A

KERALA SAMSTHANA CHETHU THOZHILALI UNION

v.

STATE OF KERALA AND ORS.

MARCH 24, 2006

B

[S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.]

Kerala Abkari Shops Disposal Rules, 2002: Rules 4(2) and 9(10)(b).

C *Sale of arrack—Ban of—Workers engaged in the manufacture, import, export, transport, sale and possession of arrack rehabilitated and paid compensation at the rate of Rs. 30,000 per worker—Benefits under Abkari Workers Welfare Fund Board Act were also given—It was also directed that one arrack worker each must be employed in all toddy shops—High Court upheld validity of Rules 4(2) and 9(10)(b)—Correctness of—Held: A Rule is* D *required to be made in conformity with the provisions of the Act whereunder it is made—State has no power to direct a particular class of workers to be employed in other categories of liquor shops—State cannot thrust employees upon an unwilling employer—Furthermore, State cannot rehabilitate one set of workers at the cost of the other—Hence, Rule 4(2) declared* **ultra vires** *in* E *its entirety—Administrative Law.*

Doctrines:

"Take it or leave it"—Explained.

F **The appellants were a federation of trade unions of toddy tappers and workers in toddy shops. The provisions of the Kerala Abkari Act sought to control and regulate various categories of intoxicating liquor and intoxicating drugs including arrack and toddy. The respondent-State banned the sale of arrack and took a policy decision to rehabilitate the workers engaged in the manufacture, import, export, transport, sale and** G **possession of arrack and paid compensation at the rate of Rs. 30,000 per worker. The said workers were also paid benefits under the Abkari Workers Welfare Fund Board Act.**

The respondent-State, in exercise of the power under Section 29 of

H

the Act, inserted the Kerala Abkari Shops Disposal Rules, 2002 directing that one arrack worker each must be employed in all toddy shops. The validity of the said Rules was questioned both by the holders of licences as also by the toddy workers. The High Court upheld the validity of the Rules. Hence the appeal.

The following question arose before the Court:-

Whether Rules 4(2) and 9(10)(b) of the Kerala Abkari Shops Disposal Rules, 2002 are *ultra vires* the Kerala Abkari Act?

Allowing the appeals, the Court

HELD: 1. The Kerala Abkari Act was enacted to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and/or intoxicating drugs in the State. While framing the Kerala Abkari Shops Disposal Rules, 2002 for the purposes of the Act, the legislative policy cannot be abridged. The Rules must be framed to carry out the purposes of the Act. [425-E, F]

2. By reason of Section 8 of the Act, trade in arrack was prohibited as far back as in the year 1996. By reason of the impugned Rules, the State has not laid down the terms and conditions for employment of a worker. The Act does not contain any provision therefor. Under the common law as also under the provisions of the Specific Relief Act, 1963, an employer is entitled to employ any person he likes. It is well-settled that no person can be thrust upon an unwilling employer except in accordance with the provisions of a special statute operating in the field. Such a provision cannot be made by the State in exercise of its power under delegated legislation unless the same is expressly conferred by the statute. [430-G, H; 431-A, B]

3.1. A Rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by the Parliament or the State Legislature. [431-B]

3.2. Rules 4(2) and 9(10)(b) in the Rules were introduced six years after the trade in arrack was completely prohibited. Section 18-A of the Act recognizes the common law right of the State to part with the privilege. The State's exclusive privilege of supply or sale of liquor is also not in question.

A Section 18-A was enacted having regard to Article 47 of the Constitution of India. The State while parting with its exclusive privilege or a part thereof, may impose such conditions but once such terms and conditions are laid down by reason of a statute, the same cannot be deviated from. [431-E-F]

Hari Shankar v. *Dy. Excise and Taxation Commr.*, [1975] 1 SCC 737, B held inapplicable.

4.1. The State may have unfettered power to regulate the manufacture, sale or export-import sale of intoxicants but in the absence of any statutory provisions it cannot, in purported exercise of the said power, direct a particular class of workers to be employed in other C categories of liquor shops. [434-A]

4.2. The Rules in terms of Section 29(1) of the Act thus, could be framed only for the purpose of carrying out the provisions of the Act. Both the power to frame rules and the power to impose terms and conditions are, therefore, subject to the provisions of the Act. They must conform to D the legislative policy. They must not be contrary to the other provisions of the Act. They must not be framed in contravention of the constitutional or statutory scheme. [434-B]

State of M.P. v. *Nandlal Jaiswal*, [1986] 4 SCC 566 and *Khoday* E *Distilleries Ltd.* v. *State of Karnataka*, [1995] 1 SCC 574, relied on.

5. Neither Section 18-A nor Section 24(c) and (d) of the Act confer power upon the delegatee to encroach upon the jurisdiction of the other department of the State and take upon its head something which is not within its domain or which otherwise would not come within the purview F of the control and regulation of trade in Liquor. The conditions imposed must be such which would promote the policy or secure the object of the Act. To grant employment to one arrack worker in each toddy shop in preference to the toddy workers neither promotes the policy nor secures the object of the Act. It is not in dispute that the purport and object of such rules is to rehabilitate the former employees of arrack shops. Rehabilitation of the G employees is not within the statutory scheme and thus, the Rules are *ultra vires* the provisions of the Act. [437-C, D, E]

Ashok Lanka v. *Rishi Dixit*, [2005] 5 SCC 598, *Bombay Dyeing and Mfg. Co. Ltd.* v. *Bombay Environmental Action Group*, (2006) 3 SCALE 1, *Clariant* H *International Ltd.* v. *Securities and Exchange Board of India*, [2004] 8 SCC

524, *State of Rajasthan* v. *Basant Nahata,* [2005] 12 SCC 77, *B.K. Industries* v. *Union of India,* [1993] Supp. 3 SCC 621 and *State of Kerala* v. *Maharashtra Distilleries Ltd.,* [2005] 11 SCC 1, relied on. A

Craies: On Statute Law, 7th Edn., p. 297 and G.P. Singh: Principles of Statutory Interpretation, 10th Edn., p. 916, referred to.

B

6. So far as trade in toddy is concerned, the toddy workers not only act in the shops, some of them are also toddy tappers. It requires a specialized skill. They form a different class. Even assuming that both toddy and former arrack workers belong to the same class, the rehabilitation of arrack workers who had been thrown out of employment because of an excise policy on the part of the State, does not have any reasonable nexus with the purpose of the Act, namely, the prohibition of grant of excise licence in relation to the trade in arrack. [438-A, B] C

7. If a policy decision is taken, the consequences therefor must ensue. Rehabilitation of the workers, being not a part of the legislative policy for which the Act was enacted, by reason thereof, the power has not been exercised in a reasonable manner. Rehabilitation of the workers is not one of the objectives of the Act. [438-C] D

8. While exercising the power of rehabilitation, the State did not take recourse to the provisions of Article 47 of the Constitution of India. The matter might have been different if the State took a decision in exercise of its executive power in consonance with the legislative policy of the State as also for the purpose of giving effect to Articles 39, 42 and 43 of the Constitution of India. But, herein, the State was exercising a specific power of delegated legislation. [438-F] E

F

9. Recourse to Section 69(1) of the Act is again misconceived. Only a rule validly made will have a statutory flavour. If a rule is not validly made, the question of its being interpreted in the same manner as if enacted or as if the same is a part of the statute, would not arise. [438-G]

Hotel Balaji v. *State of A.P.,* [1993] Supp. 4 SCC 536, held inapplicable. G

10. The rights and liabilities of a workman would fall within the purview of the provisions of the Industrial Disputes Act, 1947. What is the right of a workman in case an industry is closed is governed by Section H

A **25(FF) and/or Section 25(J) of the Industrial Disputes Act. [439-E, F]**

11. The State while pursuing its social object or policy may do something to rehabilitate the workers affected by the ban but the same would not mean that the State can thrust such employees upon an unwilling employer. It, furthermore, would not mean that the State can rehabilitate one set of workers at the cost of the other. [439-F-G]

B

12. When an employer gives employment to a person, a contract of employment is entered into. The right of the citizens to enter into any contract, unless it is expressly prohibited by law or is opposed to public policy, cannot be restricted. Such a power to enter into a contract is within the realm of the Indian Contract Act. It has not been and could not be contended that a contract of employment in the toddy shops would be hit by Section 23 of the Indian Contract Act. So long as the contract of employment in a particular trade is not prohibited either in terms of the statutory or constitutional scheme, the State's intervention would be unwarranted unless there exists a statutory interdict. Even to what extent such a legislative power can be exercised would be the subject matter of debate but in a case of this nature there cannot be any doubt that the impugned rules are also contrary to the provisions of the Indian Contract Act as also the Specific Relief Act, 1963. [440-B-D]

C

D

Pearlite Liners (P) Ltd. **v.** *Manorama Sirsi,* **[2004] 3 SCC 172,** *Solomon Antony* **v.** *State of Kerala,* **[2001] 3 SCC 694 and** *Anil Kumar* **v.** *State of Kerala,* **(2005) 1 KLT 130, referred to.**

E

C.M. Joseph **v.** *State of Kerala,* **[2001] 10 SCC 578, held inapplicable.**

13. The State, while parting with its exclusive privilege, cannot take recourse to the "take it or leave it" doctrine having regard to the equity clause enshrined under Article 14 of the Constitution of India. The State must, in its dealings, act fairly and reasonably. The bargaining power of the State does not entitle it to impose any condition it desires. [441-C]

F

Hindustan Times **v.** *State of U.P.,* **[2003] 1 SCC 591, relied on.**

G

14. Rule 4(2) of the Rules must be held to be ***ultra vires*** **in its entirety as even that part of it,** ***vis-a-vis*****, the toddy workers, is not severable. Hence Rule 4(2) is declared** ***ultra vires*** **in its entirety. [441-G, H; 442-A]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1732/2006.

H

From the Final Judgment dated 22.3.2005 of the Kerala High Court in W.P.(C) No. 26918 of 2004.

With C.A. No. 1733 of 2006.

C.K. Sasi and Ms. Malini Poduval for the Appellant.

U.U. Lalit, K.R. Sasiprabhu, Roy Abraham, M.P. Vinod, Mrs. Seema Jain, Himinder Lal, Romy Chacko and P.V. Dinesh for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J : Leave granted.

Whether Rules 4(2) and 9(10)(b) of the Kerala Abkari Shops Disposal Rules, 2002 (for short "the Rules") are *ultra vires* the Abkari Act (for short "the Act") is the question involved in these appeals which arise out of a judgment and order dated 22.3.2005 passed by a Division Bench of the Kerala High Court at Ernakulam in Writ Appeal Nos. 676, 677, 680, 722 of 2004 and Writ Petition (C) Nos. 17138 of 2003 and 26918, 27105 and 37762 of 2004 whereby and whereunder the High Court following its earlier decision in *Anil Kumar* v. *State of Kerala,* [2005] (1) KLT 130 dismissed the appeals and the writ petitions.

The Appellant herein is a federation of trade unions of toddy tappers and workers in toddy shops situate in the State of Kerala.

The Abkari Act was enacted by the Maharaja of Cochin in the year 1902. It is a pre-constitutional statute. It is applicable to the entire State of Kerala. The provisions of the said Act seek to control and regulate various categories of intoxicating liquor and intoxicating drugs including arrack, toddy, Indian Made Foreign Liquor (IMFL), country liquor and other types of foreign liquor.

On or about 1.4.1996, the State of Kerala banned the sale of arrack. A policy decision admittedly was taken by the Labour and Rehabilitation Department of the State of Kerala that the workers who had been engaged in manufacture, import, export, transport, sale and possession of arrack should be rehabilitated. The State of Kerala paid compensation at the rate of Rs. 30,000/- per worker. The said workers were also paid benefits under the Abkari Workers Welfare Fund Board Act. It is not in dispute that a Welfare

A Board has also been constituted for the workers working in the toddy shops.

The expressions "Arrack" and "toddy" have been defined in Sections 3(6A) and 3(8) of the Act as under:

"3(6A) "Arrack" means any potable liquor other than Toddy, Beer, Spirits of Wine, Wine Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala, or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietory preparations or approved as a *bona fide* medicinal preparation by the Expert Committee approved under section 68A of the Act.

3(8) "Toddy" means fermented or unfermented juice drawn from a coconut, palmyra, date, or any other kind of palm tree;"

Section 8 of the Act dealing with trade in Arrack was amended by Act No. 16 of 1997 which came into force from 3.6.1997. The trade was banned.

Sections 18A, 24(c), 24(d) and 29(1), which are relevant for our purpose, read as under:

"18 A. Grant of exclusive or other privilege of manufacture etc. on payment of rentals.

(1) It shall be lawful for the Government to grant to any person or persons, on such conditions and for such period as they may deem fit, the exclusive or other privilege —

(i) of manufacturing or supplying by wholesale; or

(ii) of selling by retail; or

(iii) of manufacturing or supplying by wholesale and selling by retail any liquor or intoxicating drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other method as may be determined by the Government, from time to time, and may be collected to the exclusion of, or in addition, to the duty or tax leviable Under Sections 17 and 18.

(2) No grantee of any privilege under Sub-section (1) shall exercise the same until he has received a licence in that behalf from the Commissioner.

(3) In such cases, if the Government shall by notification so direct, the provisions of Section 12 relating to toddy and toddy producing trees shall not apply."

24. Forms and conditions of licenses, etc. Every license or permit granted under this Act shall be granted

(a) ***

(b) ***

(c) subject to such restrictions and on such conditions; and

(d) shall be in such form and contain particulars—as the Government may direct either generally, or in any particular instance in this behalf."

29. Power to make rules. (1) The Government may, by notification in the Gazette, either prospectively or retrospectively, make rules for the purposes of this Act."

In exercise of the said power, the Rules were framed. After a lapse of about six years, the State inserted the impugned Rules, *inter alia* directing that one arrack worker each must be employed in all toddy shops in the following terms:

"4(2) The shops so notified under sub-rule (1) above shall be such shops as are retained after abolition of certain existing shops. Grantees of privilege of such retained shops shall undertake to engage the existing workers and such eligible workers of the abolished shops who were registered with the Toddy Workers Welfare Fund Board as on 31-3-2000 and as are redeployed to their shops. Grantee of privilege shall also undertake to engage on Arrack worker of the abolished Arrack Shops of the State as would be allotted to his shop for rehabilitation, on the basis of district level seniority."

9(10) In order to ensure that the employment of workers of abolished Toddy and Arrack Shops are protected, the licensees shall abide by the following conditions also:

(a) *** ***

A (b) One Arrack Worker who has been remaining unemployed since the abolition of Arrack Shops with effect from 1st April 1996 shall be absorbed in the shop as may be decided by Government by observing the District level seniority of such Arrack Workers."

The validity of the said Rules was questioned both by the holders of B licences as also by the toddy workers. The employees of the toddy shops are traditional workers. A learned Single Judge of the High Court upheld the validity of the Rules *inter alia* holding:

(i) in view of Section 18A of the Act, as control of liquor in trade is within the exclusive domain of the State and as terms and C conditions can be prescribed for granting a licence, the impugned rules were validly made.

(ii) Although, Section 29(2) does not contain any provision enabling the State to make such a provision, the same would, however, come within the purview of sub-section (1) thereof.

D

(iii) Source of power of the State to frame such rules can be traced to Entries 23 and 24 of List III of the Seventh Schedule of the Constitution of India.

The Division Bench of the said High Court upheld the said conclusions E of the learned Single Judge.

Only the toddy workers are in appeal before us.

Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the Appellants would submit :

F

(i) The State in making the aforementioned rules transgressed its power of delegated legislation as the Act does not contain any provision as regards adoption of welfare measures to be taken by the State.

G (ii) The social purpose for which the said rules were made is governed by the provisions of the Industrial Disputes Act.

(iii) As the matter relating to the terms and conditions of employment of workmen is covered by the said parliamentary legislation, the State had no competence whatsoever to make such a rule.

H (iv) The power under sub-section (1) of Section 29 of the Act could

be resorted to only for the purpose of giving effect to the Act and not for a purpose *de'hors* the same. A

(v) The entries contained in the three lists of the Seventh Schedule of the Constitution of India enumerate only the legislative field, specifying the sources of legislation by the Parliament and the State legislatures and in terms thereof, the State has no power to make the concerned rule. B

(vi) It may be true that the State has the exclusive privilege of carrying on business in liquor but the same would not mean that while parting with the said privilege the State can impose any unreasonable restriction which would be violative of Article 14 of the Constitution of India. C

Mr. T.L.V. Iyer, learned senior counsel appearing on behalf of the State, on the other hand, would contend that :

(i) imposition of such a condition is within the domain of the State in terms of Sections 18A, 24(c), 24(d) and 29 of the Act inasmuch as while granting a licence for sale of toddy, the State merely parts with a privilege which exclusively vested in it and in that view of the matter if in terms of the policy decision of the State, arrack workers were to be rehabilitated, it could direct employment of unemployed arrack workers and, thus, there was absolutely no reason as to why such a condition cannot be imposed while parting with the privilege by the State in terms of Section 18A of the Act which enables the State to impose such conditions or restrictions as it may deem fit for the purpose of grant of a licence to sell intoxicating liquor. D E F

(ii) As arrack and toddy both come within the purview of the Act, the State is entitled to exercise its control thereover which in turn would mean that a provision enabling the arrack workers, thrown out of employment, to be employed in toddy shops has a reasonable nexus with the purposes of the Act and such a provision cannot be said to be extraneous to the provisions of the Act and would come within the purview of sub-section (1) of Section 29 thereof. G

(iii) The Rules which are impugned in these appeals enable the State to direct employment of toddy workers also who are displaced by the relocation of the toddy shops or reduction in their number H

A and as such the workers cannot successfully question the validity of the Rules.

(iv) The right of the State to impose conditions is recognised by Sections 18A, 24(c) and (d) and in that view of the matter while considering the validity of the Rules made in terms of sub-section B (1) of Section 29 of the Act, the jurisdiction of this Court should not be confined only to looking at the object and purport of the Act as contended by the Appellants herein but also look to the purposes which are sub-served thereby.

(v) Section 69 of the Act also assumes importance in this context C and confers a statutory flavour on the rules made under the Act and rules validly made in terms thereof become a part of the Act itself.

Mr. Romy Chacko, learned counsel appearing on behalf of the Intervener would supplement the submissions of Mr. Iyer contending that the D purpose of the Act must be found out from the various provisions of the Act and not from Section 18A of the Act or Section 24 alone. The learned counsel would contend that while parting with the privilege, the State can impose any condition and it is for the licensee to take it or leave it. The learned counsel would further submit that as dealing in liquor is *res-extra commercium*, as has been held by this Court in *Har Shankar and Ors.* v. *Dy. Excise and Taxation* E *Commr. and Ors.*, [(1975) 1 SCC 737], the licensee could not have contended that the condition imposed for grant of licence was onerous.

Drawing our attention to sub-rule (38) of Rule 7, it was urged that the licensees are bound by all the rules which have either been passed under the F Act or which may thereafter be made thereunder or under any law relating to Abkari Revenue which may be made in future and, thus, the power conferred upon the State must be held to be of wide amplitude.

The Act was enacted to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating G liquor and/ or intoxicating drugs in the State of Kerala. While framing the Rules for the purposes of the Act, the legislative policy cannot be abridged. The Rules must be framed to carry out the purposes of the Act.

By reason of Section 8 of the Act, trade in arrack was prohibited as far back as in the year 1996. By reason of the impugned Rules, the State has not H laid down the terms and conditions for employment of a worker. The Act

does not contain any provision therefor. Under the common law as also under the provisions of the Specific Relief Act, an employer is entitled to employ any person he likes. It is well-settled that no person can be thrust upon an unwilling employer except in accordance with the provisions of a special statute operating in the field. Such a provision cannot be made by the State in exercise of its power under delegated legislation unless the same is expressly conferred by the statute.

A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by the Parliament or the State Legislature.

The State by enacting Section 8 of the Act prohibited sale of arrack. Once such a right to bring about prohibition, having regard to the principles contained in Article 47 of the Constitution of India is exercised, no trade being in existence, the question of exercise of any control thereover would not arise. Such a power in view of Section 8 of the Act must be held to be confined only to carrying out the provisions thereof meaning thereby, no person can be allowed to deal in arrack and in the event, any person is found to be dealing therewith, to take appropriate penal action in respect thereof as provided.

Rules 4(2) and 9(10)(b) in the Rules were introduced six years after the trade in arrack was completely prohibited. In the aforementioned backdrop of events, the question as regard applicability of the provisions of Sections 18A, 24(c) and (d) of the Act is required to be construed. Section 18A of the Act recognises the common law right of the State to part with the privilege. The State's exclusive privilege of supply or sale of liquor is also not in question. But, we may notice that Section 18A is an enabling provision. It was enacted evidently having regard to Article 47 of the Constitution of India. The State while parting with its exclusive privilege or a part thereof, may impose such conditions but once such terms and conditions are laid down by reason of a statute, the same cannot be deviated from.

In *Har Shankar* (supra) whereupon Mr. Chacko placed reliance, it was stated:

> "5. Auctions for granting the right to sell country liquor for the year 1968-69 were initially held in various districts of Punjab on or about March 8, 1968 in pursuance of conditions of auction framed on

A February 19, 1968. Those auctions became ineffective by reason of a judgment dated March 12, 1968 of a Division Bench of the High Court of Punjab and Haryana in Civil Writ No. 1376 of 1967 (*Jage Ram* v. *State of Haryana*). Following an earlier judgment in *Bhajan Lal* v. *State of Punjab* the High Court took the view that the licence fee B realised through the medium of auctions was really in the nature of "still-head duty" and that the licensees could not be called upon by the Government to pay still-head duty on the liquor quota which, under the terms of auctions, they were bound to lift but which in fact was not lifted by them."

C The said decision has no application to the fact of the present case, as therein this Court was concerned with a different question.

It is, furthermore, not in dispute that Article 14 of the Constitution of India would be attracted even in the matter of trade in liquor.

D In *State of M.P. and Ors.* v. *Nandlal Jaiswal and Ors.*, [1986] 4 SCC 566, this Court opined:

> "....The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants—its manufacture, storage, export, import, sale and possession. No one can E 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. But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet F will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and Respondents 5 to 11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride G roughshod over the requirement of that article."

In *Khoday Distilleries Ltd. and Ors.* v. *State of Karnataka and Ors.*, [1995] 1 SCC 574, a Constitution Bench of this Court upon referring to a large number of decisions summed up its findings in the following terms:

H "60.....(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) 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 articles which are *res commercium.* The restrictions and limitations on the trade or business in potable liquor can 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.

(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."

While imposing terms and conditions in terms of Section 18A of the Act, the State cannot take recourse to something which is not within its jurisdiction or what is otherwise prohibited in law. Sub-sections (c) and (d) of Section 24 of the Act provide that every licence or permit granted under the Act would be subject to such restrictions and on such conditions and shall be in such form and contain such particulars as the Government may direct either generally or in any particular instance in this behalf. The said provisions are also subject to the inherent limitations of the statute. Such an inherent limitation is that rules framed under the Act must be lawful and may not be contrary to the legislative policy. The rule making power is contained in Section 29 of the Act. At the relevant time, sub-section (1) of Section 29 of the Act provided that the government may make rules for the purpose of carrying out the provisions of the Act which has been amended by Act No. 12 of 2003 with effect from 1.4.2003 empowering the State to make rules either prospectively or retrospectively for the purposes of the Act.

Its power, therefore, was to make rules only for the purpose of carrying out the purposes of the Act and not de'hors the same. In other words, rules cannot be framed in matters that are not contemplated under the Act.

A The State may have unfettered power to regulate the manufacture, sale or export-import sale of intoxicants but in the absence of any statutory provision, it cannot, in purported exercise of the said power, direct a particular class of workers to be employed in other categories of liquor shops.

The Rules in terms of sub-section (1) of Section 29 of the Act, thus, B could be framed only for the purpose of carrying out the provisions of the Act. Both the power to frame rules and the power to impose terms and conditions are, therefore, subject to the provisions of the Act. They must conform to the legislative policy. They must not be contrary to the other provisions of the Act. They must not be framed in contravention of the C constitutional or statutory scheme.

In *Ashok Lanka and Anr.* v. *Rishi Dixit and Ors.*, [2005] 5 SCC 598, it was held:

> "...We are not oblivious of the fact that framing of rules is not an D executive act but a legislative act; but there cannot be any doubt whatsoever that such subordinate legislation must be framed strictly in consonance with the legislative intent as reflected in the rule-making power contained in Section 62 of the Act."

In *Bombay Dyeing & Mfg. Co. Ltd.* v. *Bombay Environmental Action* E *Group & Ors.*, (2006) 3 SCALE 1, this Court has stated the law in the following terms:

> "A policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned counsel appearing on behalf of the Appellants that the courts F cannot exercise their power of judicial review at all. By reason of any legislation whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be *ultra vires* the Constitution. A subordinate legislation apart from being *intra vires* the Constitution, G should not also be *ultra vires* the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith."

In Craies on Statute Law, 7th edition, it is stated at page 297:

H "The initial difference between subordinate legislation (of the kind

> dealt with in this chapter) and statute law lies in the fact that a subordinate law-making body is bound by the terms of its delegated or derived authority, and that courts of law, as a general rule, will not give effect to the rules, etc., thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled. The validity of statutes cannot be canvassed by the courts, the validity of delegated legislation as a general rule can be. The courts therefore (1) will require due proof that the rules have been made and promulgated in accordance with the statutory authority, unless the statute directs them to be judicially noticed; (2) in the absence of express statutory provision to the contrary, may inquire whether the rule-making power has been exercised in accordance with the provisions of the statute by which it is created, either with respect to the procedure adopted, the form or substance of the regulation, or the sanction, if any, attached to the regulation : and it follows that the court may reject as invalid and *ultra vires* a regulation which fails to comply with the statutory essentials."

In *G.P. Singh's* Principles of Statutory Interpretation, Tenth Edition, it is stated at page 916:

> "Grounds for judicial review. Delegated legislation is open to the scrutiny of courts and may be declared invalid particularly on two grounds: (a) Violation of the Constitution; and (b) Violation of the enabling Act. The second ground includes within itself not only cases of violation of the substantive provisions of the enabling Act, but also cases of violation of the mandatory procedure prescribed. It may also be challenged on the ground that it cannot be said to be in conformity with the statute or Article 14 of the Constitution or that it has been exercised in bad faith. The limitations which apply to the exercise of administrative or quasi-judicial power conferred by a statute except the requirement of natural justice also apply to the exercise of power of delegated legislation. Rules made under the Constitution do not qualify as legislation in true sense and are treated as subordinate legislation and can be challenged in judicial review like delegated legislation. Compliance with the laying requirement or even approval by a resolution of Parliament does not confer any immunity to the delegated legislation but it may be a circumstance to be taken into account along with other factors to uphold its validity although as earlier seen a laying clause may prevent the enabling Act being

A declared invalid for excessive delegation."

In *Clariant International Ltd. & Anr.* v. *Securities & Exchange Board of India*, [2004] 8 SCC 524, this Court observed:

> 63. When any criterion is fixed by a statute or by a policy, an attempt should be made by the authority making the delegated legislation to follow the policy formulation broadly and substantially and in conformity therewith. [See *Secy., Ministry of Chemicals & Fertilizers, Govt. of India* v. *Cipla Ltd.*, 23, SCC para 4.1.)

B

We may notice that in *State of Rajasthan & Ors.* v. *Basant Nahata*, [2005] 12 SCC 77 : AIR 2005 SC 3401, it was pointed out :

C

> "The contention raised to the effect that this Court would not interfere with the policy decision is again devoid of any merit. A legislative policy must conform to the provisions of the constitutional mandates. Even otherwise a policy decision can be subjected to judicial review"

D

In *B.K. Industries & Ors.* v. *Union of India & Ors.*, [1993] Supp. 3 SCC 621, this Court clearly held that a delegate cannot act contrary to the basic feature of the Act stating:

E

> "....The words 'so far as may be' occurring in Section 3(4) of the Cess Act cannot be stretched to that extent. Above all it is extremely doubtful whether the power of exemption conferred by Rule 8 can be carried to the extent of nullifying the very Act itself. *It would be difficult to agree that by view of the power of exemption, the very levy created by Section 3(1) can be dispensed with. Doing so would amount to nullifying the Cess Act itself. Nothing remains thereafter to be done under the Cess Act.* Even the language of Rule 8 does not warrant such extensive power. Rule 8 contemplates merely exempting of certain exciseable goods from the whole or any part of the duty leviable on such goods. The principle of the decision of this Court in *Kesavananda Bharati* v. *State of Kerala* applies here perfectly. It was held therein that the power of amendment conferred by Article 368 cannot extend to scrapping of the Constitution or to altering the basic structure of the Constitution. Applying the principle of the decision, it must be held that the power of exemption cannot be utilised for, nor can it extend to, the scrapping of the very Act itself. To repeat,

F

G

H

the power of exemption cannot be utilised to dispense with the very levy created under Section 3 of the Cess Act or for that matter under Section 3 of the Central Excise Act."

The law that has, thus, been laid down is that if by a notification, the Act itself stands affected; the notification may be struck down.

Furthermore, the terms and conditions which can be imposed by the State for the purpose of parting with its right of exclusive privilege more or less has been exhaustively dealt with in the illustrations in sub-section (2) of Section 29 of the Act. There cannot be any doubt whatsoever that the general power to make rules is contained in sub-section (1) of Section 29. The provisions contained in sub-section (2) are illustrative in nature. But, the factors enumerated in sub-section (2) of Section 29 are indicative of the heads under which the statutory framework should ordinarily be worked out.

Neither Section 18A nor sub-sections (c) and (d) of Sections 24 of the Act confer power upon the delegatee to encroach upon the jurisdiction of the other department of the State and take upon its head something which is not within its domain or which otherwise would not come within the purview of the control and regulation of trade in liquor. The conditions imposed must be such which would promote the policy or secure the object of the Act. To grant employment to one arrack worker in each toddy shop in preference to the toddy workers neither promotes the policy nor secures the object of the Act. It is not in dispute that the purport and object of such rules is to rehabilitate the former employees of arrack shops. Rehabilitation of the employees is not within the statutory scheme and, thus, the Rules are *ultra vires* the provisions of the Act.

In *State of Kerala and Ors.* v. *Maharashtra Distilleries Ltd. and Ors.* [2005] 11 SCC 1, this Court took notice of the provisions of Section 18A of the Act. It was held that the State had no jurisdiction to realise the turn over tax from the manufacturers in the garb of exercising its monopoly power. It was held that turn-over tax cannot be directed to be paid either by way of excise duty or as a price of privilege.

The said decision, therefore, is an authority for the proposition that the State while implementing the purposes of the Act must act within the four-corners thereof. It may be true that all types of intoxicating liquors including 'toddy' are subject matter of control but the power to control has been arbitrarily exercised. Whereas in the case of Arrack, the trade has totally been

A prohibited, the trade in toddy has merely been subjected to the control within the purview of the provisions of the Act.

So far as trade in toddy is concerned, the toddy workers not only act in the shops, some of them are also toddy tappers. It requires a specialised skill. They form a different class. Even assuming that both toddy and former B arrack workers belong to the same class, the rehabilitation of arrack workers who had been thrown out of employment because of an excise policy on the part of the State, do not have any reasonable nexus with the purpose of the Act, namely, the prohibition of grant of excise licence in relation to the trade in arrack.

C

If a policy decision is taken, the consequences therefor must ensue. Rehabilitation of the workers, being not a part of the legislative policy for which the Act was enacted, we are of the opinion that by reason thereof, the power has not been exercised in a reasonable manner. Rehabilitation of the workers is not one of the objectives of the Act.

D

The submission of Mr. Iyer that there exists a distinction between carrying out the provisions of the Act and the purpose of the Act, is not relevant for our purpose. The power of delegated legislation cannot be exercised for the purpose of framing a new policy. The power can be exercised only to give effect to the provisions of the Act and not *de'hors* the same. E While considering the carrying out of the provisions of the Act, the court must see to it that the rule framed therefor is in conformity with the provisions thereof.

Reference to the provisions of Articles 39, 42 and 43 of the Constitution of India by the learned counsel for the Respondent is misconceived. While F exercising the power of rehabilitation, the State did not take recourse to the provisions of Article 47 of the Constitution of India. The matter might have been different if the State took a decision in exercise of its executive power in consonance with the legislative policy of the State as also for the purpose of giving effect to Articles 39, 42 and 43 of the Constitution of India. But, G herein, the State was exercising a specific power of delegated legislation.

Recourse to Section 69(1) of the Act is again misconceived. Only a rule validly made will have a statutory flavour. If a rule is not validly made, the question of its being interpreted in the same manner as if enacted or as if the same is a part of the statute, would not arise.

H

In *Hotel Balaji and Ors.* v. *State of A.P. and Ors.*, [1993] Supp 4 SCC 536, whereupon Mr. Iyer placed reliance, it is stated:

> "...The necessity and significance of the delegated legislation is well accepted and needs no elaboration at our hands. Even so, it is well to remind ourselves that rules represent subordinate legislation. They cannot travel beyond the purview of the Act. Where the Act says that rules on being made shall be deemed "as if enacted in this Act", the position may be different. (It is not necessary to express any definite opinion on this aspect for the purpose of this case.) But where the Act does not say so, the rules do not become part of the Act."

The said decision runs counter to the position in the present case.

Mr. Chacko has referred to Rule 7(38) of the Rules. For the reasons stated hereinbefore, reference to sub-rule (38) of Rule 7 which mandates the licensee to be bound by the rules made under the Act is fallacious as rules contemplated thereunder would mean a valid rule and not a rule which has been made *de'hors* the statute.

The High Court, furthermore, in our opinion, is not correct in tracing the legislative power of the State to Entries 23 and 24 of the List III of the Seventh Schedule of the Constitution of India. The legislative field contained in the Seventh Schedule of the Constitution of India provides for field of plenary power of the legislature but what a legislature can do, evidently, a delegatee may not, unless otherwise provided for in the statute itself.

The rights and liabilities of a workman would fall within the purview of the provisions of the Industrial Disputes Act. What is the right of a workman in case an industry is closed is governed by Section 25(FFF) and/ or Section 25(J) of the Industrial Disputes Act.

The State while pursuing its social object or policy may do something to rehabilitate the workers affected by the ban but the same would not mean that the State can thrust such employees upon an unwilling employer. It, furthermore, would not mean that the State can rehabilitate one set of workers at the cost of the other.

The employees in the arrack shops had already been paid an amount of Rs. 30,000/- as compensation and other benefits under the Abkari Workers Welfare Fund Board Act. We are informed that they have also been paid a

A sum of Rs. 2000/- each in 1997. If they became entitled to any other benefit, the State may provide the same as a part of welfare policy but not in pursuit of an excise policy.

The matter can be considered from another angle.

B When an employer gives employment to a person, a contract of employment is entered into. The right of the citizens to enter into any contract, unless it is expressly prohibited by law or is opposed to public policy, cannot be restricted. Such a power to enter into a contract is within the realm of the Indian Contract Act. It has not been and could not be contended that a C contract of employment in the toddy shops would be hit by Section 23 of the Indian Contract Act. So long as the contract of employment in a particular trade is not prohibited either in terms of the statutory or constitutional scheme, the State's intervention would be unwarranted unless there exists a statutory interdict. Even to what extent such a legislative power can be exercised would be the subject matter of debate but in a case of this nature there cannot D be any doubt that the impugned rules are also contrary to the provisions of the Indian Contract Act as also the Specific Relief Act, 1963.

In *Pearlite Liners (P) Ltd.* v. *Manorama Sirsi,* [2004] 3 SCC 172, it is stated:

E "...It is a well-settled principle of law that a contract of personal service cannot be specifically enforced and a court will not give a declaration that the contract subsists and the employee continues to be in service against the will and consent of the employer. This general rule of law is subject to three well-recognised exceptions: (i) where a public servant is sought to be removed from service in F contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the industrial law; and (iii) where a statutory body acts in breach of violation of the mandatory provisions of the statute....."

G Furthermore, a person may not have any fundamental right to trade or do business in liquor, but the person's right to grant employment or seek employment, when a business is carried on in terms of the provisions of the licence, is not regulated.

Reliance placed by the learned counsel on *C.M. Joseph and Ors.* v. H *State of Kerala and Ors.,* [2001] 10 SCC 578 is again mis-placed. Therein, Rule

6(39) of the Rules was held to be suffering from no infirmity and it is in that situation it was held that as the said rule was in existence at the time when licence was granted, the licensee could not be allowed to impugn the same. We are not concerned with the right of the licensee but the right of the workmen.

In *Solomon Antony and Ors.* v. *State of Kerala and Ors.*, [2001] 3 SCC 694, this Court again held that the contractors were liable to pay the duty on even unlifted portion of the designated quantum of rectified spirit having regard to the binding nature of the contract.

"Take it or leave it" argument advanced by Mr. Chacko is stated to be rejected. The State while parting with its exclusive privilege cannot take recourse to the said doctrine having regard to the equity clause enshrined under Article 14 of the Constitution of India. The State must, in its dealings act fairly and reasonably. The bargaining power of the State does not entitle it to impose any condition it desires.

In *Hindustan Times and Ors.* v. *State of U.P. and Anr.*, [2003] 1 SCC 591, wherein one of us was a member, this Court observed:

> "39. The respondents being a State, cannot in view of the equality doctrine contained in Article 14 of the Constitution of India, resort to the theory of "take it or leave it". The bargaining power of the State and the newspapers in matters of release of advertisements is unequal. Any unjust condition thrust upon the petitioners by the State in such matters, in our considered opinion, would attract the wrath of Article 14 of the Constitution of India as also Section 23 of the Indian Contract Act. See *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly and Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress.* It is trite that the State in all its activities must not act arbitrarily. Equity and good conscience should be at the core of all governmental functions. It is now well settled that every executive action which operates to the prejudice of any person must have the sanction of law. The executive cannot interfere with the rights and liabilities of any person unless the legality thereof is supportable in any court of law. The impugned action of the State does not fulfil the aforementioned criteria."

We, however, accept the submission that Rule 4(2) of the Rules must be held to be *ultra vires* in its entirety as even that part of it, *vis-a-vis,* the

A toddy workers, is not severable. Hence Rule 4(2) is declared *ultra vires* in its entirety.

For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeals are allowed. No costs.

B V.S.S. Appeals allowed.