

PETITIONER:
STATE OF U.P., ETC. ETC.

Vs.

RESPONDENT:
SYNTHETICS & CHEMICALS LTD. & ORS. ETC. ETC.

DATE OF JUDGMENT 19/12/1979

BENCH:
KAILASAM, P.S.
BENCH:
KAILASAM, P.S.
GUPTA, A.C.

CITATION:
1980 AIR 614 1980 SCR (2) 531
1980 SCC (2) 441
CITATOR INFO :
D 1988 SC 850 (4)
O 1990 SC1927 (1,27,30,35,67,74,76,85)
RF 1992 SC2169 (14)

ACT:
Excise laws-"Denatured spirit" if an intoxicating liquor-Licence fee levied on sale denatured spirit-If within the competence of the State.

HEADNOTE:

The respondents who were licensees for the whole-sale vend of denatured spirit in their writ petitions before the High Court contended that levy of fees on denatured spirit was not justified because (i) the State was not providing any service to the trade and (ii) since it is the Parliament which has the power to levy excise duty or tax on denatured spirit, the State was incompetent to levy the fees. Rejecting the contentions, the High Court held that the State had exclusive privilege to deal with any intoxicating liquor which included denatured spirit, that it had the right to vend liquor either in retail or wholesale and that therefore its power to levy fees cannot be questioned.

In appeal to this Court it was contended on behalf of the licensees that (1) levy of vend fee on denatured spirit by the State was without legislative competence (2) with the enactment of Industrial (Development and Regulation) Act, 1951 the Union had taken under its control industries including fermentation of industrial alcohol and, therefore, it is only the Union which could levy the fees on denatured spirit or industrial alcohol.

Allowing the State's appeal,

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HELD: The levy of vend fee is for parting with the exclusive right of the State with regard to intoxicating liquors and for conferring a right on the licensees to sell such liquors. A conspectus of the decisions of this Court establishes (i) that there is no fundamental right of a citizen to carry on trade or to do business in liquor because under its police power, the State can enforce public morality, prohibit trade in noxious or dangerous goods (ii) the State has power to enforce an absolute prohibition on manufacture or sale of intoxicating liquors pursuant to

Article 47 of the Constitution and (iii) the history of excise laws in the country shows that the State has the exclusive right or privilege to manufacture or sell liquors. [549 F-H]

State of Bombay and Anr. v. F. N. Balsara [1951] S.C.R. 682 referred to.

(iv) The terms "intoxicating liquor" is not confined to potable liquor alone but would include all liquors which contain alcohol. [537 G]

Nashirwar v. State of Madhya Pradesh [1975] 2 S.C.R. 861; Har Shankar v. The Deputy Excise and Taxation Commissioner [1975] 3 S.C.R. 254; State of Bombay and Anr. v. F. N. Balsara & Ors. [1951] S.C.R. 682; Bhola Prasad v. The King Emperor [1942] F.C.R. 17 at p. 25 referred to.

(v) The term "liquor" used in Abkari Acts not only covers alcoholic liquor which is generally used for beverage purposes and which produces intoxication but would also include liquids containing alcohols. [537 B-C]
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Cooverjee B. Bharucha v. The Excise Commissioner and Chief Commissioner, Ajmer & Anr. [1954] S.C.R. 873; M/s. Guruswamy & Co. etc. v. State of Mysore & Ors. [1967] 1 S.C.R. 548; State of Orissa & Ors. v. Harinarayan Jaiswal & Ors. [1972] 3 S.C.R. 784; Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura and Ors. [1973] 1 S.C.R. 533; Har Shankar & Ors. etc. v. The Dy. Excise & Taxation Commissioner & Ors. [1975] 3 S.C.R. 254 referred to.

2(a) The power to regulate the notified industries is not exclusively within the jurisdiction of Parliament as Entry 33 in the Concurrent List enables a law to be made regarding production, supply and distribution of products of notified industries. The exclusive power of the State to provide for manufacture, distribution, sale and possession of intoxicating liquors is vested in the State. The power of the State Government to levy a fee for parting with its exclusive right regarding intoxicating liquors has been recognized as could be seen from the various State Acts regulating the manufacture, sale, etc. of intoxicating liquors. [544 C, A-B]

Ch. Tika Ramji and Ors. etc. v. The State of Uttar Pradesh and Ors. [1956] S.C.R. 393; Baijnath Kedai v. State of Bihar & Ors. [1970] 2 S.C.R. 100 distinguished.

(b) The term "foreign liquor" cannot be given a restricted meaning because the word consumption cannot be confined to consumption of beverages only. When liquor is put to any use such as manufacture of other articles, the liquor is all the same consumed. The State is empowered to declare what shall be deemed to be country liquor or foreign liquor. "Foreign liquor" is defined as meaning all rectified, perfumed, medicated and denatured spirit wherever made. Therefore, the plea that the Excise Commissioner had no right to accept payment in consideration for the grant of licence for the exclusive privilege for selling in wholesale or retail, foreign liquor which includes denatured spirit cannot be accepted. [548 H, 549 A-B]

(c) The definition of "alcohol" includes both ordinary as well as specially denatured spirit. The specially denatured spirit for industrial purposes is different from denatured spirit only because of the difference in the quantity and quality of the denaturants. Specially denatured spirit and ordinary denatured spirit are classified according to their use and denaturants used. Therefore, the contention that specially denatured spirit for industrial purposes is different from the ordinary denatured spirit has

no force. [551 B, 550 H-551 A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1130 of 1976.

Appeal by Special Leave from the Judgment and Order dated 24-3-1972 of the Allahabad High Court in Misc. Writ No. 8069/72.

AND

CIVIL APPEAL NOS 2248/78, 2191-2198/78 AND 2284/78.

Appeals by Special Leave from the Judgment and Order dated 6-10-1978 of the Allahabad High Court in Special Appeal Nos. 356, 352-355, 357-359/75.

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AND

CIVIL APPEAL NO. 245 of 1979.

Appeal by Special Leave from the Judgment and Order dated 17-10-1978 of the Allahabad High Court in Civil Misc. Writ No. 11702/77.

AND

CIVIL APPEAL NO. 626 of 1979.

Appeal by Special Leave from the Judgment and Order dated 17-10-1978 of the High Court of Judicature of Allahabad in Civil Misc. Writ (Tax) No. 824/75.

AND

WRIT PETITION NOS. 4663-4664 of 1978 & 4501 of 1978.
Under Article 32 of the Constitution.

AND

SPECIAL LEAVE PETITION (CIVIL) NOS. 6526-28/78, 125-126, 201 and 2533 of 1979.

From the Judgment and Order dated 6-11-1978 and 17-10-78 and 16-11-1978 and 17-10-78 of the Allahabad High Court in Civil Misc. Writ Nos. 89/77, 3822/73, 540/75 and 4129-30 of 1976 and C.W. No. 703/76 and C. Misc. Writ No. 41/76.

Rishi Ram, Advocate General for the State of U.P., G. N. Dikshit, O.P. Verma, S. C. Verma and Mrs. Sadhna Ramchandran, for the Appellant in CA No. 1130/76 and respondents in all the matters.

F. S. Nariman, Dr. L. M. Singhvi, B. G. Murdeshwar, P. C. Murdeshwar, P. C. Bhartari, S. P. Nayar, L. K. Pandeya, N. R. Khairan, Praveen Kumar, Miss Beena Gupta, Anip Satchthey and Mrs. Baby Krishnan for the Appellants and Petitioners in all other matters and respondents in CA 1130/76.

F. S. Nariman, Talat Ansari, R. Narain and S. P. Nayar for the Interveners (M/s J. K. Synthetics and Agarwal Spirit Supply Co.)

The Judgment of the Court was delivered by

KAILASAM, J.-These batches of Civil Appeals, Writ Petitions and Special Leave Petitions raise the same question and can be disposed of by a common judgment.

C.A. No. 1130/76 is by the State. The other Appeals, Writ Petitions and Special Leave Petitions are by the aggrieved parties.

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For the sake of convenience appellants in Civil Appeals by Special Leave except the State would be referred as the appellants in this judgment. Similarly the petitioners in Writ Petitions and Special Leave Petitions will be referred to as petitioners.

The appellants in Civil Appeals by Special Leave filed writ petitions before the High Court of Allahabad praying for quashing the Excise Commissioner's order dated 18th

September, 1974 whereby it was provided that the vend fee be continued to be charged for the wholesale licence dealer of denatured spirit. They also prayed for a direction to the Excise Commissioner to refund the vend fee actually paid by the appellants for a period of three years prior to the institution of the writ petitions.

The appellants have licenses for the wholesale vend of denatured spirit. It was contended that the State was providing no service to the trade of the denatured spirit and, therefore, the levy of fee is not justified. The State, it was submitted, was not competent to authorise a levy of excise duty or tax as it was within the jurisdiction of the Parliament. On behalf of the State it was contended that in law the State had exclusive privilege to deal with intoxicating liquor which included denatured spirit and the levy of a licence fee and vend fee constituted consideration for permitting the appellants to carry on wholesale trade of the denatured spirit.

The main point that was considered by the High Court was whether the imposition of vend fee on denatured spirit for grant of license for wholesale vend of denatured spirit is within the competence of State Government. This Court in *Nashirwar v. State of Madhya Pradesh* and *Har Shankar v. The Deputy Excise and Taxation Commissioner*, held that the State has exclusive privilege to deal in intoxicating liquor and, therefore, the State can auction the right to vend by retail or wholesale foreign liquor. It also found that intoxicating liquor included denatured spirit and the validity of the levy of the vend fee by the State cannot be questioned. Following this view the High Court dismissed the Writ Petitions. Against the decision, the appeals have been preferred by special leave. A batch of Writ Petitions have been filed in this Court under Art. 32 of the Constitution of India challenging the validity of the levy of vend fee. Apart from the grounds taken in the Civil Appeals, the Constitutional validity of U.P. Excise (Amendment) Act 5 of 1976 has been challenged as unconstitutional and beyond the legislative competence of the State. It is further pleaded that the provisions of the

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Industries (Development and Regulation) Act, 1951 has taken control of fermentation industry and as such a right to legislate by the State with regard to denatured spirit and industrial alcohol is beyond the competence of the State Legislature.

U.P. Excise Act was enacted in the year 1910. It empowers the State to prohibit the import and export, transport manufacture sale and possession of liquor and all intoxicating drugs in the United Provinces. The vend fee was first imposed by the Government of U.P. on 18-3-1937 on denatured spirit. In 1972 the State Legislature enacted the U.P. Excise Amendment Act 13 of 1972. By a notification dt. 3-11-72 the Government was authorised to sell by auction the right of retail or wholesale vend of foreign liquor. New Rules were framed, the effect of which was that a vend fee of Rs. 1.10 p. per bulk litre was imposed payable in advance on denatured spirit issued for industrial purposes. The legality of the levy was challenged in the High Court of Allahabad and a Bench of that Court on 24th March, 1973 held the notification was ultra vires. After the decision of the Allahabad High Court holding that the levy was illegal, this Court in two decisions *Nashirwar v. State of Madhya Pradesh* (supra) and *Har Shankar v. The Deputy Excise and Taxation Commissioner*, (supra) held that the State under its regulatory powers can prohibit every form of activity in

relation to intoxicants, its manufacture, storage, export, import and sale. The State's power to auction the right to vend by retail or wholesale foreign liquor was upheld.

Relying on the two decisions of this Court, the U.P. State Legislature repealed and re-enacted the U.P. Excise (Amendment) Act No. 30 of 1972 by the U.P. Excise (Amendment) (Re-enactment and Validation) Act, 1976. The validity of the amendment Act 1976 was again challenged in the Allahabad High Court in V. P. Anand and Sons v. State of U.P. A Full Bench of the Court held that the State has exclusive privilege of auctioning the right of wholesale or retail vend of intoxicating liquor and upheld the validity of the Act.

Mr. Nariman learned counsel raised several contentions. The first main contention of the learned counsel was that the levy of vend fee (under rule 17-para 680 of the Excise Manual-page 200-201) on the denatured spirit is without legislative competence as it does not fall within Entry 8 of List II of the Seventh Schedule. Even if it is held that the exclusive right of the State to grant privilege for the manufacture and sale of intoxicating liquor, it was submitted that the right did

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not extend to denatured spirit used for industrial purposes as it is confined only to potable liquor. The second important contention raised by the learned counsel was that after the enactment of Industries (Development and Regulation) Act, 1951 under Entry 52 of List 1 by Parliament, the Union had taken under its control in public interest the industries including the fermentation of industrial alcohol and as such the Central Government alone is empowered to provide for regulating by licence/permit or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any article relatable to a schedule industry as for example denatured spirit or industrial alcohol.

In State of Bombay and Anr. v. F. N. Balsara & Ors. the Constitutional validity of the Bombay Prohibition Act (XXV of 1949) in so far as it restricted the possession and sale of foreign liquor was impugned on the ground that it was an encroachment on the field assigned to the Dominion Legislature under Entry 19 of List I. Under Entry 31, List II to the Seventh Schedule of the Government of India Act, 1935, the Provincial Legislature had the power to make laws in respect of intoxicating liquor that is to say the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. The corresponding entry in the Constitution of India is List II Entry 8 which is in identical terms. The plea that was taken was that List I, Entry 19 conferred the power on the Dominion Legislature to make laws with respect to import, export across customs frontiers and as such the State Law restricting possession and sale of foreign liquor encroached upon the field of Dominion Legislature. This Court held that the words 'possession and sale' occurring in Entry 31 List II must be read without any qualification. In considering the meaning of the words 'intoxicating liquor' set out in entry 31 of List II, Gwyer C.J., in Bhola Prasad v. The King Emperor, stated as follows:-

"A power to legislate with respect to intoxicating liquors could not well be expressed in wider terms."
Again the Learned Chief Justice observed:-

"It is difficult to conceive of legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with their

production, manufacture, possession, transport, purchase or sale; and these words seem apt to cover the whole field of possible legislation on the subject."

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The above observations were affirmed by this Court in *Balsara's case* (supra). Dealing with the meaning of word 'liquor', the Court referred to the various Abkari cases in several provinces and found that all the Provincial Acts of this country have consistently included liquor containing alcohol in the definition of 'liquor' and 'intoxicating liquor' and, therefore, the framers of the Government of India Act, 1935, could not have been entirely ignorant of the accepted sense in which the word 'liquor' has been used in the various excise Acts of this country and concluded that the word 'liquor' covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. By adopting another method of approach, the Court observed that the object of the Prohibition Act was not merely to levy excise duties but also to prohibit the use, consumption, possession and sale of intoxicating liquor and to enforce the prohibition effectively, the wider definition of the word 'liquor' would have to be adopted so as to include all alcoholic liquids which may be used as substitution of intoxicating drinks to the detriment of the health. In *Nashirwar v. The State of Madhya Pradesh* (supra), Chief Justice Ray held that the State Legislature is authorised to make a provision for public auction by reason of power contained in Entry B of List II of the Constitution. The decision negated the concept of inherent right of citizen to do business in liquor. This Court gave three principal reasons to hold that there is no fundamental right of citizen 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 manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating 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. After pointing out the three principal reasons, the Court followed the decision in *State of Bombay and Anr. v. F. N. Balsara* holding that absolute prohibition of manufacture or sale of liquor is permissible and the only exception can be for medicinal preparations. In the context it is clear that the decisions proceeded on the basis that the word 'intoxicating liquor' is not confined to potable liquor alone but would include all liquor which contain alcohol.

Mr. Nariman, the learned counsel, submitted that the two cases-*Balsara's case* (supra) and the *Nashirwar's case* (supra)-cannot be

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read as to include alcohol manufactured for the purpose of industries such as industrial alcohol. It was submitted that in both the cases the Court was concerned only with legislation relating to prohibition and the decisions should be restricted to liquor which may contain alcohol which is likely to be misused as potable liquor. In support of his contention, the learned counsel referred to two decisions *A. Nageshwara Rao v. State of Madras* and *Malitlal Chandra v. Emperor* and submitted that if the State can exercise any control over intoxicating liquor, it can only be restricted

for the purpose of preventing subversion of its use for defeating the prohibition policy. We are unable to accept this contention for in Balsara's case after explicitly approving of the definition of word 'liquor' in various Abkari Acts in the Provinces of India, the Court held that liquor would not only cover alcoholic liquor which is generally used for beverage purposes and produce intoxication but would also include liquids containing alcohol.

We will now briefly refer to the decisions of the Supreme Court which the learned counsel submitted were confined only to potable liquor.

Cooverjee B. Bharucha v. The Excise Commissioner and Chief Commissioner, Ajmer & Anr. related to an auction sale of liquor shop under the Excise Regulation Act, 1915. In Bharucha's case it was held that licence may be restricted, that the restriction must be in regard to the sale of liquor and that there may be absolute prohibition of the sale of liquor. The Court also took into account the public expediency and public morality and police power of State to regulate business and mitigate evils.

In M/s. Guruswamy & Co. etc. v. State of Mysore & Ors. the auction related to exclusive privilege of selling toddy from certain shops. The Court held that the auction enabled the licensee to sell the toddy and the licensee paid what he considered to be the equivalent value of the right. State of Orissa & Ors. v. Harinarayan Jaiswal & Ors. related to sale by public auction of the exclusive privilege of selling country liquor in retail shops. Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura and Ors, also related to the cancellation of the licence by the Excise Collector

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to establish warehouse for the storage in bond and wholesale vend of country spirit by import and for supply to the excise vendors in the territory of Tripura. The next case that was referred to by the learned counsel was Har Shankar & Ors. etc. v. The Dy. Excise & Taxation Commissioner & Ors. Chandrachud, J. as he then was, speaking for the Court stated:-

"In our opinion the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decision of this Court in the state of Bombay and Anr. v. F. N. Balsara-[1951] SCR. 682, Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer and Ors.-[1954] SCR. 875, State of Assam v. A. M. Kidwai, Commissioner of Hills Division and Appeals, Shillong-[1957] SCR. 295, Nagendra Nath Bora and Anr. v. The Commissioner of Hills Division and Appeals, Assam and Ors.-[1958] SCR. 1240, Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura & Ors.-[1973] 1 S.C.R. 633 and State of Bombay v. R.M.D. Chamarbaugwala-[1957] SCR. 874 as interpreted in State of Orissa and Ors. v. Harinarayan Jaiswal and Ors-[1972] 3 SCR. 784 and Nashirwar Etc. v. State of Madhya Pradesh and Ors. Civil Appeals Nos. 1711-1721 and 1723 of 1974 decided on November 27, 1974. 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".

Though most of the cases dealt with the right of the State Government as regard auction of country liquor, in

Balsara's case, Nashirwar's case and Har Shankar's case, the Court was concerned with the right of the State Government over foreign liquor.

After considering all the decisions of five Constitutional Benches, Chandrachud, J. as he then was summed up the position at page 274 as follows:-

"These unanimous decisions of five Constitutional 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 is inherent in the nature of liquor business,

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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."

Har Shankar's case related to licensing of retail sale of foreign liquor for consumption on the premises of the licensees. The grant of license for sale of country spirit, foreign liquor, beer were subject to the provisions of the Punjab Act 1 of 1914. The demand by the Government for payment of large sums of money from hoteliers or barkeepers who supply foreign liquor for consumption were challenged as arbitrary, without authority and illegal. The provisions in the Act which provided for a levy on retail vend of foreign liquor was held to be valid. The decisions referred to above make it clear that the power to legislate under List II Entry 8 relating to intoxicating Liquor comprises of liquor which contains alcohol whether it is potable or not. The plea of the State is that the levy is for parting with the exclusive right of the State with regard to intoxicating liquor and the levy was for the purpose of conferring a right on the licensees. That the State has the exclusive right of manufacture or sale of intoxicating liquor which includes liquor containing alcohol has been recognised.

The second most important contention raised by Mr. Nariman is that after passing of the Industries (Development and Regulation) Act, 1951, the claim by the State to monopoly with regard to production and manufacture and the sale of the denatured spirit or industrial alcohol is unsustainable. In order to appreciate this contention it is necessary to refer to the relevant entries in Lists I and II of the Seventh Schedule of the Constitution. List I Entry 52 runs as follows:-

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

In List II the entry relating to industries is Entry 24 which is as follows:-

"Industries subject to the provisions of (entries 7 and 52 of List 1)".

Entry 7 in List I relates to industries to be declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war. In this case we are not concerned with Entry 7. A reading of Entry 52 in List I and Entry 24 in List II makes it clear

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that the Parliament will have exclusive jurisdiction to legislate regarding industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest. Connected with these two entries is entry 33 in List III Concurrent List which provides:-

"Trade and commerce in, and the production, supply and distribution of-

(a) the products of any industry where the control or such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products:

- (b) x x x
- (c) x x x
- (d) x x x
- (e) x x x"

The subject of trade and commerce in, and the production supply and distribution of the products of any industry which has been declared by Parliament under Item 1 Entry 52 is in the Concurrent List on which both Parliament and State can legislate.

The Industries (Development and Regulation) Act, 1951 was enacted by Parliament to provide for development and regulation of certain industries. Section 2 declares that it is expedient in the public interest that the Union shall take in its control industries specified in First Schedule. Item 26 in the First Schedule is fermentation industries (i) Alcohol (ii) other products and fermentation industries. Chapter II of the Act provides for establishment of Central Advisory Council and Development Council. Chapter III deals with regulation of scheduled industries. Section 10 requires registration of existing industrial undertakings. Section 11 deals with the licensing of new industrial undertakings. Section 12 deals with revocation and amendment of licenses in certain cases. Section 14 deals with the procedure for the grant of license or permission. Section 15 confers power of investigation to be made into scheduled industries and industrial undertakings. Section 18(b) confers power on the Central Government to control, supply, distribution, price, etc. of certain articles. As considerable reliance was placed on Section 18(G) for the contention that the Central Government has the exclusive power with regard to notified industries to control supply distribution, fixation of price etc. it is necessary to set out the material part of the Section in full. Section 18 (G) (1) runs as follows:-

"The Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distri-

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bution and availability at fair prices of any article or class of articles relatable to any scheduled industry, may, notwithstanding anything contained in any other provision of this Act, by notified order, provide for regulating the supply and distribution thereof and trade and commerce therein."

Sub-section 2 of Section 18(G) confers certain powers without prejudice to the generality of the powers conferred by sub-section (1) by a notified order to provide for matters enumerated in it (a) to (h) of the sub-section. These powers include amongst others the right to control the price. The powers conferred under section 18(G)(1) is exercisable by the Central Government in so far as it considers it to be necessary or expedient. The plea of the learned counsel is that the notification made by the Central Government excludes the power of the State Government to fix the price of denatured spirit and rectified spirit as it has been placed beyond the powers of the State to regulate the distribution of licences, permits etc. The notification that is relied on is the Ethyl Alcohol (Price Control) Amendment Order, 1975 dated 31st October, 1975. The order reads as follows:-

"In exercise of the powers conferred by S. 18(G) of the Industries (Development and Regulation) Act,

1951 (65 of 1951), the Central Government hereby makes the following order further to amend the Ethyl Alcohol (Price Control) order, 1971 namely:

1. (1) This order may be called the Ethyl Alcohol (Price Control) Amendment order, 1975.

(2) It shall come into force on the date of its publication in the official gazette.

2. In the Ethyl Alcohol (Price Control) order, 1971 (hereinafter referred to as the said order), in clause 2, for the Table the following Table shall be substituted, namely:-

	(1)	(2)
1	Absolute Alcohol conforming to ISI Standard No. 321-1952., names for equivalent volume at 100 per cent v/v strength;	Six hundred and sixty eight rupees and forty one paise per kilo litre.
2	Rectified spirit conforming to ISI standard No. 323-1959 named for equivalent volume at 100 per cent v/v strength.	Six hundred and twenty two rupees and twenty paise for kilo litre.
3	Rectified spirit conforming to ISI standard No. 323-1959 named for 94.68 per cent v/v strength.	Five hundred and eighty nine rupees and ten paise per kilo litre.

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The table prescribes the price of various types of alcohol and rectified spirit. The price of ethyl alcohol is fixed under the powers conferred on the Central Government under S. 18(G) (1) for securing the equitable distribution and availability at fair price. The Ethyl Alcohol (Price Control) order, 1961 which was made by the Central Government in exercise of the powers conferred on it under S. 18(G) of the Industries (Development and Regulation) Act, 1951 fixed the maximum ex-distillery price for industrial alcohol and rectified spirit under cl. 1 and 2 of the Order. Cl. 3 permitted certain additional charges in certain cases of alcohol supplied after denaturation with general or special denaturants, the cost of such denaturation being allowed to be charged. Ethyl Alcohol (Price Control) order, 1964 while fixing the maximum ex-distillery price of ethyl alcohol under cl. 3 permitted additional charges to be levied in certain cases such as for covering costs incurred for transport of molasses to the distillery and any octroi duty paid or payable on molasses and when alcohol is supplied after denaturation, to include actual cost of such denaturants plus some octroi charges as specified in the clauses. Cl. 3(a) empowered the Excise Commissioner of the State to determine the additional charges leviable under cl. 3 in case of any doubt or distillery price of ethyl alcohol provided for fixation of the price after taking into account various factors enumerated in cl. 2(2) (a to h). Reading various Ethyl Alcohol (Price Control) orders passed by the Government from time to time, it is clear that the order permitted the adding of the expenses incurred for transportation, payment of octroi duty etc. to the price fixed. We are unable to read the Ethyl Alcohol (Price Control) orders as explicitly or impliedly taking away the

power of the State to regulate the distribution of intoxicating liquor by collecting a levy for parting with its exclusive rights. If the powers of Parliament and the State Legislature were confined to entry 52 in List I and entry 24 in List II, Parliament would have had exclusive power to legislate in respect of industries notified by Parliament. The power of the State under Entry 24, List II is subject to the provisions of Entry 52 in List I. But we have to take into account Entry 26 in List II and Entry 33 in List III for determining the scope of legislative power of the Parliament and the State. Entry 26 in List II is as follows:-

"Trade and Commerce within the State subject to the provisions of entry 33 of List III."

Under Entry 33 List III the Parliament and the State have concurrent powers to legislate regarding the production, supply and

544 distribution of the products of industries notified by the Parliament. Furthermore it has to be noted that the exclusive power of the State to provide for manufacture, distribution, sale and possession etc. of intoxicating liquor is vested with the State. The power of the State Government to levy a fee for parting with its exclusive right regarding intoxicating liquor has also been recognised as is seen from the various State Acts regulating manufacture, sale, etc. of intoxicating liquor. A fair scrutiny of the relevant entries makes it clear that the power to regulate the notified industries is not exclusively within the jurisdiction of Parliament as List II Entry 33 in the concurrent list enables a law to be made regarding production, supply, distribution of products of a notified industry.

In Ch. Tika Ramji and ors. etc. v. The State of Uttar Pradesh and Ors. a question arose whether Sugarcane regulation, supply and purchase Act passed by the State Legislature and the notification issued therein by the State Government were repugnant to the notifications made under the Industries (Development and Regulation) Act of 1951. Two notifications were issued by the State Government under the U.P. Sugarcane Regulations, supply and purchase Act 1953 prohibiting the occupier of the factory to which area is assigned from entering into an agreement to purchase cane except through a cane growers Cooperative Society under certain circumstances and assigning different sugarcane factories specified to certain purchase centre for supply to them sugarcane for the crushing season were challenged as ultravires. The plea was that the subject matter of the legislation fell within the exclusive jurisdiction of Parliament and the impugned notifications were repugnant to the notifications made under the Industries (Development and Regulation) Act, 1951. On 31st October, 1951, Parliament enacted the Industries (Development and Regulation) Act, 1951 to provide for development and regulation of certain industries. By section 2 of the Act it was declared that it was expedient in public interest that the Union should take in its control the industries specified in the First Schedule which included in Item 8 thereof, the industries engaged in the manufacture or production of sugarcane. Industries (Development and Regulation) Act, 1951 was amended by Act 26 of 1953 by adding Chapter IIIA entrusting Central Government with power so far as it appears necessary or expedient for securing the equitable distribution and availability at fair price of any article relatable to scheduled industry to provide by notified order for

regulation, supply and distribution and trade and commerce thereof. The impugned notification which required the factories to purchase

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their sugarcane from the cooperative societies and assigned certain areas as cane purchasing centre for the factories was stated to be ultra vires as they were beyond the State's competence and covered by the notification under the Industries (Development and Regulation) Act. Justice Bhagwati observed at page 411:-

"When, however, it came to the products of the controlled industries comprised in Entry 52 of List I, trade and commerce in, and production, supply and distribution of, these goods became the subject-matter of Entry 33 of List III and both Parliament and the State Legislatures had jurisdiction to legislate in regard thereto."

The learned Judge proceeded to observe:-

"That sugarcane being goods which fell directly under entry 27 of List II was within the exclusive jurisdiction of the State Legislature and it was competent to legislate with regard to it and as such the impugned Act was intra vires of the state Legislature. The power to legislate regarding production, supply and distribution of goods is subject to provisions entry 33 List III which deals with products and industries notified by Parliament. Entry 33 being in the concurrent List, legislative power of the State regarding production, supply and distribution of goods cannot be denied."

The Court on the facts of the case found that even assuming that sugarcane was an article or class of articles relating to the notified industries within the meaning of Section 18(G) of Act 65 of 1951, no order was issued by the Central Government in exercise of its powers vested in it and, therefore, no question of repugnancy arose. In the case before us it cannot be discerned from the Ethyl Alcohol Control order that the power of the State Government to prescribe a levy for parting with its exclusive rights relating to intoxicating liquor had been taken away.

In *Bajinath Kedvai v. State of Bihar & Ors.* a question arose as to whether the Bihar Legislature had jurisdiction to enact the second proviso to section 10(2) of the Bihar Land Reforms Act, 1950 by which the terms and conditions of the lease of mines and minerals could be substituted for the terms and conditions laid down in the Bihar Mines and Minerals Concession Rules. On the strength of the amended section 10(2) of the Reforms Act and amended Rules 20 the Bihar Government demanded from the appellant rent contrary to

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the terms of his lease. It was held that Entry 54 in Union List speaks of requirements of mines and minerals development and Entry 23 in List II is subject to entry 54. Once a declaration was made under entry 54 specifying the extent of vesting the competency was only with Parliament.

The attempt of the learned counsel to trace the power to enact the second proviso to section 10 of the Act to Entry 18 of List II was rejected. The plea of the learned counsel was that the modification of the existing lease was a separate topic and not covered by section 15 of Act 67 of 1957. The Court rejected the plea on the ground that the entire legislative field in relation to mines and minerals had been withdrawn from the State Legislature. The decision does not help the appellants for on the facts it is clear

that the entire field relating to mines and minerals had been occupied and taken away from the Legislature and as such it was beyond the competence of the State to legislate on mines and minerals. In the case before us the position is different because the power of the State Legislature to legislate in respect of the intoxicating liquor and its exclusive right regarding intoxicating liquor cannot be questioned.

The third contention of Mr. Nariman, is that the vend fee levied by the State is not and was never treated by the State as charge or rental as the consideration for granting exclusive privilege. On the other hand the levy is excise duty or a fee which the State is not entitled to collect. The submission of the learned counsel was that even though it is found that the State is entitled to make laws regarding intoxicating liquor under List II, Entry 8, it has no power to impose any tax. The power to tax by the State is confined only to Entry 51, List II which empowers the State to levy duty on alcoholic liquors for human consumption and as denatured spirit is not alcoholic liquor for human consumption, a levy of excise duty is not permissible by the State. It was contended that the levy of a fee was also not permissible unless it had some relation to the expenses incurred for that purpose. According to the Solicitor-General, Mr. Kakkar, the levy was not a tax or a fee but a levy for parting with the exclusive right of the State in respect of intoxicating liquor. In view of the stand taken by the State, it is unnecessary for us to go into the question as to whether the levy is a tax or a fee.

For dealing with the contention of Mr. Nariman that the levy was never collected in lieu of the State parting with its rights, it is necessary to refer to the relevant provisions of the Act. The United Provinces Excise Act, 1910 (Act 4 of 1910) was passed in 1910. Subsequently, it was adapted and modified by the Government of India (Adaptation 547

of Indian Laws) order, 1927 and Adaptation of Laws order, 1950 Chapter IV of the Act deals with manufacture, possession and sale while Chapter V deals with duties and fees. The Act refers to Excise Revenue, Duty, fee, tax, fine and payment as condition for the grant of licence for any exclusive privilege. S. 3(1) defines Excise Revenue as meaning revenue derived or derivable from any duty, fee, tax, fine or confiscation imposed or ordered under the Provisions of the Act or of any law in force relating to alcohol or intoxicating drug. Excise Duty, and Countervailing duty is defined under S. 3 and 3(a) as meaning such excise duty or countervailing duty, as the case may be, as mentioned in entry 51 of List II of the Seventh Schedule of the Constitution. Chapter II relates to establishment and control of the Excise Department. Chapter III prohibits import of intoxicants. Intoxicant means any liquor which in turn includes any liquids containing alcohol. S. 12 prohibits import unless permission is obtained and conditions imposed by the State Government are satisfied and any duty imposed under S. 28 is paid. S. 28 refers to duties and fee and provides that an excise duty or countervailing duty, as the case may be, directed by the State Government may be imposed on any exciseable article. Under this section, a duty on import, export, transport, manufacture is levied in accordance with the provisions of S. 12(1), 13, 17 and 18. The stand taken by the State before us is that the levy which is being collected, is not in the nature of an excise duty or counter-veiling duty. Though a duty under S. 28, Proviso II on denatured spirit was levied

after Proviso II to S. 28 was omitted by the Government (Adaptation of Indian Law) order, 1937, no excise duty on denatured spirit was levied.

Apart from the duty that is leviable, the Excise Commissioner is empowered under S. 30 instead of or in addition to any duty to accept payment of a sum in consideration of the grant of licence of any exclusive privilege under s. 24. Section 24 provides that subject to the provisions of S. 31, the Excise Commissioner may grant any person a licence for exclusive privilege of manufacturing or supplying or selling wholesale or retail, any country liquor or intoxicating drug within any local area. Reading S. 30 and 24 together, it is clear that the Excise Commissioner may accept payment in consideration for the grant of the licence for any exclusive privilege. The exclusive privilege under S. 24 was confined only to country liquor within a local area. Before examining the impact of amended S. 24A by U.P. Act 30 of 1972, it may be mentioned that Chapter VI empowers the collection of fees for licence or permits granted under the Act. A licence fee was only collected under notification dated 22-5-1930 for licence for wholesale vend of denatured spirit. The Excise Department on 23-1-1937

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introduced rule 17(2) under S. 40(2)(d) imposing vend fee of Annas 7 per bulk gallon for the issue from the distillery. This fee was not collected regarding denatured spirit issued to industries engaged in the manufacture of synthetic rubber.

By notification dated 3rd November, 1972 the U.P. Government amended the Excise Rules and substituted rule 17(2). The rule is purported to have been issued under S. 40(2) (d) in exercise of the powers conferred on the Government under S. 40(1). By the notification on the issue of denatured spirit from a distillery a vend fee of Rs. 1.10p. per litre was made payable in advance except regarding the issue to institutions exempted under the rule. The Learned Counsel strenuously contended that this levy does not purport to be in consideration of the grant of licence for any exclusive privilege. On the other hand, the learned Counsel pointed out that S. 40(2)(d) refers to the rule making power of the Government for regulating the import, export, transport or possession of the intoxicants. The power, if any, is conferred on the Excise Commissioner under S. 41 enabling him to make rules prescribing the scale of fees in respect of licence, permits or pass or storing any intoxicants. In 1972 U.P. Act 30/1972 added S. 24A which provides that subject to provisions of S. 31, the Excise Commissioner may grant to any person a licence or licences for the exclusive privilege of selling by retail at shops (for consumption both on and off the licensed premises, or for consumption off the licensed premises only) any foreign liquor in any locality. After the introduction of S. 24A, the Excise Commissioner is empowered to grant any person a licence for the exclusive privilege of selling foreign liquor. Before the amendment, S. 24 was restricted to country liquor or intoxicating drug. By the amended Sec. 24A the Excise Commissioner may accept payment of a sum in consideration for the grant of the licence for any exclusive privilege for selling foreign liquor. S. 31 to which S. 24A is subject, relates to grant of licences and it does not in any way restrict the power thus conferred by S. 24A. The plea put forward by the learned counsel is that the word 'foreign liquor' cannot be understood as including denatured spirit as the Section would itself indicate that the licence

is for selling for consumption which would indicate that foreign liquor is meant for human consumption. We are unable to give the words 'foreign liquor' such a restricted meaning for the word consumption cannot be confined to consumption of beverage alone. When liquor is put to any use such as manufacture of other articles, the liquor is all the same consumed. Further, S. 4(2) provides that the State may declare what shall be deemed to be country liquor or foreign liquor. The State had under

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rule 12 issued notification dated 30th December, 1960 defining foreign liquor as meaning all rectified, perfumed, medicated and denatured spirit, wherever made. The plea that the Excise Commissioner had no right to accept payment in consideration for the grant of the licence for the exclusive privilege for selling wholesale or retail foreign liquor which includes denatured spirit, cannot, therefore be accepted. Rule 17(2) no doubt purports to have been issued under the rule making powers conferred on the Government under S. 40(2)(d) which enables the Government to make rules for regulating the import, export, transport for possession of any intoxicants. It may be noted that when the amended rule 17(2) was introduced on 3-11-1972, S. 24A had been amended by U.P. Act, 30/1972 and the power of the Excise Commissioner to accept payment for grant of licence for exclusive privilege cannot be denied.

The validity of Act 30/1972 which authorised the Excise Commissioner to collect a vend fee for the retail or wholesale vend of foreign liquor was challenged. The Allahabad High Court upheld the challenge holding that the State did not have the exclusive privilege to collect the vend fee. This view was not accepted by the Supreme Court in Nashirwar's case (supra) and Harishankar's case (supra) which held that under the regulatory power, the State had power to auction the right to vend by retail or wholesale foreign liquor. As Act 30 of 1972 was struck down by the Allahabad High Court the State came forward to validate Act 30 of 1972 as it stood when it was passed by introducing the U.P. Excise (Amendment) (Reenactment and Validation) Act, 1976 (U.P. Act 5 of 1976). The preamble refers to the passing of U.P. Amendment Act, it being struck down by the Allahabad High Court and the subsequent decision of the Supreme Court in Nashirwar's case, and states that it had become necessary to enact the (Amendment) (Re-enactment and Validation) Act. In the main Act, after S. 1, sub-s. (2) was introduced providing that it shall be deemed to have been in force ever since the commencement of the United Provinces Excise Act, 1910. After S. 24 of the principal Act, S. 24A was introduced. S. 24A(1) re-enacts S. 24A(1) added by U.P. Act 30 of 1972. S. 24B was introduced for removal of doubts which declared (1) that the State Government has exclusive privilege for manufacture and sale of country and foreign liquor; (2) that the amount described as licence fee in cl. (c) of S. 41 is in its essence rental or consideration for the grant of such right or privilege by the State Government and (3) that the Excise Commissioner as the head of the Excise Department of the State shall be deemed while determining or realising such fee, to act for and on

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behalf of the State Government. S. 30 was substituted which specifically mentioned that the Excise Commissioner may accept payment of a sum in consideration of the grant of privilege for any exclusive or other privilege under S. 24A. S. 24A was not specifically mentioned in S. 30 as it stood before the re-enactment. After the introduction of S. 24A,

the Excise Commissioner had a right to grant the privilege of selling of foreign liquor. The fact that S. 30 did not specifically mention S. 24A might not have made any difference. But in order to remove all doubts, the new Section 30 had been introduced. S. 41, cl. (3) was re-enacted to enable the fixation of fee payable for the grant of exclusive or other privilege under S. 24 and 24A. S. 40 was also amended so as to give retrospective effect. S. 4 of the Act 5 of 1976 also provides that the U.P. Excise (Amendment) Act, 1972 shall be deemed to be and always to have been as valid as if the provisions of this Act were in force at all material times. In short the purpose of introduction of Act 5 of 1976 was to make it clear that U.P. Excise (Amendment) Act, 1972 shall be deemed to and always to have been valid. In view of our findings that U.P. Excise (Amendment) Act, 1972 was valid, the effect of U.P. Act 5 of 1976 is to remove all doubts and to give retrospective effect.

It was next contended that foreign liquor which is defined under rule 12, as including denatured spirit, cannot apply to specially denatured spirit. Foreign liquor was defined as including specially denatured spirit. By a notification the Excise Commissioner of U.P. on 3-5-1976 framed U.P. Licences for the possession of denatured spirit and specially denatured spirit Rules, 1976. In the preamble to the rules, it is stated that the Excise Commissioner with the previous sanction of the State Government was making the rules relating to licence for possession of denatured spirit including specially denatured spirit for industrial purposes. Rule 1 (iii) provides that specially denatured spirit means rendered unfit for human consumption in such manner as may be prescribed by the Excise Commissioner by notification in this behalf and does not include ordinary denatured spirit for general use. Rule 2 provides that licences for the possession of the denatured spirit including specially denatured spirit for industrial purpose shall be of three kinds. The learned counsel contended that though foreign liquor is defined as including denatured spirit, it cannot be held to include specially denatured spirit. Denatured spirit mentioned in the rules is treated as including specially denatured spirit for industrial purpose. Denatured spirit has ethyl alcohol as one of its constituents. The specially denatured spirit for industrial purpose is different from denatured spirit only because of the difference in the

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quantity and quality of the denaturants. Specially denatured spirit and ordinary denatured spirit are classified according to their use and denaturants used. We are unable to accept the contention of the learned counsel that specially denatured spirit for industrial purpose is different from the ordinary denatured spirit. The definition of alcohol under rule 12 includes both ordinary as well as specially denatured spirit.

It was next contended that if the levy of Re. 1.10p per bulk gallon of denatured spirit as vend fee, is upheld it would result in violating the appellants/petitioners fundamental right to carry on their trade and business under Art. 19(1)(g) of the Constitution. According to the learned counsel, the price fixed per gallon of ethyl alcohol under the Ethyl Alcohol (Price Control) order is 59 paise, per gallon. If the levy is not considered as a tax and could not be passed on to the consumer as price fixed under the Ethyl Alcohol Amendment order, is only 59 p., it would be confiscatory in nature. It is seen that the right of the

State Government to accept payment of a sum for the grant of its exclusive privilege cannot be questioned. The price fixed for ethyl alcohol is ex-distillery price and we see no impediment for the addition of Re. 1.10 as vend fee by the State Government

Dr. L. N. Singhvi, who appeared as intervener in Civil Appeal Nos. 2191 to 2198 of 1978 for the appellants and for petitioners in Special Leave Petitions Nos. 125 to 126/79 while adopting the contentions of Mr. Nariman submitted that the stand taken by the U.P. Government in earlier proceedings in the High Court was that the levy was in the nature of Excise Duty or a fee while the present stand is that it is neither a duty nor fee but only a levy for the conferment of the exclusive privilege. It is true that the stand taken by the Government in the earlier proceedings was different but that would not make any difference so long as the Government had a right to impose the levy. It has been found that after the addition of S. 24A by Act 30 of 1972, the Commissioner was entitled to accept payment for conferring the privilege which the State owned exclusively. The learned counsel submitted that so far as his clients M/s. Rallis Chemicals, Kanpur and M/s. Rallis India, petitioners in Special Leave Petitions Nos. 125 to 126 of 1979 are concerned they are only holders of licences for possession and are not licencees under F.L. 16. In the same class fall the appellants in Civil Appeal No. 2248 of 1978, M/s. Synthetic and Chemicals who are only purchasers of denatured spirit. It was submitted that for this class of persons if the vend fee is

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for the grant of exclusive privilege of the State for sale of liquor, it cannot be recovered from the purchasers. Rule 17(1) relates to vend of denatured spirit. It empowers the Collector (1) to grant to a distiller a licence for manufacture of denatured spirit (2) to grant to approved dealers of denatured spirit a licence in form F.L. 16 for the wholesale vend of denatured spirit. Scale of fee is given in the rule which prescribes that for sales not exceeding 10,000 litres per annum a fee will be of Rs. 100/- and for sales exceeding 10,000 litres, the fee shall be increased by Rs. 500/- for every 5000 litres or fraction thereof. Subrule (2) provides that in case of issue from a distillery, a vend fee of rupee one and ten paise per bulk gallon will be payable before the spirit is issued. The fee charged is very different from the one in Rule 17(1) which provides that the distillery or an approved dealer for wholesale vend of denatured spirit may be given a licence in Form F.L. 16. The distiller and the approved dealer is to pay a licence fee for the sales at the rate prescribed. But rule (2) speaks of levy of vend fee in case of issued from the distillery which is payable in advance before the spirit is issued. It is admitted that the petitioners and the appellants who claim as purchasers do not have a licence under F.L. 16. Therefore, sub-s. (1) has no application. The levy on persons who are purchasers is for the possession of denatured spirit in excess of the prescribed limit. The permission granted in their favour and the allotment orders of the specially denatured spirit prescribes the terms and conditions under which the allotment is made. The licences are granted to them under form F.L. 39 and they have to abide by those conditions. The notification of the Excise Commissioner of U.P. dated 3-5-1976 provides that the licence for the possession of denatured spirit including the specially denatured spirit of industrial purpose shall be of three kinds. We are concerned with the licences for the

possession for use in industries in which alcohol is destroyed or converted chemically in the process into other products and the product does not contain alcohol such as, Ethel, Styrene, Butadiene, Acetone and Polythene etc. The licence granted for this purpose is in form F.L. 39. Rule 3(a) provides that the fee for the licence in Form F.L. 39 shall be at a rate prescribed for industry to industry by the Excise Commissioner per litre, payable on the quantity of specially denatured spirit obtained from any distillery in Uttar Pradesh and that fee shall be realised by the Excise Inspector incharge Distillery from the licensee before issue of the specially denatured spirit from the distillery. The conditions relating to grant of a licence for issue of denatured spirit for industrial purpose are laid down in rule 4. Special conditions regarding licence in form F.L. 39, 40 and 41 are prescribed in rule 5. The appellants/petitioners having applied

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for and obtained licences in form F.L. 39 are bound to comply with the conditions.

Lastly, it was contended that the provisions of Uttar Pradesh Excise (Amendment) (Re-enactment and Validation) Act, 1976 is invalid and confiscatory as its retrospective operation imposes an unbearable burden on the appellants/petitioners. It was stated that the licence under F.L. 39 was issued only in the year 1979 and no levy could be made regarding denatured spirit that was supplied before that date. The answer of the State is that the levy was imposed for permission granted in their favour and allotment orders of denatured spirit issued to them from the various distilleries. The parties after having paid the fee had taken possession of the denatured spirit from the distillery. Act 5 of 1976 has been given retrospective effect as the levy imposed under Act 30 of 1972 was found to be illegal and unsustainable by the Allahabad High Court which was reversed by this Court by giving retrospective effect, the State has only restored the status quo enabling the collection of the levy validly made by Act 30 of 1972.

Reliance was placed on the decision of this Court in A. B. Abdul Kadir & ors etc. v. State of Kerala for the contention that retrospective operation of an Act when it harshly operates is liable to be held as invalid. At page 706 this Court observed that the power to make a valid law would enable providing for prospective and retrospective operation of the provisions. It was observed that in judging the reasonableness of the retrospective operation of law, the test of length of time covered by the retrospective operation could not by itself be treated as decisive. On the facts of the case there could be no complaint because what is sought to be collected is levy which was legally made.

The result is, all the contentions raised by the learned counsel for the appellants/petitioners fail and appeals and the petitions are dismissed with costs one set of hearing fee. The State Appeal C.A. No. 1130/76 is allowed but there will be no order as to costs.

P.B.R.

State appeals allowed.

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