

STATE OF KERALA AND ORS.

v.

UNNI AND ANR.

DECEMBER 1, 2006

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Abkari Act; Ss. 3(8), 3(12), 5, 56 and 57/Kerala Abkari Shops (Disposal in Auction) Rules, 2002 - r.9(2):

Toddy—Permissive quantity of—Alcoholic contents—Adulteration—Violation of Rule 9(2) of the Rules—Applicability of Penal provisions under Sections 56 and 57 of the Act—Held: Prohibition under the Rules aimed at controlling adulteration by addition of any foreign substance in toddy to increase its intoxicating power—Though contents of ethyl alcohol by way of fermentation could go up to 12% in terms of Excise Manual but in terms of the Rules if it exceeds 8.1% would attract penal provisions under ss. 56 and 57 of the Act—State imposing a condition, violation of which attracts penal provision, hence it must be definite and not vague—Since condition so imposed is impossible to be performed, unreasonableness of the statute shall be presumed unless it is based on a reasonable criteria—Licensee must have been provided with means to prevent commission of irregularities without which it is termed vague and could be struck down—Since toddy ferments naturally after sunrise, at what point of time its ethyl alcohol content would exceed 8.1% is not known—Interpretation of statute in such situation rests on principles of reasonableness, equity and good conscience—A penal provision must be definite unless statutory requirements provide otherwise, existence of mens rea must be read into a penal statute—It must be a deliberate act and not an unintentional one—Statute should say so explicitly or by necessary implication—Act or Rules in question do not say so—Hence, ex facie unreasonable and unworkable—Interpretation of Statutes—Purposive construction—Constitution of India, 1950—Seventh Schedule—List—II—Entry 8.

Kerala Abkari Shops (Disposal in Auction) Rules 2002—Rule 9(2)—Constitutionality of—Held: It could be invoked even for the purpose of initiating a prosecution against a licensee even if he does not add any substance to it rendering it ultra vires.

- A** **Penal Statute—Applicability of—Held:** *A penal statute must receive strict construction—Only in exceptional cases the principles of purposive construction shall apply—High Court rightly held that Section 57 of the Act not attracted as it must receive strict construction as it leads to higher penalty—In the facts and circumstances of the case, provision of Section 56 would be attracted—Interpretation of Statute—Principles of purposive construction and strict construction.*

Interpretation of Statutes:

- C** *Workability of statutes—Construction of a penal statute—Purposive construction—Requirement of—Discussed.*

Maxims:

Maxim 'ut rest magis valeat quam pereat'—Applicability of.

- D** **In the State of Kerala manufacture or sale of liquor, including country made liquor is regulated in terms of the provisions of Abkari Act. The regulatory statute is made in terms of Entry 8 of List II of the 7th Schedule of the Constitution of India. A licensee is required to manufacture or sale country made liquor in terms of the provisions of the Act, Rules framed thereunder as also the terms and conditions of the licence.**
- E** **Authorities concerned seized samples of toddy from the business premises of the licensees and found that ethyl contained therein was 9.50% v/v. They were prosecuted under Section 57(a) of the Act. Aggrieved, the licensees filed Writ petitions questioning the validity or otherwise of Rule 9(2) of the Rules and/or applicability of Section 57(a) of the Act. Single Judge of**
- F** **the High Court held the said rules *ultra vires*. The Single Judge, however, did not consider it necessary to go into the question of interpretation of the two penal provisions viz. Section 56(b) and Section 57(a) of the Act. The criminal proceedings as against the licensee were quashed. In an intra-court appeal, the Division Bench, however, upheld the validity of Rule 9(2)**
- G** **of the Rules, holding that it had not imposed any condition which make it unworkable. Upon construction of Section 56(a) and Section 57(b), it was opined that having regard to the fact that ethyl alcohol is an essential component or ingredient of toddy, only because percentage of ethyl alcohol found to be more, it would not amount to addition of a foreign ingredient as envisaged under Section 57(a) of the Act. In the result, the challenge**
- H** **against the vires of Rule 9(2) of the Rules is repelled, however, proceedings**

under Section 56(b) of the Act are quashed. Hence the present appeals and cross appeals. A

Appellant-State contended that the provisions of Section 57(a) of the Act, in view of its purport and object must receive a purposive construction; that once the percentage of ethyl alcohol is found to be in excess of the permissible limit, the same would amount to addition of foreign material so as to attract the provision of Section 57(a) of the Act; and that the law must receive strict interpretation where adulteration of an edible commodity is alleged. B

Respondents-licensees submitted that Rule 9(2) of the Rules should have been declared *ultra vires* as it is unworkable, as there does not exist any mechanical equipment to measure the contents of ethyl alcohol in toddy. Even the Excise Department did not have any such facility. C

Dismissing the appeals filed by the State and allowing the appeals filed by the Licensees, the Court D

HELD: 1.1. Rule 9(2) of the Kerala Specified Spirit Rules should be given a plain meaning. Validity of Rule 9(2) can be saved if the said provision is read in its entirety and rule of harmonious construction is resorted to. If, however, Rule 9(2) is sought to be invoked even for the purpose of initiating a prosecution as against a licensee even when he does not add any foreign substance to it, the same would render it *ultra vires*. E
[943-D-E]

1.2. The constitutionality of a statute is presumed in view of the principles laid down in '*ut rest magis valeat quam pareat*'. The principles on which constitutionality of a statute is judged and that of a subordinate legislation are different. [944-C-D] F

1.3. The definition of 'toddy' does not limit the extent of fermentation. Fermented toddy would, therefore, come within the purview of definition of toddy. Manufacture and sale of toddy, which is fermented, is not prohibited. Excise Manual clearly points out that the contents of ethyl alcohol by reason of fermentation in toddy can go upto 12%, whereafter only it ceases to be a toddy. While laying down the norms in Excise Manual, the State had used the words 'average yield'. The percentage specified therein, thus, is only average. [944-D-E] G

1.4. If by reason of the rule making power, the State intended to H

- A** impose a condition, the same was required to be reasonable one. It was required to conform to the provisions of the statute as its violation would attract penal liability. It was expected to be definite and not vague. Indisputably, the State having regard to the provisions of Article 47 of the Constitution of India, must strive hard to maintain public health.
- B** While, however, imposing conditions in regard to the prescription of norms, it was expected of the State to undertake a deeper study in the matter. It should have undertaken actual experiments. It should have specified mode and manner in which the percentage of ethyl alcohol can be found out by the licensee. A subordinate legislation can be questioned on various grounds. It is also well-known that a subordinate legislation
- C** would not enjoy the same degree of immunity as a legislative act would. [944-F-G-H]

Vasu Dev Singh & Ors. v. Union of India & Ors., [2006] 11 SCALE 108, relied on.

- D** 1.5. Unreasonableness is one of the grounds of judicial review of delegated legislation. Reasonableness of a statute or otherwise must be judged having regard to the various factors which, of course, would include the effect thereof on a person carrying on a business. [945-H; 946-A]

- E** 1.6. Though nobody has any fundamental right to carry on business in toddy or liquor, but all the licensees are entitled to be treated equally. If the matter of validity or otherwise of the subordinate legislation is to be considered, Article 14 of the Constitution of India shall be attracted.

- F** *State of Punjab and Anr. v. Devans Modern Breweries Ltd. and Anr.*, [2004] 11 SCC 26; *Ashok Lanka and Another v. Rishi Dikshit and Ors.*, [2005] 5 SCC 598 and *Ashok Lanka-II v. Rishi Dikshit*, [2006] 9 SCC 90, relied on.

- 1.7. When a statute provides for a condition which is impossible to be performed, unreasonableness of a statute shall be presumed. It would be for the State in such a situation to justify the reasonableness thereof. [946-C]

- G** 1.8. When a subordinate legislation imposes conditions upon a licensee regulating the manner in which the trade is to be carried out, the same must be based on reasonable criteria. A person must have means to prevent commission of a crime by himself or by his employees. He must know where he stands. He must know to what extent or under what circumstances he is entitled to sell liquor. The statute in that sense must
- H**

be definite and not vague. Where a statute is vague, the same is liable to be struck down. [946-D-E] A

Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and Anr. v. Union of India and Others - AIR (1960) SC 554, relied on.

1.9. Workability of a statute *vis-à-vis* the question as to whether it is vague or otherwise must also be considered having regard to the question as to whether it is at all practical. [946-G] B

1.10. Where two interpretations are possible, having regard to the workability or unworkability of a statute, the one which leads to the workability of the statute must be preferred than the other, keeping in view the principle '*ut rest magis valeat quam pereat*'. In the instant case, no two interpretations are possible for upholding the validity of statute. Applying the principle of law as enunciated by this Court in number of decisions, no interpretation would make the statute workable or definite and thereafter, valid in law. [946-G-H; 948-A-B] C
D

State of Tamil Nadu v. M.K. Kandaswami and Ors., [1975] 4 SCC 745; *Commissioner of Sales Tax, Delhi and Ors. v. Shri Krishna Engg. Company and Ors.*, [2005] 2 SCC 692 and *Rakesh Wadhvani and Ors. v. Jagdamba Industrial Corporation and Ors.*, [2002] 5 SCC 440, referred to.

2.1. Toddy ferments automatically after sun rise. If it is permitted to be sold within a timeframe after toddy is tapped, reasonableness can be inferred; but at what point of time precisely ethyl alcohol content would exceed 8.1% in a toddy is not known. [948-C] E

2.2. It is reasonable to expect that the State would frame rules in consonance with equity and good conscience. A rule may not be worked out if it imposes a condition which, unless some other guidelines are issued, would become impossible to be performed. The consequences of a single violation may be disastrous. If the contention of the State is correct, it would not only result in penal consequences, but would also lead to non-renewal of the licence. The licensee, thus, for all intent and purport loses his right to carry on business. Carrying on trade of liquor may not be a fundamental right, but it is a contractual right given to him in terms of the provisions of a statute. The terms and conditions are governed by statute. The violation thereof would lead to penal consequences. Interpretation of statute in such a situation rests on the principle of F
G
H

A reasonableness, equity as well as good conscience. [948-C-D-E]

Bharat Hydro Power Corporation Ltd. & Ors. v. State of Assam and Anr., [2004] 2 SCC 553 and *Bombay Dyeing & Manufacturing Co. Ltd. (3) v. Bombay Environmental Action Group & Ors.*, [2006] 3 SCC 434, relied on.

B

2.3. In terms of provisions of the Act, a person may be held to be guilty even if the contents of ethyl alcohol exceed 8.1% marginally. He must, therefore, be in a position to know as to what extent he can go and to what extent he cannot. The matter cannot, thus, be left to an act of nature. A penal provision must be definite. Unless the statutory intention otherwise provides, existence of *mens rea* must be read into a penal statute. It must be a deliberate act and not an unintentional one, unless the statute says so explicitly or by necessary implication. However, the Act or the Rules in question do not say either. It is in that sense vague or unreasonable. Once, thus, it is found to be *ex facie* unreasonable and unworkable, the court would not hesitate to strike down the said rule. Hence, Rule 9(2) is held unworkable being vague in nature, unless read in the manner as suggested above. [948-G-H; 949-A-B]

C

D

3.1. Sections 56 and 57 of the Act operate in different fields. They lead to different consequences. They provide for different punishments. Whereas Section 56 contemplates penal action in the event terms and conditions of a licence are found to have been violated; Section 57 of the Act speaks of adulteration. [949-C-D]

E

3.2. A person may violate rule, but thereby may not adulterate liquor. Whereas violation of the rule may be intentional or unintentional attracting penal provisions of Section 56 of the Act. Violation of the provisions of Section 57 rests on existence of *mens rea* or *actus reus* on the part of the offender. In a case where extract of juice is subject to automatic fermentation, one does not have to mix anything for increase of contents of ethyl alcohol. It is not the case of the State that the licensee has deliberately mixed additional ethyl alcohol in the liquor so as to increase the potency thereof. [949-D-E]

F

G

3.3. Section 57 provides for graver offence. If one act attracts two offences, the one providing for higher punishment cannot be presumed to apply unless ingredients thereof are satisfied. A penal statute must receive strict construction. Only in exceptional cases the principles of purposive

H

construction shall apply to a penal statute. [949-F]

A

Indian Handicrafts Emporium and Ors. v. Union of India and Ors., [2003] 7 SCC 589 and *Balram Kumawat v. Union of India and Ors.*, [2003] 7 SCC 628, relied on.

3.4. Section 57 must also receive strict construction, having regard to the fact that thereby an offence proved would lead to a higher penalty; although on the self-same fact another penal provision involving a minor punishment, viz., Section 56 would be attracted. It has to be read having regard to the constitutional protection available to an accused as also other civil consequences, if any, entailing therefor. While construing a penal statute, in a case of this nature, it is necessary to apply the rule of strict construction. [951-E-F]

B

C

Iqbal Singh Marwah and Anr. v. Meenakshi Marwah and Anr., [2005] 4 SCC 370 and *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.*, [2005] 4 SCC 530, referred to.

D

3.5. It is not in dispute that whereas if an offence is committed under Section 56 of the Act, renewal of licence is permissible; but in a case where a licensee faces a prosecution under Section 57, renewal of licence would be denied to him. Consequences of attracting the provisions of Section 57, thus, must also be judged from the said angle. [952-D-E]

E

3.6. A purposive construction can be applied if the statute is read as a whole, requires such application. Upon construction of a statute, the licensees are not guilty of any adulteration. [953-C]

S. Sundaram Pillai & Ors. etc. v. V.R. Pattabiraman & Ors. etc., [1985] 1 SCC 591 and *Bhagwan Das Jain v. State of Punjab*, [1993] Supp. 3 SCC 736, held not applicable.

F

3.7. The High Court was correct in its view that the ingredients of Section 57 of the Act are not attracted in the instant case. [949-H]

Pratap Singh v. State of Jharkahnd and Anr., [2005] 3 SCC 551 and *Mathai v. State of Kerala*, [2005] 3 SCC 260, referred to.

G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5300 of 2006.

From the final Judgment dated 6.10.2004 of the High Court of Kerala at Ernakulam in W.A. No. 1054/2003 (A).

H

A L.N. Rao, T.L.V. Iyer, K.N. Bhat, Shyam Divan, Roy Abraham, Seema Jain, Himinder Lal, Ajay Kumar Jain, Dileep Pillai, M.P. Vinod, G. Prakash, Beena Prakash, C.K. Sasi, C.M. Jayakumar, C. Harisankar, Jagdeesh N. Kainikara and Neeru Vaid for the appearing Parties.

B The Judgment of the Court was delivered by

S.B. SINHA, J. Delay condoned in S.L.Ps.

Leave granted.

C Abkari Act (for short, 'the Act') was enacted by Maharaja of Cochin By Act No.10 of 1967, it was extended to the whole of Kerala. By reason of the provisions of the said Act, manufacture or sale of liquor, including country liquor is regulated. The regulatory statute, indisputably, is made in terms of Entry 8 of List II of the 7th Schedule of the Constitution of India. A licence is granted under the Act. The licensee is indisputably required to carry out the manufacture or sale of country liquor in terms of the provisions of the D Act, rules framed thereunder as also the terms and conditions of the licence.

'Alcohol' has been defined in Rule 2(b) of the Kerala Rectified Spirit Rules, 1972 in the following terms :

E "Alcohol" means ethyl alcohol of any strength and purity having the chemical composition C₂ H₂ OH."

"Country Liquor" has been defined in Section 3(12) of the Act to mean 'toddy or arrack'.

'Toddy' has been defined in section 3(8) of the Act to mean :

F "Toddy" means fermented or unfermented juice drawn from coconut, palmyra, date, or any other kind of palm tree."

G Rules were framed by the State of Kerala in exercise of its rule making power conferred upon it under Section 5 of the Act, pursuant whereto or in furtherance whereof 'Kerala Abkari Shops (Disposal in Auction) Rules, 2002 were framed. Rule 9(2) of the said Rules reads as under :

H "No toddy other than that drawn from the Coconut Plamyrah or Choondapana palms shall be sold by the licensees. All toddy kept or offered for sale should be of good quality and unadulterated. Nothing shall be added to it to increase its intoxicating power or for any other

purpose. The ethyl alcohol content of toddy kept or offered for sale drawn from Coconut, Palmyrah and Choondapana palms should not exceed 8.1% v/v 5.2% v/v and 5.9% v/v respectively.” A

Violation of any of the provisions of the Rules, *inter alia*, attract the penal provisions of Section 56 of the Act, clause (b) whereof reads as under:

“56. For misconduct by licensee, etc. - Whoever, being the holder of a licence or permit granted under this Act or being in the employ of such holder and acting on his behalf - B

(a) C

(b) Willfully does or omits to do anything in breach of any of the conditions of his licence or permit not otherwise provided for in this Act; or

... ..

shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.” D

Section 57 of the Act, however, provides for a penal provision for adulteration of liquor by a licenced vendor or manufacturer, in the following terms : E

“57. For adulteration etc. by licensed vendor or manufacturer - Whoever being the holder of a licence for the sale or manufacture of liquor or of any intoxicating drug under this Act.

(a) mixes or permits to be mixed with the liquor or intoxicating drug, other than a noxious drug or any foreign ingredient likely to add to its actual or apparent intoxicating quality or strength, or any article prohibited other than an article which the Government shall deem to be noxious by any rule made under Section 29, clause (k), when such admixture shall not amount to the offence of adulteration under Section 272 of the Indian Penal Code; or F G

(b)

(c)

(d) H

A shall on conviction before a competent court, be punished for each such offence with imprisonment for a term which may extend to five years, or with fine which may extend to fifty thousand rupees, or which both.”

B The State of Kerala published Excise Manual, the relevant provisions whereof are as under :

C “6(a).-Fermented liquors : Toddy, Beer, Wines, etc. come under the category of fermented liquors. The maximum self-generated alcohol content that will be present in a fermented liquor, which is not fortified is only 12% by volume. Because when alcohol reaches this volume, the yeast responsible for the fermentation is destroyed by its own bye-product and no further alcohol formation is possible.”

Paragraphs 4, 5 and 6 of Chapter X contained in volume II of the Manual read as under :

D “4. The toddy yield from each kind of tree and the alcoholic strength of toddy varies according to the season of the year, the time during which it is drawn and other attendant circumstances. The daily average yield for Excise Departmental purposes may be taken as 1½ litres per coconut tree, 4½ litres per palmyrah tree and 6½ litres per sago tree.

E 5. Alcoholic fermentation of toddy which is self generated by the action of wild yeasts starts in the collecting pot itself and this continues for a limited period - say a maximum period of 3 days. Subsequent to this, bacterial (acetic) fermentation starts, bringing down the alcohol content. The bacteria and pseudo yeasts are responsible for the rather strong smell of toddy and the acidity developed. If toddy is left over a period of time, (without even any other foreign matter being added to it), alcohol content comes down and acetic acid is formed and this is how vinegar (Acetic acid) is manufactured in many of the parts of Kerala. At the peak point of fermentation, the average alcoholic strength of fermented toddy may be taken as follows :

Coconut	...	8.1%	by volume
Palmyrah	...	5.2%	” ”
Date	...	4.9	” ”

H

“Sago ... 5.9 ” ”

A

6. Toddy is claimed to be having considerable nutritive value and is rich in sugars and vitamins. It is also claimed that “Toddy improves the quality of blood and supplies the necessary vitamins for all the organs, nerves and tissues of the body, that it is good diuretic and has been utilized effectively in cases of Lithasis, that it is preventive for the occasional diseases, such as silicosis and pneumoconiosis which is a fibrosis of the lungs caused by the inhalation of silicious particles of dust or grit”. It can be consumed in reasonable amounts without harm to the system.”

B

In *State of Kerala and Ors. v. Maharashtra Distilleries Ltd. and Ors.*, [2005] 11 SCC 1, the history of the said Act and its subsequent amendments were noticed by a Constitution Bench of this Court.

C

On obtaining samples of toddy taken from the business premises of the licensees, it was, *inter alia*, found that ethyl contained therein was 9.50% v/v. They were prosecuted under Section 57(a) of the Act.

D

It is not in dispute that if a prosecution is instituted under Section 57(a) of the Act, renewal of the licence shall not be granted, whereas renewal of the licence would not be a bar if the licensee is prosecuted under Section 56 thereof.

E

Writ petitions were filed, *inter alia*, questioning the validity or otherwise of Rule 9(2) of the Rules and/or applicability of Section 57(a) of the Act, in the event sample of toddy was found to be exceeded 8.1%.

A learned Single Judge of the Kerala High Court by a judgment and order dated 31.03.2003 held the said rules to be *ultra vires*. The learned Single Judge, however, did not consider it necessary to go into the question of interpretation of the two penal provisions viz. Section 56(b) and Section 57(a) of the Act. The criminal proceedings as against the licensee were quashed. In an intra-court appeal, the Division Bench, however, upheld the validity of Rule 9(2) of the Rules, opining that it had not imposed any condition which was unworkable and/or was impossible to be performed. Upon construction of Section 56(b) and Section 57(a), it was opined that having regard to the fact that ethyl alcohol is an essential component or ingredient of toddy, only because percentage of ethyl alcohol found to be more, it would not amount to addition of a foreign ingredient as envisaged

F

G

H

A under Section 57(a) of the Act. It was, therefore, held :

“In the result, the challenge against the vires of Rule 9(2) of the Abkari Shops (Disposal in Auction) Rules, 2002 is repelled. Prosecution proceedings against the Respondents under Section 56(b) of the Abkari Act are not liable to be declared illegal. Proceedings to prosecute the Respondents under Section 57(a) of the Act are quashed.”

B The Division Bench of the High Court in subsequent cases followed its earlier orders.

Both the licensees as also the State of Kerala are before us.

C Mr. K.N. Bhat, the learned Senior Counsel appearing on behalf of the State, would submit that the provisions of Section 57(a), in view of its purport and object must receive a purposive construction as even in a case of fermentation; once the percentage of ethyl alcohol is found to be in excess of the permissible limit, the same would amount to addition of foreign material so as to attract the provision of Section 57(a) of the Act. Strong reliance, in this behalf, has been placed on *S. Sundaram Pillai and Ors. etc. v. V.R. Pattabiraman and Ors. etc.*, [1985] 1 SCC 591].

D The learned counsel would furthermore submit that the law must receive strict interpretation where adulteration of an edible commodity is alleged. E Reliance, in this behalf, has been placed on *Bhagwan Das Jain v. State of Punjab*, [1993] Supp. 3 SCC 736].

F The learned counsel appearing on behalf of Respondents, on the other hand, would submit that Rule 9(2) should have been declared *ultra vires* as it is unworkable. It was urged that there does not exist any mechanical equipment to measure the contents of ethyl alcohol in toddy. Even the Excise Department, it was contended, did not have any facility in this behalf and each sample is sent to the laboratory for chemical analysis.

G Excise Manual has been made by the State of Kerala itself. It is presumed to have been prepared upon making scientific studies. It has defined ‘fermented liquor’, which states that the maximum self-generated alcohol content that would be present in a fermented liquor, which is not fortified, is only 12% by volume. It is not the case of the State that the licensees had added any foreign material. Paragraph 5 occurring in Chapter X of the Excise Manual, however, provides that *average alcoholic strength of fermented toddy* may be H taken as follows :

Coconut ...	8.1% by volume		
Palmyrah ...	5.2% “	“	
Date ...	4.9 “	“	
“Sago ...	5.9 “	“	

[Emphasis supplied]

It, therefore, does not rule out the possibility of fermented toddy containing ethyl alcohol of more 8.1% v.v. It is accepted that the fermentation is a natural process. No scientific data is available on records, nor the State could furnish any information as to how much time would it require for toddy to become fermented which would contain more than 8.1% of ethyl alcohol. Toddy, as noticed hereinbefore, has been defined in Section 3(8) of the Act, to include fermented or unfermented juice drawn from coconut tree.

Rule 9(2) of the said Rules, in our opinion, should be given a plain meaning. It should be read in its entirety. It is in two parts. The intention of the legislature must be gathered having regard to the expressions used therein. Rule 9(2) read in its entirety, states the context that thereby what is essentially sought to be prevented is adulteration of toddy. It is aimed at prevention of adulteration. The penal provision contained in first part not only directs that all toddy kept or offered for sale should be of good quality and unadulterated but also provides that nothing shall be added to it to increase its intoxicating power or for any other purpose. If the second part prescribing the contents of the ethyl alcohol in toddy is read in the context of the first part *vis-a-vis* Section 57(a) of the Act, it would be evident that prohibition is aimed at adulteration by addition of any foreign substance to increase its-intoxicating power or for any other purpose.

Validity of Rule 9(2), therefore, can be saved if the said provision is read in its entirety and rule of harmonious construction is resorted to. If, however, Rule 9(2) is sought to be invoked even for the purpose of initiating a prosecution as against a licensee even he does not add any foreign substance to it, the same, in our opinion, would render the same *ultra vires*, as would appear from the discussions made hereinafter.

It is not in dispute that there does not exist any mechanical devise to measure the contents of ethyl alcohol present in toddy. It also stands admitted that contents of ethyl alcohol in toddy would depend upon various factors

A including weather, season or pot in which it is kept etc.

Judicial notice can be taken of the fact that each village would not have a chemical laboratory where the process of analysis of ethyl alcohol can be carried out. For example, if a sample is taken in a village, by the time sample is sent for and is analyzed, the volume of ethyl alcohol may increase. Although we are informed that some chemical is mixed when a sample is taken, no material has been placed in that behalf.

The validity or otherwise of Rule 9.2 must be considered from this point of view.

C The constitutionality of a statute is presumed in view of the principles laid down in '*ut rest magis valeat quam pareat*'.

The principles on which constitutionality of a statute is judged and that of a subordinate legislation are different.

D We have noticed the definition of 'toddy'. It does not limit the extent of fermentation. Fermented toddy would, therefore, come within the purview of definition of toddy. Manufacture and sale of toddy, which is fermented, is not prohibited. Excise Manual clearly points out that the contents of ethyl alcohol by reason of fermentation in toddy can go upto 12%, whereafter only it ceases to be a toddy. While laying down the norms in Excise Manual, the State had used the words 'average yield'. The percentage specified therein, thus, is only average.

F If by reason of the rule making power, the State intended to impose a condition, the same was required to be reasonable one. It was required to conform to the provisions of the statute as its violation would attract penal liability. It was expected to be definite and not vague. Indisputably, the State having regard to the provisions of Article 47 of the Constitution of India, must strive hard to maintain public health. While, however, imposing conditions in regard to the prescription of norms, it was expected of the State to undertake a deeper study in the matter. It should have undertaken actual experiments. It should have specified mode and manner in which the percentage of ethyl alcohol can be found out by the licensee. A subordinate legislation can be questioned on various grounds. It is also well-known that a subordinate legislation would not enjoy the same degree of immunity as a legislative act would. [See *Vasu Dev Singh & Ors. v. Union of India & Ors.*, (2006) 11 SCALE 108].

In *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and Ors.*, [2006] 4 SCC 327, this Court while interpreting the provisions of the same Act, opined :

“The Rules in terms of sub-section (1) of Section 29 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 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.”

It was furthermore held :

“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 have 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 18-A nor sub-sections (c) and (d) of Section 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.”

Unreasonableness is one of the grounds of judicial review of delegated legislation. Reasonableness of a statute or otherwise must be judged *having* regard to the various factors which, of course, would include the effect thereof

A on a person carrying on a business.

B While we are not oblivious of the fact that nobody has any fundamental right to carry on business in toddy or liquor, but all the licensees are entitled to be treated equally. If the matter of validity or otherwise of the subordinate legislation is to be considered, Article 14 of the Constitution of India shall be attracted. [See *State of Punjab and Anr. v. Devans Modern Breweries Ltd. and Anr.*, [2004] 11 SCC 26, *Ashok Lanka and Anr. v. Rishi Dikshit and Ors.*, [2005] 5 SCC 598 and *Ashok Lanka-II v. Rishi Dikshit*, [2006] 9 SCC 90].

C When a statute provides for a condition which is impossible to be performed, unreasonableness of a statute shall be presumed. It would be for the State in such a situation to justify the reasonableness thereof.

D The Division Bench has, in our opinion, posed a wrong question unto itself when it proceeded on the premise that availability of a mechanical instrument to measure the contents of ethyl alcohol is of no moment. When a subordinate legislation imposes conditions upon a licensee regulating the manner in which the trade is to be carried out, the same must be based on reasonable criteria. A person must have means to prevent commission of a crime by himself or by his employees. He must know where he stands. He must know to what extent or under what circumstances he is entitled to sell liquor. The statute in that sense must be definite and not vague. Where a statute is vague, the same is liable to be struck down. [*Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and Anr. v. Union of India and Ors.*, AIR (1960) SC 554].

F The learned Single Judge although did not deal with the matter in details, but was of the opinion that the statute is not workable.

Workability of a statute *vis-a-vis* the question as to whether it is vague or otherwise must also be considered having regard to the question as to whether it is at all practical.

G We must state that where two interpretations are possible, having regard to the workability or unworkability of a statute, the one which leads to the workability of the statute must be preferred than the other, keeping in view the principle '*ut rest magis valeat quam pereat*'. [See *State of Tamil Nadu v. M.K. Kandaswami and Ors.*, [1975] 4 SCC 745].

H

We may, however, notice some precedents operating in the field : A

In *M.K. Kandawami* (supra), this Court observed :

“It may be remembered that Section 7-A is at once a charging as well as a remedial provision. Its main object is to plug leakage and prevent evasion of tax. In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed. If more than one construction is possible, that which preserves its workability, and efficacy is to be preferred to the one which would render it otiose or sterile. The view taken by the High Court is repugnant to this cardinal canon of interpretation.” B C

In *Commissioner of Sales Tax, Delhi and Ors. v. Shri Krishna Engg. Company and Ors.*, [2005] 2 SCC 692, it was opined :

“In *State of T.N. v. M.K. Kandaswami* this Court held that where the object of a provision is to plug leakage and prevent evasion of tax, in interpreting such provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute-book should be eschewed. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile.” D

The said decision was on a interpretation of a taxing statute. E

Interpreting a rent control legislation, Lahoti, J. (as His Lordship then was) in *Rakesh Wadhvani and Ors. v. Jagdamba Industrial Corporation and Ors.*, [2002] 5 SCC 440, opined :

“There are two means of resolving the riddle: firstly, by placing such meaningful interpretation on the provision as would enable the legislative intention being effectuated; and secondly, by devising such procedure without altering the structure as would enable the substantive law being meaningfully implemented. Let us see whether the expression “assessed by the Controller” qualifies only “the cost of application” or qualifies the entire preceding expression i.e. “the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application”. As there is ambiguity and the provision is susceptible to two meanings, the court should interpret it in the manner which will best serve the object sought to be achieved....” F G

H

A Here, no two interpretations are possible for upholding the validity of statute. Applying the principle of law as enunciated by this Court in the decisions noticed hereinbefore, no interpretation would make the statute workable or definite and thereafter, valid in law.

We are concerned herein with construction of a penal statute.

B

Is it possible for a licensee to apply for renewal of his licence in terms of Section 57 of the Act is the core question.

C

Toddy ferments automatically after sun rise. If it is permitted to be sold within a timeframe after toddy is tapped, reasonableness can be inferred; but at what point of time precisely ethyl alcohol content would exceed 8.1% in a toddy is not known. It will bear repetition to state that the same would depend upon several factors including the climate. It is reasonable to expect that the State would frame rules in consonance with equity and good conscience. A rule may not be worked out if it imposes a condition which,

D

unless some other guidelines are issued, would become impossible to be performed. We must remind ourselves that the consequences of a single violation may be disastrous. If the contention of the State is correct, it would not only result in penal consequences, but would also lead to non-renewal of the licence. The licensee, thus, for all intent and purport loses his right to carry on business. Carrying on trade of liquor may not be a fundamental right, but it is a contractual right given to him in terms of the provisions of a statute. The terms and conditions are governed by statute. The violation thereof would lead to penal consequences. Interpretation of statute in the aforementioned situation rests on the principle of reasonableness, equity as well as good conscience.

E

F

There exists a presumption that the framers of the statute intended to make it reasonable. [See *Bharat Hydro Power Corporation Ltd. & Ors. v. State of Assam and Anr.*, [2004] 2 SCC 553; and *Bombay Dyeing & Manufacturing Co. Ltd. (3) v. Bombay Environmental Action Group & Ors.*, and [2006] 3 SCC 434 Paras 201 & 214].

G

A person may be held to be guilty even if the contents of ethyl alcohol exceed 8.1% marginally. He must, therefore, be in a position to know as to what extent he can go and to what extent he cannot. The matter cannot, thus, be left to an act of nature. A penal provision must be definite. Unless the statutory intention otherwise provides, existence of *mens rea* must be read

H

into a penal statute. It must be a deliberate act and not an unintentional one,

unless the statute says so explicitly or by necessary implication. The Act or the Rules do not say either. It is in that sense vague or unreasonable. A

Once, thus, it is found to be *ex facie* unreasonable and unworkable, the court would not hesitate to strike down the said rule. We do so.

We for the reasons aforementioned, hold Rule 9(2) to be unworkable being vague in nature, unless read in the manner as suggested supra. B

We may now consider interpretation of Sections 56(b) and 57(a) of the Act.

Sections 56 and 57 operate in different fields. They lead to different consequences. They provide for different punishments. Whereas Section 56 contemplates penal action in the event terms and conditions of a licence are found to have been violated; Section 57 of the Act speaks of adulteration. The contention of the State, therefore, must be judged from the aforementioned context. C

A person may violate rule, but thereby may not adulterate liquor. Whereas violation of the rule may be intentional or unintentional attracting penal provisions of Section 56 of the Act. Violation of the provisions of Section 57 rests on existence of *mens rea* or *actus reus* on the part of the offender. In a case where extract of juice is subject to automatic fermentation, one does not have to mix anything for increase of contents of ethyl alcohol. It is not the case of the State that the licensee has deliberately mixed additional ethyl alcohol in the liquor so as to increase the potency thereof. D

Section 57 provides for graver offence. If one act attracts two offences, the one providing for higher punishment cannot be presumed to apply unless ingredients thereof are satisfied. E

A penal statute must receive strict construction. Only in exceptional cases the principles of purposive construction shall apply to a penal statute. [See *Indian Handicrafts Emporium and Ors. v. Union of India and Ors.*, [2003] 7 SCC 589 and *Balram Kumawat v. Union of India and Ors.*, [2003] 7 SCC 628]. F

In this case we are satisfied that the High Court was correct in its view that the ingredients of Section 57 of the Act are not attracted in the instant case. G

H

A In *Pratap Singh v. State of Jharkahnd and Anr.*, [2005] 3 SCC 551, this Court opined :

“Interpretation of a statute depends upon the text and context thereof and having regard and object with which the same was made.”

B In *Mathai v. State of Kerala* [2005] 3 SCC 260, distinguishing between a charge under Section 325 and a charge under Section 326, this Court held:

C “Some hurts which are not like those hurts which are mentioned in the first seven clauses, are obviously distinguished from a slight hurt, may nevertheless be more serious. Thus a wound may cause intense pain, prolonged disease or lasting injury to the victim, although it does not fall within any of the first seven clauses. Before a conviction for the sentence of grievous hurt can be passed, one of the injuries defined in Section 320 must be strictly proved, and the eighth clause is no exception to the general rule of law that a penal statute must be construed strictly.”

D We are not oblivious that there are certain exceptions to the said rule. In *Iqbal Singh Marwah and Anr. v. Meenakshi Marwah and Anr.*, [2005] 4 SCC 370, a Constitution Bench of this Court held :

E “Dr. Singhvi has also urged that since we are dealing with a penal provision it should be strictly construed and in support of his proposition he has placed reliance upon a Constitution Bench decision in *Tolaram Relumal v. State of Bombay* wherein it was held that it is well-settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty and it is not competent for the court to stretch out the meaning of expression used by the legislature in order to carry out the intention of the legislature. The contention is that since Section 195(1)(b) (ii) affords protection from private prosecution, it should not be given a restrictive interpretation to curtail its scope. We are unable to accept such broad proposition as has been sought to be urged. In *Crates on Statute Law* (1971 Edn., Chapter 21), the principle regarding penal provisions has been stated as under:

H “But penal statutes must never be construed so as to narrow the

words of the statute to the exclusion of cases which those words in their ordinary acceptation would comprehend. 'But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument'.

"In *Lalita Jalan v. Bombay Gas Co. Ltd.*, this question was examined in considerable detail and it was held that the principle that a statute enacting an offence or imposing a penalty is to be strictly construed is not of universal application which must necessarily be observed in every case. The Court after referring to *Murlidhar Meghraj Loya v. State of Maharashtra*, *Kisan Trimbak Kothula v. State of Maharashtra*, *Supdt. and Remembrancer of Legal Affairs to Govt. of W.B. v. Abani Maity* and *State of Maharashtra v. Natwarlal Damodardas Soni*, held that the penal provisions should be construed in a manner which will suppress the mischief and advance the object which the legislature had in view."

We are, however, dealing with a different situation. Section 57 must also receive strict construction, having regard to the fact that thereby an offence proved would lead to a higher penalty; although on the self-same fact another penal provision involving a minor punishment, viz., Section 56 would be attracted. It has to be read having regard to the constitutional protection available to an accused as also other civil consequences, if any, entailing therefor. While construing a penal statute, in a case of this nature, it is necessary to apply the rule of strict construction.

In *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.*, [2005] 4 SCC 530, yet again a Constitution Bench in a case where two different interpretations were possible, opined :

"The counsel for the appellant contended that the penal provision in the statute is to be strictly construed. Reference was made to *Tolaram Relumal v. State of Bombay*, SCR at p. 164 and *Girdhari Lal Gupta v. D.H. Mehta*. It is true that all penal statutes are to be strictly construed in the sense that the court must see that the thing charged

A as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. Here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to common sense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.”

The matter may have to be considered from another angle. Renewal of a licence is a valuable right. [See *D. Nataraja Mudialiar v. The State Transport Authority, Madras*, AIR (1979) SC 114].

D It is not in dispute that whereas if an offence is committed under Section 56 of the Act, renewal of licence is permissible; but in a case where a licensee faces a prosecution under Section 57, renewal of licence would be denied to him. Consequences of attracting the provisions of Section 57, thus, must also be judged from the said angle.

E Reliance placed by Mr. Bhat upon *Sundaram Pillai* (supra), in our opinion, is wholly misplaced. The court therein was considering a rent control statute. It laid down law with regard to the interpretation of ‘proviso’ and ‘explanation’. It was while so doing referred to the well-known decision of *Seaford Court Estates Ltd. v. Asher*, [1949] 2 All ER 155 : (1969) 2 KB 481 (CA)], stating :

“It has been observed that statutory provisions must be so construed, if it is possible, that absurdity and mischief may be avoided. Where the plain and literal interpretation of a statutory provision produced a manifestly absurd and unjust result, the court might modify the language used by the Legislature or even do some violence to it so as to achieve the obvious intention of the Legislature and produce rational construction and just results. See in this connection, the observations in the case of *Bhag Mal v. Ch. Parbhu Ram*. Lord Denning in the case of *Seaford Court Estates Ltd. v. Asher* has observed :

H

“if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it must not alter the material of which the Act is woven, but he can and should iron out the creases.” A

Ironing out the creases is possible but not rewriting the language to serve a notation of public policy held by the Judges. Legislature must have legislated for a purpose by Act 23 of 1973 and used the expression “shall be construed” in Explanation in the manner it did.” B

It, however, added a note of caution that a purposive construction can be applied if the statute is read as a whole, requires such application. C

Reliance upon *Bhagwan Das Jain* (supra), in our opinion, is also misplaced. In fact, upon construction of a statute, we have held that the licensees are not guilty of any adulteration. The said decision has, therefore, no application. D

For the reasons aforementioned, Civil Appeals arising out of Special Leave Petition (Civil) Nos. 3612 of 2005, 6769-75 of 2005 and 7003 of 2006 filed by the State of Kerala are dismissed and Civil Appeals arising out of Special Leave Petition (Civil) Nos. 5130 of 2005, 14189 of 2006 and 18142 of 2006 are allowed. No costs. E

S.K.S.

Civil Appeals 5288, 5299, 5300 are dismissed
Civil Appeal Nos. 5296, 5297, 5301 are allowed.