THE HIGH COURT OF MADHYA PRADESH

W.P.No.60/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.61/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.62/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.63/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.64/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.65/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.66/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.67/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.68/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.71/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.961/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.963/2016

(M/s Som Distilleries Pvt. Ltd. vs. Excise Commissioner & Ors.)

W.P.No.1479/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1492/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.7842/2016

(M/s Jagpin Breweries Ltd. vs. State of M.P. & Anr.)

W.P.No.214/2017

THE HIGH COURT OF MADHYA PRADESH

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.215/2017

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.216/2017

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.217/2017

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.218/2017

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.219/2017

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.220/2017

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.221/2017

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.271/2017

(Gwalior Alcobrew Pvt. Ltd. vs. State of M.P. & Anr.)

W.P.No.22584/2017

(M/s Som Distilleries Pvt. Ltd. vs. State of M.P. & Ors.)

W.P.No.22585/2017

(M/s Som Distilleries Pvt. Ltd. vs. State of M.P. & Ors.)

W.P.No.22586/2017

(M/s Som Distilleries Pvt. Ltd. vs. State of M.P. & Ors.)

Gwalior, Dated : 30.11.2018

Shri S.K. Shrivastava, Counsel for the petitioners in W.P.Nos.214/17, 215/17, 216/17, 217/17, 218/17, 219/17, 220/17, 221/17, 271/17.

None for the petitioner in W.P.No.7842/16.

Shri V.K. Bhardwaj, Senior Counsel with Shri Anand Bhardwaj, Counsel for the remaining petitioners.

Smt. Nidhi Patankar, Government Advocate for the

Respondent/State.

By this common order, W.P. Nos.60/16, 61/16, 62/16, 63/16, 64/16, 65/16, 66/16, 67/16, 68/16, 71/16, 961/16, 963/16, 1479/16, 1492/16, 7842/16, 214/17, 215/17, 216/17, 217/17, 218/17, 219/17, 220/17, 221/17, 271/17, 22584/17, 22585/17, 22586/17, are being disposed off as common question of law is involved.

Earlier, this Court by order dated 25-4-2017 had directed as under :

> "Learned Counsel for the parties are in unison in respect of their submissions that it would be appropriate if present controversy would be decided once the said petition (W.P. 525/2017) is decided by the Division Bench of this Court.
>
> Considering the submissions advanced by the parties, let this petition be placed as Sine Die. Parties are directed to renew their prayer for further hearing; once the controversy is decided by the Division Bench of this Court wherein vires of the Rules have been challenged."

The Division Bench of this Court, by order dated 2-8-2016 has observed as under :

> "These petitions take exception to action of State and its functionaries in imposing the penalty in exercise of powers under Rule 4(4) of Madhya Pradesh Country Spirit Rules, 1995 and Rule 4(4) of Madhya Pradesh Distillery Rules, 1995. As the validity of these Rules are not challenged in these batch of petitions, office is directed to list the matter before Single Bench."

Accordingly, these batch of petitions have been listed before this Court for hearing on merits.

The necessary facts for the disposal of these cases are

being considered from W.P. No. 60/2016.

This writ petition has been filed under Article 226/227 of the Constitution of India against the order dated 3-12-2013 passed by the Excise Commissioner, M.P. as well as also against the order dated 10-9-2015 passed by the Board of Revenue, by which a penalty of Rs. 1,28,500/- has been imposed against the petitioner, for not maintaining the minimum stock under Rule 4(4) of the M.P. Country Spirit Rules, 1995 (In Short Spirit Rules, 1995).

The petitioner is carrying on the business of sale of Country made liquor. A show cause notice dated 5-12-2011 was issued to the Petitioner, mentioning inter alia that the petitioner was granted license for supply of County liquor in Dewas Region for the year 2011-12. In the Dewas Warehouse, the minimum stock of Rectified Spirit was not maintained in the month of April 2011 and May 2011 as a result of which, challans remained pending for a period of 21 days in the month of April 2011 and 31 days in the month of May 2011. Similarly, in the month of June to September, 2011, the minimum stock was not maintained as a result of which for 30 days in the month of June 2011, for 30 days in the month of July, for 28 days in the month of August 2011 and for 29 days in the month of September, 2011, the challans remained pending. Further it was alleged that in the Sonkatch Warehouse, from April to September 2011, the minimum stock was not maintained as a result of which for 29 days in April 2011, for 31 days in May 2011, for 30 days in the month of June 2011, for 31 days in the month of July 2011 and for 30 days in the month of September, 2011, the challans remained pending.

Similarly, in Kannod Warehouse, the minimum stock was not maintained during the month of April to September 2011 as a result of which for 16 days in the month of April, for 18 days in the month of May, for 13 days in the month of June, for 11 days in the month of July, for 11 days in the month of August and for 11 days in the month of September 2011, the challans remained pending. Accordingly, the petitioner was called upon to show cause as to why penal action be not taken against it for violating Rule 4(4) of Spirit Rules, 1995 as well as the terms and conditions of Tender and agreement, as well as why action be not taken under rule 12(1) of Spirit Rules, 1995.

The Petitioner filed his reply, and submitted that the Country liquor was supplied as per the requirement and therefore, the supply had never failed. The retailers did not lift the stock, as a result of which the loaded vehicles of the petitioner had remained stationary for a period of 3 days and verbal information was also given to the District Excise Officer, Dewas. Therefore, it is clear that the stock in the warehouses was in excess quantity and a request was also made to the higher officers to direct the retailers to accept the supply. So far as the pendency of the challan is concerned, it may be because of various reasons, like non-deposit of money by the retailers in time, non-deposit of basic license fee, non-payment of supplied liquor etc. Not a single retailer has made a complaint and therefore, it is clear that none had suffered any financial loss, due to the supply made by the petitioner. It was further pleaded that the petitioner is trying to maintain the supply, however, because of personal problems, the retailers do not lift the

supply. It was also mentioned that in case of breach of contract by one party, if another party has not suffered any financial loss, then the another party cannot sue for damages or for payment of compensation.

It appears that the representative of the petitioner, appeared before the Excise Commissioner on 8-4-2013, and submitted that because of non-maintenance of minimum stock, the State has not suffered any financial loss, and even not a single shop was closed down for want of country liquor and none of the retailer has demanded any compensation.

The reply submitted by the petitioner was not accepted by the Excise Commissioner, and after verification of records, it was found that in Dewas Warehouse, the petitioner had not maintained the minimum stock for a period of 56 days during period from April 2011 to September 2011, in the Sonkachh Warehouse, the minimum stock was not maintained for a period of 104 days during the period of April 2011 to September 2011 and in Kannod Warehouse, the minimum stock was not maintained for a period of 44 days during the period April 2011 to September 2011 and accordingly, the Excise Commissioner by order dated 3-12-2013 imposed the penalty of Rs. 1,28,500/- under Rule 12 of M.P. Country Spirit Rules, 1995.

Challenging the order passed by the Excise Commissioner, Madhya Pradesh, Gwalior, the Petitioner, filed an appeal before the Board of Revenue, which too has suffered dismissal by the impugned order dated 10-9-2015 passed in Appeal No. 152-Chairman/14.

Challenging the orders passed by the Board of Revenue and the Excise Commissioner, it is submitted by the Counsel for the Petitioner that Rule 2(a) and (b) of Spirit Rules, 1995 defines Bottling Unit and Storage Warehouse. Rule 4(4) of Spirit Rules, 1995 provides for maintaining minimum stock.

It is submitted that as per Rule 5(b) of Spirit Rules, 1995, any retail vendor may raise an objection regarding the quality of spirit before taking delivery. All such objections shall be submitted to the Warehouse Officer, whose decision thereon shall be final and binding ont eh parties.

It is further submitted that Penalties have been provided under Rule 12 of Spirit Rules, 1995, and a Penalty can be imposed only by way of punishment, if any loss is caused to the State or to the retail vendor. It is further submitted that the Penalty must not be imposed merely because it is lawful to do so and mere existence of power does not justify its exercise. Unless and until, the loss is quantified, the penalty cannot be imposed and Penalty should not be used as a tool to extort money. It is further submitted that under Rule 4 of Rules of Procedure of Board of Revenue, if a member wants to take a substantial departure from an earlier decision of a Member sitting single, then he shall refer the proceeding pending before him to the President with recommendation that it be placed before the Division Bench. It is submitted that on an earlier occasion, the Board of Revenue had given a judgment in favor of the licensee which was upheld by the High Court, therefore, the earlier order passed by the Board of Revenue

is binding on it, and if the single member was intending to take a substantial departure from the first judgment, then he should have referred the matter to the President and should not have decided the matter on his own. It is further submitted that as per the provisions of Section 73 and 74 of Contract Act, unless and until the loss is quantified, the penalty cannot be imposed. It is further submitted that the authorities have not checked the record and there is no basis for the authorities to come to a conclusion that the minimum stock was not maintained. To buttress his contentions, the Counsel for the Petitioner, has relied upon the Judgments passed by the Supreme Court in the cases of **Hindustan Steel vs. State of Orissa** reported in **AIR 1970 SC 253, Masum Hussain vs. State of M.P. & Ors.** reported in **AIR 1981 SC 1680, Rattan Bai & Anr. vs. Ram Das & Ors.** reported in **2012(3) SCC 248, Union of India vs. Rampur Distillery & Chemical Co. Ltd.** reported in **AIR 1973 SC 1098, Gwalior Distillers Limited vs. Collector (Excise) & Ors.** reported in **2002 (4) MPHT 12, Ujjain Charitable Trust Hospital vs. State of M.P.** reported in **2010(3) MPLJ 29, Bir Bajrang Kumar vs. State of Bihar** reported in **AIR 1987 SC 1345, Akbar Badrudin Jiwani of Bombay vs. Collector of Customs, Bombay** reported in **AIR 1990 SC 1579 and Mena Transport (Ms.) vs. Assistant Commissioner of Commercial Tax & Ors.** reported in **ILR 2016 MP 371.**

Per contra, it is submitted by the Counsel for the State that under Rule 12 of Spirit Rules, 1995, the penalty is not

imposed for the loss sustained by the State, but it is a deterrent measure, so that the minimum stock is maintained in the warehouse and the Country liquor can be supplied, in order to avoid the sale of spurious Country Liquor. It is further submitted that Rule 5(1)(b) of Spirit Rules, 1995, would apply in case of any dispute with regard to quality of the Spirit and only then the warehouse officer, would be the competent authority to give decision, but Rule 5(1)(b) of Spirit Rules, 1995, would not apply in case of short supply/quantity. It is further submitted that Section 73 and 74 of Contract Act, would not apply as the quantification of loss or damage is not a condition precedent for imposing the penalty under Rule 12 of Spirit Rules, 1995. It is submitted that so far as the question of non-maintenance of minimum stock is concerned, the said finding is based on the stock register, and further, even the petitioner had accepted before the Excise Commissioner, that because of non-maintenance of minimum stock, the State had not suffered any financial loss. It is further submitted that since, the challans remained pending, it is clear that there was no spirit in the storage warehouse and the submission made by the petitioner, that the challan may remain pending for any reason, is a far fetched imagination and the pendency of the challan has to be understood in the light of the default committed by the petitioner, in not maintaining the minimum stock.

Heard the learned Counsel for the parties.

Before considering the submissions made by the Counsel for the parties, this Court thinks it apposite to consider the purpose of maintaining the minimum stock in

Storage Warehouse.

"Storage Warehouse" has been defined in Rule 2 (b) of Spirit Rules, 1995 which reads as under :

> "2(b)"Storage Warehouse" means a bonded liquor warehouse wherein bottled country liqure is received from a "bottling Unit" for storage and issuance to retail licencies."

"bottling unit" is defined in Rule 2(a) of Spirit Rules, 1995, which reads as under :

> "2(a) "Bottling unit" means a building or place wherein rectified spirit for the manufacture of country liquor is receive, stored,reduced, bottled at issue strength, sealed and issued to storage Warehouse."

Thus, where the manufactured spirit which is reading for issuance to retail licensees, is stored in "storage warehouse" whereas the rectified spirit, required for manufactured of country liquor is stored in "bottling unit".

Rule 4(4) of Spirit Rules, 1995 reads as under :

> **"4 Manufacture and Bottling :** (1).....
>
> (2).....
> (3).....
> (4) (a) The licensee shall maintain at each "bottling unit"a minimum stock of bottled liquor and rectified spirit equivalent to average issues of five and seven days respectively of the preceding month. In addition, he shall maintain at each "storage warehouse" a minimum stock of bottled liquor equivalent to average issue of five days of the preceding month ;
> Provided that in special circumstances, the Excise Commissioner may reduce the above requirement of maintenance of minimum stock of rectified spirit and/or sealed bottles in respect of any "bottling unit" or "storage warehouse".
> (5).....
> (6).....
> (7).....

(8).....
(9).....
(10).....
(11).....
(12).....
(13).....
(14).....
(15).....

As per the provisions of Rule 4(4) of Spirit Rules, 1995, the licensee is under obligation to maintain the minimum stock of bottled liquor equivalent to average issues of five days of the preceding month. The basic purpose of maintaining the minimum stock of spirit in the storage warehouse is to supply the spirit in case of additional demand. Thus, for maintaining the balance between the demand and supply, the licensee is required to maintain the minimum stock in the storage warehouse, so that in case of non-supply of liquor to meet the higher demand of spirit/liquor, the spurious spirit is not sold in the market. Thus, the basic purpose of maintaining the minimum stock in the storage warehouse is to deal with every/urgent situation and that is why, no fixed minimum quantity has been prescribed under the Rules, but it fluctuates in accordance with the average issues of five dates of the preceding month. My view is fortified by the judgment passed by the **Delhi High Court in the case of Union of India Vs. Central Distillary and Breweries Ltd.** reported in **(2002) 98 DLT 275** which reads as under :

> "33. The purpose for which the minimum stock is required to be kept is not in dispute i.e., to avoid use of spurious liquor. The purpose and object to make such rules is thus in public interest."

Thus, the maintenance of minimum stock in the storage warehouse equivalent to average issues of five days of the preceding month is mandatory and the petitioner cannot get away from the liability of maintaining minimum stock in the storage warehouse, on the ground that non-maintenance of minimum stock had not effected the State adversely.

The next question for determination is that whether the petitioner had disputed the allegation that the minimum stock as per Rule 4(4) of Spirit Rules, 1995 was not maintained and whether the petitioner has succeeded in establishing that the minimum stock was maintained by it, as per the mandatory provisions of Rule 4(4) of Spirit Rules, 1995.

If the reply filed by the petitioner before the Excise Commissioner is considered, then the only stand of the petitioner was that the challans may remain pending for various reasons, but the show cause notice was issued alleging specifically that the challans had remained pending due to non-maintenance of minimum stock. Thus, it was obligatory on the part of the petitioner to show cause that the challans had not remained pending due to lack of minimum stock and the petitioner has miserably failed to do so. Even in the memo of appeal filed before the Board of Revenue, the petitioner had pleaded that because of non-maintaining of minimum stock by the petitioner, no financial loss was caused to the State. Ground 5 and 6 raised in memo of appeal reads as under :

> "5. यह कि, आसवक द्वारा यह भी बताया कि देवास जिले के साथ ही आवंटित मघ भाण्डारागारों मे प्रदाय

व्यवस्था पूर्ण रूप से सतत् जारी रही हैं। ***मघ भाण्डागार देवास, सोनकच्छ, कन्नौद पर बोतल बंद मदिरा का निर्धारित न्यूनतम संग्रह नही रखने से शासन को कोई हानि नही हुई है***। फुटकर ठेकेदारों को मांग के अनुसार मदिरा का प्रदाय दिया गया है। कोई चालान लंबित नही रहे है। मदिरा के अभाव मे दुकाने बंद नही रही है न ही किसी फुटकर ठेकेदार द्वारा देशी मदिरा दुकाने बंद रहने के कारण क्षतिपूर्ति की मांग ही की गई है। इस प्रकार अपीलार्थी कम्पनी द्वारा दिये गये जवाब पर विधिवत् विचार किये बिना जो आदेश अधीनस्थ न्यायालय/कार्यालय द्वारा दिया गया है नितांत अवैध एवं अनुचित होने से अपास्त किये जाने योग्य है।

6. यह कि, अपीलार्थी कम्पनी द्वारा निर्धारित अवधि मे न्यूनतम संग्रह नही रखने के कारण राज्य शासन को किसी भी प्रकार की कोई हानि नही हुई और न ही प्रदाय प्रभावित हुआ और न ही किसी भी फुटकर लायसेंसी द्वारा हुए नुकसान की पूर्ति की मांग शासन से नही की है। अतः इस प्रकार कम्पनी के उक्त कृत्य से राज्य शासन को क्या हानि हुई है यह एक कल्पना मात्र है। इस प्रकार प्रमाण के अभाव मे जो शास्ति अपीलार्थी कम्पनी पर लगाई गई है वह स्थिर रखे जाने योग्य नही है।''

Thus, it is clear that it has not been disputed by the petitioner himself, that it had not maintained the minimum stock as required under Rule 4(4) of the Rules, but its stand was that due to non-maintenance of minimum stock, no financial loss was caused to the State. In absence of any dispute with regard to the allegation of non-maintenance of

minimum stock by the petitioner, it is held that the petitioner had failed to maintain the minimum stock as required under Rule 4(4) of the Spirit Rules, 1995.

It is next contended by the Counsel for the Petitioner, that the penalty cannot be imposed, merely because there is provision and the penalty can be imposed only in case of damages, loss or mens rea. To buttress his contentions, the Counsel for the petitioner, has relied upon the provisions of Section 73 and 74 of Contract Act.

Section 73 and 74 of Contract Act reads as under :

> **"73. Compensation for loss or damage caused by breach of contract.—** When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> **Compensation for failure to discharge obligation resembling those created by contract.—**When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
>
> *Explanation*.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the

inconvenience caused by the non-performance of the contract must be taken into account.

74. Compensation for breach of contract where penalty stipulated for. — When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

It is submitted that as no financial loss was caused to the State Govt, due to non-maintenance of minimum stock, therefore, the penalty should not have been imposed.

It is well established principle of law that trade in

liquor is merely a privilege and not a fundamental right. The Supreme Court in the case of **State of Punjab Vs. Devans Modern Breweries Limited,** reported in **(2004) 11 SCC 26** has held as under :

> **"113.** In my opinion, Articles 301 and 304(*a*) of the Constitution are not attracted to the present case as the imposition of import fee does not, in any way, restrict trade, commerce and intercourse among the States. In my opinion, the permissive privilege to deal in liquor is not a "right" at all. The levy charged for parting with that privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with the privilege. In this context, we can usefully refer to *Har Shankar* v. *Dy. Excise and Taxation Commr.* and *Panna Lal* v. *State of Rajasthan*. As noticed earlier, dealing in liquor is neither a right nor is the levy a tax or a fee. Articles 301-304 will be rendered inapplicable at the threshold to the activity in question. Further, there is not even a single judgment which upholds the applicability of Articles 301-304 to the liquor trade. On the contrary, numerous judgments expressly hold these articles to be inapplicable to trade, commerce and intercourse in liquor. We can beneficially refer to the judgments in *State of Bombay* v. *R.M.D. Chamarbaugwala*, *Har Shankar case*, *Sat Pal and Co.* v. *Lt. Governor of Delhi* and *Khoday case*. The learned counsel for the respondent submitted that Articles 301-304 are violated or transgressed. In view of discussions in the paragraphs above, it is clearly demonstrated as to how and why Articles 301-304 are inapplicable to liquor trade in any form."

The Supreme Court in the case of **Synthetics and**

Chemicals Ltd. Vs. State of U.P. reported in **(1990) 1 SCC 109** has held as under :

> **"105.** The basis of the privilege doctrine appears to be that alcoholic drinks or intoxicating drinks are expected to be injurious to health and therefore the trade in these commodities is described as obnoxious and therefore a citizen has no fundamental right under Article 19(1)(*g*) of the Constitution and therefore the trade in alcoholic drinks which is expected to be injurious to health and obnoxious is the privilege of the State alone and the State can part with this privilege on receipt of the consideration."

The Supreme Court in the case of **Khoday Distilleries Ltd. Vs. State of Karnataka** reported in **(1995) 1 SCC 574** has held as under :

> **"60.** We may now summarise the law on the subject as culled from the aforesaid decisions.
>
> (*a*) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(*a*) to (*g*) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.
>
> (*b*) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation,

trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium*, (outside commerce). There cannot be business in crime.

(*c*) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

(*d*) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

(*e*) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the

liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(*f*) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercium*. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(*g*) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(*h*) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.

(*i*) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be

carrying on an illegitimate business.

(*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.

(*k*) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same in the interests of general public.

(*l*) Likewise, the State cannot prohibit trade or business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19(6) of the Constitution.

(*m*) The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage."

The Supreme Court in the case of **State of Kerala Vs. Kandath Distilleries** reported in **(2013) 6 SCC 573**

has held as under :

> "24. Article 47 is one of the directive principles of State policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. The State has, therefore, the exclusive right or privilege in respect of potable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni* v. *Shamrao Tukaram Power*, *P.N. Kaushal* v. *Union of India*, *Krishan Kumar Narula* v. *State of J&K*, *Nashirwar* v. *State of M.P.*, *State of A.P.* v. *McDowell & Co.* and *Khoday Distilleries Ltd.* v. *State of Karnataka*."

Thus, it is clear that where the petitioner is well aware of the provisions of law governing and regulating the

business of liquor or was aware of the terms of auction, then the bidder cannot wriggle out of the contractual obligations.

The Supreme Court in the case of **State of Haryana v. Lal Chand,** reported in **(1984) 3 SCC 634,** has held as under :

> **"8.** In *Har Shanker* v. *Deputy Excise and Taxation Commissioner* this Court held that the writ jurisdiction of the High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purposes of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. Chandrachud, J. (as he then was) interpreting the provisions of the Punjab Excise Act, 1914 andof the Punjab Liquor Licence Rules, 1956 said: (SCC pp. 745-46, para 16)
>
> "The announcement of conditions governing the auctions was 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 the 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 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."
>
> To the same effect are the decisions of this Court in *State of Haryana* v. *Jage Ram* and the *State of Punjab* v. *Dial Chand Gian Chand & Co.* laying down that persons who offer their bids at an auction to vend country liquor with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Article 226 of the Constitution."

The Supreme Court in the case of **State of Punjab Vs. Devans Modern Breweries Ltd.,** reported in **(2004) 11 SCC 26** has held as under :

> **"139.** In the case of *State of Haryana* v. *Lal Chand* this Court 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 by filing writ petition.
>
> **140.** In the case of *State of Punjab* v. *Dial Chand Gian Chand and Co.* this Court held that a licensee who participates in the auction voluntarily and with full knowledge is bound by the bargain and the writ petition filed under Article 226 by such licensee in an attempt to dictate terms of

> the licence without paying the licence fee must fail. The highest bidder after acceptance of his bid cannot challenge the second auction on the ground of adverse effect on his business."

Thus, it is clear that when the petitioner had participated in an auction and had obtained license to supply country liquor, then he cannot avoid either the provisions regulating the trade in liquor or cannot avoid the terms and conditions of license or auction.

In the present case, it is the case of the petitioner, that since, the State had not suffered any financial loss, therefore, even in the case of non-maintenance of minimum stock, no penalty can be recovered. Penalty is provided under Rule 12 of Spirit Rules, 1995 which reads as under :

> **"12. Penalties : (1)** Without prejudice to the provision of the conditions of the C.S.1 licence and save where provisions is expressly made for any other penalty in these rules, the Excise Commissioner may impose upon C.S. 1 licensee a penalty not exceeding Rs. 2,00,000 for any breach or contravention of any of these rules or the provisions of Madhya Pradesh Excise Act, 1915 or rules made thereunder or orders of the Excise Commissioner and may further impose in the case of continued contravention an additional penalty not exceeding Rs. 1,00,000 for every day during with the breach or contravention is continued.
>
> **(2)** Deleted
>
> **(3)** Deleted
>
> **(4)** In the event of failure to dispatch the spirit requisitioned under rule 5(4)(d), the D-1 or C.S. 1 licensee shall be liable to such penalty not exceeding RS. 2/- per proof litre impossible by the Excise Commissioner

> on the quantity of spirit thus short supplied.
>
> **(5)** The Excise Commissioner may suspend or cancel the licence under Section 31 of hte Act and may also black list the licensee upon a breach or contravention of any of these rules or of the provisions of Act or of the rules made thereunder. The licensee shall be liable for any loss caused to Government as a result of suspension or cancellation.
>
> **(6)** On all losses in excess of the limits allowed under rule 10, the licensee shall be liable to pay penalty at a rate not exceeding the duty payable per proof litre on country spirit at that time, as may be imposed by the Excise Commissioner or any officer authorised by him:
>
> Provided that if it be proved to the satisfaction of the Excise Commissioner or the authorized officer that such excess deficiency or loss was due to some unavoidable causes like or accident and its first information report was lodged in concerned police station, he may waive the penalty imposable under this sub-rule."

From the plain reading of Rule 12 of Spirit Rules, 1995, it is crystal clear that the penalty is imposable on breach or contravention of any of these rules or the provisions of M.P. Excise Act. Thus, it is clear that penalty under Rule 12 of Spirit Rules, 1995 is not imposed for the loss sustained by the State.

The Supreme Court in the case of **R.S. Joshi etc. Vs. Ajit Mills and another** reported in **AIR 1977 SC 2279** has held as under :

> **"19**. The same connotation has been imparted by our Court too. A Bench has held:*
>
> "According to the dictionary meaning of the word 'forfeiture' the loss or the

deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture."

This word 'forfeiture' must bear the same meaning of a penalty for breach of a prohibitory direction. The fact that there is arithmetical identity, assuming it to be so, between the figures of the illegal collections made by the dealers and the amounts forfeited to the State cannot create a conceptual confusion that what is provided is not punishment but a transference of funds. If this view be correct, and we hold so, the legislature, by inflicting the forfeiture, does not go outside the crease when it hits out against the dealer and deprives him, by the penalty of the law, of the amount illegally gathered from the customers. The Criminal Procedure Code, Customs and Excise Laws and several other penal statutes in India have used diction which accepts forfeiture as a kind of penalty. When discussing the rulings of this Court we will explore whether this true nature of 'forfeiture' is contradicted by anything we can find in S. 37 (1), 46 or 63. Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no fault liability but must be preceded by mens rea. The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that

Section 37 (1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty.

* Bankura Municipality v. Lalji Raja and Sons : AIR 1953 SC 248, 250.

* * * * *

58. The controversy therefore centres mainly on the question whether the provision as to the forfeiture in the impugned section is a penalty or whether it is merely a device to collect the amount unauthorisedly realised by the dealer. The plea of a device or colourable legislation would be irrelevant if the legislature is competent to enact a particular law. The question is one of competence of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law the motive which impelled it to act is not relevant. After the decision in Abdul Quader's case (AIR 1964 SC 922) where it was pointed out that it was competent for the legislature to provide penalties for the contravention of the provisions of the Act for its better enforcement, the provision in an enactment levying such a penalty cannot be challenged.

* * * * *

61. Mr. Kaji next submitted that forfeiture if it is to be penalty would be confined to acts where there is a guilty mind. In other words he submitted that the penalty would be confined only to wilful acts of omission and commission in contravention of the provisions of the enactment. This plea cannot be accepted as penal consequence can be visited on acts which are committed with or without a guilty mind. For proper enforcement of various provisions of law it is common knowledge that absolute liability is imposed and acts without mens rea are made punishable."

As it is evident from Rule 12 of Spirit Rules, 1995, that the penalty is imposed for contravention or breach of any of the Rule and not by way of punishment for committing any offence, therefore, mens rea or actual loss to the other party of the contract are not necessary. Where a provision, which is in public interest, has been made, then for its better enforcement, if the penalty is provided, then it is within the legislative competence and mens rea is not necessary. Mere contravention or Breach of any of the Rule is sufficient to invite the imposition of Penalty. As already held that the petitioner himself has admitted that there was a lapse on the part of the petitioner, in maintaining the minimum stock of spirit in the storage spirit. Thus, where contravention or breach of any rule has been established, then the authorities are well within their right to impose the penalty for such contravention or breach.

It is next contended by the Counsel for the petitioner, that Rule 4 of Spirit Rules, 1995 is ultra vires.

The validity of the Rule 4 of Spirit Rules, 1995 cannot be considered by this Court, in absence of specific challenge as to the constitutional validity of the Rules. However, the validity of Rule 4(4) of Spirit Rules, 1995 has already been upheld by a Division Bench of this Court by **order dated 14-9-2018 passed** in the case of **Gwalior Alcobrew Pvt. Ltd. Vs. State of M.P. (W.P. No. 525 of 2017).** This Court has held as under :

> "(23) In view whereof the impugned Rule 4 of M.P. Country Spirit Rules, 1995 and Rule 4(4) of M.P. Distillery Rules, 1995 cannot be held to be ultra vires, the

provisions of Act, 1915."

It is next contended by the Counsel for the Petitioner, that in view of Section 73 and 74 of Contract Act, the penalty can be recovered only in case of some damages.

The Delhi High Court in the case of **Central Distilleries and Breweries (Supra)** has held as under :

> "44. The submission of the learned Counsel for the petitioner to the effect that Section 74 of the Contract Act will be attracted in a case of this nature, in our opinion cannot be accepted. It is not a case where the parties have, by reason of an agreement, agree to pay pre-estimated damages. As indicated hereinabofe, by reason of the Rule 21, penalty can be imposed as to the extent of Rs. 2/- per proof litre. Thus, the concept of Section 74 of the Indian Contract cannot be brought in Rule 21 of the Rules."

It is next contended by the Counsel for the Petitioner that as per the provisions of Rule 4 of Rules of Procedure of Board of Revenue, if a single member wants to take a substantial departure from an earlier decision of a Member sitting single, he shall refer the proceeding pending before him to the President with recommendation that it be placed before the Division Bench. The Board of Revenue, on an earlier occasion, had set aside the order of the Excise Commissioner, and thus, the said order was binding on the Single Member of the Board of Revenue and in case, if the single member was intending to take a substantial departure, then he should have referred the matter to the President of the Board of Revenue with a recommendation

to place the same before the Division Bench. It is further submitted that the said earlier order of the Board of Revenue was also challenged by the State Government by filing the writ petition, before this Court, which was registered as W.P. No. 10997/2013 and the said writ petition was dismissed by order dated 1-7-2013 and the order of the Board of Revenue was affirmed, therefore, on this ground also, the order of the Board of Revenue is liable to be quashed.

Heard the learned Counsel for the Petitioner.

I have gone through the order dated 1-7-2013 passed by this Court in W.P. No. 10997/2013. The High Court had upheld the order of the Board of Revenue, on the ground that before imposing the penalty, the Excise Commissioner had not given any notice to the licensee, whereas in the present case, admittedly, not only the notice was given to the petitioner, but the petitioner had also participated in the proceedings before the Excise Commissioner. Accordingly, the submission made by the Counsel for the Petitioner is of no assistance to him.

Secondly, the Board of Revenue might be governed by its Rules of Procedure, but the High Court, can always test the correctness of the reasons assigned by the Member, Board of Revenue. Thus, the High Court cannot be asked to interfere with the order of the Member of Board of Revenue only on the ground that since, the single member had not made a recommendation to the President of the Board of Revenue, for referring the matter to the Division Bench of the Board of Revenue, therefore, the order of Single Member, Board of Revenue is bad. Rule 4 of the

Rules of procedure of Board of Revenue is meant to regulate the working of the Board of Revenue but the order of the Board of Revenue is not binding on the High Court, therefore, irrespective of the fact that whether the single member should have referred the matter to the Division Bench of the Board of Revenue or not, the High Court, can always test the correctness of the order of the Single Member of Board of Revenue. Hence, this contention of the Counsel for the Petitioner is rejected.

No other argument is advanced by the Counsel for the Petitioner. Thus, this Court is of the considered opinion, that no illegality could be pointed out by the Petitioner in the order of the Excise Commissioner as well as in the order of Board of Revenue. Hence, this petition fails and is hereby **Dismissed.**

The interim order granted on earlier occasion is hereby **Vacated.**

(G.S. Ahluwalia)
Judge

(alok)