the denaturants used. Hence the definition of "alcohol" in the rules in question included both ordinary as well as specially denatured spirit.

The Court further held that although it was true that the stand taken by the State Government in the earlier proceedings in the High Court was that the levy was in the nature of excise duty or a fee and the present stand was that it was neither a duty nor a fee but only a levy for the conferment of the exclusive privilege, that would not make any difference so long as the Government has the right to impose the levy. The levy was imposed for permission granted in favour of the licensees and allotment orders of denatured spirits issued to them from the various distilleries. The parties having paid the fee, had taken possession of denatured spirit from the distilleries and the re-enacted legislation, viz., Act 5 of 1976 had only restored the *status quo* enabling the State to collect the levy validly made under the earlier Act 30 of 1972 which was found to be illegal by the High Court.

Since the State had exclusive right of manufacturing and selling of intoxicating liquors, the imposition of vend-fee on denatured spirit and the grant of licences to wholesale vend of denatured spirit was within the legislative competence of the State under Entry 8 of List II. The Court further held that the Ethyl Alcohol (Price Control) Order issued by the Central Government in exercise of power conferred under section 18-G of the IDR Act did not explicitly or impliedly take away the power of the State Government to regulate the distribution of intoxicating liquor by collecting a levy for parting away with its exclusive rights. The power of the State under Entry 24 of List II is subject to the provisions of Entry 52 of List I. Therefore, the power of Parliament and the State Legislature were confined to Entry 52 of List I and Entry 24 of List II respectively. The Parliament would have had exclusive power to legislate in respect of industry notified by the Parliament but the provisions of Entry 26 of List

- A II and Entry 33 of List III would also have to be taken into account for determining the scope of legislative power of the Parliament and the State. Entry 33 of List III enables a law to be made regarding the productions, supply and distribution of products of a notified industry. Thus a fair scrutiny of the relevant entries made it clear that the power to regulate notified industries is not exclusively within the jurisdiction of Parliament.
- B Hence, it cannot be contended that after passing of the Industries (Development and Regulation) Act, 1951, the claim by the State to monopoly with regard to the production and manufacture and the sale of the denatured spirit or the industrial alcohol was unsustainable.

- C In *Synthetics and Chemicals Ltd. & Ors. v. State of U.P. & Ors.*, [1990] 1 SCC 109 which is a decision of Constitution Bench of seven learned Judges, the question was with regard to the validity of levy on industrial alcohol. The Court held that it must accept the decision that the States have the power to regulate the use of alcohol and that power include power to make provisions to prevent and/or check industrial alcohol being used as intoxicating or drinkable alcohol. The question, according to the Court, was whether in the garb of regulations, the legislation which is in pith and substance fee or levy which has no connection with the cost or expenses administering the regulations, can be imposed purely as regulatory measure. Judged by the pith and substance of the impugned legislation, the Court held that the levies in question could not be treated as part of regulatory measures. The court further held that the State had power to regulate though not as emanation of police power but as an expression of the sovereign power of the State. But that power has its limitations. The Court then observed that only in two cases the question of industrial alcohol had come up for consideration before this Court. One in *Synthetics and Chemicals Ltd.* case, [1980] 2 SCR 441 and the other in *Indian Mica and Micanite Industries*, [1971] 2 SCC 236. The latter cases starting with *F.N. Balsara's* case (supra) are of potable liquor. The Court then referred to *K.K. Narula's* case (supra) and observed as follows :
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- G ".....there was not right to do business even in potable liquor. It is not necessary to say whether it is a goods law or not. But this must be held that the reasoning therein would apply with greater force to industrial alcohol."

- H The Court then observed in paragraphs 77 and 80 to 85 as under:

"77. Article 47 of the Constitution imposes upon the State the duty to endeavor to bring about prohibition of the consumption except for medical purpose of intoxicating drinks and products which are injurious to health. If the meaning of the expression "intoxicating liquor" is taken in the wide sense adopted in *Balsara's* case, it would lead to an anomalous result. Does Article 47 oblige the State to prohibit even such industries as are licensed under the IDR Act but which manufacture industrial alcohol? This was never intended by the above judgments or the Constitution. It appears to us that the decision in the *Synthetics and Chemicals Ltd.* case was not correct on this aspect.

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80. It was submitted that the activity in potable liquor which was regarded safe and exclusive right of the State in the earlier judgments dealing with the potable liquor were sought to be justifiable under the police power of the State, that is, the power to preserve public health, morals, etc. This reasoning can never apply to industrial alcohol manufactured by industries which are to be developed in the public interest and which are being encouraged by the State. In a situation of this nature, it is essential to strike a balance and in striking the balance, it is difficult to find any justification for any theory of any exclusive right of a State to deal with industrial alcohol. Restriction valid under one circumstance may become invalid in changing circumstances....."

81. It is not necessary for us here to say anything on the imposts on potable alcohol as commonly understood. These are justified by the lists of our legislature practised in this country — see the observations of Hidayatuallah, J. as the Chief Justice then was, in *Guruswamy v. State of Mysore*, at pp. 573-574 and other decisions mentioned hereinbefore.

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

A 83. Having regard to the principles of interpretation and the constitutional provisions, in the light of the language used and having considered the impost and the composition of industrial alcohol, and the legislative practice of this country, we are of the opinion that the impost in question cannot be justified as State imposts as these have been done. We have examined the different provisions. These are not merely regulatory. These are must more than that. These seek to levy imposition in their pith and substance not as incidental or as merely disincentives but as attempts to raise revenue for States' purpose. There is no taxing provision permitting these in the lists in the field of industrial alcohol for the State to legislate.

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

D 85. After the 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as Item 26 of the first Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non-potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the Central licences under IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which they do not possess. Nor can the State claim exclusive right to produce and manufacture industrial alcohol which are manufactured under grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under such grant be amenable to States claim of exclusive possession of privilege."

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G The aforesaid decision pertaining to the trade or business in denatured spirit or industrial alcohol, not only do not take the view that the citizen has a fundamental right to carry on trade or business in potable alcohol but on the contrary, hold that he has no such right. This is reiterated in the two *Synthetics & Chemicals* Cases (supra).

H 12. It will thus be obvious that all the decisions except the decision

in *K.K. Narula's* case have unanimously held as shown above that there is no fundamental right to carry on trade or business in potable liquor sold as a beverage. As pointed out above, the proposition of law which is put in a different language in *K.K. Narula's* case has been explained by the subsequent decisions of this Court including those of the Constitution Benches. The proposition of law laid down there has to be read in conformity with the proposition laid down in that respect by the other decisions of this Court not only to bring comity in the judicial decisions but also to bring the law in conformity with the provisions of the Constitution. The fundamental rights conferred by our Constitution are not absolute. Article 19 has to be read as a whole. The fundamental rights enumerated under Article 19 (1) are subject to the restrictions mentioned in clause (2) to (6) of the said Article. Hence, the correct way to describe the fundamental rights under Article 19(1) is to call them qualified fundamental rights. To explain this position in law, we may take the same illustration as in given in *K.K. Narula's case*. The citizen has undoubtedly a fundamental right to carry on business in ghee. But he had no fundamental right to do business in adulterated ghee. The expound the theme further, a citizen has no right to trafficking in women or in slaves or in counterfeit coins or to carry on business of exhibiting and publishing pornographic or obscene films and literature. The illustrations can be multiplied. This is so because there are certain activities which are inherently vicious and pernicious and are condemned by all civilised communities. So also, there are goods, articles and services which are obnoxious and injurious to the health, moral, safety and welfare to the general public. To contend that merely because some activities and trafficking in some goods can be organised as a trade or business, right to carry on trade or business in the same should be considered a fundamental right is to beg the question. The correct interpretation to be placed on the expression "the right to practise any profession, or to carry on any occupation, trade or business" is to interpret it to mean the right to practise any profession or to carry on any occupation, trade or business which can be legitimately pursued in a civilised society being not abhorrent to the generally accepted standards of is morality. Human perversity knows no limits and it is not possible to enumerate all professions, occupations, trades and businesses which may be obnoxious to decency morals, health, safety and welfare of the society. This is apart from the fact that under our Constitution the implied restrictions on the right to practise any profession or to carry on any occupation, trade or business

- A are made explicit in clauses (2) to (6) of Article 19 of the Constitution and the State is permitted to make law for imposing the said restrictions. In the present case, it will be clause (6) of Article 19 which places restrictions on the fundamental right to do business under Article 19 (1) (g). These restrictions and limitations on fundamental right are implicit and inherent even in the fundamental rights spelt out in the American Constitution, although they are not explicitly stated as in our Constitution by clause (2) to (6) of Article 19. That is how the American Supreme Court has read and interpreted the rights in the American Constitution as pointed out above by the excerpts from the relevant decisions. It will have, therefore, to be held that even under the American Constitution, there is no absolute fundamental right to do business or trade in any commodity or service. The correct way, therefore, to read the fundamental rights enumerated under Article 19(1) of our Constitution is to hold that the citizens do not possess the said rights absolutely. They have the said rights as qualified by the respective clauses (2) to (6) of Article 19. That is apart from the fact that Article 47 of the Constitution enjoins upon the State to prohibit consumption of intoxicating drink like liquor, which falls for consideration in the present case and, therefore, the right to trade or business in potable liquor is subject also to the provisions of the said Article. Whether one states as in *K.K. Narula's* case that the citizen has a fundamental right to do business but subject to the State's powers to impose valid restrictions under Clause (6) of Article 19 or one takes the view that a citizen has no fundamental right to do business but he has only a qualified fundamental right to do business, the practical consequence is that same so long as the former view does not deny the State the power to completely prohibit, trade or business in articles and products like liquor as a beverage, or such trafficking as in women and slaves. This Court in *K.K. Narula's* case has not taken such view.

13. The contention that if a citizen has no fundamental right to carry on trade or business in potable liquor, the State is also enjoined from carrying on such trade, particularly in view of the provisions of Article 47, though apparently attractive, is fallacious. The State's power to regulate and to restrict the business in potable liquor impliedly includes the power to carry on such trade to the exclusion of others. Prohibition is not the only way to restrict and regulate the consumption of intoxicating liquor. The abuse of drink intoxicates can be prevented also by limiting and controlling its production, supply and consumption. The State can do so also by

creating in itself the monopoly of the production and supply of the liquor A
 When the State does so, it does not carry on business in illegal products.
 It carries on business in products which are not declared illegal by com-
 pletely prohibiting their production but in products the manufacture, pos-
 session and supply of which is regulated in the interest of the health, morals
 and welfare of the people. It does so also in the interest of the general B
 public under Article 19(6) of the Constitution.

14. The contention further that till prohibition is introduced, a citizen
 has a fundamental right to carry on trade or business in potable liquor has
 also no merit. All that the citizen can claim in such a situation is an equal
 right to carry on trade or business in potable liquor as against the other C
 citizens. He cannot claim equal right to carry on the business against the
 state when the State reserves to itself the exclusive right to carry on such
 trade or business. When State neither prohibits nor monopolises the said
 business, the citizens cannot be discriminated against while granting licen-
 ces to carry on such business. But the said equal right cannot be elevated D
 to the status of a fundamental right.

It is no answer against complete or partial prohibition of the produc-
 tion, possession, sale and consumption etc. of potable liquor to contend
 that the prohibition where it was introduced earlier and where it is in
 operation at present has failed. The failure of measure permitted by law E
 does not detract from the power of the State to introduce such measures
 and implement them as best as they can.

We also do not see any merit in the argument that there are more
 harmful substances like tobacco, the consumption of which is not F
 prohibited and hence there is no justification for prohibiting the business
 in potable alcohol. What article and goods should be allowed to be
 produced, possessed, sold and consumed is to be left to the judgment of
 the legislative and the executive wisdom. Things which are not considered
 harmful today, may be considered so tomorrow in the light of the fresh G
 medical evidence. It requires research and education to convince the
 society of the harmful effects of the products before a consensus is reached
 to ban its consumption. Alcohol has since long been known all over the
 world to have had harmful effects on the health of the individual and the
 welfare of the society. Even long before the Constitution was framed, it was
 one of the major items on the agenda of the Society to ban or at least to H

- A regulate, its consumption. That is why it found place in Article 47 of the Constitution. It is only in recent years that medical research has brought to the fore the fatal link between smoking and consumption of tobacco and cancer, cardiac diseases and deterioration and tuberculosis. There is a sizeable movement all over the world including in this country to educate people about the dangerous effect of tobacco on individual's health.
- B The society may, in course of time, think of prohibiting its production and consumption as in the case of alcohol. There may be more such dangerous products, the harmful effects of which are today unknown. But merely because their production and consumption is not today banned, does not mean that products like alcohol which are proved harmful, should not be
- C banned.

- The 1956 Resolution of Industrial Policy adopted by the Central Government also does not help the petitioner/appellants in their contention that the production of industrial alcohol as an industry has to be recognised and all that can be done is to regulate the said production but not to
- D prohibit it. Apart from the fact that the said resolution has no legal efficacy, and cannot have the effect of limiting the powers of the State to prohibit or restrict the production of potable alcohol, the resolution itself now where speaks against such prohibition or limitation. The licences granted to the distilleries, breweries and wineries of potable liquor are valid only
- E so long as their production, possession, transport, sale, consumption etc. are not completely prohibited in the States concerned.

15. We may now summarise the law on the subject as culled from the aforesaid decisions.

- F (a) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(a) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other
- G civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.
- (a) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession
- H or carrying on an occupation, trade or business which is inherent-

- ly vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium*, (outside commerce). There cannot be business in crime. A
- (c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited. B C
- (d) Article 47 of the Constitution considers intoxication drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the Directive Principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the Directive Principle contained in Article 47, except when it is used and consumed for medical purposes. D E
- (e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise. F
- (f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and article which are *res commercium*. The restrictions and limitations on the trade or business in potable liquor can G H

- A again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.
- B (g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.
- C (h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.
- D (i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the state carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.
- E
- F (j) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.
- G
- H (k) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can

however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same in the interest of general public. A

- (l) Likewise, the state cannot prohibit trade of business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19 (6) of the Constitution. B

- (m) The restrictions placed on the trade or business in industrial alcohol in medicinal and toilet preparations containing liquor or alcohol may also be for the purpose of preventing their abuse or diversion for use as or in beverage. C

15. This Court neither in *K.K. Narula's* case (supra) nor in the second *Synthetics and Chemicals Ltd.* case (supra) has held that the State cannot prohibit trade or business in potable liquor. The observations made in *K.K. Narula's* case (supra) that a citizen has a fundamental right to trade or business in liquor are to be understood, as explained above, to mean only that when the State does not prohibit the trade or business in liquor, a citizen has the right to do business in it subject to the restrictions and limitations placed upon it. Those observations cannot be read to mean that a citizen has an unqualified and an absolute right to trade or business in potable liquor. This position in law is explained by this Court also in *Har Shankar's* case (supra). The decision in the second *Synthetics and Chemicals Ltd.* case (supra) also cannot be read to mean that the Court in that case has taken the view that a citizen has a right to trade or business in potable liquor. That decision is confined to trade or business in industrial alcohol which is legitimately used for industrial purpose and not for consumption as an intoxicating drink. The Court has also there not taken any exception to the right of the State to place reasonable restrictions on the trade or business even of industrial alcohol to prevent its diversion for the use in or as intoxicating beverage. D E F G

16. We, therefore, hold that a citizen has no fundamental right to trade or business in liquor as beverage. The State can prohibit completely the trade or business in potable liquor since liquor as beverage is *res extra commercium*. The State may also create a monopoly in itself for trade or business in such liquor. The State can further place restrictions and limita- H

A tions on such trade or business which may be in nature different from those on trade or business in articles *res-commercium*. The view taken by this Court in *K.K. Narula's* case (supra) as well as in the second *Synthetics and Chemicals Ltd.* case (supra) is not contrary to the aforesaid view which has been consistently taken by this Court so far.

B 17. One of the incidental contentions, viz., whether the State can create monopoly in trade or business in potable liquor is already answered above. This is apart from the fact that Article 19(6) provides for such monopoly in favour of the State even in trades and businesses which are legitimate. It is not, therefore, necessary to dilate upon this aspect any further.

C 18. The last contention in these groups of matters is whether the State can place restrictions and limitations under Article 19 (6) by subordinate legislation. Article 13 (3)(a) of the Constitution states that law includes D "any ordinance, order, bye-law rule, regulation, notification, custom or usage having in the territory of India the force of law". Clauses (2) to (6) of Article 19 make no distinction between the law made by the Legislature and the subordinate legislation for the purpose of placing the restrictions on the exercise of the respective fundamental right mentioned in Article E 19 (1) (a) to (g). We are concerned in the present case with clause (6) of Article 19. It will be apparent from the said clause that it only speaks of "operation of any existing law in so far as it imposes...." "from making any law imposing" reasonable restrictions on the exercise of the right conferred by Article 19(1)(g). There is nothing in this provision which make it F imperative to impose the restrictions in question only by a law enacted by the Legislature. Hence the restrictions in question can also be imposed by any subordinate legislation so long as such legislation is not violative of any provisions of the Constitution. This is apart from the fact that trade or business in potable liquor is a trade or business in a *res extra commercium* and hence can be regulated and restricted even by executive order G provided it is issued by the Governor of the State. We, therefore, answer the question accordingly.

In the view that we have taken, the appeals, special leave petitions and writ petitions will now be placed before an appropriate bench for H decision in accordance with the law laid down above.

S.L.P 24-24 OF 1994

A

19. In these petitions, the contention raised is that the A.P. (Regulations of Wholesale Trade, Distribution and Retail Trade in Indian Liquor and Foreign Liquor, Wine and Beer) Act No. 15 of 1993 (hereinafter referred to as the "Act") deals with taking over only of "trade" and not "business" in liquor and, therefore, the petitioners cannot be prevented from carrying on the "business" of wholesale dealing in Indian Made Foreign Liquor (IMFL) during the period of the validity of their FL-15 licences issued to them. It is not disputed that the petitioners are wholesale traders in Indian Made Foreign Liquor (IMFL) and have been carrying on the said trade under FL-15 licence issued to them. The licence permits them to sell IMFL in the premises indicated in the licence.

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As the preamble of the Act shows, it has been enacted to take over the wholesale trade and distribution in Indian liquor/Foreign Liquor, Wine and Beer from the private sector in order to have an effective control over the wholesale supply and distribution of the liquor. The State Government had taken a policy decision that in public interest, the exclusive privilege of the supplying in wholesale the Indian liquor/Foreign liquor, Wine and Beer in the whole of the State of Andhra Pradesh shall be vested in the A.P. Beverage Corporation limited and for terminating all existing licences for wholesale trade and distribution of the Indian Liquor/Foreign Liquor, Wine and Beer. The title of the Act also shows that it is for regulation of wholesale trade and distribution and retail trade in Indian Liquor/Foreign Liquor, Wine and Beer, Section 3 of the Act further makes it clear that any licence issued to sell Indian Liquor/Foreign Liquor, Wine and Beer in wholesale and remaining in force on the appointed day, shall stand terminated with effect from that day. As stated above, the licence issued to the petitioners, viz., FL-15 is also to sell the liquor in the premises and to do no more. When, therefore, the Act terminated the said licence of the petitioners with effect from the appointed day, the whole of the trade or business of the petitioners for sale of the liquor came to an end. It is, therefore, difficult to understand the logic of the petitioners' contention that what was extinguished was only the trade of sale and not the business of sale. However, we will examine even the said contention for what it is worth.

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There is no doubt that the word "business" is more comprehensive H

A than the word "trade" since it will include manufacture which the word "trade" any not ordinarily include. The primary meaning of the word "trade" is the exchange of goods for goods or goods for money. However, the word "trade" has also secondary meaning viz., business carried on with a view to profit. In fact, the words "trade" and "industry" are also used interchangeably many times. It all depends upon the context in which the words occur.

B In Words and Phrases Legally Defined, Third Edition (Volume 4 : R-Z) by John B, Saunders, the word "trade" is explained as:

C "Trade' in its primary meaning is the exchange of goods for goods or goods for money and in a secondary meaning it is any business carried on with a view to profit, whether Manual or mercantile, as distinguished from the liberal arts, or learned professions and from agricultural. However, the word is of very general application, and must always be considered in the context in which it is used. *As used in various revenue Acts, 'trade' is not limited to buying and selling, but may include manufacture.* In the 'expression restraint of trade' the word is used in its loosest sense to cover every kind of trade, business, profession or occupation. (47 Halsbury's Law (4th edn.) Para 1)."

D

(Emphasis supplied)

E In *Skinner v. Jack Breach Ltd.*, [1927] 2 KB 220 at 225- 227, DC, Lord Hewart, C.J. has observed:

F "No doubt in a great many contexts the word "trade" indicates a process of buying and selling but that is by no means an exhaustive definition of its meaning. It may also mean a calling or industry or class of skilled labour.

G While interpreting the provisions of the Industrial Courts Act, 1919 Lord Wright, in *National Association of Local Government Officers v. Balton Corporation*, (1943) AC 166 at 184, 185, has observed thus:

H "Section 11 of the Act of 1919 (Industrial Court Act 1919) shows that "trade" is used as including "industry because it refers to a trade dispute in the industry of agriculture.... Trade and industry are thus treated as interchangeable terms. Indeed, "trade" is not only in the etymological or dictionary sense, but in legal usage, a

term of the widest scope. It is connected originally with the word "tread" and indicates a way of life or an occupation. In ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate. It may also mean a skilled craft". A

In *Aviation Shipping Co. Ltd. v. Murry (Inspector of Taxes)*, [1961] 2 All ER 805 at 811 C.A., Lord Donovan has observed : B

"A trade is an organised seeking after profits as a rule with aid of physical assets."

21. Thus it is apparent that the word "trade" may include all the connotations of the word "business". As held in *K.K. Narula's* case (supra), in Article 19 (1) (g) of our Constitution, the words "trade" and "business" are used synonymously. Hence, we reject the contention and hold that after the taking-over of the trade, viz., the activity of buying and selling liquor, no activity was left with the petitioners to carry on under the licence held by them. C D

22. The special leave petitions are frivolous and are dismissed with costs.

A.G.

Appeals and Petitions disposed of.