

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.5573 of 2014 (O&M)

Date of decision: July 11, 2014

Karambir Nain and another

Petitioner

Versus

The State of Haryana and others

Respondents

**CORAM: HON'BLE MR.JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE JASPAL SINGH**

Present: Mr. Chetan Mittal, Sr. Advocate with
Mr. Vivek Singla, Advocate and Mr. Varun Issar,
Advocate.

Mr. Anil Kshetarpal, Sr. Advocate with Mr. Aditya
Kochar, Advocate.

Mr. Dhirender Chopra, Advocate for Mr. A.K.Jain,
Advocate.

Mr. Rajiv Agnihotri, Advocate.

Mr. Sunil Polist, Advocate.

Mr. S.S.Kharb, Advocate.

Mr. Harsh Aggarwal, Advocate.

Mr. A.S.Gulati, Advocate for Mr. A.S.Sullar,
Advocate.

Mr. P.K.Ganga, Advocate.

Mr. Sudhir Kumar Hooda, Advocate.

Mr. Hemant Bassi, Advocate.

Mr. Anil Ganghas, Advocate.

-----For the Petitioners.

Ms. Tanisha Peshawaria, DAG, Haryana.
and Mr. Himanshu Munjal, AAG, Haryana.

----For the Respondents.

Ajay Kumar Mittal,J.

1. This order shall dispose of a bunch 101 petitions bearing CWP Nos. 5573, 5155, 5169, 5170, 5310, 5314, 5574, 5579, 5580, 5581, 5582, 5583, 5584, 5585, 5586, 5587, 5599, 5600, 5602, 5604 to 5510, 5635, 5703, 5706, 5708, 5723, 5725, 5728, 5729, 5734, 6045, 6052, 6053, 6057, 6062, 6133, 6140, 6141, 6145, 6166, 5840, 5850, 5856, 5860, 5929, 5930, 5931, 5933, 5935, 5937, 5949, 5968, 6248, 6261, 6361, 6370, 6846, 6921, 6941, 6942, 6943, 6945, 6946, 6948, 6980, 6981, 6982, 6983, 7006, 7082, 7183, 7190, 7193, 7196, 7214, 7278, 7292, 7294, 7295, 7297, 7304, 7305, 7558, 7569, 7574, 7722, 7795, 7831, 8255, 8438, 9131, 9312, 9366, 10417, 10424 and 10425 of 2014, as learned counsel for the parties are agreed that common question of law is involved therein. However, the facts are being extracted from CWP No.5573 of 2014.

2. CWP No.5573 of 2014 has been filed by the petitioners for issuance of a writ in the nature of certiorari quashing Clause 2B in the amended policy for the year 2014-15, Annexure P.6 to the extent whereby the licensee has been given an option to surrender only one vend/vends which fall on the highway out of complete group/licence compelling the licensee to continue with the vends. Further prayer has been made for quashing the public notice dated 21.3.2014, Annexure P.8 whereby the individual vends falling on the highways have been put to auction by the

respondents.

3. A few facts relevant for the decision of the controversy involved, as narrated in CWP No.5573 of 2014, may be noticed. The petitioners were allotted licences for retail outlet of country liquor (L-14A) and were allotted group Nos.2, 3 and 11 in the District of Kaithal commencing from 1.4.2013 to 31.3.2015. The State of Haryana inspite of the directions of the National Highway Authority of India (NHAI) dated 4.8.2012 and letter dated 1.12.2011 of the Government of India, Ministry of Road Transport Highways, Road Safety Cell, auctioned the liquor vends on National Highways under the Excise policy of 2013-14 which was made for two years. One society namely Arrive Safe filed a Public Interest Litigation in this Court challenging the policy of the State based on the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 prescribing 30 meters distance being contrary to the directions issued by NHAI and Ministry of Road Transport and Highways. Finally the State of Haryana instead of curtailing the policy for one year issued amended policy for the remaining year of 2014-15. The two clauses which were amended – one was relating to the distance from the National Highway and State Highway which was subject matter of the Public Interest Litigation (PIL) and the other - Clause 2B which related to the shifting of the vends and

the surrender etc. By incorporating Clause 2B in the amended policy for the year 2014-15, the respondents tried to bifurcate the group as well as the licence unilaterally without seeking consent of the petitioners or any other shareholder in the said policy. Pursuant to the amended policy Annexure P.5, the respondents have issued a public notice in the newspaper on 21.3.2014, Annexure P.8 inviting bids for auction of the vends which are going to be surrendered. Hence the present writ petitions by the petitioners.

4. We have heard learned counsel for the parties and perused the record.

5. Learned counsel for the petitioners made the following submissions:-

- (i) the amended policy Annexure P.6 is illegal and arbitrary as it compels the licensee to continue with the unaffected vends whether it is profitable to him or not;
- (ii) the licence fee is fixed for a group. Even the reserved price was fixed for the entire group of vends. The bifurcation of the licence fee, vendwise is nowhere provided in the policy or in any terms and conditions of the auction or allotment. Therefore, compelling the bidder to continue with the unaffected vend on the basis of the formula as depicted in Clause 2B(ii) is illegal and arbitrary.
- (iii) there cannot be any unilateral alteration of the terms and conditions of the contract and if the

same is done, that is not in consonance with Section 62 of the Contract Act. The allotment of a liquor vend was a contract which was applicable for two years. The State has unilaterally altered the same without the consent of the licensee which is against the well established principles of law. Under the Act or the rules, there is no power with the State to shift the vend unilaterally. The licence can be divided into various sub contracts. These are statutory contracts governed by law.

(iv) the incorporation of Clause 2B cannot be said to be accepted terms and conditions of any contract. The same is a counter offer and unless it is specifically accepted, the same cannot be enforced. Such a condition was never part of the original policy or terms and conditions of the auction.

(v) Relying upon ground (K) in SLP(C) No.8971 of 2014 filed by the State of Haryana against the order dated 18.3.2014 passed by this Court in Arrive Safe's case (supra), it is urged that the vends situated on the National/State Highways are more economically viable vends which are the main source of revenue generation. Ground (K) reads thus:-

“Because the Hon'ble Court, while ordering the impugned amendment, lost sight of the fact that as per the Excise Policy 2013-15, liquor vends are to be allotted in groups/zones i.e. on the basis of anticipated revenue generation i.e. with every high revenue earning liquor vend, the allottee compulsorily has to take a low revenue earning

vend. This exercise is done in order to maintain equilance and also to ensure disposal of all liquor vends situated in different areas in one go. Any relocation of the vends along these State Highways and service lanes would entail huge financial loss to the State.”

Reliance was placed on the judgments in *Delhi Development Authority and another v. Joint action Committee*, 2008(2) SCC 672, *Bharat Sanchar Nigam Limited v. BPL Mobile Cellular Limited*, (2008) 13 SCC 597, *M/s Scorpion Express Pvt. Limited v. UOI*, 2010(8) RCR (C) 2716, *LIC of India vs. Consumer Education & Research Centre*, 1995(5) SCC 482, *ABL International Limited v. Export Credit Guarantee Corporation of India*, (2004) 3 SCC 553, *Surinder Kumar & Co. Wine Contractors v. State of Punjab*, 1996(2) RRR 472, *Sanjeev Bhandari v. State of Punjab*, 2004(4) RCR (Civil) 358 and *Jayant Shantilal Sanghvi v. Vadodara Municipal Corporation*, AIR 2011 (Gujarat) 122 in support of the submissions.

6. On the other hand, learned counsel for the respondents submitted that there is no statutory or constitutional right and therefore, no cause of action in favour of the petitioner to invoke writ jurisdiction arises. It is a privilege. It is different from any other commercial transaction. It is a statutory contract. The contracts executed in exercise of the executive powers are

statutory in nature. No new policy has been framed for the year 2014-15. The existing policy has been amended only. There is no fault in the policy and therefore, there is no cause of action. The act of the State Government was not unilateral but was on the directions of the High Court. The economic policies are not amenable to judicial review except on the grounds that the same are contrary to statutory provisions. Learned counsel supported the impugned amended policy and relied upon judgments in *State of Haryana v. Lal Chand*, (1984) 3 SCC 634, *M/s Khoday Distilleries Limited v. State of Karnataka*, 1995(1) SCC 574, *M/s Ugar Sugar Works Limited v. Delhi Administration*, 2001 (3) RCR (Civil) 219, *Balco Employees v. Union of India*, 2002 (2) SCC 333, *Union of India v. Dr. J.D.Suryavanshi*, 2011(13) SCC 167, *M/s Vijay Kumar & Co. v. State of Haryana*, 1996(2) RRR 11, *Ram Chander v. State of Haryana*, 2006(3) RCR (C) 692, *M/s Rattan Singh Kishore Chand v. State of Haryana*, 1998(1) RCR (C) 448, *Balde Mukundayya v. State of AP Hyderabad*, AIR 1959 (AP) 394, *M/s Madan Lal Jagjit Kumar & Co., vs. State of HP and others*, 2004(1) CLJ (HP) 112, *Jagatjit Industries Limited vs. Lt. Governor and others*, 1992 (46) DLT 535, *Sunny Markose vs. State of Kerala*, 1996(3) RCR (Civil) 51 and *Rameshwar Lal etc. v. State of Rajasthan etc.*, AIR 1997 (Raj.) 213. The authorities cited by learned counsel for the petitioners are not attracted.

7. The twin issues that arise for determination in these petitions are as under:-

- (i) Whether the State was empowered to unilaterally impose terms of amended policy on the licencees?;
- (ii) Whether the remedy of writ petition is available to the present writ petitioners?

8. Under Issue No.(i), State of Haryana formulated Excise policy in February/March 2013 for two years i.e. 2013-14 and 2014-15. It was effective from 1.4.2013 to 31.3.2015. Some of the salient features of the said policy may be noticed. Under Clause 1.2.1 thereof, location of vends has been prescribed in the following terms:-

“1.2 LOCATION OF VENDS AND COMMAND AREA OF RURAL COUNTRY LIQUOR (L-14A) & IMFL (L-2) VENDS: 1.2.1

The command area shall be prescribed for all rural country liquor vends/ group of vends (L-14A) & all rural IMFL vends/group of vends (L-2). The command area will include the area of main vend. Wherever the vends are clubbed into a group for the purpose of allotment, the command area of that group would comprise the command area of all the included vends taken together. The licensee has the freedom to locate his main vend in any village falling in the command area of that particular vend subject to approval of the DETC(Excise) concerned in case of resistance from local residents. Similarly for locating other main vends comprised in the group, the command area of those respective vends would be applicable. The vend shall be located within the area specified subject to other

provisions of law. The licensee shall make his own arrangement for opening of the retail outlet with prior approval of site plan by the Department. Prior approval of site plan of vend shall have to be obtained from concerned DETC(Excise) both in case of vends as well as sub vends. The location of the business premises is required to conform to all the provisions of the Punjab Excise Act and the Rules framed there under and the provisions of any other Act/Rules, as may be applicable.”

Clause 1.2.5 of the policy relates to restriction of location on Scheduled Roads etc. It reads thus:-

“1.2.5 RESTRICTION OF LOCATION ON SCHEDULED ROADS ETC:

(a) The retail liquor outlets on National Highway/ State Highways (except in case of retail liquor outlets located in the areas of Municipal Committees/Municipal Corporations/Councils/Housing Boards or any other local authority/Urban Estates/the areas developed by the colonizers with the approval of the Government) shall be located at a distance as stipulated in the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 (41 of 1963).”

9. The allotment of liquor vends is to be made in groups as per clause 2.1 as under:-

“2.1 UNIT OF ALLOTMENT (GROUP) : The allotment of groups of retail liquor outlets of country liquor and IMFL shall be done individually and separately. A Group will comprise of a maximum number of three contiguously located retail outlets of either country liquor or IMFL.”

10. A PIL was filed by Arrive Safe Society of Chandigarh by way of CWP No.25777 of 2012 titled as '*Arrive Safe Society of Chandigarh v. National Highway of Authority of India and others*', wherein the petitioner had sought directions to both the States i.e., Haryana and Punjab to remove the retail liquor outlets on the Highways and that no licence be issued under the Excise policy on the Highways and the roadside. Civil Writ Petition came up for hearing on 22.12.2012 when notice of motion was issued for 23.1.2013. The PIL was ultimately decided on 18.3.2014 whereby the liquor vends on the Highways were directed to be closed and State of Haryana was required to frame amended liquor policy. In compliance with the directions in PIL, amended Excise policy was formulated amending and incorporating various clauses as under:-

“1.2.5 RESTRICTION OF LOCATION ON SCHEDULED ROADS ETC:

(a) The retail liquor outlets on National Highway/ State Highways (except in case of retail liquor outlets located in the areas of Municipal Committees/Municipal Corporations/Councils/Housing Boards or any other local authority/Urban Estates/the areas developed by the colonizers with the approval of the Government) shall be located at a distance as stipulated in the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 (41 of 1963).

(b) No liquor vend shall be located along the National Highways/ State Highways. They shall not be accessible

or visible from the National Highways/ State Highways or the service lane running along such highways.

Note:- It shall be the personal responsibility of the DETC(Excise) of the district concerned to ensure the strict compliance of the above stipulated restrictions.”

“2A. LONG TERM POLICY: In order to bring stability in the liquor trade the liquor vends [both country liquor (L-14A) as well as IMFL(L-2)] shall be allotted for a period of two years i.e. from 1st April, 2013 to 31st March, 2015 subject to the following conditions :-

The license shall be granted to the successful bidder on the basis of highest bid received for the year 2013-14.

The allotment will be for the year 2014-15 also with the condition that the license fee for 2014-15 will be 5% more than the license fee of the year 2013-14.

Vend-wise quota of liquor (both country as well as IMFL) shall remain same for each of the years.

Security deposit @ 21% of the license fee for the year 2013-14 will be deposited by the allottee, which will be adjusted in the last 2 installments of the year 2014-15.

It will be obligatory on the part of the licensees to get their license renewed for the year 2014-15 between February 15th and March 24th 2014. In case a licensee fails to renew his license, his security deposit will be forfeited and his vends will be re-allotted as per prescribed procedure at his risk and cost.

Full amount of license fee pertaining to the year 2013-14 will be recovered from the licensee in 12 equal monthly installments. The license fee of the year 2014-15 after adjusting the amount of the security will be recovered in 9

equal monthly installments. The security amount will be adjusted in the last 2 installments of the year 2014-15.

2B. i) Since the existing liquor vends located along the National Highways/ State Highways have to be shifted, the licensees may be allowed to change their location in their allotted area (for urban vends) and within the command area of the concerned vend or within the command area of that group of vends (for rural vends). In case the licensee does not shift to new location and prefers to close down the vend, the Department will have the right to allot such vend for the year 2014-15 within the command area in case of rural vend and allotted area in case of urban vend of the concerned vend and conforming to the locational restriction as per para 1.2.5 of the excise policy. However, this fresh allotment will not be at the risk and cost of the concerned licensee. The reserve price of affected vend would be equal to the proportionate license fee of that vend for the year 2013-14.

ii) Since the affected vends would be getting shifted from their present premium locations, the 5% increase in license fee for the year 2014-15 from these vends will not be charged. However the license fee of the remaining unaffected vends within that group would continue to be governed by the existing provisions in the excise policy 2013-15 i.e. 5% increase in the license fee for year 2013-14 would be charged for renewal of the license of those vends for the year 2014-15. The proportionate license fee for a vend within a group would be computed on the basis of incidence of license fee of that group. For example if the quota for a group of three vends is 100 proof litres (50 proof litres for vend A, 35 proof litres for vend B & 15

proof litres for vend C) and the license fee of that group for the year 2013-14 is Rs. 200 then the incidence of license fee for the group would be Rs. 200 / 100 P.L. i.e. Rs. 2 per P.L. Accordingly the proportionate license fee for 2013-14 for vend A works out to be $50 \times 2 = \text{Rs. } 100$, for vend B works out $35 \times 2 = \text{Rs. } 70$ and for vend C works out $15 \times 2 = \text{Rs. } 30$. Accordingly the computation of license fee for the three vends for the year 2014-15 would be as follows:-

Vend A = Rs. 100 (assuming that vend A is shifted away from the National Highway/ State Highway) Vend B = Rs. 70 + 5% of Rs. 70 Vend C = Rs. 30 + 5% of Rs. 30

iii) The department would provide an option to the licensees of the affected vends to shift the affected vend to a conforming location and continue to sell liquor within the group as per the fee structure in point (ii) given above. In case the licensee of the affected vend opts to close down the vend for the year 2014-15, the remaining two vends within the affected group would continue to be operated as such as per the existing provisions of the excise policy 2013-15. The security of the vend along the National Highway/ State Highway which is closed down by the licensee may be either got refunded or got adjusted against the license fee of the other vends of the same group due in the month of April, 2014.”

11. The State of Haryana had framed Excise Policy for two years i.e. 2013-14 and 2014-15 when the matter was pending in PIL in CWP No.25777 of 2012. The clause 2-B of the amended policy was incorporated whereby the licensee has been allowed to close down only the vends on the Highways and not

the other vendis which are appended in the composite licence. Once, licensee had given a bid and was issued a composite licence, which included the vend on the Highways (i.e., the affected vend), the State has without seeking consent of the licensee tried to impose the fresh terms on the licensee. The question is whether the State is authorised to do so unilaterally.

12. Section 62 of the Indian Contract Act, 1872 deals with effect of novation, rescission and alteration of contract, which reads as follows:-

“62. Effect of novation, rescission, and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

13. The issue relating to novation of a contract has been subject matter of various decisions which we proceed to examine. The Apex Court in *H.B.Basavaraj (dead) by Lrs and another v. Canara Bank and another*, 2010(12) SCC 458 considering the scope of Section 62 noticed as under:-

“This Section gives statutory form to the common law principle of novation. The basic principle behind the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. It was defined thus by the House of Lords in *Scarf v. Jardine* (1882 (7) App Case 345).

'that there being a contract in existence, some

new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.”

It was further held that any alteration or variation in the terms of the contract under Section 62 would imply that both the parties have agreed to the change of the terms of the agreement. It was recorded as under:-

“The learned counsel for the appellant further argued that if not a novation, there was at least an alteration in the terms of the original contract when the bank had let the court appointed receivers to deal with the hypothecated property. Infact, the bank had also given another loan against the very same property which had been hypothecated also for the first loan. Alteration or variation in the terms of a contract under Section 62 of the Act implies that both parties have voluntarily agreed to the change in the terms of the agreement. In this case, however, as can be gathered from the facts and circumstances of the present case, the Bank never had a say in the matter at all. Infact it was due to a decree of the courts that the property in question had been entrusted in the hands of a receiver. The bank never had, in any of the dealings of its own volition expressly accepted the change of the hands of the property ownership and thereby accepted a change in the liability. It might also be useful to recognise at this point of time that the receiver being a public appointed servant cannot bring about a change in the said contract so as to

affect the legal consequences for the borrower or the guarantor. The administrator appointed by the Government had indeed secured a loan towards the facilitation of running of the publications but had not created any new charge on the property.”

14. In *Delhi Development Authority's* case (supra), the Supreme Court laying down the broad principles for novation of contract had held as under:-

“62. It is well known principle of law that a person would be bound by the terms of the contract subject of course to its validity. A contract in certain situations may also be avoided. With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout. A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even the subject matter of a public notice...”

It was further noticed as under:-

“66. The stand taken by DDA itself is that the relationship between the parties arises out of the contract. The terms and conditions therefor were, therefore, required to be complied with by both the parties. Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of

contract in terms of Section 60 of the Contract Act must precede the contract making process. The parties thereto must be ad idem so far as the terms and conditions are concerned. If DDA, a contracting party, intended to alter or modify the terms of contract, it was obligatory on its part to bring the same to the notice of the allocate. Having not done so, it, relying on or on the basis of the purported office orders which is not backed by any statute, new terms of contract could thrust upon the other party to the contract. The said purported policy is, therefore, not beyond the pale of judicial review. In fact, being in the realm of contract, it cannot be stated to be a policy decision as such.”

15. Emphasising that any change in the terms of the original contract, there has to be ad idem between the parties as regards new terms. It has been observed in *Bharat Sanchar Nigam Limited's* case (supra) as under:-

“44. If the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. Such an exercise having not been resorted to, we are of the opinion that no interference with the impugned judgment is called for.”

16. The following relevant observations had been made in *Monarch Infrastructure (P) Limited vs. Commissioner, Ulhasnagar Municipal Corporation and others*, (2000) 5 SCC 287 :-

“12....The High Court had taken the view that if a term

of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered.”

17. In *Polymat India (P) Limited and another V/s. National Insurance Company Limited and others*, (2005) 9 SCC 174, it has been held that when terms of contract have been reduced to writing, it cannot be changed without mutual agreements of both the parties.

18. In *Syed Israr Masood v/s. State of Madhya Pradesh*, AIR 1981 SC 2010, it has been categorically laid down that when the State Government has substantially altered the contract, it was open to the plaintiff to repudiate the contract and claim a refund of the first installment of sale price.

19. Similar view was expressed by Patna High Court in *M/s Scorpion Express Pvt. Limited's* case (supra) in the following terms:-

“12. One must not forget that Railways is State within the meaning of Article-12 of the Constitution of India for the purposes of Part-III of the Constitution of India

and is, as such, bound by the principles enshrined in Article-14 of the Constitution of India which, inter alia, provides for fairness and reasonableness in all its actions including in contractual matters. Railways are not exempt from ordinary law of the land. The agreement, once reduced to writing, binds both the parties and parties are bound by the contractual obligations contained therein and no party has right to relieve itself of its contractual obligations much less unilaterally in the manner in which it has been done in the present case.”

20. The question regarding maintainability of writ petition in cases of licensee who deals in liquor trade was dealt with by a Division Bench of this Court in ***Surinder Kumar & Co. Wine Contractor's*** case (supra) as under:-

“27. Counsel appearing for the State of Punjab raised an argument that this Court should not exercise its jurisdiction under Article 226 of the Constitution of India in a contractual matter especially in favour of a licensee who deals in liquor trade. This contention has no merit in view of the law laid down by their Lordships of the Supreme Court in ***Ram Chandra Rai v. State of Madhya Pradesh and others***, AIR 1971 Supreme Court 128, wherein it was held that the rights and obligations arising under a license issued under Statute cannot, without further investigation, be said to be purely contractual. It was held that the writ petition was maintainable.”

21. A Division Bench of this Court in ***Sanjeev Bhandari's*** case (supra), had held that the writ petition under

Articles 226/227 to be remedy available to the aggrieved party and noticed the arguments of the petitioners therein in paras 22 and 24 and the answer has been given in paras 29,32 and 33 which are reproduced below:-

“22. It has been pointed out that right to trade in liquor is not a fundamental right infringement of which can be complained of by the petitioner in terms of Article 19(1)(g) of the Constitution of India and the rule creating monopoly in liquor trade is not bad on that account alone. Reference was made to Section 35(3) of the Punjab Excise Act to contend that the Act itself contemplate auction of more than one district by the Financial Commissioner. Reliance has been placed upon the decision of the Hon'ble Supreme court in the cases of [Cooverjee B. Bharucha v. Excise Commissioner and The Chief Commissioner, Ajmer and Ors.](#) ; AIR 1954 Supreme Court 220 and Har Shankar and Ors. etc. v. The Deputy Excise and Taxation Commissioner and Ors. etc. AIR 1975 Supreme Court 1121.

24. Mr. J.K. Sibal, learned Senior Advocate appearing for respondent No. 5, has vehemently argued that the petitioner has no locus standi to challenge the auction finalised in favour of the said respondent. There is no proof that the petitioner gave a higher bid of Rs. 72 crores. It is very easy for any person to allege after the finalisation of auction to say that he was ready and willing to pay a particular amount. Since the petitioner has not raised any objection at the time of auction nor able to prove higher bid during the course of auction, therefore, the allegation that the auction has been conducted in violation of the rules is not available to the petitioner. Reference was made to Clause 12(ii) of

the Auction Announcements. Annexure P-1, to contend that the auction of individual vend has been done away with while announcing such policy.

29. A Division Bench of this Court in Makhan Lal's case (supra) decided on 4.8.1995 has issued certain directions so that the provisions of the Excise Act and the Rules made thereunder including the terms and conditions are not violated by the auctioning officer. That was a case where three circles, namely, Bhuchho, Maur and Rampura Phul were tagged jointly for auction. The minimum license fee for the vends of Bhuchho and Maur was fixed. It was Rampura Phul circle which was put to auction. All the three circles were part of Bhatinda circle. Similar argument that liquor license could not be equated with the ordinary contract and that it is privilege of the State and the State, therefore, could deal with it in the manner it deemed fit was negative. It was held that arbitrariness of the State or its instrumentaries is always open to judicial review. The privilege of the Government to auction the vends for the sale of liquor cannot be kept away from judicial scrutiny when such action ex-facie is arbitrary and is an abuse of power or colourable exercise of power under the garb of the authority vested in them under the provisions of law. A citizen may not be able to claim as of fundamental right to such trade or business and consequently Article 14 may not be infringed. Reliance was placed upon the decision of the Hon'ble Supreme Court in the case of State of Madhya Pradesh and Ors. etc. v. Nandlal Jaiswal and Ors. etc., AIR 1987 Supreme Court 251, wherein it was held to the following effect:

'There is no fundamental right in a citizen to carry on

trade or business in liquor. The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention that Article 14 can have no application in a case where the licence to manufacture or sell is being granted by the State Government. The State cannot ride roughshod over the requirement of that Article. But while considering the applicability of Article 14 in such a case, the Court 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.'

After relying upon such judgment, the Court concluded that the arbitrary action of the State even in liquor license matters would be open to challenge. We respectfully agree with the following findings.-

'It is the settled principle of law that State has discretion to formulate its policy and impose such restrictions for grant of licenses for sale of liquor and other vend items in the manner the State considers it proper and beneficial to the State revenue. But once the State has formulated such policy which according to the State is in consonance with the provisions of law applicable, the State must act fairly and its decision vis-a-vis the citizen must not be arbitrary....

32.It is needless to make reference to the various judgments referred to by the parties to the effect that there is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. However, once the State Government has framed the rules for grant of privilege of sale of liquor, the State Government cannot act arbitrarily and at its sweet will. It must comply with the equality clause while granting

the exclusive right or privilege of manufacturing or selling liquor. It cannot be said that Article 14 has no applicability in a case where license to sell liquor is granted by the State Government but while considering the applicability of Article 14, the Court would be slow to interfere with the policy laid down by the Government and allow a large measure of latitude to the State Government. But the State Government cannot choose to ignore the rules or instructions for the grant of such privilege.

33. We do not find merit in the argument raised by the respondents that the petitioner has no locus standi to challenge the auction as he has not offered higher bid during the auction proceedings. The presence of the petitioner during the course of auction proceedings is not disputed. Although it would be a disputed question of fact whether the petitioner has given a higher bid of Rs. 72 crores as the voice is not clearly audible in the video recording prepared by the Government. The video recording shows that the Presiding Officer has not waited response from the public even though a voice is heard. Instead of elucidating response from the persons present, the Presiding Officer called upon partners of respondent No. 5 to deposit the draft. The video recording does not show count of 1, 2, 3 and the fall of the hammer. Therefore, we are of the opinion that the petitioner has locus standi to invoke the jurisdiction of this Court to challenge the arbitrary conduct of auction and on account of violation of the statutory rule in respect of auction of the liquor vends.”

22. From the above, it emerges that the petitioner in terms of the excise policy is entitled to claim equality in the grant of

exclusive right or privilege of manufacturing or selling liquor. The arbitrary action of the State even in liquor licence matters is amenable to challenge. Further, once an agreement is reduced to writing, it shall be binding on the parties to the agreement and no party has any right to relieve itself of its contractual obligations unilaterally. Still further, the action of the State in altering, modifying or withdrawing any contractual obligation unilaterally would entitle the petitioner to invoke the writ jurisdiction of this Court under Articles 226/227 of the Constitution of India.

23. Examining the factual matrix herein, it may be noticed that as per excise policy, the State had formulated Excise policy for the years 2013-14 and 2014-15. The unit of allotment of retail liquor outlets of country liquor and IMFL was to be group-wise. A group would comprise of a maximum number of three contiguously located retail outlets of either country liquor or IMFL. The petitioners had bid for the groups of liquor vends and accordingly composite licence was issued by the State. The licence fee had been determined for the entire group as a unit. In CWP No.25777 of 2012 decided on 18.3.2014, it has been directed that no liquor vend shall be permitted to be opened on the National or State Highway with effect from 1.4.2014. In such a situation, the petitioners have been asked to close down or shift retail liquor vends on the National or State Highway being affected vends but required to continue with the other vends of the

group which do not fall on National or State Highway. There is alteration in the terms of the licence. Alteration cannot be enforced unless both the parties agree to it. The terms of licence are, although statutory in nature, cannot be unilaterally changed by the State in between the licence period, without either seeking consent of the licensees or without giving opportunity to the licensee to repudiate the contract. The licence fee for all the three vends was single and there was no vend-wise bifurcation of the licence fee. The method of calculation of licence fee adopted by the State upon the quota of each vend cannot be imposed unilaterally on the liquor vends without their consent. None of these clauses or eventuality had been provided in the excise policy for the year 2013-14 and 2014-15. No provision under the Punjab Excise Act, 1914 or the Haryana Liquor Licence Rules, 1970 had been shown which empowered the State to change the terms of the licence during the currency of the licence or change the location of the vends. The State cannot be permitted to change the rules of the game announced at the time of Excise policy unilaterally. Moreover, the State is in the present situation because of its own doing as would be apparent from the following observations of the Division Bench in *Safe Arrive's* case (supra):-

“The problem was aggravated on account of the fact that the State of Haryana came up with the Policy for two years for the first time when the lis was already pending

before this Court and we were of the view that the endeavour was to avoid the possible rigors of the orders which may be passed in these proceedings, especially as the State of Haryana had been taking time on more than one occasion to file response. We were, thus, influenced by the fact that the Liquor Policy for the State of Haryana purported to be for a period of two years and taking cue from what was stated by the State of Punjab, we were willing to give concession also to the State of Haryana till 31.3.2014 so that a new regime came into play with effect from 1.4.2014. As noticed above, the endeavour of the State of Haryana to challenge the said direction passed by this Court before the Hon'ble Supreme Court of India has not been successful.'

24. It is concluded that wherever a composite liquor licence has been issued relating to liquor vends on National or State Highway alongwith liquor vends in rural area, the State shall not be entitled to enforce clause 2B of the amended policy against such licencees without their consent. As a consequence, such licencees shall not be obliged to continue with the vends in rural area against their express affirmative response. The State shall be entitled to recover the licence fee from such licencees till 31.3.2014. However, it is clarified that wherever, such licencees had operated vends in the rural area from 1.4.2014, they shall not be entitled to any benefit under this order as their continuance would amount to implied consent on their part to operate the unaffected vends located there.

25. Learned Advocate general with full vehemence defended the action of the State and referred to plethora of judgments to substantiate his submissions. In all fairness, we shall make reference to all the judgments individually relied upon by the learned Advocate General. It may be seen that a distinction was noticed between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature by the Apex court in *Lal Chand and others's* case (supra). It was held that Article 299(1) of the Constitution of India applies to a contract made in the exercise of executive power of the Union or the State. Such contracts are required to be executed in conformity with the provisions of Article 299(1), otherwise it would be nullified and rendered void which cannot be ratified or the principle of estoppel does not apply. However, where Union or State enters into a contract in exercise of its statutory power, the contract is statutory in nature as distinguished from contract made by it in exercise of executive power under Article 299(1). The State Government in exercise of its statutory powers grants the exclusive privilege of manufacturing, supplying or selling any intoxicant like liquor to any person on certain terms and conditions which is created in exercise of its statutory powers. It was further noticed that the statutory duties and liabilities arising on acceptance of the bid as a public auction of a liquor contract is enforceable in accordance with the statutory provisions and it is

not a condition precedent for recovery of an amount due under the Act.

The factual background in which the aforesaid observations came to be recorded were that the liquor licensees had approached the High Court for quashing of impugned notice of demand of recovery issued by the Excise Department on account of difference between the amount which they had agreed to pay under the terms of the auction of a liquor vend and the amount realised on re-auction of the vend and also the defaulted installments of the licence fee payable in respect of the liquor vend. The Apex Court had overruled the judgment in *Kanhaiya Lal Bhatia & Co. v. State of Haryana* CWP No.343 of 1969 decided on 23.7.1969 by the High Court and followed the judgment in *State of Haryana v. Jage Ram* (1983) 4 SCC 556 : AIR 1983 SC 1207 holding that the amount of licence fee on auction of the liquor vend which the State Government had charged from the licensee was neither in the nature of a tax nor in the nature of excise duty but was price which the State Government was entitled to charge as consideration for parting with its privilege in favour of the licensees. Further, it was held that after making bid for grant of exclusive privilege of liquor vend with full knowledge of terms and conditions of auction, the bidder cannot wriggle out of the contractual obligations arising out of acceptance of his bid. Once the bid is accepted as per the

rules, a binding contract comes into existence and cannot be rescinded unilaterally by the bidder on the ground that another liquor shop subsequently allowed to be opened in the vicinity would affect his business. It was observed that opening of shop in the vicinity on facts did not breach any condition of the auction or any other agreement and, therefore, the bidder was not absolved of his liability to make good the loss sustained by the Government on account of re-auction conducted on his default in paying security money.

26. The judgment in *M/s Khoday Distilleries Limited's* case (supra), relates to the issue that whether the State can prevent the petitioners from carrying on the business of liquor during the unexpired period of licence and further whether the petitioners have fundamental right to carry liquor business and whether reasonable restriction can be imposed.

27. The Supreme Court in *M/s Ugar Sugar Works Limited's* case (supra) was adjudicating the issue whether the fixing of Minimum Sales Figures (MSF) violates the rights of the small traders/manufacturers under Articles 14, 16, 19(1) (g) and 32 of the Constitution of India. It was answered in the negative holding that there was no fundamental right to trade in liquor and to regulate manufacture, sale and distribution of liquor is a policy matter and State exercises its statutory power under the Excise Act. It was further noticed that the Court cannot interfere with

such policies of the State unless the policies are actuated with malafide or are unreasonable, arbitrary or unfair and they cannot be invalidated on the plea that it would hurt business interests of a party.

28. ***Balco Employees Union (Regd.)'s*** case (supra) was relating to the scope of judicial review in the matters of policy formulated by the State. The validity of the decision of the Union of India whereby 51% shares of M/s Bharat Aluminum company Limited was sought to be disinvested and transferred was under consideration in this case. The Apex Court had laid down that the court cannot in exercise of power of judicial review embark on enquiry whether the public policy formulated by the Government is wise or whether a much better public policy could be evolved. The policy cannot be struck down at the instance of employees' union on the plea that according to them a different policy would be more fairer, wiser, scientific or logical. The policy decision involving complex economic matters would be outside the judicial review unless they are violative of constitutional or legal limits of power or so alien to reason.

29. Whether court could direct Railways to introduce new trains, add coaches or change timings of trains was held to be falling within the domain of the Railways and outside the scope of judicial review in ***J.D.Suryavanshi's*** case (supra) by the Apex Court.

30. In *M/s Vijay Kumar & Co.*'s case (supra), the Court had gone into a question where a party had entered into a contract through an open auction. It was held that the said party could not complain subsequently with regard to the arbitrariness of the terms of the contract. Further, that the State has the exclusive privilege in the matters of business of liquor which can permit a citizen to carry on such trade subject to specified limitations and conditions. The State can adopt any mode of selling the licences for trade or business with the object of earning the maximum revenue and it is also possessed with the power to prohibit or regulate the trade or business of the same and the mere fact that the State charges taxes and fees on trade or business of liquor does not make it a right to carry on trade or business in liquor, a fundamental right or even a legal right and a State can impose total prohibition. The method of grant of licence to the highest bidder to deposit a part of the licence fee in advance does not suffer from any inherent infirmity and after having entered into a contract, the licensee cannot make a claim that the State has acted arbitrarily by demanding the cash security in the form of advance towards the licence fee.

31. In *Ram Chander's* case (supra), the allotment of liquor vends was under challenge and action was sought for not prescribing maximum retail price for sale of liquor in accordance with the provisions of the Standard of Weights and Measures Act, 1976. It was held that policy of the State to grant of liquor licenses

and fixing of liquor quota is an exclusive discretion of the State and it can impose restrictions or relax the same to any extent as a matter of liquor policy of the State. No right can be claimed by any citizen as right to free trade in liquor. The State can amend, revise or modify the policy in public interest.

32. Cancellation of licence to pursue the prohibition in the State was under adjudication in M/s ***Rattan Singh Kishore Chand & Co.'s case (supra)***. It was held that in public interest, Government cannot be estopped from cancelling licence in breach of conditions of licence and public interest cannot be defeated on the principles of estoppel. Government is not estopped from discharging legislative and constitutional obligations by any express or implied contract. Licence to deal in liquors etc. is a State privilege given to a particular person to do a particular act.

33. In ***Balde Mukandayya's case (supra)***, the issue before the Court was regarding the claim made by the licensees to pay them compensation for the loss which was sustained by them as a result of shifting of the shops from the middle of the town to the sites outside the abadi selected by the Sites Selection Committee and on account of shifting of some of the shops situated on the borders between the erstwhile Hyderabad State and the Andhra State to residential quarters nearer his shops.

34. In ***M/s Madan Lal Jagjit Kumar and Co.'s case (supra)***, the Himachal Pradesh High Court was seized of the issue

whether the licensee who was granted alternative site for start of liquor vends was entitled to refund of licence fee. The plea of the licensee that the contract had been frustrated under Section 56 of the Contract Act was held to be complicated question of law and fact and not amenable to writ jurisdiction. The petitioner was relegated to the remedy of civil suit in such circumstances.

35. In *Jagatjit Industries Limited's case* (supra), the Delhi High Court was dealing with the matter whether the State had imposed certain restrictions on the trade of liquor. It was concluded that right to trade in liquor is not a fundamental right and State is empowered to even totally prohibit every one form of the activity relating to intoxicant. Similar issue was before the Kerala High Court in *Sunny Markose's case* (supra).

36. Before learned Single Bench of Rajasthan High Court in *Rameshwar Lal's case* (supra), the challenge was laid to the shifting of location of liquor shops which were running on the main roads or highways. In order to stop increasing accidents, an order was issued directing shifting of shops from Highway. It was observed that where an authority had power to relax, it could withdraw the relaxation also.

37. No doubt, the principles of law enunciated in these pronouncements are unexceptionable, but keeping in view the facts and circumstances of the cases in hand, no advantage can be derived by the State from them.

38. Accordingly, the writ petitions are allowed with the direction that the State shall not penalise any licensee who has not opted for renewal of the licence in respect of liquor vends included in the composite licence of a group of vends relating to vends situated in rural area. The State shall be authorised to recover the licence fee from such licensees till 31.3.2014. The petitioners shall be entitled to refund of the security deposit after adjustment of any amount due from them on the basis of excise policy of 2013-15 by treating that the liquor vend had been operated till 31.3.2014. As a consequence, the State shall not be entitled to forfeit any amount of security deposit made by the licensee due to the aforesaid reason. However, wherever, such licensees had continued with the liquor vends in the rural area, the benefit under this order shall not be available to them. All the petitions stand disposed of in the above terms.

(Ajay Kumar Mittal)
Judge

July 11, 2014
'gs'

(Jaspal Singh)
Judge