

IN THE HIGH COURT OF ORISSA AT CUTTACK**W.P. (C) No.10726 of 2021 and batch of Writ Petitions**

<i>Nabin Kumar Singh</i> <i>(In W.P.(C) No.10726 of 2021)</i>	<i>Petitioners</i>
<i>Kamalini Kushal</i> <i>(In W.P.(C) No.10743 of 2021)</i>		
Mr. P. K. Rath, Advocate		
<i>Paramananda Singh</i> <i>(In W.P.(C) No.10471 of 2021)</i>		<i>Petitioner</i>
Mr. Huzefa Ahmed, Senior Advocate along with Mr. S. C. Tripathy and Mr. R. Roy, Advocates		
<i>Bidulata Behera</i> <i>(In W.P.(C) No.19982 of 2021)</i>		<i>Petitioner</i>
Mr. Asok Mohanty, Senior Advocate assisted by Mr. G.M. Rath, Advocate		
<i>Debasis Behera</i> <i>(In W.P. (C) No.10908 of 2021)</i> <i>Ajay Kumar Mohanty</i> <i>(In W.P.(C) No.11157 of 2021)</i> <i>Kabir Das</i> <i>(In W.P.(C) No.11159 of 2021)</i> <i>Arvind Kumar Sahu</i> <i>(In W.P.(C) No.11164 of 2021)</i> <i>Rajesh Senapati</i> <i>(In W.P.(C) No.11165 of 2021)</i> <i>Deepak Kumar</i> <i>(In W.P.(C) No.11166 of 2021)</i> <i>Aruna Kumar Sahoo</i> <i>(In W.P.(C) No.11171 of 2021)</i> <i>Sukanti Hota</i> <i>(In W.P.(C) No.12646 of 2021)</i>		<i>Petitioners</i>
Mr. A. K. Patra, Advocate		

Manish Sahu (In W.P.(C) No.11099 of 2021) Basanta Kumar Behura (In W.P.(C) No.11102 of 2021) Prafulla Kumar Pradhan (In W.P.(C) No.11103 of 2021) Jaya Prakash Gupta @ Jayaprakash Gupta (In W.P.(C) No.11104 of 2021) Manoj Kumar Sahoo (In W.P.(C) No.11106 of 2021) Jagadish Sahoo (In W.P.(C) No.11107 of 2021) Parbatibala Das (In W.P.(C) No.11109 of 2021) Harish Chandra Mohanty (In W.P.(C) No.11110 of 2021) Ashok Kumar Behera (In W.P.(C) No.11786 of 2021) Prajnya Priyadarshini Gharai (In W.P.(C) No.11979 of 2021) Dinesh Kumar Nayak (In W.P.(C) No.12165 of 2021)		Petitioners
Mr. B. P. Das, Advocate		
Shantanu Kumar Dash (In W.P.(C) Nos.11311 and 12452 of 2021)		Petitioner
Mr. Achyuta Nanda Routray, Advocate		
Ranjan Kumar Padhi (In W.P.(C) No.11345 of 2021)		Petitioner
Mr. Ajaya Kumar Jena, Advocate		
Sanjeeb Kumar Barik (In W.P.(C) No.11427 of 2021)		Petitioner
Mr. Sidhartha Das, Advocate		

<i>Gouranga Charan Tripathy (In W.P.(C) No.11431 of 2021)</i>		<i>Petitioner</i>
Mr. Umesh Chandra Patnaik, Senior Advocate		
<i>Pranati Das Mohapatra (In W.P.(C) No.11625 of 2021)</i>		<i>Petitioner</i>
Mr. R. N. Mishra, Advocate		
<i>Bipin Bihari Nayak (In W.P.(C) No.19644 of 2021)</i>		<i>Petitioner</i>
Mr. J. K. Khandayatray, Advocate		
<i>Hemanta Kumar Sahu and Others (In W.P.(C) No.11252 of 2021) Biraja Prasad Premananda Nayak and Others (In W.P.(C) No.11367 of 2021)</i>		<i>Petitioners</i>
Mr. P.K. Rath, Advocate		
<i>-versus-</i>		
<i>State of Odisha and others</i>	<i>....</i>	<i>Opposite Parties</i>
Mr. A. K. Parija, Advocate General assisted by Mr. M. S. Sahoo, Mr. D. K. Mohanty and Mrs. S. Patnaik, Additional Government Advocates		

CORAM:
THE CHIEF JUSTICE
JUSTICE B.P.ROUTRAY

JUDGMENT
29.09.2021

Dr. S. Muralidhar, CJ.

1. The policy decision of the Government of Odisha to part with the exclusive privileges of retail sale through IMFL Off Shops by charging a fixed license fee and selecting the applicants through a lottery/ draw of lots is the subject matter of the challenge in this batch of writ petitions.

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2. The amendment introduced to Rule 34 (1) of the Orissa Excise Rules ('OE Rules') by the Odisha Excise (Amendment) Rules to replace the words "or otherwise" with the words "lottery or e-lottery" with effect from 7th January, 2021 is also under challenge. The consequential notification issued by the Excise Department, Government of Odisha on 26th February, 2021 laying down the criteria and guidelines for organizing the lottery for grant of exclusive privilege in the trade of intoxicating liquors through IMFL OFF Shops and the sale notice dated 14th March, 2021 issued by the Collectors and District Magistrates inviting the applications for settlement of IMFL OFF Shops in different localities are also challenged in these writ petitions.

3. For convenience, W.P.(C) No.10726 of 2021 (Nabin Kumar Singh vs. State of Odisha and others) is treated as the lead petition in this batch, and will be discussed in some detail hereafter.

4. The lead petition was first listed on 19th March, 2021. This Court while issuing notice in the writ petition dismissed the Interlocutory Application (IA No.4749 of 2021) by a detailed order which was challenged by the said Petitioner and other Petitioners by way of SLP (C) Nos.5051 and 7073 of 2021. The Supreme Court on 1st July, 2021 while adjourning the SLPs clarified that the writ petitions pending in this Court are to proceed on merits "uninfluenced by the pendency of the special

leave petitions". It was also clarified that "all contentions available to both sides can be agitated before the High Court."

5. This Court has heard the submissions of Mr. Asok Mohanty, Mr. Huzefa Ahmed, Mr. U.C. Pattnaik, learned Senior Advocates and Mr. P.K. Rath, Mr. S.C. Tripathy, Mr. G.M. Rath, Mr. A.K. Patra, Mr. B.P. Das, Mr. A.N. Routray, Mr. A.K. Jena, Mr. Sidhartha Das, Mr. R.N. Mishra and Mr. J.K. Khandayatray, learned counsel appearing for the Petitioners. The submissions of and Mr. A.K. Parija, learned Advocate General along with Mr. M.S. Sahoo, Mr. D.K. Mohanty and Mrs. S. Patnaik, learned Additional Government Advocates have been heard on behalf of the Opposite Parties (State).

Background

6. Prior to the enactment of Orissa Excise Act, 2008 (OE Act), the grant of exclusive privilege of trade and manufacturing of intoxicating liquor was governed by the Bihar and Orissa Excise Act, 1915 (BOE Act). Section 29 of the BOE Act empowers the State Government to accept payment of a sum in consideration of the grant of any exclusive privilege under Sec. 22 of the BOE Act. Section 29(2) of the BOE Act further provided the mode by which such sum shall be determined. It could be by auction or by calling tenders as the State Government may in the interest of the excise revenue, by general or special order, direct. The corresponding rules concerning IMFL were the Orissa Excise (Exclusive

Privilege) Foreign Liquor Rules, 1989 ('1989 Rules'). Rule 6 of the 1989 Rules laid down the manner in which the 'consideration money' for grant of the exclusive privilege would be paid.

7. Section 22 of the BOE Act dealt with "Grant of exclusive privilege of manufacture and sale of country liquor or intoxicating drugs". Section 22(1-a) of the BOE Act dealt with the grant of exclusive privilege for retail sale of foreign liquor "within any specified place". The proviso thereto mandated the giving a public notice of the intention to grant an exclusive privilege and for considering the objections of any person residing within the area affected, before an exclusive privilege is granted.

8. In the year 2005, the State Government decided to change the system of parting with the exclusive privilege of retail sale of intoxicating liquors through IMFL OFF Shops by charging a license fee. All new IMFL Off Shops were to be settled by lottery. This was brought about by an Order dated 28th April, 2005 issued by the Excise Department. Amendments were made to the BOE Act in exercise of power conferred under Section 29(2) of the BOE Act by an Order dated 23rd April, 1990 of the Government of Odisha. Section 29 (2) of BOE Act expressly provided that the sum payable for the exclusive privilege was to be determined by auction or by calling tenders 'or otherwise'. The amended Section 29 read as under:

"29. Payment for grant of exclusive privilege- (1)

Instead of or in addition to, any duty leviable under this Act, the State Government may accept payment of a sum in consideration of the grant of any exclusive privilege under Section 22.

(2) The sum payable under Sub-section (1) shall be determined as follows:

(a) by auction or by calling tenders or otherwise as the State Government may, in the interest of excise revenue, by general or special order, direct; and

(b) by such authority and subject to such control as may be specified in such order.

(3) The sum determined under Sub-section (2) shall be final and shall be binding on the party making the offer by way of tender, bid or otherwise once such offer is accepted by the authority referred to in Clause (b) of that sub-section."

9. It was decided that under the new policy licences for all new IMFL OFF Shops were to be allotted through a process of lottery while licences in respect of existing shops were to be renewed annually. It is pointed out by the State Government in its counter affidavit filed in the lead petition that lottery has been successfully conducted in 503 new IMFL Off Shops spread over the whole State since 2005. On the other hand, in respect of the existing IMFL Off Shops where licences were granted or renewed in 2001-02, it has lead to cartelization among a few license holders leading to monopolistic trade practices. It is further pointed out by the State Government that the Comptroller and

Auditor General of India (CAG) in a report No.9 (Revenue Sector) in the year 2016 recommended as under:

"Government may consider evolving a mechanism to ensure settlement of foreign liquor 'Off' shops and Country Spirit shops every year by calling for applications on a fixed consideration money and **through draw of lottery** instead of renewal of the existing licences to ensure transparency in issue of licenses."

10. With effect from 1st April, 2017, the OE Act 2008 was brought into effect by repealing the BOE Act. The OE Rules were also brought into force simultaneously. Section 20 of the OE Act provided "for grant of exclusive privilege of manufacture and sale of foreign liquor, India made foreign liquor and country liquor or other intoxicants etc." Section 22 deals with the "Transfer of exclusive privilege". Section 35 provides for "Payment for grant of privilege". Section 90 of the OE Act deals with "the power to make rules". Section 109 deals with "Repeal and savings".

11. As far as the OE Rules is concerned, Rule 31 deals with "Notice of the proposals for grant of licenses or exclusive privilege to be given to certain authorities". Rule 34 deals with "Payment of fee in consideration of grant of exclusive privilege". Rule 34(1) expressly states that the fee in consideration of grant of exclusive privileges would be determined by the State Government "whether by auction, e-auction, tender, e-tender or otherwise". The State Government felt that "lottery" should be expressly included as a method of parting with the privilege rather

that resorting to the words or "otherwise". Rule 34 (1) was accordingly amended by the 2021 Rules. Corresponding changes were made in Rules 48 and 150 (which speaks manner of fixation and realization of fees) and Rule 222 which speaks of "license and settlement".

12. Rule 34 of the OE Rules borrowed its language from Section 29 of the erstwhile BOE Act. The State Government issued a notification on 26th February, 2021 laying down the criteria and guidelines for organizing lottery for grant of exclusive privileges in the trade of intoxicating liquor in IMFL OFF Shops. This was made in exercise of the power conferred under Section 20 of the OE Act read with Rule 34 of the OE Rules and in supersession of the earlier notification dated 20th April, 2005 of the Excise Department. It was notified that the grant of exclusive privilege for retail sale through IMFL OFF and Country Liquor Shops will be decided by "draw of lottery inviting applications on fixed monthly consideration money". The detailed procedure was set out. One of the conditions was that the holder of the licence "shall open the shop in the stipulated locality within 15 days of the issue of licence".

13. On 14th March, 2021 the Collectors and District Magistrate of the several districts of the State of Odisha issued similar notices in Form-A inviting applications for settlement of exclusive privilege IMFL OFF Shops through lottery for the year 2021-22. As far as

the lead case i.e. W.P.(C) No.10726 of 2021 is concerned, the relevant notice is dated 14th March, 2021 issued by the Collector and District Magistrate, Deogarh which stated that the lottery was to be held on 16th April, 2021 at 11 am in Deogarh Collectorate. In a table appended to the sale notice in a tabular form, the name of the existing IMFL OFF Shop, locality of the shop, exclusive privilege (EP) area, monthly consideration money fixed for the year 2021-22, the monthly minimum guarantee (MMG) quantity for the year 2021-22 (both for IMFL and Beer) were set out. The conditionalities were also specified in the notice. Clause 7 stated that the State Government would not be responsible for providing the place for location of the shops and that it should be the responsibility of the privilege holder "to arrange suitable place and carry on the privilege granted to him and the place shall be free from objections from public". Under Clause 8, the EP once granted was to continue for a period of five years. The EP holder shall renew his licence on the terms and conditions generally prescribed by the State Government from year to year till completion of five years. Form-B appended to the notice set out the application for grant of EP of the IMFL OFF Shops through the lottery system.

Submissions of the Petitioners

14. The principal contentions on the side of the Petitioners, as advanced by learned Senior Counsel as well as other learned counsel appearing on their behalf, can be summarized as under:

(i) There is no provision in the OE Act for introducing lottery as one of the modes of settlements of exclusive privilege, the collection fees and duty. In other words, there is no provision in the OE Act, 2008 corresponding to Section 22 read with Section 29 of the BOE Act. Even in Rule 34 of the OE Rules there is no such power of holding lottery as the procedure for fixation of sum for grant of exclusive privilege.

(ii) The legislative power to make a law with respect to Entry-8 and Entry-51 of the list of the Constitution of India has been delegated to the State Government. This amounts to delegating essential legislative function which is not permissible in the eye of law. Unless a law is passed on the floor of the Assembly, Section 90(2)(ix) and (xv) cannot be resorted to hold a lottery for grant of the exclusive privilege. Reliance is placed on the decisions in ***Delhi Race Club Ltd. v. Union of India (2012) 8 SCC 680*** and ***Pandit Banarsi Das Bhanot v. State of M.P. AIR 1958 SC 909***. Reliance is also placed on the decision of the Supreme Court in ***State of Odisha v. Harinarayan Jaiswal (1972) 2 SCC 36*** in support of the submission that the grant of exclusive privilege can be only under an express provision of the statute.

(iii) Lottery is one of the species in gambling under Entry-40 of List-I of the Constitution of India. Therefore, there could be no law of the State to regulate the lottery of any kind. This being the

exclusive domain of the Union of India under Article 246 (1) of the Constitution of India and without any law passed in this regard by the Parliament, it cannot be done under the OE Rules. Reliance is placed on the decision in ***All Kerala Online Lottery Dealers Association v. State of Kerala (2016) 2 SCC 161.***

(iv) The State Government ought to have obtained the Presidential sanction under Article 258(1) of the Constitution of India before it could make a law in relation to lottery. Whereas Section 89(2)(i)(1) and (2) of the BOE Act delegated the rule-making power to the State Government regarding procedure to be followed for grant of license for the exclusive privilege of trading in liquor, there is no corresponding provision under the OE Act or in the OE Rules. The legislature never intended to give authority to the State Government to make 2021 Amendment Rules to provide for lottery or e-lottery in Rule 34 of the OE Rules and this is without legislative backing. Reliance is placed on the decision of this Court in ***Ajit Kumar Routray v. State of Odisha*** (decision dated 24th July, 2013 in W.P.(C) No.8084 of 2013) which held that the grant of license to trade in intoxicating liquor through auction each year instead of renewal was more appropriate and in consequence to the objects sought to be achieved by the BOE Act.

(v) On the procedural aspect it is submitted that with that no location or locality of the prospective lottery winner having been fixed in the sale notice dated 14th March, 2021 it is violative of

Section 20 of the OE Act which obliges the State to invite objections from public and consider the same before grant of licence within any specified local area.

(vi) Reliance is placed on the proviso to Rule 31 of the OEA Rules which according to the Petitioners, specifically prescribes that "local area of the shop shall be the same as the locations of the shop". In other words, "the local area and the location of the shop will be the shop premises itself". It is pointed that there has been no communication of any of the particulars provided in Form 8 notice. The requirement that 'locality' and the 'location' of the shop should be the same as that of the 'local area' has not been indicated in the advertisements for the year 2021-22. Reliance is placed on the decision in ***Sarat Kumar Sahoo v. Collector, Cuttack (1992) 73 CLT 834.***

(vii) It is further pointed out that the format of the Notice is not the same as Form-8 format. The format prescribed in the OE Rules specifically mentions the exclusive privilege area which is not available in Form-8 notice as filed by the State.

(viii) Relying on the decision in ***Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489, M/s. Nova Ads v. Metropolitan Transport Corporation (2015) 13 SCC 257, Ram and Shyam Company v. State of Haryana (1985) 3 SCC 267*** and ***In Re: Natural Resources Allocation (2012) 10 SCC 1***, it is submitted that when it comes to parting with the State

largesse, auction is one of the preferable modes. It is submitted that there is no rational basis for the State to switch to the procedure of lottery which is based on chance and on a fixed reserved price. According to the Petitioners, auction will encourage fair competition among the bidders leading to maximization of the revenue which would be five to seven times of the reserve price. According to the Petitioners, the lottery is nothing but a "thumb rule" and is inconsistent with the need in a democracy governed by the rule of law which is to promote transparency in all processes of parting with State largesse.

(ix) The Petitioners distinguish the decisions in *Harinarayan Jaiswal* (*supra*) and *State of M.P. v. Nandalal Jaiswal* (1986) 4 SCC 566 on the ground that the concept of public trust doctrine and maximization of States revenue was not the point of determination in those decisions.

(x) It is also pointed out that the State is taking a stand contradictory to the one it took in the *Ajit Kumar Routray* cases. where it argued that the auction is the preferred method for grant of the exclusive privilege of trading in liquor. It is contended that the grant of the exclusive privilege for retail sale of IMFL is different from a housing scheme or the grant of spectrum license which are for the overall development of the nation. In matters of grant of the exclusive privilege for trading in IMFL, revenue

augmentation or revenue maximization of the State largesse "should be the only consideration."

Submissions on behalf of the Opposite Parties

15. In reply to the above arguments, it is submitted by Mr. Ashok Parija, learned Advocate General and Mr. M.S. Sahoo, learned Additional Government Advocate as under:

(i) There are different modes of parting with the exclusive privilege of the State for trading in IMFL. These include tender, auction, fixed license fees and so on. The method of draw of lots is based on a fixed license fees and is neither arbitrary nor irrational. The word 'fee' used in the OE Act or the OE Rules is not to be understood in the technical sense. It is actually meant to be the "price or consideration" which the Government charges from the licensees for parting with its privilege. Reliance in this regard is placed on the decision in ***Har Shankar v. Deputy Excise & Taxation Commissioner (1975) 1 SCC 737***.

(ii) The grant of license for sale of IMFL would essentially be a matter of policy. The Court should not strike down a policy unless it is arbitrary, irrational or mala fide. In this regard reliance is placed on the decision in ***Nandalal Jaiswal (supra)***. The rationale behind the State Government deciding to move to the system of lottery was to end monopolistic practices and reviving a healthy

competition. The recommendations in report No.9 of CAG were also taken note of. It was noticed that shops would be run by the same persons for decades. Some of the Petitioners were license holders for the longest periods. They themselves were selected initially through auctions and continued on the basis of renewal annually by 10 to 15% increase of the license fees. They cannot be heard to complain about the shift to the system of lottery.

(iii) Lottery as mode of disposal of the State largesse has been accepted as a fair method. In this regard, reliance is placed on the decisions *Bhubaneswar Development Authority v. Adikanda Biswal* (2012) 11 SCC 731 and *Lt. Col. Surinder Kumar Dutt v. Shakti Cooperative House Building Ltd.* (1994) (Supp) 1 SCC 80. The system of lottery for settlement of IMFL OFF Shops has been followed in certain other States like Uttar Pradesh, Jharkhand, West Bengal and Telengana. The learned Advocate General has also presented before the Court in a tabular form the comparison between systems of auction and lottery and the requirements thereunder. He points out in both reasons, the criteria for participation financial credibility which has, obvious, become more and more stringent. It is contended that family maximization is now the sole criteria it must be considered by the State Government while parting with its exclusive privileges in the retail of sale of intoxicating liquor. The State Government has also to account for public health, welfare and safety.

(iv) Reference is made to the Section 5(2) of the OE Act which speaks of the powers and functions of the Excise Commissioner. Reliance is placed on the decisions in *Ashok Lanka v. Rishi Dixit (2005) 5 SCC 598* and *In Re Natural Resources Allocation (supra)*. According to the learned Advocate General, auction as a mode of settlement of exclusive privileges has not been resorted to in the State since 2005. The excise revenue has seen a steady increase over the years. According to the Government, the fixed license fee system is better suited for determining the right value of commodity/service/license etc. whereas in an auction process the Government is unsure about true potential of the commodity or service.

(v) The State Government exercises control over the maximum retail price (MRP) of the alcoholic beverages shown being sold in State through the regulation of supply at Ex-Distillery Price, Excise Duty and Taxes and the wholesale and retail margin. This results in little opportunity for the retailers to earn beyond certain limits. Therefore, a fixed prices system is more sensible method for fixation of consideration for the parting with the exclusive privilege. According to the State, the fixed price lottery system is a "scientific and rationale method for settlement of alcohol vends, as the revenue generation is through actual consumption.

(vi) On the contrary, according to the Government, if the IMFL Off Shops are settled through the lottery process there is a

possibility that the licensee with a view to recouping the costs resorts to mal practices such as overcharging the consumers or going selling through informal outlets for maximization of the revenue. There could also be sales of sale of non-duty paid liquor or spurious liquor. In this regard, reliance is placed on the observations of the Andhra Pradesh High Court in ***P. Subhash v. The State of A.P. (Manu/AP/0843/2012)***. There are also instances of unrealistic auction bids in certain other States resulting in the blacklisting/debarring of the bidders as set out in the written submissions.

(vii) States such as Uttar Pradesh, Telengana and Odisha that have resorted to grant of exclusive privilege on the basis of a fixed license fee have witnessed a better Compounded Annual Growth Rate (CAGR) of Revenue than other States which fix the license fees on the basis of auction. Extracts the report of the Consultants i.e. E & Y have also been set out in this regard.

(viii) As regards the contention of the Petitioners that the switching over to the lottery method is without legislative sanction, it is pointed out that Entry-8 (List-II) of the Constitution of India permits the State Government to deal with intoxicating liquors. It is submitted that the State Government has the exclusive privilege to deal with manufacture and sale of intoxicating liquors and no person can claim a fundamental right to that trade. Reliance is placed on the observations of the

Supreme Court in ***Government of Maharashtra v. Deokar's Distillery (2003) 5 SCC 669.***

(ix) Reliance is also placed under Sections 20, 28, 35, 45 and 90 (2)(xv) of the OE Act in support of the contention that there are sufficient provisions in the OE Act as presently enacted that recognise the power of the State Government to determine and levy the license fee in return for grant of exclusive privilege.

(x) The grant of exclusive privilege by the State Government to persons is in the nature of the contract. Reliance is placed on the observations in ***Har Shankar (supra)***. Article 298 of the Constitution is said to empower the State Government to part with the exclusive privilege in exchange for a consideration in the form of a license fee.

(xi) On the procedural aspect, the State has presented a tabular chart showing the compliance of the requirements of inviting objections from the public in respect of a local area within which the exclusive privilege (EP) shops are to be established. Although the proviso to Rule 31(A) of the OE Rules may not be appropriately worded, it has to be read in its entirety and not just two lines in isolation. When so read, it is consistent with the Rule 30 and 31 of the OE Rules. It is pointed out that in ***Ramesh Chandra Rout v. State of Odisha 97 (2004) CLT 39***, the ratio of the earlier judgment in ***Sarat Kumar Sahoo (supra)*** has been

clarified and it has been held that whereas "local area" refers to a larger area and "locality" refers to a smaller area, it nevertheless, does not refer to the exact location of the shop premises.

(xii) As regards to the Kandhal IMFL OFF Shop, it is stated that the State Government issued notices inviting objections under Form VIII in November-December, 2020, i.e. before expiry of the erstwhile licenses on 31st March, 2021. The notice in Form VIII for the Petitioner's Kandhal IMFL OFF Shop was published on 18th November, 2020. The Kandhal IMFL OFF Shop shall be established within the locality, i.e. Kandhal Gram Panchayat. The State Government has substantially complied with the requirements of Rules 31 to 33 of the OE Rules read with Sections 37 to 42 of the OE Act.

(xiii) It is further pointed out that after finalizing a list of objection-free localities, sale notices inviting applications for establishing IMFL OFF Shops within the localities are issued by the State Government. Then after identification of new licenses through lottery, the designated licensees are directed to identify the exaction location of the shop within the objection-free 'locality'. The final location of the shop is subject to the approval of the Collector under Rule 53(4). Even after grant of license, if any objection is received in respect of the said shop, the Collector may direct shifting of the said shop premises with the prior approval of the Excise Commissioner under Rule 53(5). Indeed, Rule 53(5) has been invoked in a few cases during the present

settlement process also. Moreover, from time to time, this Hon'ble Court has also directed the public-spirited objectors to approach the Excise Commissioner for addressing their grievances. The entire process of inviting objections under Rules 30 to 33 are performed annually.

Issues for determination

16. Having considered the above submissions, the issues arise for determination are as follows:

- (i) Whether the power to impose a license fee for grant of exclusive privilege under Rule 34 of the OE Rules does not have any legislative sanction and whether Rule 34 suffers from the vice of excessive delegation?
- (ii) Whether the policy decision of the State Government to part with the exclusive privilege of retail sale in intoxicating liquors through IMFL OFF Shops by charging a fixed license fee and selecting the Applicants through lottery/draw of lots is arbitrary, discriminatory and violative of Article 14 of the Constitution?
- (iii) Whether the policy decision of the State Government to part with the exclusive privilege of retail sale in intoxicating liquors through IMFL OFF Shops by charging a fixed license fee as opposed to auction, leads to loss of revenue for the State Government and is therefore, not in public interest?
- (iv) Whether the State Government has complied with the requirement of inviting objections from the public under

proviso to Section 20 of the OE Act read with Rule 31 of the OE Rules?

Issue (i)

17. The first issue to be considered is whether in the absence of an express provision in the OE Act introducing lottery as one of the modes for settlement of exclusive privilege for collection of fees for retail sale of IMFL in OFF shops, there has been a delegation of the State's essential legislative function which is impermissible in law? In other words, one of the principal contentions on the side of the Petitioners is that the switchover by the State Government to the lottery system is without legislative backing and therefore unconstitutional and illegal.

18. It is therefore argued that it was only the Parliament which can make a law in relation to lotteries and insofar as the consent of the President as envisaged in Article 258 (1) of the Constitution of India has not been obtained, there can be no valid legislation by the State at all.

19. First, the above submission appears to proceed on the misconception. It is undeniable that 'lottery' is a topic which is in Entry-40 of List-I in Schedule-VII to the Constitution i.e. the Union List. It reads as under:

"Lottery organized by the Government of India or the Government of a State."

20. However, here the State Government is not conducting any 'lottery' as understood in the real sense of that term and particularly in the sense in which it is found in Entry-40 of List-I of the Schedule-VII. The method of determining the amount of licence fee and the persons found eligible for grant of the exclusive privilege is very different from the holding of lotteries as understood in Entry-40 of List-I. Nor is the system of 'lottery' in the context of the OE Act, 'betting' and 'gambling' as understood in the sense in which appear in Entry-34 of List-II i.e. the State List.

21. To understand this issue better, it would be useful to refer to Section 2 (b) of the Lotteries (Regulation) Act, 1998 ('1998 Act') which defines 'lottery' to be "a scheme, in whatever form and by whatever name called, for distribution of prizes by lot or chance to those persons participating in the chances of a prize by purchasing tickets." This type of lottery where the successful winner gets a 'prize' is very different from a scheme that forms the subject matter of these writ petitions. Further the statement of objects and reasons of the 1998 Act reveals that the said legislation was in response to the problems of poor daily wagers and families belonging to low income groups suffering from the temptation offered by "single digit and instant lotteries". The kinds of lotteries that the 1998 Act seeks to regulate are those that offer "prize money" purely out of chance. No doubt, every participant in this 'lottery' has to pay a sum of Rs.1,00,000/- as an

application fee, and winning the lottery is a matter of chance. However, there are other conditionalities to be fulfilled by every participant. In particular, the solvency of the person participating requires to be ensured even before such person is granted the exclusive privilege for retail sale of IMFL in OFF shops. Further the fixed licence fee is determined in a scientific method. Every participant has to make payment of the advance consideration of money. This can by no means be compared with 'lottery' as popularly understood and for regulating which there is a legislation by the Parliament in the form of 1998 Act.

22. In *All Kerala Online Lottery Dealers Association* (supra), the Supreme Court was dealing with the validity of a notification issued by the Government of Kerala prohibiting online lotteries which had become popular and prevalent. In paragraph 37 of the said judgment, the Supreme Court observed that "lottery is a species of gambling". The Supreme Court upheld the delegation of the power under Section 5 of the Central enactment to the State to decide on prohibiting the sale of lotteries. There too it was contended by the Petitioners that this amounted to the delegation of an essential legislative function. This was negated by the Supreme Court by referring to its earlier decision in *B.R. Enterprises v. State of U.P. (1999) 9 SCC 700*. It was reiterated that under Section 12 of the Lotteries Act, the Centre had delegated its power to legislate with regard to lotteries to States and further there was specific delegation with regard to ban of

lotteries of other States under Section 5 of the said Act. The Supreme Court observed: "this delegation of the legislative power by the principal to the delegate would not amount to abdication of the legislative power of the Centre and it would not be without any guidelines and would be sustainable in law if the State concern would ban lotteries of its own State and other States as well."

23. The context in which the above observations were made pertains to the sale of lotteries and not the kind of mode of fixation of any licence fee as in the present case. The OE Act has been validly made with reference to Entry-8 in List-II of Schedule-VII of the Constitution of India which expressly authorizes the State Government to deal with intoxicated liquors and which reads as under:

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

24. That the State has the exclusive right to make a law to regulate the activity of trade in liquor is well recognized for several decades now. In ***Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner, Ajmer, AIR 1954 SC 220***, a Constitution Bench of Supreme Court held as under:

"It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot

be held to be illegal as enacting a prohibition and not a mere regulation."

25. This was reiterated in *State of Assam v. A.N. Kidwai, Commissioner of Hills Division AIR 1957 SC 414* wherein it was held as under:

"no person has any absolute right to sell liquor and that the purpose of the Act and the rules is to control and restrict the consumption of intoxicating liquors, such control and restriction being obviously necessary for the preservation of public health and morals, and to raise revenue."

26. Again in *Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura, (1972) 2 SCC 442*, the Supreme Court while upholding the validity of Section 43 of the Bengal Excise Act, 1909 observed as under:

"Trade or business in country liquor has from its inherent nature been treated by the State and the society as a special category requiring legislative control which has been in force in the whole of India since several decades. In view of the injurious effect of excessive consumption of liquor on health this trade or business must be treated as a class by itself and it cannot be treated on the same basis as other trades while considering Article 14."

27. In *State of Orissa v. Harinarayan Jaiswal* (supra), one of the contentions raised was that the power of the State Government to accept or reject any bid for grant of exclusive privilege for selling country liquor without assigning any reasons was arbitrary and violative of Article 14 and 19 (1) (g) of the Constitution.

Recognizing the power of the State Government to part with the exclusive privilege, the Supreme Court observed as under:

“The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights.”

28. In ***Government of Maharashtra v. Deokar's Distillery*** (*supra*), it was explained as under:

“The legal (*sic* liquor) licensee does not have a fundamental right to deal in liquor. Under Entry 8 List II in the Seventh Schedule to the Constitution of India and thereby under Sections 49 and 143(2)(u) of the Prohibition Act, the State has the exclusive right/privilege in respect of potable liquor and the State, in our opinion, can charge any reasonable expenses or even consideration for permitting such activity by grant of licence and that the respondents ought to comply with all reasonable orders, as undertaken by them while obtaining the licence. This factor, the High Court, has not appreciated. Once the liquor licensee has undertaken to abide by all reasonable orders under the Prohibition Act while obtaining the licence, they cannot wriggle out of the contractual liability voluntarily incurred by them.”

29. If one carefully examines the scheme of the OE Act and the OE Rules, it is plain that there is no delegation of the essential legislative function in favour of the State Government. Section 5 of the OE Act imposes an obligation on the State Government to regulate and control the sale and consumption of liquor. This is sought to be achieved under Section 18 of the OE Act by mandating that the manufacturing and sale of intoxicating liquor shall be only through grant of licences. Section 20 of the Act deals with the grant of exclusive privilege of retail sale of intoxicating liquor through IMFL OFF shops which reads as under:

“20. Grant of exclusive privilege of manufacture and sale of foreign liquor, India made foreign liquor and country liquor or other intoxicants etc.-

(1) The State Government may grant to any person on such conditions and for such period as it may think fit, the exclusive privilege—

- (i) of manufacturing, or supply by wholesale, or of both; or
- (ii) of selling by wholesale or by retail; or
- (iii) of manufacturing or of supplying by wholesale, or of both, and of selling by retail, any liquor or other intoxicant within any specified local area:

Provided that public notice shall be given of the intention to grant any such exclusive privilege under the preceding sub-section and that any objections made by any person residing within that area shall be considered before an exclusive privilege is granted.

(2) The State Government may, by notification, confer on any officer the power mentioned in Sub-section (1).

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

30. Section 28 of the OE Act recognizes licence fee as one of the components of excise revenue. It reads as under:

“28. Nature and components of excise revenue: Excise duty and fees shall be levied and recovered under the following heads, namely, (a) excise duty, (b) countervailing duty, (c) **license fee**, (d) VAT, (e) brand registration fee, (f) import duty (g) export duty and (h) other fees as may be prescribed.” (*emphasis supplied*)

31. This has to be read with Section 35 of the OE Act which is in *pari materia* with Section 29 (1) of the erstwhile BOE Act. It provides that the State Government may, in addition to duty levied under the OE Act, accept payment of any sum or fees in consideration of any privilege granted or minimum guaranteed quantity (MGQ) determined under the OE Act.

32. Section 45 (1) of the OE Act also provides that every licence, permit or pass under the OE Act shall be granted on payment of such fees, if any, and subject to such restrictions as may be

imposed and shall be in such form and contain such particulars, as the Commissioner may direct, from time to time.

33. Section 90 of the OE Act also governs the procedure for grant of exclusive privilege. Relevant portion of Section 90 of the CPC Act reads as under:

“90. Power to make rules: (1) The State Government may make rules to carry out the objects of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provisions, the State Government may make rules for—

XXX XXX XXX

(ix) regulating the procedure to be followed and prescribing the matters to be ascertained before any licence for the wholesale or retail sale of any intoxicant is granted for any locality;

XXX XXX XXX

(xv) **prescribing the manner of fixation of fee**
payable in respect of any licence, permit or pass
granted under this Act and the manner of storing of
any intoxicant;

xxx	xxx	xxx''
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34. The Court is unable to accept the plea of the Petitioners that it is no guidance to the State in the OE Act in formulating rules and therefore in the absence of the provisions similar to Section 29 (2) of the BOE Act, the amendment to Rule 34 of the Rules to provide for lottery, must be held to be *ultra vires* the BOE Act.

There is sufficient guidance in Section 5 (2) of the Act which provides that the objectives for which the OE Act has been made and this includes revenue maximization, social regulation and public health. A conjoint reading of Section 25 and Section 90(2)(ix)(xv) with Section 35 makes it clear that there is no lack of legislative power in the State Government to determine and levy licence fee for grant of exclusive privilege for trade in intoxicating liquor. The Court is, therefore, unable to countenance the submission that there is any excessive delegation of essential legislative function in favour of the State Government.

35. As explained in *Khoday Distilleries Ltd. v. State of Karnataka (1995) 1 SCC 574* “the State can adopt any mode of selling the licences for trade or business with a view to maximize its revenue so long as the method adopted is not discriminatory.”

It was further explained in the said decision as under:

“(j) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or business in liquor a fundamental right, or even

a legal right when such trade or business is completely prohibited.”

36. The contention on the side of the Petitioners that the collection of licence fee is in the nature of a tax which again would require legislation also appears to be misconceived in the context of the right of the State Government to part with the exclusive privilege for sale of intoxicating liquor. It was explained in *Har Shankar v. Deputy Excise & Taxation Commissioner* (*supra*) as under:

“16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of

judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.

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55. Since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. By Article 298 of the Constitution, the executive power of the State extends to the carrying on of any trade or business and to the making of contracts for any purpose. As observed in *Harinarayan Jaiswal case [(1972) 2 SCC 36]* (SCC p. 44, para 13)

“if the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights.”

37. In the same decision, the Supreme Court also explained that the word ‘fee’ is not used in the same sense as it is in the technical sense of expression. It was held as under:

“56. The distinction which the Constitution makes for legislative purposes between a “tax” and a “fee” and the characteristics of these two as also of “excise duty” are well-known. “A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered” [*Per Latham C.J. in Mathews v. Chickory Marketing Board*, 60 CLR 263, 276]. A fee is a charge for special services rendered to individuals by some governmental agency and such a charge has an element in it of a quid pro quo [*Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country [*Guruswamy & Co. v. State of Mysore*, AIR 1967 SC 1512]. The amounts charged to the licensees in the instant case are, evidently, neither in the nature of a tax nor of excise duty. But then, the “licence fee” which the State Government charged to the licensees through the medium of auctions or the “fixed fee” which it charged to the vendors of foreign liquor holding licences in Forms L-3, L-4 and L-5 need bear no quid pro quo to the services rendered to the licensees. The word “fee” is not used in the Act or the Rules in the technical sense of the expression. By “licence fee” or “fixed fee” is meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the State can carry on a trade or business, such a charge is the normal incident of a trading or business transaction.”

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“58. In the view we have taken, the argument that the Government cannot by contract do what it

cannot do under a statute must fail. No statute forbids the Government from trading in its own rights or privileges and the statute under consideration, far from doing so, expressly empowers it by Sections 27 and 34 to grant leases of its rights and to issue the requisite licences, permits or passes on payment of such fees as may be prescribed by the Financial Commissioner.”

38. Article 298 of the Constitution provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and the making of contracts for any purpose. This too, therefore, enables the State Government to part with the exclusive privilege for trade in liquor in exchange for consideration in the form of a licence fee. The OE Act enables the exercise of this power.

39. For all of the aforementioned reasons, the Court rejects the contention of the Petitioners that in terms of the amendment to the OE Rules the system of lottery as a mode of determining the fee payable for parting with the exclusive privilege for trade in liquor is *ultra vires* the OE Act and is otherwise unconstitutional. The contention that it amounts to the delegation of the essential legislative function to the State and, therefore, impermissible in law is also hereby rejected. It is also held that ‘lottery’, in the sense in which it has been inserted in Rule 34 of the OE Rules, is not the same as the ‘lottery’ found in Entry 40 of List-I of the Constitution of India. The contention that there could be no law by the State to determine lottery as one of the modes of

determining the fee for parting with the exclusive privilege for retail trade in liquor is, therefore, expressly rejected by this Court.

Issue (ii) and (iii)

40. The next major contention concerns the irrationality of the policy to allot IMFL OFF shops on the basis of a fixed licence fee through draw of lots or lottery.

41. The contention that earlier the State Government had defended the auction system and therefore it could not now turn around and contend that the lottery system is a better one, deserves to be only noticed to be rejected. It is essentially for the State Government to determine whether at any point in time a certain mode of disposal or parting with the exclusive privilege is preferable to other modes. This was recognized in ***Nandalal Jaiswal*** (*supra*) in the context of a similar legislation in the State of Madhya Pradesh. There the Supreme Court observed as under:

“4. It is clear on a plain reading of Rule 22 that a licence for manufacture or sale of country liquor may be disposed of in any one of four different modes, viz., tender, auction, fixed licence fee or such other manner as the State Government may by general or special order direct. These four different modes are alternative to one another and any one of them may be resorted to for the purpose of disposing of a licence. It is not necessary that the mode of disposal by tender must first be resorted to and if that cannot be acted upon, then only the mode of disposal by auction and failing that and not otherwise, the

third mode of disposal by fixed licence fee and only in the event of it not being possible to adopt the first three modes of disposal, the last mode, namely, “such other manner as the State Government may by general or special order direct”. This would seem to be plain and incontrovertible but Mr Justice B.M. Lal has rather curiously in his judgment held that these four modes of disposal are interrelated and “failing in one of the clauses, the next is to be acted upon and for applying the fourth clause, it is incumbent for the State to specify the manner by general or special order and this also includes “specifying how and why the other three clauses are not possible to be acted upon which compels to take resort to the fourth clause”. This view taken by Mr Justice B.M. Lal in regard to the interpretation of Rule 22 is obviously unsustainable. It is indeed surprising how such a view could possibly be taken. On a plain grammatical construction of Rule 22 it is obvious that the Collector or an officer authorised by him in that behalf can choose any one of the four modes set out in that rule. There is nothing in the language of Rule 22 to justify the interpretation that an earlier mode of disposal set out in the rule excludes a latter mode or that reasons must be specified where a latter mode is adopted in preference to an earlier one. The language of Rule 22 in fact militates against such construction. It is impossible to subscribe to the proposition that it is only when an earlier mode is not possible to be adopted for reasons to be specified, that a latter one can be followed. The Collector or an officer authorised by him can adopt any one of the four modes of disposal of licence set out in Rule 22, but, of course, whichever mode be adopted, the equality clause of the Constitution should not be violated in its application.”

42. Again, it was pointed out in the same decision that there had to be sufficient leeway granted to the State Government to decide even on a “trial and error” method which was the preferable mode of parting with the exclusive privilege. It was held as under:

“34. But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government has done, unless it appears to be plainly arbitrary, irrational or mala fide. We had occasion to consider the scope of interference by the Court under Article 14 while dealing with laws relating to economic activities in *R.K. Garg v. Union of India* [(1981) 4 SCC 675]. We pointed out in that case that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. We observed that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the

nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. We quoted with approval the following admonition given by Frankfurter, J. in *Morey v. Dond* [354 US 457]:

“In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.”

What we said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestal as legislative judgment insofar as judicial deference is concerned. We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call “trial and error method” and, therefore, its validity cannot be tested on any rigid a priori considerations or on the application of any strait jacket formula. The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or “play in the joints” to the executive. “The problem of Government” as pointed out by the Supreme Court of the *United States in Metropolis Theatre*

Co. v. State of Chicago [57 L Ed 730] “are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void.”

The Government, as was said in *Permian Basin Area Rate cases* [20 L Ed (2d) 312] is entitled to make pragmatic adjustments which may be called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. It is against the background of these observations and keeping them in mind that we must now proceed to deal with the contention of the petitioners based on Article 14 of the Constitution.”

43. The Court is also unable to accept the plea that revenue maximization has to be only consideration for the State. In fact, lotteries as a mode of disposal was accepted in ***Bhubaneswar Development Authority v. Adikanda Biswal*** (*supra*) where in the context of allotment of plots it was held as under:

“25. We are of the view that BDA can adopt several methods for allotment of plots like, by way of lots, "First Come First Served", auction etc., but the process should be transparent. We, are, however, of the view that so far as the instant

case is concerned, the decision taken by the authority to cancel the process of allotment by way of "first-come-first-served" basis cannot be said to be illegal, arbitrary or vitiated by extraneous reasons warranting interference under Article 226 of the Constitution of India.”

44. Again in the context of allotment of plots in ***Lt. Col. Surinder Kumar Dutt v. Shakti Cooperative House Building Ltd (1994) Supp (1) SCC 80***, the Supreme Court permitted adoption of any appropriate method “i.e. by draw of lots or by some other fair method.”

45. While auction could be one of the modes for determining the consideration for parting with the exclusive privilege for sale of liquor, it is not invariably the only method to be adopted. The States of Uttarakhand, Jharkhand, West Bengal and Telengana, are some of those who have switched over to the process of lottery for settlement of IMFL shops. In ***Ashok Lanka (supra)***, it was noted that revenue maximization need not be the only criterion and it could include public health, welfare and safety. In the said decision, it was held as under:

“87. There cannot, however, be any doubt or dispute that having regard to the several decisions of this Court e.g. *State of Bombay v. R.M.D. Chamarbaugwala* [AIR 1957 SC 69], *Fatehchand Himmatlal v. State of Maharashtra* (1977) 2 SCC 670, *Khoday Distilleries Ltd. v. State of Karnataka* (1995) 1 SCC 574, *B.R. Enterprises v. State of U.P.* [(1999) 9 SCC 700], *State of A.P. v. McDowell & Co.* [(1996) 3

SCC 709], *State of Punjab v. Devans Modern Breweries Ltd.* [(2004) 11 SCC 26] trade in liquor is considered to be res extra commercium although tobacco produce has not been declared so. (See *Godawat Pan Masala Products I.P. Ltd. v. Union of India* [(2004) 7 SCC 68]). The State while exercising its power of parting with its exclusive privilege to deal in liquor has a positive obligation that any activity therein strictly conforms to the public interest and ensures public health, welfare and safety. Strict adherence to the requirement to comply with the statutory provisions must be considered from that angle.”

46. Again in the context of spectrum, it was held in *In Re: Natural Resources Allocation* (*supra*) as under:

“119. The norm of “common good” has to be understood and appreciated in a holistic manner. It is obvious that the manner in which the common good is best subserved is not a matter that can be measured by any constitutional yardstick—it would depend on the economic and political philosophy of the Government. Revenue maximisation is not the only way in which the common good can be subserved. Where revenue maximisation is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method. Where revenue maximisation is not the object of a policy of distribution, the question of auction would not arise. Revenue considerations may assume secondary consideration to developmental considerations.”

47. In the present case, there is empirical data available to the State Government, which has been set out in the replies filed, to show that the system of auction that had been earlier adopted had given rise to its own set of problems. Further, auction as a mode had been discontinued since 2005. The State Government had been renewing the licences earlier settled through lottery annually by fixing the percentage of increase. The figures of collection of revenue have shown a steady increase since 2005-06. This appears to support the contention of the Government that the fixed licence fee is a better suited method.

48. The pluses and minuses of auction method have also been discussed in ***P. Subhash v. The State of A.P.*** (supra). A Division Bench of the Andhra Pradesh High Court in the said decision noted the distinction of two methods as under:

“31. It is the case of the State that in the system of auction, the retailers were selling the liquor more than the maximum retail price putting the consumers at loss and, therefore, the Government constituted a Cabinet sub-committee to look into the excise policy, and the sub-committee recommended the present policy after making deliberations with all stake holders. Further, the auctioneers were selling the licence to other persons at a higher price. Therefore, the Government have chosen to discontinue the system of auction in the new excise policy.

32. In the system of lottery, as rightly contended by the State, the licensee will be able to do his business without resorting to malpractices, as he

pays the fixed licence fee. Drawal of lots gives an opportunity to all the prospective licensees and the same cannot be equated with gambling. Lots are drawn by the District Collector in the presence of all the applicants in a transparent manner.”

49. There cannot be, in the very nature of things, one right fix in matters of this kind. In other words, it is not possible to accept the contention of the Petitioners that auction is the only and the best method for parting with the exclusive privilege for sale of liquor.

50. The argument on the side of the Petitioners that the high bids in the auction held for liquor vends in the State of Rajasthan supports the retention of the auction method is well-counteracted by the State Government by pointing out that at least in four instances in Saipur Pakhar, Khuiyan, Minakdesar, Sikar and Alwar in Rajasthan the bidders who offered unusually high bids have been blacklisted or debarred since they failed to make the requisite deposits. Therefore, the ideal method of determining the fee to be paid is best left to the State Government. Further there is no material placed on record to enable the Court to doubt the contention of the State Government that resort to the grant of exclusive privilege on the basis of fixed licence fee has witnessed better compounded annual growth rate (CAGR) of revenue. Further, the empirical data in the form of the report of E& Y consultants appears to support the case of the State.

51. Consequently, the Court is unable to agree with the contention of the Petitioners that the policy of the State to switch over to lottery as a mode of determination of fees for parting with the EP of trade in IMFL through OFF Shops is irrational and arbitrary.

Issue (iv)

52. Lastly, the contention of the Petitioners concerning non-compliance of the procedural requirement of the proviso to Section 20 of the OE Act read with Rule 31 of the OE Rules requires to be considered.

53. Under Rule 30 of the OE Rules, before the 20th October of every year, the Collector has to prepare a list in Form-VI in which the locality for which the licence is to be granted is required to be mentioned as accurately as possible. Such of those objections which are serious in nature are to be taken into account while settling the licence in that location.

54. Under Rule 31 (a) of the OE Rules the proposal in Form-VI shall be published as a public notice both in Odia and in English in Form No. VIII inviting objections before 1st November. As explained by the State Government the exact location of the future shops is yet unknown since the future licencees are yet to be identified at this stage.

55. Rule 33 (1) of the OE Rules envisages that the objections received will be sent to the Collector. Under Rule 33 (3) of the OE Rules, the list prepared and recommended by the Collector, and submitted to the Excise Commissioner in accordance with Section 41(2) of the OE Act shall be submitted by the State Government for approval under Section 42 of the OE Act. Thus, through the above exercise, the Government ascertains the locality within which an IMFL OFF shop shall be established.

56. Under the amendment to Rule 34, for the settlement of new IMFL OFF shops through lottery, it is seen that after settlement of such licence, the licencees are to identify the exact location of the shop within the 'locality'. In this context, the Court would like to delve on the language of Rule 31 (a) of the OE Rules which reads as under:

“31. Notice of the proposals for grant of licences or exclusive privilege to be given to certain authorities.—

Before the 1st November or such other date as the State Government may decide, the Collector shall,

(a) affix the public notice both in Odia and English in Form No. VIII as required under sub-section (1) of section 20 and clause (a) of section 38 giving fifteen days time therein for receiving objections, if any, and proclaim the same in the locality by beat of drums as required under clause (b) thereof or by mike announcement in the locality, or by hosting of notice in the concerned district Website:

Provided that the Collector shall indicate the local area of the shop for retail sale which shall be same as the location of the shop containing a list of Police Station limits, Grama Panchayats, Wards of Municipal Corporation, Municipality or Wards of Notified Area Council or village(s), as the case may be, convenient in each case so as to indicate the local area within which the exclusive privilege is proposed to be granted:

Provided further that in the Scheduled Areas, no such licence or exclusive privilege shall be granted without giving thirty days time as required under Section 27.”

57. The expression “the local area of the shop for retail sale which shall be the same as the location of the shop containing a list of police station limit...” has to be interpreted to mean that the shop would be located in that very local area as mentioned in the notice. The purpose is indicated in the proviso viz., “so as to indicate the local area within which the exclusive privilege is proposed to be granted”. The emphasis is therefore on the “local area” and not so much on the ‘location’ which in any event has to be within the local area. The State is certainly obliged to indicate the local area and not the exact location of the shop.

58. The earlier decisions of this Court in **Sarat Kumar Sahoo** (supra) and **Ramesh Chandra Rout** (supra) dealt with the expression “local area” but not in the context in which it occurs in either Section 20 or Rule 34 of OE Rules. In **Ramesh Chandra**

Rout (supra) after considering the earlier decision in *Sarat Kumar Sahoo* (supra), this Court held that the expression 'local area' refers to a larger area and 'locality' refers to a smaller area. However, this did not refer to the exact location of the shop premises. The relevant passages read as under:

“5. We have perused the judgment of this Court in *Sarat Kumar Sahoo and Anr. v. Collector, Cuttack and Anr. (supra)* and we find on a reading of the said judgment that at the time of issuing public notice inviting objections in accordance with the proviso to Sub-section (1) of Section 22 of the Act and Rule 3 of the Orissa Exclusive Privilege Rules, 1970 the local areas and localities in the local area in which the exclusive privilege is to operate are to be mentioned. Paragraphs 5 and 6 of the said judgment of this Court in *Sarat Kumar Sahoo and Anr. v. Collector, Cuttack and Anr. (supra)* are quoted herein below :

"5. 'Locality' and 'local area' are essentially relative terms distinguishing places from other places but when they are both used in the same context, 'locality' would implicitly mean a smaller identified place other than the 'local area' which would include within itself the locality and embrace more areas and would be identified as the local area in distinction from still bigger area.

The concept of 'local area' being clarified, as seen earlier, in the Form itself as to mean the limits of the police station or the grama panchayat, etc., the locality in respect of which the public notice is given in the Form is necessarily to be specific place where the exclusive privilege is to be exercised. One meaning of 'locality' in the Oxford English Dictionary is "the fact of being local, in the

sense of belonging to a particular spot". It is for such reason clear that when public notice is issued in Form 'A' inviting objections, it is to specify both the local area, such as the grama panchayat, municipal wards, etc., as also specify the particular spot at which the exclusive privilege of sale is to be carried on. The public notice is required, in Sub-rule (3) of Rule 3, to be specifically affixed to the locality in which the privilege is proposed to be granted. The other sub-rules of rules of Rule 3 require the public notice to be proclaimed by beat of drums or such other forms as are found convenient and an extract of it is to be sent to the Chairman of each Municipality, Chairman of each Notified Area Council or Chairman of each Panchayat Samiti reproducing so much of the aforesaid list as relates to their jurisdiction and an extract of the notice is also to be sent to the Commanding Officer of each of the Cantonments reproducing so much of the aforesaid list as relates to manufacture and/or retail sale of country liquor in the area within the limits of the Cantonment. The variable purpose for such wide circulation of the notice is apparently to bring it to the notice of as much public as possible and their representatives so that objections can be made protesting the grant of privilege in the locality as well as in the local area.

6 . This being the purpose and requirement of the public notice, it goes without showing that at the very notice stage itself the locality for operation of the exclusive privilege has to be specified. Unless the locality is so made known in the notice itself, no notice can be given since otherwise the requirement of

inviting public objections becomes an useless formality. It hence is not the responsibility of the grantee of the privilege to select the locality at which the shop shall be opened and rather the privilege is to be granted only in respect of the predetermined local area and local place so that it is operated from no other place".

In the aforesaid judgment, the word 'locality' has been described to be a smaller identified place than local area and not as the exact place or premises, in which the exclusive privilege proposed to be granted is to operate, and it has been held in the judgment that both the local area and locality have to be mentioned in the public notice in Form A so that objections can be made protesting the grant of privilege in the locality as well as the local area. The judgment of this Court in *Sarat Kumar Sahoo and Anr. v. Collector, Cuttack and Anr.* (supra) has been followed in the *Liberation Education and Action for Development (LEAD), through its Secretary and Ors. v. State of Orissa and Ors.* (supra) and it has been held therein that not only the local area but also the locality in which the exclusive privilege is to operate is to be mentioned in the public notice inviting objections.

7. Coming to the contention of Mr. Mohanty, learned counsel for the petitioner, that unless the exact place or premises in which the exclusive privilege is to operate has to be mentioned in the public notice inviting objections the members of the public will not be able to know as to whether the place in which exclusive privilege will operate is a prohibited place under Sub-rule (1) of Rule 34 of the Orissa Excise Rules, 1965, at the stage of issuing public notice inviting objections, it is not

possible to know as to who will be granted exclusive privilege in the proposed safe and the exact place or premises in which the exclusive privilege will operate, though at this stage the local areas and localities in which the exclusive privilege will operate can be identified by the authorities. Moreover, on a plain reading of Sub-section (2) of Section 22 of the Act we find that no grantee of any privilege under Sub-section (1) can operate the exclusive privilege unless and until he has received a licence in that behalf from the Collector or the Excise Commissioner. Hence, even where a person is granted exclusive privilege under Sub-section (1) of Section 22 of the Act, unless the premises in which he intends to operate the exclusive privilege is beyond the places mentioned in Sub-rule (1) of Rule 34 of the Orissa Excise Rules, 1965, licence cannot be granted to such grantee of exclusive privilege in view of the provisions of Rule 34 of the Orissa Excise Rules, 1965 that licences for shops for consumption of liquor shall not be granted at the places mentioned therein. This position has also been considered by this Court in the case of *Sarat Kumar Sahoo and Anr. v. Collector, Cuttack and Anr.* (supra) in paragraph-8 which is quoted herein below:

"8. As the foregoing discussions would show it is primarily the duty of the licensing authority and the authorities who grant the exclusive privilege to know about the premises where the shop is to be located. Public objection is to be invited before grant of exclusive privilege with relation to the shop. For the purpose, the objections made are to be considered and decision taken. Besides whether objections are made or not, the authorities are themselves to consider and decide as to whether the premises is one where the shop can be allowed to operate

keeping in view the guidelines of Rules 34 and 35 of the Orissa Excise Rules".

Thus, in our considered opinion, while at the stage of inviting objections from the public by a public notice it is only necessary to indicate the local areas and the localities in which the exclusive privilege is to operate as provided in Rule 3 of the Orissa Exclusive Privilege Rules, 1970 and Form-A appended thereto, at such stage of inviting objection, it is not necessary to indicate the exact place or premises in which such exclusive privilege will operate but before granting licence to the grantee of exclusive privilege, the authorities will have to ensure that the exact place or premises in which the exclusive privilege is to operate does not fall in the places mentioned in Rule 34 of the Orissa Excise Rules, 1965."

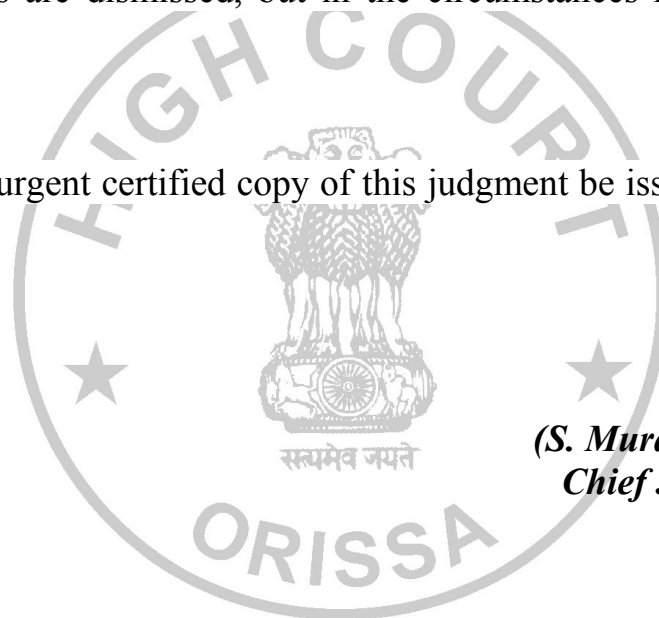
59. In any event, the impugned notices do not militate against the proviso to Rule 31 (a) OE Rules. Having examined some of these sample notices, the Court is not satisfied that there has been a violation of procedure in indicating the locality of the shop. In any event, on a case-by-case basis it would still be open for such of those residents of these localities who may be affected to come forward with their grievances. In fact, it must be noted here that writ petitions are being filed even after new policy of parting with the exclusive privilege for retail sale of IMFL by lottery mode, by residents of particular localities complaining of the location of the OFF shops on the ground that it was fixed without considering their objections. Those cases are being examined individually either by the Court or by the authorities. Consequently, the Court

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would not like to comment more on these aspects since it is always open under the scheme of the OE Act and OE Rules for the affected parties to ventilate their grievances in appropriate proceedings. Suffice it to hold that the policy shift to a lottery mode cannot be invalidated on this count.

60. For all of the aforementioned reasons, this Court finds no merits in any of these writ petitions. Accordingly, the writ petitions are dismissed, but in the circumstances no order as to costs.

61. An urgent certified copy of this judgment be issued as per the rules.



(S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

S.K.Jena/PA
S.K. Guin/Sr. Stenographer