

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18<sup>TH</sup> DAY OF FEBRUARY, 2021

PRESENT

THE HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA

AND

THE HON'BLE MR. JUSTICE V.SRISHANANDA

WRIT APPEAL NO.3834/2019

BETWEEN:

HIP BAR PVT. LTD.,  
REPRESENTED BY ITS DIRECTOR  
MR.PRASANNA NATARAJAN  
HAVING ITS REGISTERED OFFICE AT  
NO.34, 1<sup>ST</sup> FLOOR  
B.RAMACHANDRA ADITHANAR ROAD  
(4<sup>TH</sup> MAIN ROAD)  
GANDHI NAGAR, ADYAR  
CHENNAI-600 020

AND HAVING ITS BRANCH OFFICE AT:  
NO.602, 2<sup>ND</sup> FLOOR, 3<sup>RD</sup> B CROSS  
6<sup>TH</sup> MAIN, 2<sup>ND</sup> BLOCK, HRBR  
BANGALORE-560 043

...APPELLANT

(BY SRI.K.G.RAGHAVAN, SR. ADV., FOR  
SRI.HITESH KUMAR AND  
SMT.NIVEDITA SHENOY, ADV.)

AND:

STATE OF KARNATAKA  
THROUGH THE COMMISSIONER  
EXCISE DEPARTMENT  
2<sup>ND</sup> FLOOR, TTMC BUILDING  
A BLOCK, BMTC, SHANTHINAGAR  
BANGALORE-560 027

... RESPONDENT

(BY SRI.I.THARANATH POOJARY, AGA)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE IMPUGNED ORDER DATED 13/09/2019 PASSED BY THE LEARNED SINGLE JUDGE OF THIS HON'BLE COURT IN WP NO.6448/2019 AND ETC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, THIS DAY **SATISH CHANDRA SHARMA J.**, PRONOUNCED THE FOLLOWING:

**JUDGMENT**

The present writ appeal is arising out of the order passed by the learned Single Judge in WP No.6448/2019 (HIP BAR Pvt. Ltd. vs. State of Karnataka).

2. The appellant- Hip Bar Pvt. Ltd. before this Court is a company incorporated under the Companies Act, 2013. It is a FinTech Company offering a Semi-Closed Pre-paid Instrument (Mobile Wallet) to its customers.

3. The facts of the case would reveal that the Reserve Bank of India (RBI) has issued Certificate of authorization to the appellant for operation of Semi-Closed Pre-Paid Instrument Mobile Wallet under the Payments and Settlements Act, 2007 (hereinafter referred to as 'PSS Act of 2007'). The facts of the case would further reveal that the appellant contended before the learned Single Judge that appellant by itself does not sell any goods and the transaction of sale takes place between the user of the Mobile application and the owner of the licensed

premises. The facts would further reveal that the appellant has developed the Mobile Wallet which can be specifically used for paying for purchase of alcoholic beverages in retail outlets as well as Bars/Pubs, which have an arrangement with the appellant company. It is further stated that through the mobile wallet and platform designed by the appellant, the registered users can also opt to have alcoholic beverages delivered to their residence and for such users, the appellant delivers alcoholic beverages to their doorstep after following a stringent protocol for age and identity verification. It is further stated by the appellant that after starting Mobile Wallet, the appellant wrote to the respondent on 16.11.2016 explaining its proposed service and the benefits of the appellant's mobile wallet as a payment mechanism for purchase of alcoholic beverages from licensed retail outlets and also requested the respondent for a meeting to explain the entire process. The respondent requested the appellant/petitioner to approach the Liquor Dealers Association vide letter dated 08.12.2016 with regard to the benefits of the digital payments of the liquor trade and as requested by the respondent, the appellant explained the use of mobile application and technology and also informed the respondent vide letter dated 17.02.2017 stating that the first service of mobile wallet would be launched from 18.02.2017 in

Bengaluru, Karnataka. The petitioner thereafter approached the respondent in June, 2017 with its proposed business plans for collection and concierge services for home delivery of alcoholic beverages to the end customers and the appellant's contention is that though the consent was not required from the respondent in terms of the provisions of the Act, the appellant approached the respondent with a view to maintain transparency and the larger objective of working in tandem with the State authorities to achieve its objectives. The appellant made a presentation at the office of the respondent on 23.06.2017 explaining the benefits of its mobile application, which was followed by a detailed letter dated 04.07.2017 and finally on 01.08.2017, a "Letter of Authority" (hereinafter referred to as 'LOA' was issued by the respondent for "Online Order processing and Delivery of Indian and Foreign Liquor including Beer, Wine and LAB". The appellant has further stated that no such 'Letter of Authority' was required under the Karnataka Excise Act 1965 or the Rules framed thereunder and the regulations do not prescribe such a requirement and the petitioner has not applied for any such letter of authority. It is further stated that in the letter of authority certain conditions were mentioned like selling liquor to underage, individuals, prohibition of sale of liquor in public spaces, etc., The

appellant has further stated certain information was sought under the LOA and the same was replied vide letter dated 17.08.2017. That the appellant started service of delivering alcoholic beverages to its consumers strictly by following the protocol from September, 2017 ('Home Delivery Service') and also permitted the respondent to access all the data of the appellant including the orders placed by each consumer, live tracking of the delivery executive and proposed delivery destination, daily reports of deliveries made during the day were provided to the respondent on the next business day by email. The appellant further stated that vide letter dated 14.06.2018, the appellant sought for the renewal of the LOA as it was valid up to 30.06.2018 and the LOA was renewed on 06.07.2018 for a period of one year up to 30.06.2019. Thereafter, an order was issued by the respondent dated 03.11.2018 recalling the earlier letter of authority issued for the year 2017-18 i.e., online order processing and delivery of Indian and Foreign Liquor including Beer, wine and LAB from shop to the door step of the consumer through mobile wallet was withdrawn. The petitioner/appellant herein being aggrieved by the aforesaid order dated 03.11.2018 filed a writ petition with the following reliefs:

*"a. Stay the impugned Letter dated 03.11.2018 bearing ref. No. ICD/50/REV/GEN/2016-17 (Annexure-AF);*

*b. Grant an interim injunction restraining the Respondent from interfering with the business of online order processing and delivery of Indian and Foreign Liquor including Beer, Wine and LAB carried out by the petitioner in the State of Karnataka;*

*c. Pass such or further orders as this Hon'ble Court deems fit in the interests of justice and equity."*

4. A reply was filed on behalf of the respondent-State in the writ petition. The respondent-State in its reply has submitted that the petition itself was not maintainable and it was further stated that the existence of a legal right of a person which is alleged to have been violated is the foundation for invoking the jurisdiction under Article 226 of the Constitution of India. It was contended that the petitioner has no fundamental right to trade in liquor. It was further contended that Entry 8 of List II Schedule VII of the Constitution empowers the State Government to legislate with regard to intoxicating liquors i.e., production, manufacture, possession, transport, purchase and sale of intoxicating liquors and Entry 51 empowers the State legislature to levy duties of Excise and countervailing duties

and under Entry 8, there may be an absolute prohibition of sale of liquor. A citizen has no fundamental right to carry on trade or business in liquors. Reply of the State further reveals that the contention of the petitioner that he does not require licence or permission to conduct business of online order processing and delivery of Indian and Foreign Liquor including Beer, Wine and Low Alcoholic Beverages (LAB) is not correct as Sections 13, 14 and 15 of the Act prohibits manufacture, possession and sale of any excisable article without the licence. The respondent has further stated that the petitioner does not have licence granted by the RBI for sale and purchase of the liquor and the contention of the petitioner that it is only a facilitator and delivering liquor in respect of the purchase which has taken place at the shop itself is not correct. The respondent has admitted issuance of LOA dated 01.08.2017. Further, it has been stated that initially letter of authority (LOA) issued to the petitioner for processing online order and delivery was only on a trial and experimental basis, he was operating only in Bengaluru BBMP limits. The Excise Department at some point of time felt that the same was not adaptable due to the huge objections from existing licensed stake holders and media buzz on social concerns. Reply further states that underage drinkers were turning to online retailers to buy alcohol, which is not

permissible in law and therefore keeping in view the various objections from all corners, the LOA was withdrawn. Further, it has been stated by the respondent that the Excise Act does not provide online selling of alcohol and the petitioner being the user of the mobile application initiated the sale transactions by purchasing the liquor from CL-2 licence holder and in turn had sold the same to the end consumer meaning thereby the liquor has not been sold directly by the CL-2 licence holder to the end use consumer, which is not permissible under the Act. The respondent further stated that the petitioner cannot be permitted to trade in liquor without obtaining a licence under the Act and the Rules made thereunder. It is prerogative of the State Government to deal with the IMFL and it has statutory power to grant CL-2 license to a person to sell the liquor in a licensed premises. The respondent has further stated that the petitioner on one hand makes statement that there is no requirement for any permission for selling the liquor through and mobile application and is on the other hand is challenging revocation of LOA as bad in law. It is further stated that the Excise Department is the sole authority of controlling the liquor trade in the State of Karnataka and therefore the petitioner cannot be permitted to carry out liquor business without having

any licence under the Excise Act and the Rules framed thereunder.

5. A rejoinder was also filed in the matter and this Court has taken into account the grounds raised by the petitioner.

6. The learned Single Judge, after taking into account the statutory provisions governing the field has dismissed the writ petition. Paragraphs-21 to 25 of the judgment reads as under:

*"WRIT OF MANDAMUS:*

*21. It is settled law that writ of mandamus cannot be granted unless the existing legal right of an applicant or an existing duty of the respondent has been established. The writ cannot be issued to create or establish a legal right, but to enforce that stood already established. The petitioner is neither a licensee*

*under the provisions of the Act, 1965 to carry on trade in liquor nor has a legal right under the statute to enforce its performance. Unless the legal right is established, corresponding legal duty imposed under the statute cannot be invoked. No prohibition for liquor in the State would not mean absolute liberty to deal in liquor trade. The business model of the petitioner cannot be held that it does not require authorization under any of the provisions of the Act, 1965. The petitioner taking shelter under the PSS Act cannot give*

*a go-bye to the provisions of the Act, 1965. Indeed, the Act, 1965 do not permit home delivery of alcohol either for oneself or as an agent of another. Hence, no writ of mandamus can be issued as prayed.*

22. At this juncture, it is beneficial to refer to the judgment of *Kandath Distilleries, supra*. The relevant paragraphs are extracted hereunder for ready reference;

*"30. The Legislature when confers a discretionary power on an authority, it has to be exercised by it in its discretion, the decision ought to be that of the authority concerned and not that of the Court. Court would not interfere with or probe in to the merits of the decision made by an authority in exercise of its discretion. Court cannot impede the exercise of discretion of an authority acting under the Statute by issuance of a Writ of Mandamus. A Writ of Mandamus can be issued in favour of an applicant who establishes a legal right in himself and is issued against an authority which has a legal duty to perform, but has failed and/or neglected to do so, but such a legal duty should emanate either in discharge of the public duty or operation of law. We have found that there is no legal duty cast on the Commissioner or the State Government exercising powers under Section 14 of the Act read with Rule 4 of the 1975 Rules to grant the licence applied for. The High Court, in our view, cannot direct the State Government to*

*part with its exclusive privilege. At best, it can direct consideration of an application for licence. If the High Court feels, in spite of its direction, the application has not been properly considered or arbitrarily rejected, the High Court is not powerless to deal with such a situation that does not mean that the High Court can bend or break the law. Granting liquor licence is not like granting licence to drive a cab or parking a vehicle or issuing a municipal licence to set up a grocery or a fruit shop. Before issuing a writ of mandamus, the High Court should have, at the back of its mind, the legislative scheme, its object and purpose, the subject matter, the evil sought to be remedied, State's exclusive privilege etc. and not to be carried away by the idiosyncrasies or the ipse dixit of an officer who authored the order challenged. Majesty of law is to be upheld not by bending or breaking the law but by strengthening the law."*

23. *In the case of Dr. Rai Shivendra, supra, the Hon'ble Apex Court has held thus;*

*"5. A great deal of controversy was raised before us as to whether the Statutes framed by the University under Section 20 of the University of Bihar Act have or have not the force of law and whether a writ under Article 226 of the Constitution has a legal right to the performance of a legal duty by the respondents. In order that mandamus may issue to compel the respondents to do*

*something it must be shown that the Statutes to enforce its performance. It is, however, wholly unnecessary to go into or decide this question or to decide whether the Statutes impose on the Governing Body of the College a duty which can be enforced by a writ of mandamus because assuming that the contention of the appellant is right that the College is a public body and it has to perform a public duty in the appointment of a Principal, it has not been shown that there is any right in the appellant which can be enforced by mandamus. According to the Statutes all appointment of teachers and staff have to be made by the Governing Body and no person can be appointed, removed or demoted except in accordance with Rules but the appellant has not shown that he has any right entitling him to get an order for appointment or reinstatement. Our attention has not been drawn to any article in the Statutes by which the appellant has a right to be appointed or reinstated and if he has not that right he cannot come to Court and ask for a writ to issue. It is therefore not necessary to go into any other question."*

24. The Hon'ble Apex Court in Rajasthan State, supra, has observed thus;

*"24. The primary purpose of the writ is to protect and establish rights, and to impose a corresponding imperative duty existing in law. It is designed to promote justice, (ex debito justiciae) and its grant or refusal is at*

*the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or establish a legal right but, to enforce one that stood already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter-alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for issuance of the writ is, whether or not substantial justice will be promoted. Furthermore, while granting such a writ, the court must make every effort to ensure from the averments of the writ petition, whether proper pleadings are being made. Further in order to maintain the writ of mandamus, the first and foremost requirement is that, the petition must not be frivolous and it is filed in good faith. Additionally, the applicant must make a demand which is clear, plain and unambiguous. It must be made to an officer*

*having the requisite authority to perform the act demanded. Furthermore, the authority against whom mandamus is issued, should have rejected the demand earlier. Therefore, a demand and its subsequent refusal, either by words, or by conduct are necessary to satisfy the court that the opposite party is determined to ignore the demand of the applicant with respect to the enforcement of his legal right. However, a demand may not be necessary when the same is manifest from the facts of the case, that is, when it is an empty formality, or when it is obvious that the opposite party would not consider the demand."*

*CONCLUSION:*

*25. In the light of the aforesaid judgments, it is clear that no writ of mandamus can be granted in the circumstances of the case. The petitioner is not entitled to carry on business of online order processing and delivery of liquor to the consumers in the State of Karnataka in the absence of enabling provision available under the Karnataka Excise Act, 1965 to grant such licence or permission.*

*For the foregoing reasons, both the questions framed are answered against the petitioner.*

*In the result, writ petition is dismissed. No order as to costs"*

7. Heard the learned counsel for the parties at length.  
Perused the record.

8. The appellant, before this Court, is a company incorporated under the Companies Act, 2013. Undisputedly, a FinTech Company was offering a Semi-Closed Pre-aid Instrument (Mobile Wallet) to its customers. The appellant-company submitted an application to the RBI and the RBI under the provisions of Payment and Settlement Act, 2007 (for short 'PSS Act') issued Certificate of Authorization (COA) to the appellant on 22.08.2016 permitting to operate mobile wallet. The appellant-company was meeting minimum requirement of Rs.15 Crores prescribed to obtain RBI authorization and has about 50 staff employed for development and operation of the mobile application. The statutory provisions which are relevant for adjudication of the present writ appeal are reproduced as under:

- i) Section 15, 39(1) and (2) of the Karnataka Excise Act, 1965,
- ii) Rule 3 of the Karnataka Excise (Sale of Indian and Foreign liquors) Rules, 1968
- iii) Rule 21 of the Karnataka Excise (Possession, Transport, Import and Export of Intoxicants) Rules, 1967
- iv) Rule 5, 10 of the Karnataka Excise Licences (General Conditions) Rules, 1967

**i) Section 15, 39(1) and (2) of the Karnataka Excise Act, 1965,**

***"15. Sale of excisable articles without licence prohibited.-*** (1) No intoxicant shall be sold except under the authority and subject to the terms and conditions of a licence granted in that behalf:

*Provided that, subject to such restrictions and conditions as the Excise Commissioner may by general or special order specify,-*

*(a) a person having the right to the toddy drawn from any tree may sell such toddy without a licence to a person licensed to manufacture or sell toddy under this Act;*

*(b) a cultivator or owner of any plant from which an intoxicating drug is produced may sell without a licence those portions of the plant from which the intoxicating drug is manufactured or produced, to any person licensed under this Act to sell, manufacture or export the intoxicating drugs or to any officer, whom the Excise Commissioner may generally or specially authorise.*

*(2) A licence for sale under sub-section (1), shall be granted,-*

*(a) by the Deputy Commissioner, if the sale is within a district, or*

*(b) by the Excise Commissioner, if the sale is in more than one district:*

*Provided that subject to such conditions as may be determined by the Excise Commissioner, a licence*

*for sale granted under the Excise law in force in any other State may be deemed to be a licence granted under this Act.*

*(3) Nothing in this section shall apply to the sale of any liquor lawfully procured by any person for his private use and sold by him or on his behalf or on behalf of his representatives in interest upon his quitting a station or after his decease.*

*(4) Notwithstanding anything contained in sub-sections (1) and (2), no club shall supply liquor to its members on payment of a price or of any fee or subscription except under the authority of and subject to the terms and conditions of a licence granted in that behalf by the Excise Commissioner and on payment of such fees according to a scale of fees to be fixed by the State Government in this behalf.*

**39. Manufacture, sale or possession by one person on account of another.-** **(1)** *Where any intoxicant has been manufactured or sold or is possessed by any person on account of any other person and such other person knows or has reason to believe that such manufacture or sale was or that such possession is, on his account, the article shall, for the purposes of this Act, be deemed to have been manufactured or sold by or to be in the possession of such other person.*

**(2)** *Nothing in sub-section (1) shall absolve any person who manufactures, sells or has possession of any intoxicant on account of another person from liability to any punishment under this Act for unlawful manufacture, sale or possession of such article.*

**ii) Rule 3 of the Karnataka Excise (Sale of Indian and Foreign liquors) Rules, 1968**

**"Licences - Licences for the vend of [Indian Liquor (other than arrack)] or Foreign liquor or both shall be of the following descriptions, namely-**

**[(1) x x x x  
(1-A) x x x x x ]**

**(2) Retail off shop licences for vend of Indian liquor or Foreign or both not to be drunk on the premises - Under these licences granted in Form C.L.2, the sale of liquor in sealed bottles to any person in a quantity less than 0.180 litres at a time is prohibited.**

**(3) x x x x x**

**(4) Licence to Clubs - The Agent, Secretary or Manager or any other person entrusted with the management of the business of the club shall apply and obtain licence in Form CL-4 from the Deputy Commissioner.**

**Explanation - For the purpose of this clause, a club means a body of persons registered under the Karnataka Societies Registration Act, 1960**

**Provided that no such licence under this clause shall be granted by the Deputy Commissioner, unless the following conditions are satisfied-**

**(1) the club shall have been registered under the Karnataka Societies Registration Act, 1960 for a period of not less than five years and there must be atleast 100 permanent members.**

**(2) It shall have its own land and building or shall have obtained it on lease for a term of eleven years or more.**

**(3) It shall have facility for outdoor games like, Tennis, Badminton, Volleyball etc., and indoor games like Carrom, Table Tennis etc. and a reading room or a library.**

**(4) It shall have adequate facilites for catering food and drinks to the members.**

(5) It shall have separate toilet with running water facilities for men and women:

Provided further that existing clubs to whom licences are granted under this clause for the excise year 2001-2002 shall be allowed to renew their licences under the rule existing prior to the commencement of the Karnataka Excise (Sale of Indian and Foreign Liquors) (First Amendment) Rules, 2002".

**(iii) Rule 21 of the Karnataka Excise (Possession, Transport, Import and Export of Intoxicants) Rules, 1967**

**"21. Case where permit or licence is not required.**- No permit or licence, under these rules, shall be required for the possession or transport of the following quantities of liquors.

	<b>Liquor</b>	<b>Quantity</b>
1	Toddy, in such areas of the State where the sale of toddy to public is allowed under sub-rule (4) of Rule 3 of the Karnataka Excise (Trapping of Trees) Rules, 1991	2.5 Litres
2	x x x x x	
3	x x x x x	
4	Country Beer	18.2 litres
5	Brandy, Whisky, Gin, Rum, Milk-Punch and such other liquors manufactured in Karnataka State or manufactured in other places in India and imported to Karnataka State, excluding Foreign liquors (imported)	4.6litres
6	Foreign Liquors (Imported)	9.1 litres
7	Denatured Spirit	750 Millilitres
8	x x x x	
9	Wines (including mass wine and sacramental wine)	9.0 litres
10	Fortified Wine	4.5 Litres

**(iv) Rule 5, 10 of the Karnataka Excise Licences (General Conditions) Rules, 1967**

**"5. Restriction in respect of location of shops.**- (1) No licence for sale of liquor shall be granted to a liquor shop or premises selected within a distance of 100 metres from any religious or educational institution or Hospital or any Office of the State Government or

*Central Government or Local Authorities or in a residential locality, where the inhabitants are predominantly belonging to Scheduled Castes or scheduled Tribes or within a distance of 220 metres from the middle of the State Highways or National Highways.*

*Provided that where a shop is sanctioned to a village the population of which is less than two thousand five hundred, such shop shall be located outside the residential locality of the village.*

**10. Liquor not to be sold to certain persons, etc.-**

(1) *No liquor shall be sold or otherwise given to the following persons, namely:-*

*(a) insane persons;*

*(b) persons known or believed to be drunk;*

*(c) persons known or suspected to be about to take part in a riot or disturbance of public peace or any other crime;*

*(d) Excise Officials, Police Officers, Railway Servants and Motor Bus Chauffeur, on duty, or in uniform;*

*(e) persons below the age of (twenty one years)*

*(2) No quantity of liquor shall be allowed to be taken out of the shop except to the extent permitted by the rules under Karnataka Excise Act, 1965.*

9. The petitioner-company though was having COA in respect of mobile wallet like other mobile wallets in the country, however started a new mobile App “**Hip Bar**” for delivering alcohol beverages to the end use consumer. In the State of Karnataka, the sale, purchase, possession, transportation and

import of intoxicants are governed under the Karnataka Excise Act, 1965 read with Karnataka Excise (Possession, Transport, Import and Export of Intoxicants) Rules, 1967. The relevant statutory provisions which are necessary for adjudication of the present writ appeal has already been reproduced earlier.

10. Undisputedly, the RBI has issued Certificate of Authorisation in favour of the appellant-company exclusively to set up and operate payment system for semi-closed prepaid payment instruments services in India. The relevant extract of the Certificate of Authorisation is quoted as under:

*"In exercise of the powers conferred on the Reserve Bank of India by Section 7 of the Payment and Settlement Systems Act, 2007, Hip Bar Private Limited, Chennai is hereby granted Certificate of Authorisation to set up and operate payment system for semi-closed prepaid payment instruments services in India with effect from August 22, 2016 as per the guidelines issued by Reserve Bank of India and subject to compliance with the terms and conditions given on the reverse of this certificate".*

11. The appellant wanted to venture delivery of liquor from the shop to the end use consumer with the use of mobile wallet, approached the respondent-State by submitting a representation on 23.06.2017 and sought permission to carry out the business. The appellant also made a live presentation

before the Commissioner and finally on 01.08.2017 the respondent (Excise Commissioner) issued Letter of Authority (LOA) or online order, processing and delivery of Indian and Foreign liquor including Beer, Wine and LAB. The statutory provisions under the Karnataka Act read with Rules does not have any provision for issuance of such letter of Authority.

11.1 That the appellant started services of delivery of alcohol beverages to its consumers in terms of protocol. The LOA dated 01.08.2017 was valid up to 30.06.2018 and the appellant vide letter dated 14.06.2018 sought renewal of LOA. The respondent-State thereafter renewed the LOA on 06.07.2018 for a period of one year up to 30.06.2019. The respondent-State (Excise Commissioner) ultimately withdrew the LOA vide letter dated 03.11.2018 and the petitioner being aggrieved by the withdrawal of LOA has filed a writ petition before this Court and the learned Single Judge has dismissed the writ petition.

11.2 The facts of the case reveal that the petitioner was having Certificate of Authorisation (COA) under the provisions of the PSS Act of 2007 and the aforesaid Act provides for payment system and it does not provide for purchase of goods from a shop and to deliver to its end use consumer. The appellant wants processing and delivery of online order in respect of

Foreign liquor including Beer, Wine and LAB. The PSS Act of 2007 was enacted with a view to regulate and oversee the various payment and settlement systems in the country including those operated by non-banks like Clearing Corporation of India Ltd. (CCIL), card companies, other payment system providers and the proposed umbrella organisation for retail payments. Section (c), (e), (h), (i) and (q) of the PSS Act of 2007 reads as under:

*"(c) "electronic funds transfer" means any transfer of funds which is initiated by a person by way of instruction, authorisation or order to a bank to debit or credit an account maintained with that bank through electronic means and includes point of sale transfers, automated teller machine transactions, direct deposits or withdrawal of funds, transfers initiated by telephone, internet and card payment;*

*(e)"netting" means the determination by the system provider of the amount of money or securities, due or payable or deliverable, as a result of setting off or adjusting, the payment obligations or delivery obligations among the system participants, including the claims and obligations arising out of the termination by the system provider, on the insolvency or dissolution or winding up of any system participant or such other circumstances as the system provider may specify in its rules or regulations or bye-laws (by whatever name called), of the transactions admitted for settlement at a future date so that only a net claim be demanded or a net obligation be owned;*

<https://indiankanoon.org/doc/97606241/>

(h) “*payment obligation*” means an indebtedness that is owned by one system participant to another system participant as a result of clearing or settlement of one or more payment instructions relating to funds, securities or foreign exchange or derivatives or other transactions;

(i) “*payment system*” means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange;

*Explanation .—For the purposes of this clause, “payment system” includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations;*

(q)“*system provider*” means a person who operates an authorised payment system.”

12. The PSS Act of 2007 empowers issuance of COA by the RBI only for a limited purpose of making online payments. The Act nowhere empowers a person to deliver the goods. It is only a payment system through electronic mode and therefore once the COA under the PSS Act, 2007 does not empower processing/delivery/facility of online order in respect of foreign liquor including Beer, Wine and LAB, the appellant cannot be permitted to deliver liquor by making online payment to end use consumer.

13. Learned counsel for the appellant placing reliance upon the judgment delivered in the case of **Sodexo SVC India Private Limited v. State of Maharashtra and others (2015) 16 SCC 479**, contended that he is also entitled to deliver liquor to the purchaser as he is simply act as a facilitator and the medium between the affiliater and the consumers.

14. In the aforesaid case, the appellant was doing business for providing preprinted meal vouchers to its customers i.e., establishments/companies having a number of employees on their rolls and had arrangements with various restaurants, departmental stores, shops etc. (affiliates) for utilization of vouchers. The appellant resisted imposition of local body tax (LBT) on the ground that establishments with whom it had entered into contracts was for providing services and not for sale of any goods. In those circumstance, the Hon'ble Supreme Court has held that the appellant was only a medium between the affiliater and the consumers and was providing service.

15. In the present case, this Court is dealing with sale purchase and transport of liquor and the same has to be done keeping in view the statutory provision under the Karnataka Excise Act, 1965 read with Karnataka Excise Licenses (General

conditions) Rules, 1967, the trade of liquor is having various restrictions imposed under the statutory provisions and delivery of liquor from shop to end use consumer cannot be compared with vouchers which were the subject matter in the judgment delivered in **Sodexo's** case (supra). Hence, the judgment distinguishable on facts.

16. Learned counsel for the appellant has also placed reliance upon the judgment delivered in the case of **Coffee Board, Karnataka, Bangalore v. Commissioner of Commercial Taxes, Karnataka and others (1988) SCR Sup(1) 348** in respect of essentials involved in the elements of sale. Paragraph-27 and 43 of the aforesaid judgment reads as under:

*"27. It was submitted by the learned Additional Solicitor General that these cases, namely, Bhavani Tea Estate (supra) and Vishnu Agencies (supra) would have no application within the set up of the Coffee Act because the provisions of the statute expressly provide that there could be no sale or contract of sale, yet the High Court had for purposes of Sales Tax assumed (notwithstanding the statutory prohibition) that the transaction contemplated by the statute in the present case, the mandatory delivery, would be a sale. It was submitted that where a statute prohibited a registered owner from selling or contracting to sell coffee from any registered estate, there could be no implication of*

*any purchase on the part of the Coffee Board of the coffee delivered pursuant to the mandatory provisions of section 25(1) of the Act. It was urged that section 17 of the Coffee Act read with sections 25 and 47 enacts what since 1944 is a total prohibition against the sale of coffee by growers and corresponding purchase of coffee from growers. In view of section 17 read with section 25, purchase by the Coffee Board of coffee delivered under section 25(1) was also impliedly prohibited. It is in view of this express prohibition of sale and corresponding implied prohibition of purchase that the Act provided the only method of disposal of coffee, viz., by the delivery of all coffee to the Coffee Board with no rights attached on such delivery, save and except the statutory right under section 34. It was also argued that the Legislature has made a conscious difference between acquisition of coffee by compulsory delivery by the growers under Section 25(1) of the Act and purchase of coffee by the Board under Section 26(2) and, as such, compulsory delivery of coffee under Section 25(1) cannot constitute a sale transaction as known to law between the growers and the Coffee Board. We are, however, unable to accept the submissions of the learned Additional Solicitor General. All the four essential elements of sale-(1) parties competent to contract, (2) mutual consent-though minimal, by growing coffee under the conditions imposed by the Act, (3) transfer of property in the goods and (4) payment of price though deferred,-are present in the transaction in question. As regards the provisions under Section 26(2) empowering the Coffee Board to purchase additional coffee not delivered for inclusion in the surplus pool, it is only a supplementary provision enabling the Coffee Board to have a second*

*avenue of purchase, the first avenue being the right to purchase coffee under the compulsory delivery system formulated under Section 25(1) of the Act. The scheme of the Act is to provide for a single channel for sale of coffee grown in the registered estates. Hence, the Act directs the entire coffee produced except the quantity allotted for internal sale quota, if any, to be sold to the Coffee Board through the modality of compulsory delivery and imposes a corresponding obligation on the Coffee Board to compulsorily purchase the coffee delivered to the pool, except:*

- (1) *where the coffee delivered is found to be unfit for human consumption; and*
- (2) *where the coffee estate is situated in a far off and remote place or the coffee grown in an estate is so negligible as to make the sale of coffee through compulsory delivery an arduous task and an uneconomical provision.*

**43.** *The levy of duties of excise and customs under sections 11 and 12 of the Coffee Act are inconsistent with the concept of compulsory acquisition. Section 13(4) of the Coffee Act clearly fixes the liability for payment of duty of excise on the registered owner of the estate producing coffee. The Board is required to deduct the amount of duty payable by such owner from the payment to the grower under section 34 of the Act. The duty payable by the grower is a first charge on such Pool payment becoming due to the grower from the Board. Section 11 of the Act provides for levy of duty of customs on coffee exported out of India. This duty is payable to the Customs authorities at the time of actual export. The levy and collection of this duty is*

*not unrelated to the delivery of the coffee by the growers to the Board or the pool payments made by the Board to the growers. The duty of excise as also the duty of customs are duties levied by Parliament in exercise of its powers of taxation. It is not a levy imposed by the Board. It is a fact that the revenue realised from the levy of these duties form part of the Consolidated Fund of India and can be utilised for any purpose. It may be utilised for the purpose of the Coffee Act only if Parliament by appropriation made by law in this regard so provides. The true principle or basis in Vishnu Agencies case applies- to this case. Offer and acceptance need not always be in an elementary form, nor does the law or contract or of sale of goods require that consent to a contract must be express. Offer and acceptance can be spelt out from the conduct of the parties which cover not only their acts but omissions as well. The limitations imposed by the Control order on the normal right of the dealers and consumers to supply and obtain goods, the obligations imposed on the parties and the penalties prescribed by the order do not militate against the position that eventually, the parties must be deemed to have completed the transaction under an agreement by which one party binds itself to supply the stated quantity of goods to the other at a price not higher than the notified price and the other party consents to accept the goods on the terms and conditions mentioned in the permit or the order of allotment issued in its favour by the concerned authority.“*

17. This Court has carefully gone through the aforesaid judgment. In the aforesaid case, that the Coffee Board has

contended that compulsory delivery of coffee by grower to the Board under the Coffee Act. 1942 extinguishing all marketing rights of the growers was compulsory acquisition and not sale or purchase to attract levy of purchase tax. It was further contended that the appellant was only a trustee or agent of growers not exigible to purchase tax and that all export sales were in the course of export" immune to tax under Article 286 of the Constitution.

18. The Division Bench of Karnataka High Court held that an element of consensuality subsists even in compulsory sales governed by law and once there is an element of consensuality, however minimal that may be, whether express or implied, then that would be sale or purchase for purposes of Sale of Goods Act and the same would be exigible to sales or purchase tax as the case may be under the relevant sales tax law of the country.

19. The Hon'ble Supreme Court has upheld the view taken by the High Court of Karnataka. Therefore, the aforesaid judgment again does not help the appellant as sale and delivery of liquor is governed in the State of Karnataka under the Excise Act and Rules thereunder. Liquor cannot be

compared with other commodities like Coffee or other goods where no restrictions are imposed by the statutory provisions.

20. Learned counsel for the appellant has also placed reliance upon the judgment delivered in **New India Sugar Mills v. Commissioner of sales Tax (1963 SCR Sup.(2) 459** which deals with the issue of definition of sale. Paragraphs-56, 57, 58 and 59 of the aforesaid judgment reads as under:

*"56. I shall now analyse the whole transaction and see how the element of compulsion and control affect the existence of a sale. First there is the fixation of price by the Controller. Can it be said that there is no sale because the price is fixed by a third person and not by the buyer and seller. This is the old controversy between Labeo and Proculus that if price is fixed by a third person a contract of sale results or not. Labeo with whom Cassius agreed, held that there was not, while Proculus was of the contrary opinion :*

*"Pretium autem certum esse debet. nam alioquin si its inter nos convenerit, ut quanti Titius rem aestemasuerit, tanti sit empta, Labeo negavit ullam uim hoc negotium habere, cuius opinionem Cassius probat. Ofilius et earn emptionem et uenditionem cuius opinionem Proculus secutus est." (Gaius III, 140).*

*This was solved by justinian holding that there was :*

*"Sed nostra decisio its hoc constituit." (Inst. III, 23, 1)*

57. I do not think the modern law is any different. So long as the parties trade under controls at fixed rice and accept these as any other law of the realm because they must, the contract is at the fixed price both sides having or deemed to have agreed to such a price. Consent under the law of contract need not be express it can be implied. There are cases in which a sale takes place by the operation of law rather than by mutual agreement express or implied. See Benjamin on Sale (8th Edn. p. 91). The present is just another example of an implied contract with an implied offer and implied acceptance by the parties. What I have said about price applies also to quantity and quality. The entry 48 of List II Seventh Schedule dealt with sale of goods in all its forms. We have seen above how numerous are these forms. The entry was expressed in six simple words but was meant to include a power to tax sale of goods in all its forms. It was not meant to operate only in those elementary cases where there is offer by A and an acceptance by B with the price as consideration. The concept of taxes on sale of goods is more complicated and the relations of people do not always take elementary forms. When the Province after receiving the permit telegraphed instructions to despatch sugar and the mill dispatched, it, a contract emerged and consent must be implied on both side's though not expressed antecedently to the permit. The indent of the Province was the offer to purchase sugar of such and such quality and quantity. The mills by quoting their stocks offered to sell sugar. The controller brought the seller and purchaser together and gave them his permission with respect to a particular quantity and quality. There was thus an implied

*contract of sale in the words of the Digest (XL, 1,1, IX, 4):*

*'Si cui libera universorum negotiorum administratio a domino permissa fuerit, isque ex hic negotiis rem vendiderit et tradiderit facit cam accipientis.'*

58. No doubt, there is compulsion in both selling and buying, perhaps more for the mills than for the Provinces. But a compelled sale is nevertheless a sale as was held by the House of Lords in *New Castle Breweries v. inland Revenue Commissioner*. The case in *Kitkness V. John Hudson & Co. Ltd*, was different because the section there interpreted required a "sale" and there was no sale express or implied when the wagons were taken away and compensation was paid in the shape of transport stock. There a sale in its ordinary forms wag, obviously meant though it was recognise that sale in other context has other meanings.

59. It was argued that there must be mutuality. That one party must be free to offer and must offer and the other side must be free to accept and must accept the offer before a sale can be said to arise. But sales often take place without volition of a party. A sick man is given medicines under the orders of his doctor and pays for them to the chemist with tax on the price. He does not even know the names of the medicines. Did he make an offer to the chemist from his sick bed ? The affairs of the world are very complicated and sales are not always in their elementary forms. Due to short supply or maldistribution of goods, controls have to be imposed. There are permits, price controls, rationing and shops which are licensed. can it be said that there

*is no sale because mutuality is lost on one account or another? It was not said in 'the Tata Iron and Steel case (1) which was a case of control, that there was no sale. The entry should be interpreted in a liberal spirit and not cut down by narrow technical considerations. The entry in other words should not be shorn of all its content to leave a mere husk of legislative power. For the purposes of legislation such as on sales tax it is only necessary to see whether there is a sale express or implied. Such a sale was not found in "forward" contracts and in respect of materials used in building contracts. But the same cannot be said of all situations. I for one would not curtail the entry any further. The entry has its meaning and within its meaning there is a plenary power. If a sale express or implied is found to exist then the tax must follow. I am of the opinion that in these transactions there was a sale of sugar for a price and the tax was payable. I would, therefore, dismiss these appeals with costs."*

21. This Court has carefully gone through the judgment also. In the present case, the appellant takes an order from end use consumer purchases liquor from the shop and delivers it to the end use consumer. Technically as the appellant is having authorization in respect of the mobile wallet, the amount is paid at the shop through that wallet. However, delivery is given to the appellant, who in turn delivers the goods to the end use consumer at his residence and the entire chain establishes that the sale in the instant case gets completed only after the delivery is done to the end use consumer. Therefore, in the

peculiar facts and circumstances of the case, the judgment relied upon by the appellant again does not help the appellant in any manner.

22. Learned counsel for the appellant has also placed reliance upon the judgment delivered in **Kerala Bar Hotels Association and another vs. State of Kerala and others (2015) 16 SCC 421** and has argued before this Court that the right to trade any liquor is a right guaranteed under Article 19(1) of the Constitution of India. Paragraphs-30 to 33, 38 of the aforesaid judgment reads as under:

**“30.** *The next ground for challenge has been under Article 19. The Learned Senior Counsel for the Appellants, Mr. Aryaman Sundaram, has sought to argue that a right under Article 19(1)(g) exists in the business of liquor. In his detailed elucidation of the decision in Khoday, he has contended that the State is given three options. The first is prohibition, the second is a State monopoly in manufacture or trade or both in potable liquor, and the third, which is similar to the case at hand, is that the State allows private individuals into this business, in which event everyone would have a right to partake in it. Reliance was placed on the following paragraphs of Khoday: (SCC pp.606-07, paras 55-56)*

**“55.** *The contention that if a citizen has no fundamental right to carry on trade or business in potable liquor, the State is also injunctioned from carrying on such trade, particularly in view of the provisions of Article 47, though apparently attractive, is fallacious. The State's power to regulate and to restrict the business in potable liquor impliedly includes the power to carry on such trade to the exclusion of others. Prohibition is not the only way to*

*restrict and regulate the consumption of intoxicating liquor. The abuse of drinking intoxicants can be prevented also by limiting and controlling its production, supply and consumption. The State can do so also by creating in itself the monopoly of the production and supply of the liquor. When the State does so, it does not carry on business in illegal products. It carries on business in products which are not declared illegal by completely prohibiting their production but in products the manufacture, possession and supply of which is regulated in the interests of the health, morals and welfare of the people. It does so also in the interests of the general public under Article 19(6) of the Constitution.*

*56. The contention further that till prohibition is introduced, a citizen has a fundamental right to carry on trade or business in potable liquor has also no merit. All that the citizen can claim in such a situation is an equal right to carry on trade or business in potable liquor as against the other citizens. He cannot claim equal right to carry on the business against the State when the State reserves to itself the exclusive right to carry on such trade or business. When the State neither prohibits nor monopolises the said business, the citizens cannot be discriminated against while granting licenses to carry on such business. But the said equal right cannot be elevated to the status of a fundamental right."*

*31. Khoday also held that all rights under Article 19(1) of the Constitution are not absolute, as they are qualified by the respective clauses (2) to (6) of Article 19. Business in liquor is further regulated by the rigours of Article 47. However, the categorization of dealing in liquor as a "qualified fundamental right" cannot be interpreted to indicate that a right under Article 19(1) (g) does not arise. This is in line with the previous Five-Judge bench decision in Krishan Kumar Narula, which, as we previously discussed, returned the opinion that a citizen can have a right to deal in liquor, subject to reasonable restrictions in the public interest. Thus,*

*since Five Star hotels are given a right to deal in liquor, all other categories of hotels can claim on the grounds of Article 19(1)(g), subject to the reasonable restrictions allowed by Article 19(6). It has been contended that the restrictions imposed herein are not reasonable, for various reasons, including that the relevant material has not been considered so the restriction was arbitrary and unreasoned. The Division Bench, while overturning the finding of the Single Judge that the relevant materials were not considered, held that "we cannot assume that the Government did not consider the report at all." The Appellants contend that an assumption that the materials were considered merely because nothing on the record definitively says that they were not is erroneous.*

32. We disagree with the submissions of the Respondents that there is no right to trade in liquor because it is res extra commercium. The interpretation of Khoday put forward by Mr. Sundaram is, in our opinion, more acceptable. A right under Article 19(1)(g) to trade in liquor does exist provided the State permits any person to undertake this business. It is further qualified by Article 19(6) and Article 47. The question, then, is whether the restrictions imposed on the Appellants are reasonable.

33. We have had the privilege and indeed the pleasure hearing the extremely erudite arguments of a galaxy of senior counsel on both propositions on the interpretation of our Constitution and the laws pertaining to the right to carry on trade or business in potable liquor by this Court. In Krishan Kumar Narula, the Constitution Bench was of the opinion that dealing in liquor is a legitimate business, although the State can impose reasonable restrictions. A few years later, however, in Khoday, the concept of res extra commercium came to be accepted and applied to the business of manufacture and trade in potable liquor. This Court, however, did not place any embargo or constraints on the State to transact this business. History has painstakingly made it abundantly clear that prohibition has not succeeded. Therefore strict state regulation is imperative. The State of Kerala had in the past forayed into prohibition, but found it to be unimplementable. Thereafter, keeping in mind the heavy consumption of alcohol within the territory, it has experimented with other measures to user temperance if not abstemiousness. So far as this trade is concerned, Article 47 of the Constitution places a

*responsibility on every State Government to at least contain if not curtail consumption of alcohol. The impugned Policy, therefore, is to be encouraged and is certainly not to be struck down or discouraged by the Courts. How this policy is to be implemented, modified, adapted or restructured is the province of the State Government and not of the Judiciary. The consumption of tobacco as well as liquor is now undeniably deleterious to the health of humankind. Advertising either of these intoxicants has been banned in most parts of the world, the avowed purpose being to insulate persons who may not have partaken of this habit from being seduced to start. Banning public consumption of either of these inebriants cannot be constrained as not being connected in any manner with the effort to control consumption of tobacco, or as we are presently concerned, with alcohol. Vulnerable persons, either because of age or proclivity towards intoxication or as a feature of peer pressure, more often than not, succumb to this temptation. Banning public consumption of alcohol, therefore, in our considered opinion, cannot but be seen as a positive step towards bringing down the consumption of alcohol, or as preparatory to prohibition.*

38. We now move to the arguments predicated on Article 19 of the Constitution. We have already noted that the business in potable liquor is in the nature of *res extra commercium* and would, therefore, be subject to more stringent restrictions than any other trade or business. Thus while the ground of Article 19(1)(g) can be raised, in light of the arguments discussed with regard to Article 14, it cannot be said that the qualification on that right is unreasonable.

23. The aforesaid judgment makes it very clear that the State Government has a right to impose restrictions in respect of liquor trade and it is not an absolute right and can be subjected to restrictions by the State Governments. The Hon'ble Supreme Court has also taken into account the judgment delivered in ***Khoday Distilleries Ltd. and others v. State of Karnataka and others reported in (1995) 1 SCC***

**574** and the judgment nowhere says that a person is having absolute right to trade in liquor, right has to be subjected to the restrictions provided under the Karnataka Excise Act, 1965 read with Karnataka Excise Licenses General Conditions Rules, 1967 and Karnataka Possession and Transportation Rules, 1967. The judgment does not give a right to the petitioner to trade liquor without fulfilling terms and conditions of the Karnataka Excise Act read with Excise Rules.

24. Learned counsel for the appellant also placed reliance upon the judgment delivered by the Madras High Court in ***T.M.Thaniyarasu v. The Commissioner of Police and others (2014) 1 Mad LJ 669*** and his contention is that the order passed by the Excise Commissioner withdrawing LOA is violative under Article 19(1)(g) and the impugned order shows non-application of the mind.

25. This Court has carefully gone through the aforesaid judgment. However, in the present case, the State Government (Excise Commissioner) has certainly granted LOA in spite of the fact that the Excise Act and the Excise Rules did not provide for granting of such LOA. Grant of LOA was *void ab initio* in the light of the statutory provisions and therefore it was rightly

withdrawn by the impugned order. The judgment also does not help the petitioner in any manner.

26. Learned counsel for the appellant has also relied upon the judgment delivered by the Hon'ble Apex Court in ***Krishan Kumar Narula v. State of J & K and others*** reported in AIR 1967 SC 1368.

27. In the aforesaid case while dealing with the trade of liquor and the interpretation of the trade or business under Article 19(1g) and 19(6) it was held that standards of morality can afford a guidance to impose restrictions but cannot limit the scope of the right. It was also held that legislature can impose restrictions on, or even prohibit carrying on of a particular trade or business and the Court, having regard to the circumstances obtaining at particular time or place may hold the restrictions or prohibition reasonable. The aforesaid judgment also does not help the appellant as he did not have any licence i.e., CL-2 and CL-11(c), which entitles the a person to take liquor to public in retail.

28. Learned counsel for the appellant also placed reliance upon the judgment delivered by the Hon'ble Supreme Court in ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and Others (1978) 1***

**SCC 405** on the ground of violation of principles of natural justice and fair play. It is contended that LOA was withdrawn without following principles of natural justice and fair play. No show cause notice was issued at any point of time.

29. In the considered opinion of this Court, the judgment relied upon is again does not help. As in the first place, the Excise Commissioner was not having any authority to issue such LOA. The LOA could not have been issued as there is no provision under the Excise Act nor under the Excise Rules and under the Karnataka Excise Licences (General Conditions) Rules, 1967 and therefore as there was no legal statutory right in favour of the appellant for grant of LOA, the question of violation of principles of natural justice and fair play does not arise.

30. Lastly, reliance has been placed on the judgment delivered by the Hon'ble Supreme Court in ***Commissioner of Customs (import), Mumbai v.Dilip Kumar and Company and others (2018) 9 SCC 1.*** The contention of the learned counsel for the appellant is that in case of ambiguity a taxing statute should be construed in favour of the assessee.

31. The aforesaid judgment also deals with the interpretation and strict construction of a statute. However, in

the present case no such interpretation statutory provision of law is involved. The statute does not permit a person who is not authorized/not having licence issued under the Karnataka Excise Act to trade in liquor/to deliver liquor/to act as a facilitator, hence the question of issuance of LOA which is alien to the Excise Act does not arise nor the petitioner can be permitted to trade any liquor in the manner and method it has been done by the appellant-company.

32. The statutory provisions which has been reproduced earlier of the KST Act, 1965 makes it very clear that no intoxicating drugs can be sold without licence and contrary to the terms and conditions of the licence. The intoxicating drugs are also defined under the Karnataka Excise Act and they include bhang/ganja. If the plea canvassed by the learned counsel for the appellant is accepted , then he will also be entitled to act as a facilitator to supply bhang/ganja apart from supply of liquor to the citizens of Bengaluru Township. It is certainly not at all the intention of the legislature and restrictions have been rightly imposed under the Excise Act. It provides that no intoxicating drugs can be sold without licence contrary to the conditions of the licence. The licence issued under the Excise Act and the Rules framed thereunder in no way authorizes any agent/intermediary to transport the liquor

and under Rule 3 of the sale of Indian and Foreign liquor Rules, 1968 only CL-2 and CL -11(c) licensees are entitled to vend licence to public in retail. It is only a take away transaction in a sealed bottle for MRP from shop premises. Sections 39(1) of the Excise Act provides that if any person possess for or sold to the consumer any quantity (if not necessarily the quantity stipulated under Rule 21), it is presumed to be possessed and sold by the consumer and Section 39(2) provides that the vendor of the manufacture is liable for penal action for such possession or sale as indicated under section 39(1).

33. The appellant in the present case who is claiming itself to be a facilitator is no doubt entitled to facilitate cashless digital payments between the customer and the merchant/vendor on its mobile wallet. Such digital payment is permissible for which he has to obtain licence under PSS Act, 2007.

34. The aforesaid statutory provision of law does not provide for delivery of article or goods, the appellant being a 'system provider' as defined in clause(q) of Section 2 of PSS Act of 2007, is only authorized to maintain payment system.

35. The appellant-company has also contended that it is having a licence under the Food Safety and Standards Act, 2006

(for short 'FSS Act of 2006). The licence under the FSS Act of 2006 is a licence to comply all safety and standards in respect of food, it will not constitute a licence for trade in liquor.

36. Rule 5 of Karnataka Excise Licences (General Conditions) Rules, 1967 provides for restriction in respect of location of shops. It provides that no licence shall be granted for sale of liquor to a liquor shop or premises within a distance of 100 mtrs. from any religious or educational institution or Hospital as well as certain the other places. Therefore, if the plea canvassed by the appellant-company is accepted, it will be contrary to the statutory provisions as contained under Rule 5 of the Rules, 1967 and as there will be no restriction in respect of place of location of shops, not only this, Rule 10 of the Rules, 1967 provides for restriction in respect of sale of liquor to certain category of persons like insane persons, persons below 21 years of age etc., and the same can be checked in case liquor is being bought from the authorized shops. It is going to be very difficult to check persons like the appellant company who are acting as alleged facilitator. The respondent-State has also placed reliance on the judgments delivered in **Khoday Distilleries Ltd.** (supra) and **Kerala Bar Hotels Assn.** (supra) and it has been rightly contended that reasonable restrictions can be imposed in respect of trading of liquor by the State and

the same has been done on account of the statutory provisions under the Excise Act and Rules framed thereunder. Reliance has also been placed upon the judgment delivered in ***Coverjee B. Bharucha v. Excise Commissioner, Ajmer and ors. AIR 1954 SC 220*** and the Hon'ble Supreme Court in paragraphs-7, 8, 9, 10,11 has held as under:

*"7. Article 19 (1) (g) of the Constitution guarantees that all citizens have the right to practise any profession or to carry on any occupation or trade or business, and clause (6) of the article authorises legislation which imposes reasonable restrictions on this right in the interests of the general public. It was not disputed that in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the*

*community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold, require also special qualifications in the parties permitted to use, manufacture or sell them. These pro positions were not disputed, but it was urged that there was something wrong in principle and objectionable in similar restrictions being applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors. It was urged that their sale should be without restriction, that every person has a right which inheres in him i.e., a natural right to carry on trade in intoxicating liquors and that the State had no right to create a monopoly in them. This contention stands answered by What Field J. said in Crowley v. Christensen:*

*"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold*

*indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a licence be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business-to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only."*

*These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitioner. The provisions of the regulation*

*purport to regulate trade in liquor in all its different spheres and are valid.*

8. *The contention that the effect of some of these provisions is to enable Government to confer monopoly rights on one or more persons to the exclusion of others and that creation of such monopoly rights could not be sustained under article 19 (6) is again without force. Reliance was placed on the decision in Rashid Ahmad v. Municipal Board of Kairana. That decision is no authority for the Proposition contended for. Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all could carry. The provisions of the regulation cannot be attacked merely on the ground that they create a monopoly. Properly speaking, there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor. Reference in this connection may be made to the observations of Lord Porter in Commonwealth of Australia v. Bank of New South Wales. This is what his Lordship said:*

*"Yet about this as about every other proposition in this field a reservation must be made. For their Lordships do not intend to lay it down that in no circumstances would exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time."*

*Further it seems to us that this argument suffers from a fallacy. Under the rules every member of the public who wishes to carry on trade in liquor is invited to make bids. This is the only method by which carrying on of liquor trade can be regulated. When the contract is thrown open to public auction, it cannot be said that there is exclusion of competition and thereby a monopoly is created. For all these reasons we are of opinion that the contention that the provisions of the regulation are unconstitutional as they abridge the rights of the petitioner to carry on liquor trade freely cannot be sustained.*

9. *The next contention that the charge of fee by public auction is excessive and is not in the nature of a fee but a tax ignores the fact that that licence fee described as a licence fee is more in the nature of a tax than a licence fee. One of the purposes of the regulation is to raise revenue. By the provisions of section 24, duties can be imposed on the manufacture, import, export and transport of liquor and other excisable articles. Revenue is also collected by the grant of contracts to carry on' trade in liquors and these contracts are sold by auction. The grantee is given a licence on payment of the auction price. The regulation specifically authorises this. It is not a fee levied without authority of law as was the situation in Rashid Ahmad's case.*

10. *As regards the other contentions of the learned counsel, it is sufficient to say that if there has been any breach of the rules framed under the regulation by the officers concerned, the remedy for such breaches is provided for in the regulation itself. Mere irregularities*

*committed in conducting an auction sale cannot be said to have abridged the petitioner's fundamental rights and so article 32 is not attracted. It is open to the petitioner under article 226 to approach the- High Court for a mandamus if the officers concerned have conducted themselves not in accordance with law or if they have acted in excess of their jurisdiction. The same is the answer to the petitioner's next contention that the sale could not be confirmed by the Minister and that under the rules it was only the Chief Commissioner who was authorised to confirm it. The point of discrimination was not seriously argued before us.*

11. *For the reasons given above we see no validity in this application and we accordingly dismiss it with costs."*

37. In the aforesaid case, the Hon'ble Supreme Court has held that Article 19 (1)(g) of the Constitution guarantees all citizens a right to practice any profession or to carry on any occupation or trade or business, and clause(6) of the article authorizes legislation which imposes reasonable restrictions on this right in the interests of the general public.

38. In the considered opinion of this Court, restrictions under the Karnataka Excise Act, 1965 and Rules framed thereunder are reasonable restrictions. By no stretch of imagination the appellant-company can be permitted to trade in

liquor as prayed under the relief clause. The learned Single Judge was justified in dismissing the writ petition and no case for interference is made out in the matter. Accordingly, the writ appeal also stands dismissed.

(SATISH CHANDRA SHARMA)  
JUDGE

(V.SRISHANANDA)  
JUDGE

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