

STATE OF KERALA AND OTHERS

v.

KANDATH DISTILLERIES

(Civil Appeal No. 1642 of 2013)

FEBRUARY 22, 2013

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Liquor - Application for licence for setting up distillery unit - Non-consideration of - After intervention of the Court, application considered and then rejected by competent authority - Courts below quashed the rejection order directing grant of the licence - On appeal, held: Courts below wrongly directed grant of distillery licence by issuing writ of mandamus - Grant of the same was within the discretionary power of the competent authority - Court should not have interfered with the same, unless the applicant established a better claim over others, which the applicant failed - Abkari Act - s.14 - Foreign Liquor (Compounding, Blending, Bottling) Rules, 1975 - r.4.

Constitution of India, 1950 - Art.19(1)(g) and Art.47 - Fundamental right to trade or business in liquor - Held: In view of the directive principles provided under Art.47, State has exclusive right or privilege in respect of portable liquor - A citizen has, therefore, no right to trade or business in liquor as a beverage and the activities, which are res extra commercium.

Writ - Mandamus - A Writ of Mandamus can be issued only when a legal right is established against an authority who has legal duty emanating in discharge of public duty or operation of law - Court to issue the writ of mandamus keeping in mind the legislative scheme, its object and purpose, the subject matter, the evil sought to be remedied, State's exclusive privilege etc.

A *Administrative Law:*

Policy decision - Liquor policy of State - Judicial review of - Held: Monopoly in the trade of liquor is with the State - State has the power to frame and reframe, change and rechange, adjust and readjust its policy, which cannot be declared as illegal or arbitrary by the Court on the ground that earlier Policy was better - Judicial Review.

Statutory discretion - Exercise of - Exercise of the discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or caprice anathema to the rule of law envisaged under Art.14 of the Constitution - However, the onus to prove the discrimination is on the complainant - Abkari Act - s.14 - Foreign Liquor (Compounding Blending, Bottling) Rules, 1975 - r.4. - Constitution of India, 1950 - Art. 14 - Evidence Act, 1872 - s.10 - Onus to prove.

Judicial review - Of discretionary decision - Court cannot impede the exercise of discretion of an authority acting under the Statute by issuing writ of Mandamus - Writ - Writ of mandamus.

The respondent applied on 12.1.1987, for licence for establishing distillery unit in a particular district. In the year 1998 and prior thereto, large number of applications for setting up of distillery units were received. State Government granted licence to 4 applicants. Out of them two licences, were for the establishment of the unit, in the district for which the respondent had applied for.

Respondent challenged the non-consideration of his application. Initially the State communicated the respondent that his application would not be considered in view of the policy decision not to grant further licences. After intervention of the Court, the State considered the application of the respondent and rejected the same. Respondent challenged the rejection of his

application. Single Judge of High Court allowed the writ petition and directed the State to grant licence applied for, by the respondent. In writ appeal, Division Bench of High Court upheld the order of Single Judge. Hence the present appeal. A

Allowing the appeal, the Court B

HELD: 1. Article 47 is one of the Directive Principles of State Policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to the human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. State has, therefore, the exclusive right or privilege in respect of portable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in portable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. [Para 21] [1072-G-H; 1073-A-D] C D E F

1.2. Legislature, in its wisdom, has given considerable amount of freedom to the decision makers, the Commissioner and the State Government since they are conferred with the power to deal with an article which is inherently injurious to human health. The powers conferred on the Commissioner and the State Government under s.14 of the Abkari Act as well as Rule 4 are G H

A discretionary in nature. [Paras 22 and 23] [1073-F-H]

Vithal Dattatraya Kulkarni and Ors. vs. Shamrao Tukaram Power SMT and Ors. (1979) 3 SCC 212: 1979 (3) SCR 572; *P.N. Kaushal and Ors. vs. Union of India and Ors.* (1978) 3 SCC 558: 1979 (1) SCR 122; *Krishna Kumar Narula etc. vs. State of Jammu and Kashmir and Ors.* AIR 1967 SC 1368: 1967 SCR 50; *Nashirwar and Others vs. State of Madhya Pradesh and Ors.* (1975) 1 SCC 29: 1975 (2) SCR 861; *State of A. P. and Ors. vs. McDowell and Co and Ors.* (1996) 3 SCC 709: 1996 (3) SCR 721; *Khoday Distilleries Ltd. and Ors. vs. State of Karnataka and Ors.* (1995) 1 SCC 574: 1994 (4) Suppl. SCR 477 - relied on.

2. Liquor policy of State is synonymous or always closely associated with the policy of the Statute dealing with liquor or such obnoxious subjects. Monopoly in the trade of liquor is with the State and it is only a privilege that a licensee has in the matter of manufacturing and vending in liquor. Courts are also not expected to express their opinion as to whether at a particular point of time or in a particular situation, any such policy should have been adopted or not. In the instant case, 1998 Policy had life only in that year and if any rights accrued to any party, that had to be adjudicated then and there. Writ Petition was moved only in the year 2000, by then, policy had been changed because 1999 liquor policy was total ban, so also subsequent liquor policies. It is trite law that a Court of Law is not expected to propel into "the uncharted ocean" of State's Policies. State has the power to frame and reframe, change and re-change, adjust and readjust policy, which cannot be declared as illegal or arbitrary on the ground that the earlier policy was a better and suited to the prevailing situations. Situation which existed in the year 1998 had its natural death and cannot be revised in the year 2013, when there is total ban. [Para 24] [1074-A-E]

H

State of Maharashtra vs. Nagpur Distilleries (2006) 5 SCC 112 - relied on. A

3.1. Discretionary power implies freedom of choice, a competent authority may decide whether or not to act. The legal concept of discretion implies power to make a choice between alternative courses of action. Statute has conferred discretionary power on the Commissioner and State Government but not discretion coupled with duty because they are dealing with a subject matter on which State has exclusive privilege. Permissive language used by the Statute in Section 14 of the Act and the rule making authority in Rule 4 of Foreign Liquor (Compounding, Blending, Bottling) Rules, 1975 gives the State Government and the Commissioner, no mandatory duty or obligation to grant the licence except perhaps to consider the application, if the liquor policy permits so. (Para 25) [1074-F-H] B C D

3.2. The powers, conferred on the Commissioner as well as the Government, have to be understood in the light of the Constitutional scheme bearing in mind the fact that the trade or business which is inherently harmful can always be restricted, curtailed or prohibited by the State, since it is the exclusive privilege of the State. No duty is, therefore, cast on the Commissioner to grant a licence for establishing a distillery unit and no right is conferred on any citizen to claim it as a matter of right. State can always adopt a "restrictive policy", e.g., reducing the number of licences in a particular district or a particular area, or not to grant any licence at all in a particular district, even in cases where the applicants have satisfied all the conditions stipulated in the rules and the policy permits granting of licences. In other words, the satisfaction of the conditions laid down in 1975 Rules would not entitle an applicant as a matter of right to claim a distillery licence which is within the exclusive privilege of the State. [Para 26] [1075-B-E] E F G H

- A 3.3. Discretionary power leaves the donee of the power free to use or not to use it at his discretion. The exercise of statutory discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or caprice anathema to the rule of law envisaged in Article 14 of the Constitution. It is trite law that, though, no citizen has a legal right to claim a distillery licence as a matter of right and the Commissioner or the State Government is entitled to either not to entertain or reject the application, they cannot enter into a relationship by arbitrarily choosing any person they like or discriminate between persons similarly circumscribed. In such a situation, it is for the party who complains to establish that a discriminatory treatment has been meted out to him as against similarly placed persons but cannot demand a licence for establishing a distillery unit, as a matter of right. [Para 29] [1076-G-H; 1077-A-C]
- B
- C
- D

Rani Drig Raj Kuer vs. Raja Sri Amar Krishna Narain Singh AIR1960 SC 444; 1960 SCR 431; *State of Madhya Pradesh vs. Nandlal Jaiswal* (1986) 4 SCC 566: 1987 (1) SCR 1 - relied on.

E

- 3.4. The Respondent could lay a claim only if it establishes that a preferential treatment has been meted out to other two applicants, while granting licences for establishing the respective distillery units on the ground of discrimination violating Article 14 of the Constitution of India. Respondent has never challenged the distillery licences granted to them, but only prayed for another licence for it as well which cannot be claimed as a matter of right. Citizens cannot have a fundamental right to trade or carry on business in the properties or rights belonging to the State nor can there be any infringement of Article 14, if the State prefers other applicants for the grant of licence, during the pendency of some other applications, unless an applicant establishes a better claim over
- F
- G
- H

others. [Para 32] [1078-B-E]

A

3.5. 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 into 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. Since 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 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. 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. [Para 27] [1075-F-H; 1076-A-E]

B

C

D

E

F

G

4. In the facts of the case, it cannot be said that the application of the respondent was rejected solely on the

H

- A ground that the application could not be treated as an application put forward by a firm based on a partnership deed, which came into existence on 10.4.1991, as per Clause 3 of the Partnership Deed but on various other grounds as well. The State Government considered the
- B respondent's application dated 12.1.1987 with regard to the conditions that existed in the year 1998. The Government letter dated 28.6.1994 would indicate that, apart from the respondent, few other applications were also pending prior to the year 1994. Over and above, the
- C State Government during the year 1998, received 52 applications for establishing compounding, blending and bottling units in IMFLs in various parts of the State. This Court cannot activate an out-modeled, outdated, forgotten liquor policy of 1998, in the year 2013, by a Writ of Mandamus. Single Judge as well as the Division Bench
- D of the High Court have overlooked the vital factors while issuing a Writ of Mandamus directing the State Government/ Commissioner to grant distillery licence to the respondent. [Paras 33 and 34] [1078-F-H; 1079-A-C]
- E *Bihar Distillery and Anr. vs. Union of India and Ors.* 1997 (1) SCR 680; *Comptroller and Auditor-General of India and Anr. vs. K.S. Jagannathan and Anr.* (1986) 2 SCC 679: 1986 (2) SCR 17; *Harigovind Yadav vs. Rewa Sidhi Gramin Bank and Ors.* (2006) 6 SCC 145: 2006 (2) Suppl. SCR 116;
- F *RBF Rig Corporation, Mumbai vs. The Commissioner of Customs (Imports), Mumbai* (2011) 3 SCC 573: 2011 (2) SCR 691 - referred to.

Case Law Reference:

- | | | | |
|---|-------------------------|-------------|---------|
| G | 1997 (1) SCR 680 | referred to | Para 3 |
| | 1986 (2) SCR 17 | referred to | Para 17 |
| | 2006 (2) Suppl. SCR 116 | referred to | Para 17 |
| H | 2011 (2) SCR 691 | relied on | Para 17 |

1979 (3) SCR 572	relied on	Para 21	A
1979 (1) SCR 122	relied on	Para 21	
1967 SCR 50	relied on	Para 21	
1975 (2) SCR 861	relied on	Para 21	B
1996 (3) SCR 721	relied on	Para 21	
1994 (4) Suppl. SCR 477	relied on	Para 21	
2006 (1) Suppl. SCR 603	relied on	Para 24	C
1960 SCR 431	relied on	Para 29	
1987 (1) SCR 1	relied on	Para 30	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1642 of 2013.

From the Judgment & Order dated 22.01.2009 of the High Court of Kerala at Ernakulam in W.A. No. 716 of 2008.

C.S. Rajan, Ramesh Babu M.R. for the Appellants.

George Poonthottam, George Mathew, Dileep Pillai, Usha Nandini, Biju Raman, Ajay K. Jain, M.P. Vinod for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. We are, in this appeal, concerned with the question whether the High Court can issue a *Writ of Mandamus* under Article 226 of the Constitution of India, directing the State to part with its exclusive privilege, in the matter of granting licence for establishing distilleries under the Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975 (for short "1975 Rules") read with Section 14 of the Abkari Act (for short "the Act").

A 3. M/s Kandath Distilleries, respondent herein, claimed to
 have submitted an application dated 12.1.1987 before the
 Commissioner of Excise for a licence to establish a
 compounding, blending and bottling unit in the Palakkad
 District. Few others had also filed similar applications for
 B licence for setting up distillery units in the State of Kerala. All
 of them were directed to first obtain the approval of the
 Government of India for the setting up of new blending and
 bottling units and, thereafter, to approach the State Government.
 This Court, however, vide its judgment dated 29.1.1997 in Writ
 C Petition No. 322 of 1996 (*Bihar Distillery and Another v. Union
 of India and Others*) took the view that the power to permit the
 establishment of any industry engaged in the manufacture of
 portable liquors, including Indian Made Foreign Liquors
 (IMFLs), beer, country liquor and other intoxicating drinks is
 D exclusively vested in the respective State Governments. Further,
 it was also held that the power to prohibit and/or regulate the
 manufacture, production, sale, transport of consumption of such
 intoxicating liquors is equally that of the States.

E 4. We notice, during the year 1998 and prior to that, the
 Commissioner of Excise and the State Government had
 received large number of applications for setting up of distillery
 units in various parts of the State. The Commissioner of Excise
 or the State could not have entertained all those applications
 and granted the licences for the setting up of large number of
 F distillery units in the State. The State Government, however,
 entertained four applications favourably and accorded its
 approval under Section 14 of the Act. The State Government,
 vide GO (Rt.) No. 291/98/TD dated 20.5.1998, examined the
 application submitted by M/s Amrut Distilleries in detail and
 G granted approval for issuing a licence by the Excise
 Commissioner for the establishment of a distillery unit for the
 manufacture of IMFLs at Kanjkode village in the Palakkad
 District. The Government also, vide its order dated 6.8.1998,
 examined the application of M/s Empee Distilleries, Madras,
 H and accorded approval for the grant of licence by the Excise

STATE OF KERALA v. KANDATH DISTILLERIES 1063
[K.S. RADHAKRISHNAN, J.]

Commissioner for establishing a distillery unit at Kanjkode village in the Palakad District. The application submitted by M/s K. S. Distilleries, Kannur was also considered by the State Government and granted permission to the Excise Commissioner to issue a licence for a distillery unit to be established at Kannur, vide order dated 18.8.1998. The application of M/s Elite Group of Companies was also favourably considered by the Government and accorded permission to the Excise Commissioner for issuing the necessary licence for establishing a distillery unit at Trichur.

5. M/s Kandath Distilleries (respondent) having noticed that its application submitted in the year 1987 for setting up the unit in the Palakkad District was not considered, filed a Revision Petition before the Minister for Excise on 22.11.1998 to consider its application as well for the grant of licence for establishing a distillery unit in the Palakkad district, though it had not raised any dispute with regard to the grant of other two distillery licences for setting up the units in the Palakkad District.

6. We notice that the Excise Commissioner/State Government had received, during the year 1998 and prior to that, large number of applications for licences for establishing distillery units in various districts in the State of Kerala. The Government, therefore, constituted a Scrutiny/Selection Committee to shortlist the applications received for setting up of IMFL Units, as per G.O. (Rt.) No. 157/99/TD dated 3.3.1999. The Government considered the recommendations of the Committee in detail and, vide G.O. (Rt.)/689/99/TD dated 29.9.1999, took a policy decision not to grant any more licences for setting up the distillery units in any part of the State. The order was communicated to the respondent by the Joint Excise Commissioner vide his letter dated 11.11.1999.

7. Respondent then preferred O.P. No. 7727 of 2000 before the High Court to quash the above mentioned Government order dated 11.11.1999 contending that its application also should have been considered along with the

- A applications submitted by M/s Amrut Distilleries, Bangalore, M/s. Empee Distilleries, Madras, M/s. K. S. Distillery, Kannur and M/s. Elite Group of Companies, Thrissur, in the year 1998. Respondent, however, did not challenge the licences granted for establishing the units in the Palakkad District, the very same
- B district where it had applied for a licence. Learned single Judge quashed the letter dated 11.11.1999 issued by the Joint Excise Commissioner and directed the State Government to consider the application submitted by the respondent in the light of the conditions prevailing in the year 1998 vide his judgment dated
- C 23.6.2004.

8. The Excise Commissioner heard the respondent's representative on 18.10.2004 and, after obtaining the views of the State Government, rejected the application based on G.O. (Rt.) No. 689/99/TD dated 29.9.1999. Aggrieved by the
- D communication received from the Excise Commissioner, the respondent filed a Representation on 20.2.2005 before the State Government, which was rejected by the Government vide its communication No. 4493/G3/2005/TD dated 1.9.2005.

- E 9. Respondent then challenged the above mentioned orders by filing a Writ Petition No. 29092 of 2005. Learned single Judge vide his judgment dated 25.1.2006 quashed the above mentioned orders and passed the following order:

- F "So, when this Court directed the Government to consider the claim of the petitioner under Section 14 of the Abkari Act, with reference to the conditions obtained in 1998, the Government decided the matter on the basis of the G.O. issued in 1999. So, the above quoted decision of the Government under Section 14 is unsustainable. It is
- G declared so. Since Ext.P12 is passed, based on the above quoted communication, it is quashed. Though the petitioner raised several contentions in Ext.P13 appeal, none of them was considered in Ext.P14. Accordingly, Ext.P14 is also quashed. The Government is directed to
- H reconsider the matter concerning grant of sanction under

STATE OF KERALA v. KANDATH DISTILLERIES 1065
[K.S. RADHAKRISHNAN, J.]

Section 14 of the Abkari Act in accordance with law in the light of the directions in Ext.P11 judgment and also the above observations contained in this Judgment, within two months from the date of receipt of a copy of this Judgment."

10. State Government, in pursuance to the directions given by the learned single Judge in Writ Petition No. 29092 of 2005, again considered the matter and took the view that the Government has to make an "independent assessment of eligibility" of the applicant for the grant of licence. Holding so, the Government passed an order on 16.3.2006. The operative portion of the order reads as under:

"Whenever, applications for Distillery & Compounding (Blending & Bottling) units are received, they are processed separately. The decision taken in each application may be based on the facts & the circumstances akin to the individual application and may not be a common decision. Licenses were given on the applications of M/s Amrut Distillery, Palakkad, Empee Distillery, Palakkad, Elite Distillery, Trissur & KS Distillery, Kannur during the period as alleged by the petitioner. At the same time applications from Kandath Distillery, S.R. Distillery, Sree Chakra Distillery, Rajadhani Distilleries etc. were rejected. Government cannot grant the privilege to all those who had applied for such licence, for a host of reasons. Restrictions have to be imposed, which is permissible under the Constitution. The Government has with effect from 29/9/99 issued Government Order deciding not to grant fresh licenses for Distillery and Compounding (Blending & bolting) unit. The granting of licence for the Distillery & Compounding (blending & bottling) units is a prerogative of the Government and not the right of the petitioner. The directions and the communications from the offices to the petitioner are only the statutory requirements for processing the application and do not cast any right or claim on the petitioner.

In the above circumstances, Government finds no reasons

A to reconsider the request of the petitioner under section 14 of the Abkari Act. Request of the petitioner is settled accordingly, keeping in abeyance of the judgment of the Hon'ble High Court read 5th paper.

B The Excise Commissioner will pass fresh orders on Ext.P1 within the time limit prescribed by the Hon'ble High Court."

C 11. Respondent, noticing that the Government had not followed the directions given by the High Court while passing the order on 16.3.2006, filed Contempt Case (C) No. 521 of 2006 before the High Court. Learned single Judge of the High Court felt that the State Government should have considered, the claim for licence, in the light of the conditions, which existed in the year 1998 and could have granted permission or rejected it, but referred to irrelevant matters. Learned single Judge felt that the Government had prima facie committed contempt of court by ignoring the directions contained in its earlier judgment in O.P. No. 29092 of 2005 and passed an order on 29.6.2006, placing the matter before the Division Bench of the High Court.

E 12. The Division Bench of the High Court directed personal appearance of the Secretary to the Government who appeared before the Court on 9.8.2006 and offered unconditional apology and submitted that the order dated 16.3.2006 would be withdrawn and fresh orders would be passed, in conformity with the judgment in O.P. No. 29092 of 2005. The contempt case was accordingly closed on 12.9.2006.

F 13. The Government, later, passed a detailed order dated 11.10.2006. The operative portion of the same reads as follows:

G "Government has examined the matter in detail with all available records and filed in the light of directions from the High Court of Kerala and it is found that partnership came into existence only on 10.4.91 as per clause no. 3 of the partnership deed. Therefore, the application dated

H

12.11.87 cannot be treated as an application submitted by the partnership firm. Further, the alleged application dated 12.11.87 was already disposed of by the Board of Revenue by letter No. XC3-32739/93/L.Dis dated 28.6.1994. thereafter, it is stated that the petitioner made an application on 21.11.1998 requesting to reconsider the application alleged to have been submitted by them on 12.1.1987. It is contended that in the year 1998, four licenses were granted on 20.5.1998, 06.08.1998 and 20.09.1998 respectively. From the files it is seen that the above licences were granted on applications which were submitted during 1995, 1996 and 1997 respectively.

From 3.2.1998 to 21.11.1998 Government received 52 applications for establishing compounding, blending and bottling units of Indian made foreign liquor. The Excise Commissioner as per letter No. XC3-15555/98 dated 25.11.1998 reported that there was an unprecedented flow of application and the Government constituted a scrutiny committee as per GO (Rt) No. 157/99/TD dated 3.3.1999 to shortlist the application. As on 21.11.1998 the date on which the petitioner made the application for compounding blending and bottling licence there were other 52 applications and Government have not considered any one of them. Moreover, the application put in by the partnership firm byname M/s. Kandath Distilleries on 12.1.1987 cannot be treated as an application put in by the firm based on a partnership deed which came into existence on 10.4.1991 as per Clause 3 of the Partnership Deed.

In the above circumstances the application put in by M/s Kandath Distilleries on 21.11.1998 does not merit consideration for approval by Government based on the factual conditions available as on 21.11.1998."

14. M/s Kandath Distilleries then challenged the above mentioned order by filing Writ Petition No. 2708 of 2007.

- A Learned single Judge took the view that no reason other than the constitution of the firm and the date of its effect, was noticed in the impugned order dated 11.10.2006 for refusing the licence and that there was no other ground found by the Government to refuse the licence. Consequently, learned single
- B Judge quashed the Government order dated 11.10.2006 and directed the State Government to grant licence applied for vide application dated 12.1.1987.

15. The State Government, aggrieved by the said judgment, filed a Writ Appeal No. 716 of 2008. The Division
- C Bench felt that the State Government had ingenuously made a classification to weed out respondent to the effect that, from 21.11.1998 onwards, State had a different policy. The Division Bench noticed that the High Court had directed the State Government to consider its application submitted as early as
- D in 1987. Further, it was also pointed out that the State Government had no case that the respondent applicant was not suitable, nor such contention had ever been taken in the previous litigations. Further, it was also held by the Division Bench that similarly situated persons had already been granted
- E licences long back. In such circumstances, the Division Bench held that there was no illegality in the directions given by the learned single Judge giving a positive direction to grant the licence, which was necessary to uphold the majesty of rule of law. The appeal filed by the State Government was accordingly
- F dismissed. Aggrieved by the same, the State Government has come up with appeal.

16. Shri C. S. Rajan, learned senior counsel appearing for the State, submitted that the learned single Judge as well as the Division Bench of the High Court has committed a grave
- G error while exercising their jurisdictions under Article 226 of the Constitution of India in giving a positive direction to grant a distillery licence to the respondent. Learned senior counsel submitted that a citizen has no fundamental right to trade or business in liquor and that the matter relating to grant of licence
- H

STATE OF KERALA v. KANDATH DISTILLERIES 1069
[K.S. RADHAKRISHNAN, J.]

for dealing in liquor or starting distillery unit is within the exclusive domain of the State. A

Learned senior counsel submitted that if the State has the right to adopt a policy decision and, indisputably, it has the right to vary, amend or rescind the same. Further, it was also submitted that the application submitted by the respondent was a defective application and, therefore, the Government was justified in not entertaining that application. Learned senior counsel submitted that cogent reasons have been stated by the Government vide its order dated 11.10.2006 rejecting the application submitted by the respondent and the High Court was not right in issuing a Writ of Mandamus directing the State Government to grant the licence applied for. B C

17. Shri Giri, learned senior counsel and Shri George Ponthottam, learned counsel appearing for the respondent, traced the entire history of the case starting from 1987 till the Government passed the order dated 11.10.2006. Learned counsel submitted that there was a concerted effort on the part of the State not to consider the application of the respondent for licence for starting the distillery unit in the Palakkad District. At the same time, on the basis of Policy which was in force in the year 1998, four licences were granted and the respondent was discriminated. Learned counsel submitted that, on non-compliance of the various directions given by the High Court, the High Court found that the Secretary to Government had committed contempt and the order dated 11.10.2006 was nothing but a repetition of earlier orders and it is under those circumstances, the High Court gave a positive direction to grant distillery licence to the respondent, which shall not be interfered with by this Court under Article 136 of the Constitution. Learned counsel also referred the judgment of this Court in *Comptroller and Auditor-General of India and Anr. v. K.S. Jagannathan and Anr.* (1986) 2 SCC 679 and submitted that in order to prevent injustice, this Court can always give direction to compel performance of a discretion by an authority in a proper and lawful manner. Reference was also made to the judgment of D E F G H

- A this Court in *Harigovind Yadav v. Rewa Sidhi Gramin Bank and Ors.* (2006) 6 SCC 145 and *RBF Rig Corporation, Mumbai v. The Commissioner of Customs (Imports), Mumbai* (2011) 3 SCC 573 and submitted that in appropriate cases under Article 226 of the Constitution, this Court can always
B mould the reliefs.

18. We may, before examining the rival contentions, examine the scheme of the Act as well as 1975 Rules. The Act was enacted to consolidate and amend law relating to the import, export, transport, manufacture, sale and possession of
C intoxicating liquor and of intoxicating drugs in the State of Kerala. Section 14 of the Act deals with the establishment and control of distilleries, breweries, warehouses, etc, which confers power on the Commissioner to issue a licence with the previous approval of the Government to establish public distilleries,
D breweries or wineries, or authorize the establishment of private distilleries, breweries, wineries or other manufactories in which liquor may be manufactured. Section 14 is given below for easy reference:

E **"14. Establishment and control of distilleries, breweries, warehouses, etc.- The Commissioner may, with the previous approval of the Government,-**

(a) Establish public distilleries, breweries or wineries, or authorize the establishment of private distilleries, breweries, wineries or other manufactories in which liquor may be manufactured under a licence granted under this Act.

	Xxx	xxx	xxx
G	xxx	xxx	xxx"

19. The State Government, in exercise of its powers conferred by Section 29 of the Act framed the 1975 Rules. Rule 3 deals with the application for licence, which requires a person
H who desires to carry on operations of compounding, blending

STATE OF KERALA v. KANDATH DISTILLERIES 1071
[K.S. RADHAKRISHNAN, J.]

and bottling of foreign liquor to apply in writing to the Commissioner and furnish the necessary details as required under the Rule. Rule 3 is given below for easy reference: A

3. Application for Licence.- Any person who desires to carry on operations of compounding, blending and bottling of foreign liquor shall apply in writing to the Commissioner. Every application for a licence shall give details of the operation desires to perform and shall be accompanied by - B

(i) description and plan of the building in which the operations are to be carried out in triplicate, drawn on scale in tracing cloth; C

(ii) statement specifying the number, size and descriptions of the permanent apparatus, if any, which are proposed to be used; D

(iii) details regarding the maximum quantity in proof litres of spirits expected to be in the store or in the process of compounding, blending or bottling; and E

(iv) a treasury receipt for the deposit of an earnest money of one hundred rupees."

Rule 4 deals with the grant and renewal of licence, which empowers the Commissioner to issue the licence applied for. Rule 4 reads as under: F

"4. Grant and renewal of licence.- (1) The Commissioner may, if he is satisfied after making such enquiries as he may consider necessary that the applicant is a person to whom licence may be issued, grant to the applicant.- G

(i) a compounding and blending licence in Form 1 on payment of a fee of Rs.2,00,000 (Rupees two lakhs only); and H

A (ii) a bottling licence in Form 2 on payment of a fee of Rs.2,00,000 (Rupees two lakhs only).

B (2) The Commissioner shall retain the original of the description of plan and forward the duplicate to the officer-in-charge through the Assistant Excise Commissioner and return the triplicate to the licensee.

C (3) The earnest money deposit shall be adjusted towards the fees of the licence. If the licence applied for is not granted, the earnest money deposit of Rs.100 shall be refunded to the applicant.

(4) The Commissioner may on application made to him in this behalf and on payment of the fee specified in rules renew a licence for a period of one year at a time."

D (emphasis supplied)

E Rule 5 deals with the requirements to be satisfied with regard to building in which the compounding, blending and bottling operations are to be carried out. Licence for compounding and blending of foreign liquor is issued in Form No. 1 and the licence for bottling of foreign liquor is issued in Form No. 2.

F 20. We may, before examining the scope of the above mentioned provisions and the nature of jurisdiction or the powers to be exercised by the Commissioner and the State Government, examine the general purport of the Act in the light of Article 19(1)(g) of the Constitution of India.

RIGHT TO CARRY ON TRADE OR BUSINESS IN LIQUOR

G 21. Article 47 is one of the Directive Principles of State Policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to the human health. Consequently, it is the privilege of the State and

H

STATE OF KERALA v. KANDATH DISTILLERIES 1073
[K.S. RADHAKRISHNAN, J.]

it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. State has, therefore, the exclusive right or privilege in respect of portable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are *res extra commercium*, cannot be carried on by any citizen and the State can prohibit completely trade or business in portable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are *res commercium*. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni and Others v. Shamrao Tukaram Power SMT and Others* (1979) 3 SCC 212, *P.N. Kaushal & Others v. Union of India & Others* (1978) 3 SCC 558, *Krishna Kumar Narula etc. v. State of Jammu & Kashmir & Others* AIR 1967 SC 1368, *Nashirwar and Others v. State of Madhya Pradesh & Others* (1975) 1 SCC 29, *State of A. P. & Others v. McDowell & Co and Others* (1996) 3 SCC 709 and *Khoday Distilleries Ltd. & Others v. State of Karnataka & Others* (1995) 1 SCC 574.

22. Legislature, in its wisdom, has given considerable amount of freedom to the decision makers, the Commissioner and the State Government since they are conferred with the power to deal with an article which is inherently injurious to human health.

23. Section 14 of the Act indicates that the Commissioner can exercise his powers to grant licence only with the approval of the State Government because the State has the exclusive privilege in dealing with liquor. The powers conferred on the Commissioner and the State Government under Section 14 as well as Rule 4 are discretionary in nature, which is discernible from the permissible language used therein.

A LIQUOR POLICY:

24. Liquor policy of State is synonymous or always closely associated with the policy of the Statute dealing with liquor or such obnoxious subjects. Monopoly in the trade of liquor is with the State and it is only a privilege that a licensee has in the matter of manufacturing and vending in liquor, so held, by this Court in *State of Maharashtra v. Nagpur Distilleries* (2006) 5 SCC 112. Courts are also not expected to express their opinion as to whether at a particular point of time or in a particular situation, any such policy should have been adopted or not.
- 1998 Policy has life only in that year and if any rights have accrued to any party, that have to be adjudicated then and there. Writ Petition was moved only in the year 2000, by then, policy had been changed because 1999 liquor policy was total ban, so also subsequent liquor policies. It is trite law that a Court of Law is not expected to propel into "the uncharted ocean" of State's Policies. State has the power to frame and reframe, change and re-change, adjust and readjust policy, which cannot be declared as illegal or arbitrary on the ground that the earlier policy was a better and suited to the prevailing situations. Situation which existed in the year 1998 had its natural death and cannot be revised in the year 2013, when there is total ban.

DISCRETION AND DUTY:

25. Discretionary power implies freedom of choice, a competent authority may decide whether or not to act. The legal concept of discretion implies power to make a choice between alternative courses of action (Discretionary Justice Davis 1969). Statute has conferred discretionary power on the Commissioner and State Government but not discretion coupled with duty because they are dealing with a subject matter on which State has exclusive privilege. Permissive language used by the Statute in Section 14 and the rule making authority in Rule 4 gives the State Government and the Commissioner, no mandatory duty or obligation to grant the licence except perhaps to consider the application, if the liquor policy permits so.

STATE OF KERALA v. KANDATH DISTILLERIES 1075
[K.S. RADHAKRISHNAN, J.]

26. Section 14 uses the expression "Commissioner may", "with the approval of the Government" so also Rule 4 uses the expressions "Commissioner may", "if he is satisfied" after making such enquiries as he may consider necessary "licence may be issued". All those expressions used in Section 14 and Rule 4 confer discretionary powers on the Commissioner as well as the State Government, not a discretionary power coupled with duty. The powers, conferred on the Commissioner as well as the Government, have to be understood in the light of the Constitutional scheme bearing in mind the fact that the trade or business which is inherently harmful can always be restricted, curtailed or prohibited by the State, since it is the exclusive privilege of the State. No duty is, therefore, cast on the Commissioner to grant a licence for establishing a distillery unit and no right is conferred on any citizen to claim it as a matter of right. State can always adopt a "restrictive policy", e.g., reducing the number of licences in a particular district or a particular area, or not to grant any licence at all in a particular district, even in cases where the applicants have satisfied all the conditions stipulated in the rules and the policy permits granting of licences. In other words, the satisfaction of the conditions laid down in 1975 Rules would not entitle an applicant as a matter of right to claim a distillery licence which is within the exclusive privilege of the State.

MANDAMUS - TO ISSUE LICENCE

27. 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 into 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

- A 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.

28. Respondent-applicant, in the instant case, in our view, has failed to establish a legal right or to show that there is a legal duty on the Commissioner or the Government to issue a distillery licence.

DISCRETIONARY ORDER - ARTICLE 14

29. Discretionary power leaves the donee of the power free to use or not to use it at his discretion. (refer *Rani Drig Raj Kuer v. Raja Sri Amar Krishna Narain Singh* AIR 1960 SC 444). Law is well settled that the exercise of statutory discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or caprice anathema to the rule of law envisaged in Article 14 of the Constitution. It is trite law that, though, no citizen has a legal right to claim a distillery licence

STATE OF KERALA v. KANDATH DISTILLERIES 1077
[K.S. RADHAKRISHNAN, J.]

as a matter of right and the Commissioner or the State Government is entitled to either not to entertain or reject the application, they cannot enter into a relationship by arbitrarily choosing any person they like or discriminate between persons similarly circumscribed. The State Government, when decides to grant the right or privilege to others, of course, cannot escape of the rigor of Article 14, in the sense that it can act arbitrarily. In such a situation, it is for the party who complains to establish that a discriminatory treatment has been meted out to him as against similarly placed persons but cannot demand a licence for establishing a distillery unit, as a matter of right.

A

B

C

30. In *State of Madhya Pradesh v. Nandlal Jaiswal* (1986) 4 SCC 566, this Court held that 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 privilege or right of manufacturing and selling liquor. But, when the State decides to grant such right or privilege to others the State cannot escape from the rigor of Article 14 of the Constitution, it cannot act arbitrarily or at its sweet will.

D

31. We have noticed that the application preferred by M/s Kandath Distilleries (respondent herein) in the year 1987 was for establishing a distillery unit in the Palakkad District. So also the applications submitted by M/s Amrut Distilleries, Bangalore and M/s. Empee Distilleries, Madras and licences were granted to them for establishing the distillery units in the Palakkad District. However, the respondent's application was not considered. The Commissioner or the State Government has to take an independent decision in each application based on its eligibility and there cannot be any common decision. As held in *Nandlal Jaiswal* (supra) when the State Government is granting licence for putting up new industry, it is not necessary that it should advertise and invite offers for putting up such industry. The State Government is entitled to negotiate with those who have come up with an offer to set up such industry. The State Government cannot grant the privilege to all those

E

F

G

H

A who have applied for such a licence in a particular district, for a host of reasons. The State Government could restrict the number of distillery licences in a particular district by two and it can also grant a third licence in a particular district as well, but an applicant cannot claim a licence as a matter of right.

B 32. The Respondent, in our view, could lay a claim only if it establishes that a preferential treatment has been meted out to M/s Amrut Distilleries, Bangalore and M/s. Empee Distilleries, Madras while granting licences for establishing the
C of discrimination violating Article 14 of the Constitution of India. Respondent has never challenged the distillery licences granted to them, but only prayed for another licence for it as well which, in our view, cannot be claimed as a matter of right. Citizens
D cannot have a fundamental right to trade or carry on business in the properties or rights belonging to the State nor can there be any infringement of Article 14, if the State prefers other applicants for the grant of licence, during the pendency of some other applications, unless an applicant establishes a better claim over others.

E 33. We have gone through the Government Order dated 11.10.2006 in extenso and we are not prepared to say that the application of the respondent was rejected solely on the ground that the application dated 12.1.1987 could not be treated as
F an application put forward by a firm based on a partnership deed, which came into existence on 10.4.1991, as per Clause 3 of the Partnership Deed but on various other grounds as well. The State Government, in our view, has considered the respondent's application dated 12.1.1987 with regard to the
G conditions that existed in the year 1998. The Government letter dated 28.6.1994 would indicate that, apart from the respondent, few other applications were also pending prior to the year 1994. Over and above, the State Government during the year 1998, from 3.2.1998 to 21.11.1998, had received 52 applications for
H establishing compounding, blending and bottling units in IMFLs

in various parts of the State. The Excise Commissioner vide his letter dated 25.11.1998 had reported that there was an unprecedented flow of applications, that was the situation prevailing in the year 1998, a factor which was taken note of in not entertaining the respondent's application, whether it was submitted on 12.1.1987 or on 22.11.1998. We cannot, in any way, activate an out-modeled, outdated, forgotten liquor policy of 1998, in the year 2013, by a Writ of Mandamus.

34. We are, therefore, of the view that the learned single Judge as well as the Division Bench of the High Court have overlooked those vital factors while issuing a Writ of Mandamus directing the State Government/Commissioner to grant distillery licence to the respondent for setting up of a new distillery in the Palakkad District, thinking that the impugned order is nothing but old wine in new bottle. We are informed, after 1998, not even a single licence has been granted by the State Government/Commissioner for establishing distillery units anywhere in the State. That being the factual and legal position, we are of the view that the learned single Judge as well as the Division Bench of the High Court was not justified in issuing a Writ of Mandamus directing the issuance of a distillery licence to the respondent.

35. We are, therefore, inclined to allow this appeal and set aside the judgment of the learned single Judge and affirmed by the Division Bench of the High Court. Ordered accordingly. However, in the facts and circumstances of the case, there will be no order as to costs.

K.K.T.

Appeal allowed.