

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

OWP No. 486/2017 (O&M),
LPAOW No. 11/2017 (O&M),
LPAOW No. 20/2017 (O&M),
LPAOW No. 21/2017 (O&M),
LPAOW No. 22/2017 (O&M),
LPAOW No. 23/2017 (O&M)&
LPAOW No. 44/2017 (O&M)
(Through Video Conferencing)

Reserved on : 21.12.2020

Pronounced on: 28.12.2020

Balbir Singh and others

...Petitioner/Appellants(s)

Through:

Mr. Z. A. Shah, Sr. Advocate with
Mr. Rahil Raja, Advocate in
LPAOW No. 11/2017

Mr. P. N. Raina, Sr. Advocate with
Mr. J. A. Hamal, Advocate in
LPAOW NO. 44/2017

Mr. R. K. Gupta, Sr. Advocate with
Mr. Rahil Raja, Advocate in OWP
No.486/2017 &
LPAOW No.11/2017

Mr. Abhinav Sharma, Sr. Advocate
with Ms. Saba Atiq, Advocate in
LPAOW Nos. 21 & 44 /2017

Mr. Pranav Kohli, Sr. Advocate
with Mr. Rahul Sharma, Advocate
for interveners in
LPAOW No.11/2017

Mr. Rahil Raja, Advocate in
LPAOW Nos. 22 & 23/2017

v/s

State of J&K and others

.... Respondent(s)

Through: Ms. Seema Shekhar, Sr. A.A.G.
with Mr. Bhanu Jasrotia, G.A.

CORAM:
HON'BLE THE CHIEF JUSTICE (ACTING)
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

RAJESH BINDAL, CJ(A)

1. This Court has once again being called upon to clear the skeletons from the cup-board in Union Territory of Jammu and Kashmir. The case in hand is not in isolation where rule of law has been kept aside and there is total arbitrary exercise of power. Earlier many glaring issues came before the court. The same were, challenge to the Jammu and Kashmir State Land (Vesting of Ownership to Occupants) Act, 2001, popularly known as Roshni Act, grant of licenses for extraction of minor minerals, rampant encroachment of public/forest land, adhocism in government service, keeping investigation of criminal cases against senior officers and politicians under the Prevention of Corruption Act pending for decades and occupation of government accommodation by private persons, ex-politicians, retired employees, political workers, whereas the government employees are waiting for allotment.

2. This time it is in liquor trade, which had always remained lucrative. Before the issues are taken up after noticing the arguments raised by the learned counsels for the parties, it would be apt to notice certain glaring facts.

3. As per the information furnished by the government counsel, at present there are 223 functional liquor vends in Jammu and Kashmir. A perusal of the chart given below will show that these are continuing with the same persons or their successors in interest for decades as the process of renewal of licenses was being followed, where admittedly the allotments had not been

made in a transparent manner. The same were only on the recommendation of the Finance Minister concerned. Without there being any advertisement issued, on an application filed by a favorite, the Finance Minister would order allotment of a vend and the allottee will continue for all times to come. The details of the liquor vends which were allotted from time to time and are continuing with the same persons or their successors in interest are given here under:

Year-wise License granted as per available record	
Year	No. of Licenses granted
1968-69 (Prior to)	2
1969-70	10
1970-71	13
1971-72	0
1972-73	19
1973-74	0
1974-75	14
1975-76	4
1976-77	21
1977-78	5
1978-79	0
1979-80	4
1980-81	15
1981-83	0
1983-84	1
1984-85	1
1985-98	0
1998-99	18
1999-2000	32
2000-01	1
2001-05	0
TOTAL	160

4. In addition to above, two sub-vends granted in the year 2005-06 were regularized vide order dated 25-02-2019. 60 vends were allotted on temporary basis in August 2005 for a period of four months and are continuing till date in view of various interim orders passed by this court in different cases filed by them, which are subject matter of consideration in the present cases. One liquor vend was allotted in January 2011.

FACTS

5. A bunch of intra-court appeals and a writ petition, bearing LPAOW Nos.11,20-23 & 44/2017 and OWP No. 486/2017 are being taken up together. In the appeals, challenge has been made to a common judgment of learned Single Judge. The only difference in LPAOW No. 20/2017 is that in the aforesaid appeal, order passed in OWP No. 1796/2016 is under challenge. The relief prayed for in the aforesaid petition was that the successful allottees in the draw of lots held in the year 2004 should be allotted the licenses. In OWP No. 486/2017, challenge has been made to the Excise Policies for the years 2017-18, 2018-19 and 2019-20.

ARGUMENTS ON BEHALF OF THE APPELLANTS/PETITIONERS**IN LPAOW NO.11/2017**

6. Mr. Z. A. Shah, learned senior counsel appearing for the appellants submitted that prior to the allotment of liquor vends to the appellants, there was no system being followed. Applications used to be filed to the Finance Minister who would recommend grant of licenses. The applicants were required to complete the formalities and thereafter licenses were issued. Number of vends was also not fixed. No public notice was ever issued. Whenever any application was filed, license was being issued and the allottees were being chosen arbitrarily.

7. As far as the dispute in the present bunch of cases is concerned, he submitted that public notice was issued inviting applications for allotment of 90 liquor vends. The appellants also applied. Draw of Lots was held on

09.08.2005. Against each vend, three persons were identified in the order of priority. In terms of Rule 30(8) of the Jammu and Kashmir Liquor License and Sales Rules, 1984 (for short 'the Rules'), the competent authority could even grant temporary license for a period of four months with a view to safeguard the revenue. The allottee was to complete the formalities during the interregnum. Thereafter either regular license was to be granted or temporary license will expire. 67 allotments were made for a period of 4 months. 57 of these completed the formalities within the time permitted. Before expiry of the period of four months, notices were issued to the aforesaid allottees to show cause as to why the licenses granted to them be not cancelled. The genesis thereof was a complaint made by some private person to the Government stating that the entire process of draw of lots had been manipulated. The matter was referred to State Vigilance Organisation, who referred the matter to CBI for testing of the device on which draw of lots was held. The report was sent to the Government on which it was decided to cancel the temporary licenses granted to 57 allottees. Direction was issued to the Excise Commissioner for the purpose. It was on the basis thereof that show-cause notices were issued to the appellants.

8. While impugning the judgment of the learned Single Judge, Mr. Shah, learned Senior Counsel argued that the show-cause notice was merely an eye-wash, as para 12 thereof clearly mentioned that the same had been issued on the direction of the Government to cancel the licenses. Hearing was merely an empty formality as the Commissioner was bound by the direction of the government. Hence, going to the Commissioner by filing response to the show-cause notice was totally meaningless. Licenses had been granted to the appellants, which were valid upto 19.12.2005. Otherwise, as per Rule 27 of the

Rules, the validity of a license granted to an applicant is up to 31st March of the succeeding year. Challenge has also been made to the reference of dispute to Vigilance Organisation and thereafter CBI and receipt of report therefrom. It was submitted that the entire exercise was at the back of the appellants. They were never associated in the process. Even the report also suggested that the same was not conclusive but still the licenses granted to the appellants were sought to be cancelled without there being any fault on their part. There are no allegations against the appellants that they were party to any of the allegations regarding tampering of the device. Referring to the impugned judgment of learned Single Judge, it was submitted that the issue regarding validity of the show-cause notice has not been dealt with at all. In fact none of the arguments raised by the appellants has been touched. The writ petitions have been disposed of merely by giving liberty to the government to frame policy. As a result, valuable rights of the appellants have been affected. In support of the arguments, reliance was placed on the judgment of Hon'ble the Supreme Court in *M/s Siemens Ltd. Vs. State of Maharashtra & Ors.* reported as (2006) 12 SCC 33.

9. Taking his argument further, it was submitted that Rule 14 of the Rules provides that licensee has a right to get his license renewed. In case, show cause notices issued to the appellants are quashed, their licenses shall be treated as regular and consequently they will have right to get the same renewed. As far as the issue regarding right of any person to trade in liquor is concerned, the submission is that though it would not be a matter of right to get the license renewed but in Jammu and Kashmir, as a matter of course, all

licenses for liquor vends are being renewed from time to time. Hence, the appellants also expected the same treatment.

10. As far as renewal of license is concerned, it was argued that Rule 30 of the Rules provides procedure for grant of license. Certain formalities are to be completed. Whereas Rule 14 deals with renewal of license. The same is independent. At that stage, the conditions as laid down in Rule 30 have no relevance. For all these years, when the matter was pending in this court, on account of interim directions the appellants were allowed to continue with their liquor business and they have been depositing the license fee whatever fixed by the government. There is no default on that count. There is no skill required for sale of liquor. It is merely to sit across the counter. The fixed price has to be charged and the bottle delivered. Even an illiterate person can also handle the same. In terms of proviso (d) to Rule 14, the license granted is also heritable.

11. On a question as to whether the applicants ever applied for renewal of license, the answer was in negative stating that once their licenses had not been made regular, there was no question of filing application for renewal thereof. It is only on account of interim direction by this court that the appellants are continuing and the license fee is being paid regularly.

12. Another contention raised to challenge the show-cause notice is that none of the unsuccessful applicants for allotment of vends in question challenged the process. The action was initiated against the appellants only on a complaint by a private person who himself was not an applicant. The process of draw of lots was not under challenge as such.

13. Vide CM No.6852/2020, certain documents have been placed on record in OWP No. 486/2017. Reference was sought to be made to these documents. These are inter-departmental communications with regard to the liquor vends in question. As to the source of these inter-departmental communications, which have not been endorsed to the appellants, there was no specific answer except that in a writ of certiorari, the court can always summon the record and authenticity of these documents can be verified from the record. From the documents it was sought to be argued that the matter was live with the government at different levels and even the opinion is also on record that the case of the government is weak.

14. Excise Policy for the year 2018-19 was referred to argue that no authority in the government applies its mind either at the time of framing a policy or its implementation. Though the Rules provide for grant of license only for one year with liberty to get the same renewed for the same period but the Excise Policy for the year 2018-19 provides for grant of license or renewal thereof for a period of five years. This runs totally contrary to the provisions of the Rules. As licenses granted to all other allottees prior to the appellants have been renewed for five years, they also deserve to be granted the same relief.

15. As regards the private persons who were impleaded as respondents in the appeals, Mr. Shah contended that prior to 2003, the licenses were being allotted on the recommendation of the Finance Ministers concerned. The applicants had submitted their applications at that time. They were not granted the licenses. They were applicants for certain particular vends. Once those already stand allotted, no issue can possibly be raised now. Otherwise independently they had not questioned rejection of their

applications. It is only on account of observations of Hon'ble the Supreme Court in **Civil Appeal No.2949/2006** titled as **Satvir Singh and others v. State of J&K and others, decided on 30.04.2009** that they have been allowed to intervene in the appeals. Their contention is only that in case the licenses granted to the appellants are cancelled, they may get the same.

IN LPAOW NO.11/2017 & OWP NO.486/2017

16. Mr. R. K. Gupta, learned Senior Counsel appearing for the appellants/petitioners in addition to the contentions raised by Mr. Shah, submitted that 2003 Excise Policy provided for draw of lots pertaining to the new vends. Some of them had been located on account of conversion of Country Made Liquor Vends into Indian Made Foreign Liquor (for short 'IMFL'). Excise Policy for 2004-05 was notified on 27.03.2004. No writ petition was filed in this Court for challenging the aforesaid policy or allotments made therein.

17. In OWP No. 486/2017, the contention raised by Mr. Gupta, learned senior counsel for the petitioners is that in the aforesaid writ petition, initially Excise Policy for the year 2017-18 was under challenge. However, later on amendment application has been filed seeking liberty to challenge the Excise Policies for the years 2018-19 and 2019-20, as well. The policies being in the form of Statutory Rules and Orders (SRO) have been framed in exercise of powers derived under the Act and the Rules. Referring to Clauses 3.2.7, 3.2.9 and 11 of the Policy, it was submitted that these run totally contrary to the provisions of the Rules. No policy, which is subordinate to the Rules, in case the power is derived therefrom, can run contrary to the provisions contained therein. Once the Rules provide for grant of license for one year, the clause in

the policy that it shall be for a period of five years cannot be legally sustained. There cannot be automatic renewal of license as the provisions of the rules do not envisage that situation.

18. It was submitted that certain old licensees were granted sub-vends temporarily. However later on, on the basis of recommendation made by a Committee, these were regularised. This was a kind of back door entry. No process was followed. The same licensee was operating two vends in the area, which is not permissible.

IN LPAOW NO.44/2017

19. Mr. P. N. Raina, learned Senior Counsel appearing for the appellants referred to Section 14(A) of the Act which deals with grant of licenses for Country Made Liquor by way of public auction or the vends being operated departmentally. He further submitted that the distinction of Country Liquor and IMFL was done away with as all the vends were combined.

20. He further referred to Rule 4 of the Rules to show that how JKEL-2 licenses are to be granted, the competent authority there for and also the kinds of licenses which can not be renewed. It is only the licenses granted by way of public auction or private contract, which cannot be renewed. Hence, in the case of the appellants there is no bar on renewal of licenses in case they fulfil the conditions laid down therefor.

21. The report of the Vigilance and reference of the matter by it to CBI was totally uncalled for. There was no FIR registered. In the absence thereof, no action could be taken. The procedure adopted was unknown to law. There are no allegations against any government officer/official or the allottees

of the licenses. The report itself says that it is inconclusive. Hence, drastic action of cancelling the licenses granted in the draw of lots is totally illegal and the same deserves to be set aside by this court. He further submits that most of the licenses have been granted in Jammu region.

IN LPAOW NOS. 21 & 44/2017

22. Mr. Abhinav Sharma, learned senior counsel appearing for the appellants while adopting the contentions as noticed above, further added that before the process in question was adopted for allotment of liquor vends by way of draw of lots, totally arbitrary exercise was going on. In that process, allotments were being made on the recommendation of the Finance Minister concerned. There are certain vends which are continuing for the last 50-60 years. It was at that stage that the government decided to allot more vends and a transparent method was adopted for allotments of vends by way of draw of lots. The learned Single Judge has failed to deal with the issues raised by the appellants as there is no finding recorded regarding validity of the show cause notices issued. He had gone on the premise that the licenses had been granted for one year whereas the fact remains that there is provision in the Rules, which talks of renewal of the license on fulfilment of certain conditions. The appellants never refused to follow the procedure.

ARGUMENTS ON BEHALF OF THE GOVERNMENT

23. On the other hand, Ms. Seema Shekhar, learned Senior AAG submitted that as far as the claim made by the petitioners in OWP No.486/2017 is concerned, the relief prayed for has been rendered infructuous as the period for which Excise Policy impugned therein was notified, is over. She further submitted that in the Excise Policy for the year 2017-18, 61 liquor vendors,

which are subject matter of litigation, where show-causes notice for cancellation thereof had been issued, were treated separately. Grant of license as per the aforesaid policy was subject to the conditions laid down in the judgment of this court in *Sandya Devi's* case, which is subject matter of challenge in the appeals. She further submitted that the writ petitioners being not the applicants for grant of licenses for the year in question cannot, challenge the policies as such only for academic purpose as they do not have any locus.

24. As far as the bunch of appeals is concerned, the argument is that the normal validity of a regular license is one year which expires on March 31 every year. Though provisions of Rules 4 and 14 of the Rules provide for renewal of the license, however, the same is not as a matter of right if seen in the light of provisions of Rule 16 thereof. The contention is also that the period up to which the licenses could at the most be granted to the appellants was to expire on 31.03.2006. The same being over, the writ petitions in fact had been rendered infructuous and nothing survives in these appeals.

25. Coming to the facts in appeals, she submitted that public notice for allotment of 90 number of vends was issued on 25.06.2005. In response thereto, 9,910 applications were received. After draw of lots, allotments were made. Agreements were signed with the allottees. The temporary licenses were granted for a period of four months, subject to completion of the formalities. The object was to safeguard the revenue as any time taken to complete the formalities would have resulted in loss of revenue for that period.

26. Further she referred to the communications dated 16.09.2005 and 23.11.2005. It was pointed in the aforesaid communications that the program of the device was tutored to pick up more numbers of specific categories in the draw of lots. As a result of which more percentage of allottees are in the category of 2 and 3 digit number applications. She further referred to the report from the Senior System Analyst, CBI where the opinion was that there were inherent defects in the computer programming. It was designed in such a way that chances of appearance of 2 and 3 digit numbers were ten times more than 4 digit numbers. For favoring 4 digit numbers, another code was available in the system to draw only 4 digit numbers.

27. She further submitted that in the list of allottees there are relatives of the employees of the department and brother in law of the programmer as well. She did not dispute the fact that prior to the allotments in question by draw of lots, all allotments were being made on the recommendation of the then Finance Ministers. In the year 2005, new liquor vends were located. Some were converted from Country Made Liquor to IMFL. Hence, the process of allotment by way of draw of lots was adopted. She did not have any answer to the query as to why all allotments of liquor vends were not made in terms of the aforesaid policy by adopting the process of draw of lots, as the liquor vends which were allotted earlier and were continuing for decades were not touched, though the idea was to bring transparency in the process of allotments. She further submitted that the process of draw of lots as followed by the department was upheld by Division Bench of this court in earlier round of litigation in **LPA(OW) No.63/2004** titled as **State of J&K and others v. Vikas Jandial and others, decided on 21.12.2004.**

28. The decision of the government in issuing show-cause notice to the allottees of temporary licenses was bona fide. It was based on an enquiry by the Vigilance Organisation. The appellants had opportunity to respond to the aforesaid notices and bring out all the facts. They could even challenge the findings of the report as is sought to be done before this court. They have failed to avail of that opportunity but rushed to this court.

29. She further submitted that there is no error in the judgment of the learned Single Judge as the allotment or renewal of the liquor vends is on year to year basis, which otherwise is not a matter of right. Policy for the year 2021-22 will be notified, specifying conditions for grant of licenses in terms of the law on the subject.

ARGUMENTS ON BEHALF OF RESPONDENTS
NO.17,45,47,49 AND 53 IN LPA NO.11/2017/
INTERVENERS

30. Mr. Pranav Kohli, learned senior counsel submitted that the parties to whom he is representing had filed their applications to the department in the year 1999 in the category of unemployed youth. All formalities were completed. When ignoring their claims, allotments were sought to be made by way of draw of lots, they filed **OWP No. 199/2004** titled as *Vikas Jandial and others v. State of J&K and others*, which was decided on 10.06.2004. The learned Single Judge quashed the notification dated 27.02.2004 and all consequential actions for selection of prospective licensees by draw of lots. Liberty was granted to conduct fresh exercise for allotment of liquor vends. The aforesaid judgment was subject matter of challenge in **LPAOW No. 63/2004** titled as *State of J&K and others v. Vikas Jandial and*

others. The same was allowed partially on 21.12.2004 and the process of draw of lots was upheld with a direction to conduct the same afresh.

31. When the matter was taken to the Supreme Court in **Satvir Singh and other's case** (supra), they were allowed to intervene in Sandya Devi's case, pending before this court. The order of the Government dated 22.07.2003, treats the parties to whom he is representing as a different class as they had completed all the formalities and therefore deserved to be granted the licenses, though liquor trade is not a matter of right. On a query as to how they can be granted licenses now once 2003 policy is not in vogue and much water has flown thereafter, as Excise Policy for the year 2020-21 has been notified, which supersedes all earlier policies, the submission is that their rights have to be considered in the light of the facts existing at the time of filing the applications. He further submitted that locations for which they were applicants, have not been allotted yet.

ARGUMENTS IN REBUTTAL

32. Mr. Gupta, learned senior counsel appearing for the appellants in LPAOW No.11/2017 submitted that in the public notice issued on 25.06.2005, the applicants to whom Mr. Kohli, learned senior counsel represents were specifically excluded from consideration, however, they never felt aggrieved as no challenge was made to such clause in the policy. Hence, it is too late for them to raise the issue in the litigation where process of allotments as such is not in dispute. Grant of liberty by Hon'ble the Supreme Court to them to be party to the litigation, does not mean that they are entitled to any relief. In case they had any cause of action, they should have approached the court raising their grievances.

33. No other argument was raised by either of the parties in all the appeal or the writ petition.

34. Heard learned counsels for the parties and perused the relevant referred record.

DISCUSSIONS

35. Before issues raised by the learned counsels for the parties are considered on merits, we deem it appropriate to refer to the settled legal position with regard to trade in liquor.

I. WHETHER RIGHT TO TRADE IN LIQUOR IS FUNDAMENTAL?

36. As to whether any person has a fundamental right to do trade or business in intoxicants was considered by Hon'ble the Supreme Court in *Har Shanker and others etc. v. The Deputy Excise and Taxation Commissioner and others etc.*, reported as *AIR 1975 Supreme Court 1121*. The relevant para therefrom is extracted below :-

“53. In our opinion, the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decisions of this Court in *Balsara's case, 1951 SCR 682* : (*AIR 1951 Supreme Court 318*); *Cooverjee's case, 1954 SCR 873* : (*AIR 1954 Supreme Court 220*); *Kidwai's case, 1957 SCR 295* : (*AIR 1957 Supreme Court 414*); *Nagendra Nath's case, 1958 SCR 1240* : (*AIR 1958 Supreme Court 398*); *Amar Chokraborty's case, (1973)1 SCR 533* : (*AIR 1972 Supreme Court 1863*) and the *RMDC case, 1957 SCR 874* = (*AIR 1957 Supreme Court 699*) as interpreted in *Harinarayan Jaiswal's case, (1972)3 SCR 784* : (*AIR 1972 Supreme Court 1816*) and *Nashirwar's case, (AIR 1975 Supreme Court 360)*. There is no fundamental right to do trade or business in intoxicants. The State,

under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants.....".

37. The issue was further considered in **AIR 1987 SC 251**, wherein while reiterating the law laid down in *Har Shanker's case* (supra), it was observed that when the State decides to grant such right or privilege to others, it cannot escape the rigour of Article 14 of the Constitution of India. It cannot act arbitrarily or at its sweet will. Grant of licenses to manufacture or sale of liquor would essentially be a matter of economic policy wherein the Courts normally do not intervene but if the action appears to be plainly arbitrary, irrational or malafide, interference is called for. Relevant paras there from are extracted below :-

“32.....Now, it is true and it is well settled by several decisions of this Court including the decision in *HarShanker v. Deputy Excise & Taxation Commr., (1975) 3 SCR 254 : (AIR 1975 Supreme Court 1121)*, that there is no fundamental right in a citizen to carry on trade or business in liquor. The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants – its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others, the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State

Government and respondents Nos. 5-11 that Article 14 can have no application in a case where the license to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that Article.

33. But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licenses for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity, allow a large measure of latitude to the State Government in determining its policy of regulating manufacture and trade in liquor. Moreover, the grant of licenses for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government had done, unless it appears to be plainly arbitrary, irrational or mala fide. We had occasion to consider the scope of interference by the Court under Article 14 while dealing with laws relating to economic activities in *R.K. Garg v. Union of India*, (1982)1 SCR 947 : (AIR 1981 Supreme Court 2138). We pointed out in that case that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. We observed that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrinaire which do not admit of solution through any doctrinaire or strait jacket formula and this is particularly true in case or legislation dealing with economic matters, where having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. We quoted with approval the followed admonition given by Frankfurter, J. in *Morey v. Doub*, (1957) 354 US 457 :

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

What we said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high and pedestal as legislative judgment in so far as judicial deference is concerned. We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call ‘trial and error method’ and, therefore, its validity cannot be tested on any rigid ‘a priori’ consideration or on the application of any straitjacket formula. The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or ‘play’ in the “joints” to the executive. “The problem of Government” as pointed out by the Supreme Court of the United States in *Metropolis Theatre Company v. State of Chicago*, (1912)57 L Ed 730 “are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercise which can be declared void”. The

Government, as was said in *Permain Basin Area Rates* cases, (1968) 20 L Ed (2d) 312, is entitled to make pragmatic adjustments which may be called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or *mala fide*. It is against the background of these observations and keeping them in mind that we must now proceed to deal with the contention of the petitioners based on Article 14 of the Constitution.”(*Emphasis supplied*)

38. The aforesaid principle was reiterated in (1995)1 SCC 574, titled as *M/s Khoday Distilleries Ltd. and others vs State of Karnataka & Ors* . Para No. 62 therefrom is extracted below :-

“62. We, therefore, hold that a citizen has no fundamental right to trade or business in liquor as beverage. The State can prohibit completely the trade or business in potable liquor since liquor as beverage is *res extra commercium*. The State may also create a monopoly in itself for trade of business in such liquor. The State can further place restrictions and limitations on such trade or business which may be in nature different from those on trade or business in articles *res commercium*. The view taken by this Court in *K.K. Narula* case as well as in the second *Synthetics and Chemicals Ltd. Case* is not contrary to the aforesaid view which has been consistently taken by this Court so far”.

39. The same view was expressed in a subsequent judgment by Hon’ble the Supreme Court in (2004) 11 SCC 26, titled as **State of Punjab and another v. Devans Modern Breweries Ltd. and another.**

II. RELEVANT PROVISIONS OF THE ACT AND THE RULES

40. Relevant provisions of the **Jammu and Kashmir Excise Act, Svt. 1958, and the Jammu and Kashmir Liquor License and Sale Rules 1984**, are reproduced hereunder:

SECTIONS 14A, 16, 16A & 17 OF THE ACT

“14-A. Regulation of the sale of liquor in the State. ---(1) Notwithstanding anything to the contrary contained in any other law, rule, order, agreement or any other instrument or any order, judgment or decree of any Court, the Government shall regulate the sale of country liquor in the State by auctioning or operating departmental vends the country liquor shops on such conditions and for such period as it may deem fit :

Provided that the departmental shops existing for the sale of country liquor at the time of first auction shall continue to run at such places and for such period as may be specified by the Government by a special or general order.

(2) Any agreement or instrument executed, any letter of intent or order issued by the Government relating to manufacturing, bottling or sale of country liquor before the commencement of the Jammu and Kashmir Excise (Amendment) Ordinance, 1985 (II of 1985) shall be and shall always be deemed to have been without effect.

X X X X

16. Duty on liquor or intoxicating drugs— A duty shall, if the Government so direct, be levied on all liquor and intoxicating drugs manufactured in the territories of the State or imported into or exported from the State of such amount as the Government may from time to time prescribe:

Provided that it shall be lawful for the Government to exempt any liquor or intoxicating drug from any duty to which the same may be liable under any of the provisions of this Act.

16-A. Approval to the label.-No liquor, whether manufactured in the State or imported, shall be purchased, stored or sold in the State unless the label of such brand is approved by the Commissioner subject to such conditions as may be laid down by him and on payment of such fee as the Government may, by notification in the Government Gazette, specify from the time.

17. How duty may be imposed ---- Such duty may be levied in one or more of the following ways:-

(a) by duty of excise to be charged, in the case of spirits or beer, either on the quantity produced in the distillery or brewery or passed out of the distillery, brewery or warehouse or imported into or exported from the State, as the case may be;

(b) in the case of intoxicating drugs, by a duty to be rateably charged on the quantity produced or manufactured or passed out of the ware-house or on the acreage cultivated;

(c) by payment of a sum in consideration of the grant of any exclusive or other privilege—

(1) of manufacturing or supplying by wholesale, or

(2) of selling by retail, or

(3) of manufacturing or supplying by wholesale, and selling by retail any country liquor or intoxicating drug in any local area and for any specified period of time,

(d) by fees on licences for manufacture or sale,

(e) by transport duties assessed in such manner as the Government may direct.

(f) by duty on bottling of liquor.

x x x x

20. Forms and conditions of licences, etc.---(1)

Every licence or permit granted under this Act shall be granted-

- (a) on payment of such fees (if any),
- (b) for such period,
- (c) subject to such restrictions and on such conditions, and
- (d) shall be in such form and contain such particulars, as the Government may direct, either generally or in any particular instance, in this behalf.
- (2) The Government may, by order, delegate all or any of its powers under sub-section (1) to the Commissioner subject to such conditions, if any, as be specified in the order.”

RULES 4, 14, 15, 16, 26, 27 & 30 OF THE RULES

“**Rule 4.** There shall be the following classes of licences. Their mode of grant and the authorities to grant and renew them shall be as noted against each:

	Nature	Mode of grant	Authority empower to	
			Grant	Renew
L. FOREIGN LIQUOR				
JKEL-1	XXXX	XXXX	XXXX	XXXX
JKEL-1A	XXXX	XXXX	XXXX	XXXX
JKEL-2	Retail vend of foreign liquor to the public only.	Fixed fee or auction or private contract.	Excise Commissioner	Excise Commissioner (not renewable if the licence is granted by auction or private contract).
JKEL-3	XXXX	XXXX	XXXX	XXXX

X X X X

14. Every license issued under the provisions of the Jammu and Kashmir Excise Act and the rules framed thereunder shall be renewed before the expiry of its period of validity if the Licensing Authority approved the continuation of license through the same licensee and in respect of the same premises. A new license shall, however, be required where a

license has determined by reasons of surrender, cancellation or order of non-renewal or for any other reason or where it is proposed that a license in respect of premises or persons not previously licensed, should be issued;

Provided that no license shall be deemed to have been renewed on its expiry unless the Licensing Authority issues the express orders for its continuation;

Provided further that:

(a) a new license is not required on account of the addition or removal of a partner on the application of all the partners or the change of representative of a company or society;

(b) a license continued in favour of the legal representative of a deceased licensee for the remaining period of the licensee shall not be deemed to be a new license;

(c) if the premises of a license are changed during the period of its currency the license may be continued for the remaining period of the term on existing fee on the direction of the authority competent to grant such license;

(d) the authority competent to grant the license can for good and sufficient reasons, transfer the license in favour of a legal heir of the licensee for remaining period of the term.

15. All applications, for the grant or renewal of licences, which require, the orders of the Excise Commissioner under these rules should be received through the proper channel in the Excise Commissioner's Office before the end of October in each year:

Provided that applications for the grant of licenses in Form JKEL 3 or JKEL 4 may in urgent case, where they do not adversely affect any existing licence, be submitted at any time during the year.

16. No person to whom a license has been granted shall be entitled to claim as a matter of right any renewal thereof and no claim shall lie for damages for otherwise in consequence of any refusal to renew a licence on the expiry of the period for which it remains in force.

The Excise and Taxation Officer Incharge of Excise Range shall lay before the Deputy Excise Commissioner by the 10th of January each year a list of all licences requiring renewal. The list shall be accompanied in the case of licences granted on assessed fee, by a certificate of sales, in the case of bottling licenses by a similar certificate showing litres (London proof) bottled upto December 31.

X X X X

26. Licenses for the vend by wholesale and retail of any liquor may only be given for a period of one year from the 1st of April, to the 31st of March following, provided that:

- (a) a licence may be given from any date to the 31st March following;
- (b) the Excise Commissioner may sanction for shorter periods such licences or classes or licences as he thinks fit;
- (c) the Excise Commissioner, may by order, direct that the subject to such conditions and limitations as may be mentioned in such order, the period of any class of licenses shall be extended for a period not exceeding one month.

27. All licences shall unless it is otherwise provided determine on the 31st of March, next following the grant.

X X X X

30. Procedure to be followed and matters to be ascertained before any licence is granted for the retail vend of liquor, for consumption on the premises and off the premises in case of fixed fee leviable licences.

1. When it is proposed to grant a licence for the retail vend of liquor for consumption on/off any premises, which were not licensed in the preceding year, the Deputy Excise Commissioner of the Province shall take all reasonable steps to ascertain the opinion of persons, who reside or have property in the neighbourhood and are likely to be affected by the proposal.
2. The Deputy Excise Commissioner shall cause a notice posted of the proposal at or near the site proposed for the new licence.
3. If the proposed premises are in a municipal area or a town area, or notified area, the Deputy Excise Commissioner shall lay the proposal, in writing before the committee of the Municipality, Town area or Notified area.
4. The Deputy Excise Commissioner shall also ask for the opinion of the District Magistrate.
5. If the site of the proposed licence is near a Railway Station, educational institution, hospital area or any large factory, mill or workshop, the Deputy Excise Commissioner shall ask for the opinion of the Railway, educational or hospital authorities or commercial firms concerned.
6. If any objection is preferred to the proposal within two months from the date of the notice and reference, referred to in sub rule 2 of this rule, the Deputy Excise Commissioner or a gazetted officer deputed by him shall enquire into it. The inquiry shall, if possible, be made on the spot. If it is not possible to make an inquiry on the spot, an inquiry shall be made in a formal proceeding at which evidence tendered for or against the proposal shall be recorded. The date and place of the inquiry shall be published in the notice prescribed above.

7. The final report, together with the opinion of the Commissioner of the Local Bodies concerned and the District Magistrate (provided this opinion is furnished within two months and in respect of licence JKEL-4B within two weeks from the date of the reference mentioned in sub-rule (3) and (4) of this rule, shall be forwarded by the Deputy Excise Commissioner to the Excise Commissioner.

8. Pending completion of the procedure, here-in-above, the Excise Commissioner, may if the situation so warrants in the interest of Government revenue, grant a temporary licence for retail vending of liquor at a premises, previously notified by the department, for a period not exceeding four months, to be followed either by grant of a regular licence, licence under the rules on completion of the procedure or termination of the temporary licence in the event of non completion of the procedure.”

41. Section 14A of the Act talks about grant of license for sale of Country Liquor. The same could either be by auction or operation of the departmental vends. Section 16 talks of levy of duty of liquor and intoxicating drugs, Section 16A deals with approval of labels, whereas Section 17 provides for procedure for levy of duty.

42. As per the scheme of the Rules, a set procedure is required to be followed and certain formalities completed before any license is granted for retail vend of liquor for consumption on and off the premises. The important condition being to obtain opinion of the persons residing in that area where the liquor vend is to be opened. In case, the liquor vend proposed is close to Railway Station, Education Institutions, Hospital area or any large Factory, Mill or Workshop, their opinion is also relevant. (See **Rule 30**). Sub Rule 8 of Rule 30, which was inserted in the Rules w.e.f. 26.02.2004 provides that

pending completion of the formalities, the Excise Commissioner, in the interest of government revenue, can grant temporary license for retail vending of liquor for a period not exceeding four months. This may either follow grant of regular license on completion of procedure and formalities or termination of the temporary licenses, on expiry of its term. Every license granted under the Act is normally for the period from 1st of April to 31st of March of the following year (Rule 26). However, the Excise Commissioner has the power to extend the same for a period not exceeding one month (Rule 26(c)).

43. Rule 14 of the Rules provides for renewal of the licenses before the expiry of period of its validity. No license is deemed to be renewed unless the Licensing Authority issues express order in that regard. Proviso (d) thereof provides that the license is transferable in favour of the legal heirs of the licensee for remaining period of the term.

44. Rule 15 provides for procedure for filing application for grant or renewal of license.

45. Rule 16 provides that person to whom a license has been granted shall not be entitled to claim as a matter of right, renewal thereof. Refusal to renew a license will not be a cause of action to claim damages.

46. Though the Jammu and Kashmir Excise Act, Svt. 1958 was enacted in the year Svt.1958 (1901 A.D.). However, the Jammu and Kashmir Liquor License and Sales Rules, 1984, which prescribe the procedure for allotment of vends or for providing any other procedure were framed in the year 1984. In the absence of any Rules, how the system of allotment of vends

and charge of license fee and duties was being worked out for more than eight decades after the Act was enacted, is anybody's imagination. There is no clause of Repeal and Savings in the Rules. That would mean there were no Rules framed earlier.

III. EXCISE POLICIES

47. Ms. Seema Shekhar, learned Sr. A.A.G. has submitted before the court a compilation of the Excise Policies framed by the Government from year to year.

48. First in the series was issued on 03.04.2001 for the year 2001-02. The same was quite sketchy. It merely stated that the Government does not recognize sale of liquor as normal trade activity. Licenses shall be issued only if justified by exceptional circumstances. It means that before 2001-02 no Excise Policy was notified. However, 160 licenses had been issued before that, admittedly by applying a pick and choose policy.

49. Excise Policy for the year 2002-03 is not forthcoming.

50. Notification dated 26.06.2003 issued in exercise of powers conferred under Sections 16, 16A & 17 of the Act merely provided for duty and fee on liquor. It also provided for license fee. A provision was also made that old licensees who have got their licenses renewed after payment of pre-revised fee shall deposit the differential amount.

51. There is nothing on record to suggest as to what was the license fee charged from the different types of licensees, before the notification dated 26.06.2003.

52. From the Excise Policies produced before the Court, it is evident that in the 13 years practically there was no increase in the license fee for JKEL-2 licenses. That is why the liquor vendors are interested to continue with this trade merely by approaching the court and with interim orders passed in their favour and the object of the government to generate revenue is totally defeated. In the Excise Policies reference has been made to Sections 16, 16A and 17 of the Act source of power. None of these sections envisage grant or renewal of licences.

53. In the Excise Policy for the year 2017-18, on the one hand, Clause 3.2.1 of the aforesaid Policy provides that grant of licenses for operating liquor vends shall be strictly in terms of the provisions of the Act and the Rules and judgment of Hon'ble the Supreme Court and this court, however, going beyond that Clause 3.2.7 was added which provides that grant of new licenses shall be for a period of five years, which runs contrary to the provisions of the Rules and had to be ignored.

54. The Policy for the year 2018-19 again provided in Clause 3.2.1 that grant of licenses for operating liquor vends shall be undertaken strictly in terms of the provisions of the Act and the Rules and the Excise Policy notified for the year 2017-18. It further provided therein that for unserved areas, applications could be entertained on satisfaction of certain conditions. Clause 3.2.4 provided for validity of a license to be five years, totally contrary to the provisions of the Rules and earlier Clause 3.2.1 in the

Policy itself, which provided that licenses shall be granted in accordance with the provisions of the Act and the Rules.

55. The provisions in the Excise Policy for the year 2019-20 are also similar, as above with reference to period of grant and renewal of licenses.

56. There was no change in the License fee for any of the categories though liquor trade is said to be one, which though is prohibited but is a major source of revenue for the government but no application of mind was there by any authority in that direction.

III(A). CHALLENGE TO THE EXCISE POLICY FOR 2017-18 AND OTHERS

57. Relevant clauses of the Excise Policies for the years 2017-18, 2018-19 and 2019-20, which are under challenge, are reproduced hereunder:

2017-18	2018-19	2019-20
<p>Clause 3.2.1</p> <p>“The grant of license for operating vends shall be strictly in accordance with the provisions of the ‘J&K Excise Act, Svt. 1958’, ‘J&K Liquor License and Sales Rules, 1984’...”</p>	<p>Clause 3.2.1</p> <p>“The grant of licenses for operating liquor shops (JKEL-2) at identified unserved locations shall be undertaken by the Excise Department strictly in accordance with the provisions of the J&K Excise Act, Svt. 1958, J&K Liquor License and Sales Rules, 1984...”</p>	<p>Clause 3.2.1</p> <p>“The grant of licenses for operating liquor vends shall be strictly in accordance with the provisions of the ‘J&K Excise Act, Svt. 1958, ‘J&K Liquor License and Sale Rules, 1984”</p>
<p>Clause 3.2.7</p> <p>“Grant of any new license will be for a period of 5 years and the bid would include the premium over and above the annual license fee to be paid by such highest bidder, as determined by the Excise Department from time to time.”</p>	<p>Clause 3.2.4</p> <p>Validity of all types of licenses will be for a period of five years.</p>	<p>Clause 3.2.7</p> <p>“Grant of any new license will be for a period of 5 years and the bid would include the premium over and above the annual license fee to be paid by such highest bidder, as determined by the Excise Department from time to time.”</p>

<p>Clause 11. Renewal of license.-</p> <p>The renewal of license will be automatic subject to the following conditions:</p> <p>i. The licenses not being a defaulter of any taxes, levies or duties to the Commercial Taxes Department or Excise Department.</p> <p>ii. For the above purpose, the Excise Department will refer to the defaulters list maintained by the Commercial Taxes Department on its website as well as its own records.</p> <p>iii. Depositing of Annual prescribed fee by the licensee.”</p>	<p>Clause 11. “Renewal of licenses.-</p> <p>The renewal of license will be automatic for a period of 5 years from the issue of this policy, subject to the conditions laid down in Government Order No.311-FD of 2017 Dated 20-10-2017</p> <p>For the above purpose, State Taxes Department and Excise Department shall upload the list of all defaulters on the Department website by 1st of February, 2019.”</p>	<p>Clause 10. “Renewal of Licenses:</p> <p>The renewal of license will be automatic for a period of 5 years subject to the conditions laid down in Government Order No. 311-FD of 2017 Dated 20.10.2017. However, the licenses issued to the Army/PMF/NPS shall be renewed every year.”</p>
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58. In the Excise Policy for the year 2017-18 which was notified on March 30, 2017, it was provided that demand for granting new licenses for underserved areas shall be determined and the licenses shall be granted through e-auction mode. The procedure for e-auction was to be notified separately. Clause 3.2.7 provided that new licenses will be for a period of five years. Clause 11 thereof provided that renewal of licenses shall be automatic subject to fulfillment of certain conditions. The fact remains that no new licenses were allotted in Jammu and Kashmir ever since 2005 except that one license was granted in January 2011 and two sub-vends allotted in the year 2005, were made regular in 2019. Hence, issuance of Excise Policies was an eye-wash and apparently were only for renewal of the earlier licenses granted.

59. In the Excise Policy for the year 2018-19 as well, Clause 3.2.4 provides that grant of liquor licenses at a stretch shall be for a period of five

years. Rules 26 and 27 of the Rules provide that a license may be granted from any date to the 31st March following. That would mean maximum period of one year in case allotment is made on April 1 in any year. Clause 3.2.1 in the Policy provides that licenses shall be in accordance with the provisions of the Act and the Rules. A plain reading of Rules 14 and 15 also show that even renewal can also be maximum for a period of one year. The Excise Policy in the present case, which has been framed as subordinate to the Act and the Rules could not go beyond the same wherein provision has been made for allotment of licenses at a stretch for a period of five years. Any provision in the Excise Policy which is subordinate to the Act and the Rules can not go beyond the same. It apparently is a result of connivance between the parties. Hence, Clause 3.2.7 and Clause 11 in the Excise Policy for the year 2017-18, Clause 3.2.4 and Clause 11 in the Excise Policy for the year 2018-19 and Clause 3.2.7 and Clause 10 in the Excise Policy for the year 2019-20, are struck down being contrary to the provisions of Clause 3.2.1 of the Excise Policies for the year 2017-18, 2018-19 and 2019-20, and Rules 26 and 27 of the Rules.

60. Concept of regularization of licenses is also unknown in the liquor trade and alien to the provisions of the Act and the Rules. Clause 3.2.11 talks about sub-vends. It provides that operational sub-vends shall be eligible for regularization. Nothing was suggested at the time of hearing that any transparent procedure was adopted for allotment of sub-vends. It is nothing else but the system which follows the principle, '*you show me face I show you rule*'.

61. Excise Policy for the year 2018-19 was notified on 29.05.2018. The licenses earlier granted were valid only up to March 31, 2018

if read in the light of Rules 26 and 27 of the Rules. Hence, as to what happened for the interregnum period for April 1, 2018 to 29.05.2018 was not pointed out by any of the parties. Extension could be granted for a period of one month (Rule 26). Renewal could only be granted during the validity of the license (Rule 14) and by a specific order (First Proviso to Rule 14).

62. The conduct of the officers at the helm of affairs who had issued the aforesaid Excise Policy for the year 2017-18 till 2019-20 and acted totally contrary to the provisions of the Act and the Rules and interim order dated 23.03.2017 passed in these appeals needs to be examined by the competent authority. As to whether in future they can be entrusted with any responsible position. Their mindset of violating the law and court orders, is another factor which is required to be taken care of as they are capable of tinkering with provisions of law and violate the mandate contained therein or rewrite the same.



IV. REGARDING MAINTAINABILITY OF THE PETITION AT THE SHOW CAUSE STAGE

63. One of the issues on which much stress was laid by the learned counsels was regarding maintainability of the writ petition against the show cause notice. Grievance of the appellants is that their aforesaid argument and the issue regarding validity of the show cause notices have not been gone into by the learned Single Judge. The ground raised was that the government having already decided to cancel the temporary licenses granted to the appellants, as is evident from Para 12 of the show-cause notice, it was an exercise in futility to respond and appear before the Excise Commissioner, an authority subordinate to the government. Whereas the stand taken by the respondents was that all the issues could very well be raised before the Commissioner. At the cost of

repetition, it may be added that it is the undisputed case of both the parties that mere temporary licenses were granted to the appellants for a period of four months, which in any case were to expire on 19.12.2005. The same could either be followed by a regular license or automatic termination on its expiry. In this view of the matter the relief prayed for in the writ petition, in fact had become infructuous. But the appellants contested that issue, by raising an argument that after the expiry of the temporary licenses, the appellants having completed all the formalities were entitled for issuance of regular license and thereafter renewal on year to year basis claiming parity with the licensees who had been granted renewal for the last 50-60 years.

64. Right to trade in liquor is not a fundamental right, which can be enforced in court. As per the law laid down by Supreme Court, the court cannot go into the policy as such. However, wherever arbitrariness is there, the court can always interfere. The arbitrariness in the action of the respondents in the process of grant of licenses for liquor vends is writ large in the case in hand. It is the admitted case of the parties that no process was followed ever, till such time the advertisement in question was issued on 25.06.2005 for grant of licenses for liquor vends. Prior to that it was the discretion of the Finance Minister to grant licenses to any one at any time. There cannot be more arbitrariness in the process than this, as any process of allotment specially where the rights are being conferred by the State, had to be in totally transparent manner especially where lot of revenue is involved.

65. Even for the allotment of vends in question, though the procedure for draw of lots was followed but the fact remains that even the same was found to be tainted. The report cannot be said to be totally non-reliable though

said to be inconclusive, as the result of draw of lots speaks for itself. In the communication dated 16.09.2005 from State Vigilance Organization to the Chief Secretary it was conveyed that computer program was got prepared from KAWA a private agency in the year 2004. It was further developed by Rakesh Dogra for the year 2005. As against 90 vends, 270 candidates were selected i.e. three against each vend in the order of priority. Out of 9,545 valid applications, 270 applicants were found to be successful. The result of the draw of lots as mentioned in the aforesaid communication was as under:

“

Applications Form No.	No. of applicants approx.	%age of total applicants (out of 9545)	Selected Applicants (out of 270)	%age of selection
1 & 2 Digits (1-99)	99	1.0	14	5.2
3-Digits (100-999)	899	9.4	101	37.4
4-Digits (1000-9545)	8545	89.5	155	57.0

”

66. 42.6% applicants, who were successful were out of 10.4% applicants in the category of 1, 2 and 3 digit numbers applications. The program was heavily skewed in favour of 1, 2 and 3 digit application numbers. It further mentioned that from examination of record, it was found that there were number of proxy applicants on behalf of serving or retired government employees including of the Excise Department. Sanjay Sharma, brother in law of the Software Engineer Rakesh Dogra was the successful candidate. The opinion expressed was that there were inherent defects in the system.

67. There is another communication dated 23.11.2005 from State Vigilance Organization to the Chief Secretary referring to the report of Senior System Analyst, CBI which reads as under:

“2. A C.D. carrying the programme through which lots were drawn on computed by the Excise Department was referred to Senior System Analyst, CBI. Findings are summarized as follows:-

- a. On inspection of the code, it was found that the logic to pop-up a particular random number was so designed that first a 5 digit number will appear and then 2 or 3 digit numbers and lastly 4 digit numbers will appear. There was no 5 digit numbers to be allotted. Therefore, the probability of appearing listed numbers are divided into two categories i.e. 50% to 2 and 3 digit numbers and 50% to 4 digit numbers.
- b. Chances of appearance of 2 or 3 digit numbers is ten times more than appearance of a 4 digit number.
- c. For favoring 4 digit numbers another code was available on system to draw only 4 digit number.

3. The report has proved that there was inherent defect in the computer programme favouring 2 or 3 digit numbers. Also the presence of a code which could draw only 4 digit numbers raises suspicion about the intention of the programmer but nothing conclusive can be deduced from this about tutoring of the programme to favour particular numbers. The presence of abnormally high proxy candidates on behalf of serving/retired employees of the Excise Department in the select list as also brother-in-law of the software designer do raise a suspicion about the programme having been tutored.”

68. It is further evident from the facts that two sub liquor vends granted in the year 2005-06 were regularised vide order dated 25.02.2019. Even these vends had been continuing for more than a decade though temporary initially but regularised later on. There was one liquor vend allotted in January 2011, for which no one at the time of hearing pointed out that any public notice was issued.

69. As per the information furnished by the Government, out of 160 liquor licenses granted up to the year 2000-01 without following any procedure, 34 are in the name of women whereas in 25, they are partners with other males. Out of 60 licenses which are subject matter of dispute having been allotted in the draw of lots, 21 are in the name of women. The aforesaid fact clearly establishes that there are other persons behind the scene as it was the admitted case of the appellants themselves that women folk are not sitting on the vends to take care of the business.

70. The only action taken by the Government against Rakesh Dogra, Programmer was that he was debarred from participation in the government contracts subsequently. This was the minimum required. However it is a fact that no action was taken against any other person. But two wrongs will not make one right. Merely because there is no action against any other person will not entitle the appellants to claim that they should also be allowed to enjoy benefits of the tutored system used for draw of lots. The fact of matter is also that despite these allegations and action of the government to cancel the licenses, still the appellants were expecting renewal thereof, when right to trade in liquor is not fundamental. In the process it is not possible to segregate the genuine.

71. As far as the argument raised regarding reference of the cases pertaining to draw of lots to the Vigilance is concerned, the same is totally misconceived to the extent that such a matter could not have been referred to the Vigilance as no criminal case had been registered. The Vigilance department could only enquire into any F.I.R registered and not otherwise. Merely because the matter had been referred to the Vigilance Department does

not mean that a criminal case was to be registered or had been registered by the Vigilance Department. Even before registration of case, for preliminary enquiry matter can be referred to Vigilance. Reference was apparently for the reason that the Excise and Taxation Department did not have the required infrastructure to carry out the investigation for the allegation regarding tutoring the computer system on which draw of lots was held. The fact of the matter is that even Vigilance did not have that infrastructure. They had to request the CFSL and finally report came from Senior System Analyst, CBI. This is sad state of affairs in Jammu and Kashmir where number of government employees per lakh of population is about 3,600, whereas one of the good governed State of Gujarat has about 830 government employees per lakh of population. The reason why these facilities are not available despite receipt of thousands of crores of rupees of tax payers money from the government of India annually, is that quality had always been compromised. Formula of pick and choose and favourism is prevalent in the entire system.

72. In view of our aforesaid discussion, in our view, the show cause notices issued to the appellants for cancellation of licenses cannot be said to be bad in law as the material which has come on record in the form of enquiry into the system on which the draw of lots was held and the result thereof is sufficient to hold that the process adopted was not fair. In the case in hand criminal trial is not being held. We have to consider the report of the System Analyst. This throws light on the tampering with the programme as a result of which maximum allotments have gone in the category of 1, 2 and 3 digit number applications. The report says that chances of appearance of 2 or 3 digit numbers were ten times more than 4 digit numbers. Further there being number

of successful applicants having relations with retired or serving Government officials including in Excise Department and allotment of vend to brother in law of the Programmer leads to only one conclusion that the system followed did not inspire confidence. There is no reason with us to discard the report of the expert.

73. Keeping in view the aforesaid factual matrix and also the stand taken by the learned counsel for the government that as usual the government will be coming out with a new Excise Policy for the year 2021-22, the transparent method for allotment of licenses for trade in liquor is required to be followed which may give fair opportunity to all interested in the trade, subject to their eligibility. These have not to be limited to the persons in power or close to the corridors of power, as had been the practice earlier. All have equal right to participate. The fact that licenses already granted were being renewed as a matter of course, contrary to the provisions of law, will not debar the authorities to take corrective steps and act in accordance with law and not follow the practice which is contrary to law. And the clauses in Excise Policies for the year 2017-18, 2018-19 and 2019-20 providing for renewal of licenses for five years having been found to be contrary to the Rules, the government shall be at liberty to frame new Excise Policy for the year 2021-22 taking care of all the aspects. The clauses in the policy for the years 2017-18 to 2019-20 granting renewal for a period of five years having been set aside by this court, consequently earlier renewal may be invalid.

74. However, immediate action may create a vacuum as there would be no liquor vends. It may result in loss of revenue to the Government also. Hence, it is directed that the appellants should also be allowed to operate their

vends till March 31, 2021. For the period subsequent thereto appropriate steps be taken for allotment of liquor vends by following a transparent method keeping in view the government revenues. As conditions in the policies for the years 2017-18, 2018-19 & 2019-20 regarding renewal of licenses for a period of five years have been struck down being contrary to the provisions of the Act and the Rules, appropriate steps be taken in that direction, however, all the liquor vends should be allowed to operate till March 31, 2021 and the entire process should be completed before that date so that in the coming financial year the allotment of liquor vends in the Union Territory of Jammu and Kashmir is by adopting a transparent procedure, which inspires confidence in the public as well, otherwise all are losing faith in the system because of repeated arbitrariness in the different actions by the authorities at the helm of affairs, where all rights and privileges are being conferred only on few, who are close to power.

IV(A)**RENEWAL OF LICENSES**

75. The learned counsels for the appellants had been fair enough to state that trade in liquor is not a matter of right. It is so as Hon'ble the Supreme Court has time and again opined that there is no fundamental right to trade in liquor. It is a right conferred by the State. They were fair enough to state that the right to trade may not be fundamental right and consequently they may not have right to claim renewal of their licenses but the fact remains that as a matter of course, the licenses are being renewed in Jammu and Kashmir for decades together. Sum total of the argument is that a practice which is contrary to law, is sought to be enforced in court.

76. Rule 14 of the Rules is only an enabling provision which may not confer any right on the licensees to enforce, if seen in the light of Rule 16 of the Rules and the law laid down by Hon'ble the Supreme Court, as has been discussed in Part-I of the Judgment.

77. In the case of the appellants, admittedly they were granted temporary licenses for a period of four months, which were to expire on 19.12.2005. Before the expiry of the aforesaid period, complaint was received regarding tampering of the device used for draw of lots. On enquiry, the allegations were substantiated. Show cause notices dated 14.12.2005 were issued for cancellation thereof. The same were challenged by the licensees in this court. Ever since then they are operating liquor vends in view of interim orders passed in their favour. Temporary licenses granted to them could at the most be valid up to 31.03.2006 and thereafter they could only seek renewal thereof, which in terms of the Rules and the law laid down by the Supreme Court is not a matter of right. It is only that parity is sought to be claimed with the licensees who are operating for the last 50-60 years with renewal of their licenses, which again cannot be said to be strictly in accordance with law and will not confer any right on the appellants.

IV(B) TEMPORARY LICENSES

78. Grant of license especially for trade in liquor without completion of formalities can never be thought of. Apparently this is not provided under any Statute or Rules. Grant of license is only after any applicant is found to be eligible. As adhocism is writ large in the functioning of all the departments in Jammu and Kashmir, the same system was brought even in liquor trade by inserting Sub Rule (8) in Rule 30 thereof, vide SRO No.508 dated 26.02.2004.

The idea to carry out the amendment may be for grant of licenses in the near future. The process for allotment of liquor vends started when advertisement was issued on 25.06.2005. Draw of lots was held on which issues were raised.

79. One of the reason mentioned in Rule 30(8) of the Rules is that temporary licenses can be granted if the situation so warrants in the interest of government revenue but the same seems to be totally misnomer as government revenue has always been kept at a back seat in Jammu and Kashmir. There is no process followed to generate more revenues. Rather the idea is to waste as much as possible and loot the government properties. The fact that there was no Excise Policy for decades as the first in series was notified in the year 2001 and further the provisions being totally sketchy and the renewal of license being granted as a matter of course to the license holders thereof, shows that the effort is not to generate revenue but let it go to the pockets of the favourites.

**V. APPLICATION OF CONDITIONS LAID DOWN IN
RULE 30 FOR THE PURPOSE OF RENEWAL OF
LICENSE**

80. The arguments raised by the learned counsels for the appellants that the conditions as laid down in Rule 30 which are meant for grant of licenses will not be applicable for the purpose of renewal thereof, is though attractive but totally misconceived. Article 47 of the Constitution of India which is part of directive Principles of State Policy provides that the State shall endeavour to bring about prohibition of consumption except for medicinal purposes of intoxicating drinks and of drugs, which are injurious to health.

81. One of the important conditions laid down in Rule 30 of the Rules is the opinion of the persons who reside in the area where the license is to be granted. Another important condition is that opinion of the Railway, Educational or Hospital Authorities or Commercial Firms in the neighbourhood is also to be sought and the matter is required to be inquired into. Merely because a license is granted at a particular place does not mean that for all times to come, the residents of the area or the establishments, as have been referred to in Rule 30(5) are debarred to raise objections, especially when licensing is on annual basis. Such a system leads to the conclusion that right to trade in liquor is a fundamental right.

82. Trade in liquor is restricted. It can be regulated. Merely because a liquor vend has been opened at a particular place will not mean that the other development activities, which are basic in nature, in the area have to be put on hold merely because a liquor vend exists there. For renewal of any license, satisfaction of all the conditions which are required for the purpose of grant thereof are inbuilt and have to be satisfied in case, any license is to be renewed. The competent authority will be well within its right to ensure compliance thereof in case, in addition to any conditions, laid down in the Excise Policy for the year before renewal of any license, if permissible. Rule 16 of the Rules provides that no one has a right to claim renewal of the license.

VI. ARGUMENTS OF INTERVENERS

83. As far as the contention raised by Mr. Pranav Kohli, learned Senior Counsel appearing for the private respondents who have been impleaded in terms of the liberty granted by Hon'ble the Supreme Court in **Satvir Singh and other's case** (supra) is concerned, they cannot be granted any

licenses at this stage. It is their admitted case that they filed their applications way back in the year 1999 and claimed to have completed the formalities at that stage but were not granted the licenses though the system followed at that time was for grant of licenses on the recommendation of the Finance Minister. At this stage, even if the vends for which they were the applicants have not been allotted, they cannot be allotted the vends as in the last more than two decades much water has flown and there had been different Excise Policies, which have been notified for allotment of liquor vends. Instead of the same being a closed quarter affair transparent method for allotment is to be followed from the coming financial year. No relief can possibly be granted to them at this stage. Hence, their prayer to that extent deserves to be rejected. Even otherwise they were not the applicants in the process of grant of licenses against the advertisement in question. Hence their claim stands rejected.

84. Reference can be made to the judgment of Hon'ble the Supreme Court in (1996) 5 SCC 268 titled as *P.T.R. Exports (Madras) Pvt. Ltd and Others v. Union of India and others*, wherein the issue under consideration was as to whether the change in policy is permissible after the applications are invited for the purpose. It was observed therein that it may be open to the government to evolve new scheme and the Court will not bind the government to the policy which existed on the date of application if the change in policy was necessary in public interest. The Court should allow free play to the government to evolve fiscal policy in the public interest and to act upon the same. The relevant para No. 5 thereof is extracted below:-

“5. It would, therefore, be clear that grant of license depends upon the policy prevailing as on the date of grant of the

license. The Court, therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come. When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to be Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilization of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved. We, therefore, hold that the petitioners have no vested or accrued right for the issuance of permits on the MEE or NQE, nor is the Government bound by its previous policy. It would be open to the Government to evolve the new schemes and the petitioners would get their legitimate expectations accomplished in accordance with either of the two schemes subject to their satisfying the conditions required in the scheme. The High Court, therefore, was right in its conclusion that the Government is not barred by the promises of legitimate expectations from evolving new policy in the impugned notification”.

VII. CONDUCT OF GOVERNMENT DEPARTMENTS

85. The connivance of the Excise and Taxation Department is apparent on the face of it where they have maintained conspicuous silence and

did not take any action in the matter. The writ petitions filed by the appellants were disposed of by the learned Single Judge giving liberty to the Government to review its Excise Policy keeping in view earlier judgments of this court. Though no grievance was left but still the appellants who had been able to operate liquor vends granted to them temporarily for four months, for a period of about 12 years because of pendency of the writ petitions, they challenged the order passed by the learned Single Judge by filing intra-court appeals. LPAOW No. 11/2017 came for hearing before this court on 23.03.2017, when the same was admitted. As far as grant of interim relief is concerned, the arguments raised by learned counsels for the appellants were same as are being raised now that they have right to get the licenses renewed and their plea of show-cause notices being invalid was not considered by the learned Single Judge. Whereas the stand taken by the Advocate General was that new Excise Policy will be notified on or before 31.03.2017 for allotment of liquor vends in future. Keeping these facts in view, this court observed that even if the new policy is notified, the process of invitation of bids for allotment of liquor vends will take some time and in case during this period, the appellants are not allowed to run the vends and pay the license fee, the same will result in loss to the public exchequer. The following interim directions were issued:

“.....We direct that the appellants shall be allowed to run their shops subject to payment of license fee as required under the terms and conditions of the license till process of fresh tender for grant of liquor licences is completed. Needless to state that the appellants shall also furnish undertaking before the competent authority that they shall not operate the liquor vends in case the license is not granted to them. Needless to state that the appellants would also be at liberty to participate in the process of fresh tender. The aforesaid interim arrangement shall be subject to the final outcome of the writ petition.”

86. Despite the aforesaid order being there, in terms of which process of allotment of liquor vends was to take place in terms of the new Excise Policy to be notified by the government and the appellants were allowed to continue till such time, new licenses were issued but still the government slept over the matter. This clearly shows that they were hand in glove with the appellants and instead of allotting the licenses as per Excise Policy notified on 30.03.2017 had been renewing the temporary licenses granted to the appellants.

87. Connivance is also evident from the fact that the appeal was admitted on 23.03.2017 and there is nothing on record to show that any effort was made by the Excise and Taxation Department or the Law Department to get the matter expedited.

88. As far as proceedings of the case before the learned Single Judge are concerned, it is evident that notice was issued on 19.12.2005. On 29.03.2006, interim directions were issued in favour of the writ petitioners. The bunch of petitions was admitted on 20.04.2006 and the writ petitioners were allowed to carry on their business. Thereafter till such time application was filed by the private respondents herein seeking their impleadment as respondents in the writ petitions and the same was allowed on 30.06.2011, primarily no effective proceedings had taken place in the bunch of petitions as only applications were being filed by the writ petitioners seeking direction for allowing them to deposit the license fee every year. The official respondents apparently were not interested to pursue the present petitions. Complete overhaul in the working of the Advocate General's office is also required as it has also failed to protect the interest of the Government by showing delinquent

behaviour in pursuing important matters, where huge revenue was involved. But this is not a case in isolation as this has become part of the system.

VIII. REGARDING PRODUCTION OF OFFICIAL COMMUNICATIONS IN COURT

89. Mr. Shah, learned Senior counsel had referred to certain additional documents placed on record in OWP No. 486/2017. A perusal of the aforesaid documents shows that these are official communications inter-se different government departments. None of them was referred, to show that these were endorsed or addressed to the petitioners. In the absence thereof, no right accrues to the petitioners with reference to any of the contents of those communications. Reference in this regard can be made to the judgments of Hon'ble the Supreme Court in AIR 1994 SC 2737 titled as *Puranjit Singh v. Union Territory of Chandigarh* and AIR 2003 SC 2357 titled as *M.D., U.P. Land Development Corporation and anr. V. Amar Singh and others*. In any case, the petitioners have not been able to apprise the court about the source of these documents, which apparently must have been procured by adopting unfair means. Such an effort of any litigants needs to be deprecated.

IX. RELIEF

90.

- (i) The show cause notices issued to the appellants for cancellation of their temporary licenses granted on 20.08.2005, which were valid up to 19.12.2005, are upheld.
- (ii) Clause 3.2.7 and Clause 11 in the Excise Policy for the year 2017-18, Clause 3.2.4 and Clause 11 in the Excise Policy for the year 2018-19 and Clause 3.2.7 and Clause 10 in the Excise Policy for the year 2019-20, are struck down being

contrary to the provisions of Clause 3.2.1 of the Excise Policies for the years 2017-18, 2018-19 and 2019-20, and Rules 26, 27 of the Rules.

- (iii) As submitted by the learned counsel for the Government, the official respondents shall be at liberty to frame new Policy for the coming year namely, 2021-22 in accordance with the provisions of the Act and the Rules, and the law laid down by Hon'ble the Supreme Court on the subject.
- (iv) The Liquor Vends already operating shall be allowed to continue till 31.03.2021 and thereafter the licenses for liquor vends shall be allotted in terms of the Excise Policy to be notified by the Government for the year 2021-22. The government shall be at liberty to take appropriate steps in view of striking down of the provisions of the Excise Policies, which envisage grant and automatic renewal of licenses for a period of five years.
- (v) With reference to the observations made in Para 62 of the Judgment, the matter may be examined by the Chief Secretary of the Government of Jammu and Kashmir, for taking appropriate action.
- (vi) Renewal of licenses for trade in liquor is not matter of right, which can be enforced.
- (vii) For the purpose of renewal of licenses for trade in liquor, if permissible in law, all the conditions applicable for grant of a new license shall also be applicable.

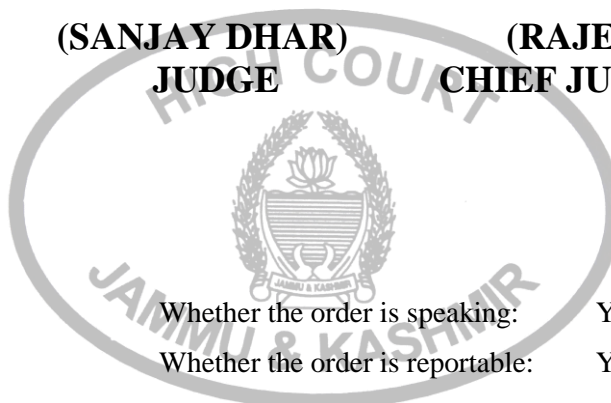
(viii) The writ petition is allowed in the aforesaid terms. The appeals are dismissed with cost of ₹10,000/- on each of the appellants. The cost be deposited with the respondent No.2, Excise Commissioner, Department of Excise and Taxation within one month from the receipt of the copy of the judgment.

While modifying the judgment of learned Single Judge the appeals are disposed of in aforesaid terms. The writ petition is allowed.

(SANJAY DHAR)
JUDGE

(RAJESH BINDAL)
CHIEF JUSTICE (ACTING)

Jammu
28.12.2020
Raj kumar



Whether the order is speaking: Yes/No
Whether the order is reportable: Yes

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